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Lead Article

***3 A DEFENSE OF THE ROLE OF THE CONVENING
AUTHORITY: THE INTEGRATION OF JUSTICE AND DISCIPLINE**

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One component of the celebration of the Fiftieth Anniversary of the Uniform Code of Military Justice has been a series of retrospectives, as well as critiques of various aspects of the present administration of justice. One such endeavor that has received a measure of attention is the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice--the so-called "Cox Commission." This commission was created through the efforts of the National Institute of Military Justice, an organization composed primarily of academics, retired judge advocates, and civilians practicing defense litigation in military courts-martial.¹

The commission, under the leadership of the Honorable Walter T. Cox III, former Chief Judge of the United States Court of Appeals for the Armed Forces, produced a report making four recommendations designed, in its view, to respond to "legislative and executive inattention" toward the military justice system since 1972. The four recommendations include modifying the pretrial role of the convening authority in the court-martial process, changing the responsibilities of the military judge, implementing additional protection in capital cases, and modeling the prosecution of criminal sexual misconduct after the Model Penal Code.

While what press attention this effort has garnered² has focused on general dissatisfaction with the military justice system, or the recommendation concerning the modification of aspects of criminal sexual activity, the more significant, and more troubling, recommendations focus on the relationship of the convening authority to the court-martial process. The first specific recommendation focuses on the selection of court-members by the convening authority. The second specific recommendation suggests removing the convening authority from certain aspects of the pre-trial process, to be replaced by a military judge. Taken together, these two recommendations alter the relationship between the military justice process and command, removing the convening authority as a discretionary actor in the creation and preliminary stages of the court-martial process.

The suggestions limiting the role of the commander are not new. They have been proposed and rejected by Congress previously. Indeed, one can infer that "the lack of new and novel issues reflects well upon the basic soundness of the military justice system."³ Additionally, there are innumerable operational difficulties with the recommendations that render them problematic--and indicate a lack of appreciation for the practical aspects of the administration of military justice by the commission.⁴

Removing command discretion to this degree in the court-martial process is ill advised for two reasons. First, it ignores the uniqueness of the military culture in American society, and seeks to undermine the role of the commander in that culture; secondly, it is based on the faulty premise that discipline and justice in a criminal system are incompatible.

MILITARY CULTURE

The fundamental purpose of a nation's military is to fight and win its nation's wars.⁵ War is a violent enterprise. "War is a course of killings, assaults, deprivations of liberty, and destruction of property."⁶ Although war has been a regular occurrence throughout history, the death and destruction that war causes is not desirable. Those who wage war, then, are engaged in conduct that is counter to the interest to survive.

Success in warfare requires military members who are able to overcome this self-survival interest. It requires members who are able to sacrifice--to perform one's duty, no matter the cost.⁷ Thus, the ethics of the military culture promote those moral characteristics that enhance teamwork-- integrity, selfless service, loyalty, sacrifice, and patriotism. That these values *4 result in the cohesion necessary to successfully engage in battle is evidenced by the history of American warfare.⁸

When the chips are down, there is no rational calculation in the world capable of causing an individual to lay down his life. On both the individual and collective levels, war is therefore primarily an affair of the heart. It is dominated by such irrational factors as resolution and courage, honor and duty and loyalty and sacrifice of self. When everything is said and done, none of these have anything to do with technology, whether primitive or sophisticated.⁹

Indeed, the "values based" foundation of the military culture infuses words like discipline, obedience, and leadership with content beyond simple definition. The concept of discipline must be viewed, and understood, in the context of creating a force that is capable of waging war. "Military discipline is but an extension and a specialized application of the discipline to which all peoples are accustomed. It is subordination of the individual to the good of the team. It is not synonymous with punishment."¹⁰ Obedience is not a "blind or mindless" acquiescence, but is a response to the call to service, a statement of trust in the leadership of the force, and loyalty to comrades.¹¹ Fostering military discipline stems from practicing, and expecting others to practice, the "core values" of military service--thereby creating a service capable of performing its mission.

AMERICAN LAW AND MILITARY CULTURE

A culture's criminal justice system is a reflection of its values. The presumption of innocence, for example, reflects the American value of liberty. Due process reflects the American value of fairness. The American system reflects the value of "justice." "Justice," like "discipline," is a word of multiple meanings. "Social justice" reflects the obligations of each individual to society toward attainment of the "common good."¹² In the context of law, justice is conformity to the law--the "constant and perpetual disposition to render every man his due."¹³

Over the course of the past century, American law has repeatedly recognized and respected the uniqueness of the American military culture. It is important to recognize that although the civilian and military cultures are different, the values that serve as the foundation of each are the same. Values such as service, integrity, and sacrifice are held in esteem throughout American culture. Likewise, the fair and just treatment of military personnel is a vital aspect of effective command. "When a country looks at its fighting forces it is looking in a mirror: if the mirror is a true one the face that it sees will be its own."¹⁴ It is the emphasis placed upon certain values, due to the imperative of the military mission, which distinguishes the military culture from civilian society--and the military justice system from its civilian counterpart.¹⁵

American jurisprudence has consistently recognized "that the military is, by necessity, a specialized society separate from civilian society." The unique requirements of an effective military--grounded in the values of obedience, unity, commitment and subordination of individual desires to the needs of the service--has resulted in a "different application" of Constitutional rights in the military environment.¹⁶ Thus, the values that make imperative the creation and maintenance of a disciplined military also make equally imperative a "just and fair" military justice system. The Uniform Code of Military Justice is a testament to the careful application of those rights to the military environment by Congress.¹⁷ It has resulted in a system responsive to the unique nature of military discipline, yet remains fundamentally fair and just in its protections of service members.

Most importantly, American jurisprudence recognizes that the command relationship “is at the heart of the necessarily unique structure of the Military Establishment.”¹⁸ It recognizes that commanders are obligated to foster morale, loyalty and discipline among subordinates, and authorizes discretion in attaining these goals.¹⁹

COMMAND

Leadership—including the values that characterize an effective leader—are a consistent and constant theme of military career development and practice.²⁰ A central component of military leadership is the need for personal adherence to the values of the organization. “The Commanding Officer’s uniform obligates him to conduct himself as ‘the first servant of the unit under his command.’”²¹

It is the leader—usually a commander—who is responsible for ensuring that a particular unit successfully performs its mission. A commander’s responsibility is not solely defined in terms of missions launched, miles traveled, or even battles won. Command responsibility includes the maintenance of discipline—that is, the inculcation of military values within the unit that foster teamwork. It also includes, to some extent, personal responsibility for the conduct of the members of the command.²² Breaches in discipline *5 are themselves unjust, because they undermine the “common good” of unit cohesion. Similarly, unfair treatment of those who breach discipline undermines unit cohesion.

[G]ood discipline presupposes just treatment. If the trials are conducted in such a way or punishment of such severity is imposed as to create a feeling among the troops that courts-martial are arbitrary and unjust, the disciplinary effect will be impaired or destroyed. It is necessary not only that the system function fairly but that its fairness be recognized by [service members].²³

Thus, in the context of command, the values of discipline and justice are not merely consistent, but integrated.²⁴

In the military justice system, it is the Convening Authority who personifies this integration of discipline and justice. The Convening Authority is trusted with the responsibility for choosing a court-martial panel,²⁵ and trusted with the responsibility for various court-martial actions, because of the unique responsibilities inherent in command. Thus, Convening Authorities who engage in unlawful command influence violate not only the law,²⁷ but violate the trust bestowed upon them as commanders of a military organization, their legitimacy as leaders, and their oath to “protect and defend the Constitution of the United States.”

THE COMMISSION REPORT

The rationale for the commission’s proposal to remove the discretionary role of the commander from the military justice process is flawed because it is based on a distorted understanding of the commander’s role in the military justice system.

According to the report, the Convening Authority is viewed as a “barrier” to the operation of a “fair system,” and is depicted as “loom[ing] over courts-martial, able to intervene and affect the outcomes of trials in a variety of ways.” In exercising their duties, Convening Authorities operate in a system that invites “mischief” and provides an opportunity for “corruption of the trial process.” The role of the Convening Authority is deemed “unacceptable in a society that deems due process of law to be the bulwark of a fair justice system.”²⁸

This perspective ignores the uniqueness of military culture and the duties of the commander within that culture. The commission’s characterization of the Convening Authority interjects a level of suspicion into the command-subordinate relationship that is at the core of an effective military force.²⁹ The report demonstrates a severe mistrust in a Convening Authority’s ability to faithfully and impartially exercise discretion in “legal matters.” The commission transforms a Convening

Authority into a simple functionary aligned with the criminal prosecution of a military member rather than the quasi-judicial function the Code envisions. It presumes the worst of the Convening Authority, and ignores the role a commander often performs within the military justice system as its “conscience.”

To justify its recommendations, the commission points to a supposed “perception” of unfairness in the process. As noted above, a perception by the military force of unfairness or harshness in the administration of military justice can have a direct impact on discipline.³⁰ But this is not the basis for the “perception” articulated by the commission. Rather, this perception is based primarily on the “experience” of the commission membership and the “input” received from various “submissions and testimonies.”³¹ Indeed, the report contains no assertion that the military justice system, as presently constituted, is actually harsh or unfair--only that it “deviates” from the civilian criminal justice system. Given the recognized uniqueness of military culture, process deviation is an inadequate and dubious basis for the fundamental changes proposed by the commission.

CONCLUSION

Values such as “justice” and “discipline” are not guaranteed through processes, but through the character of the men and women who are faced with, and responsible for, making decisions those processes create. The genius of the Uniform Code of Military Justice is that it does not simply serve a bureaucratic branch of government, but an institution grounded in traditions and values and focused on a well-defined purpose.

At the heart of this institution is the commander, uniquely obligated to produce a military society imbued with a sense of service. To the extent a commander is excised from a military process, that process becomes less vital to the military mission. Removal of the commander from the military justice process to the extent advocated by the commission would render that process alien to the culture it is designed to protect and serve. It would ultimately lead to less reliance on that process by commanders. Moreover, placement of the commander in an adversarial relationship with any military subordinate-- including an accused--is a distortion of that relationship, and has a corrosive effect *6 on the discipline and unity required to achieve the military mission. For these reasons, the recommendations of the Cox Commission limiting the role of the Convening Authority should be rejected--again.

Footnotes

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¹ Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001). The Commission Executive Summary can be located at the website of the National Institute of Military Justice found at www.nimj.org.

² “Panel: Bring Military law into 21st Century” *Air Force Times*, (4 June 2001) p. 25. Also see, e.g. Stephen Koff and James Ewinger, “Military Tips Scales of Justice, Critics Charge,” *The Cleveland Plain Dealer*, (3 July 2001).

³ Moorman, Major General William A., “Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to Be Changed?” 48 *A.F. L. Rev.* 185 (2000).

⁴ Report on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial, Department of Defense Joint Service Committee of Military Justice (1999). The report details a number of practical difficulties with proposed “random” forms of member selection in operational environments that require operational mobility and flexibility.

⁵ *United States ex rel Toth v. Quarles*, 350 US 11, 17 (1955).

⁶ Remarks of Justice Robert Jackson, Chief Prosecutor of the United States at the Nuremberg Trials of the Major Nazi War Criminals, as printed in *Excerpts of the Nuremberg Trials*, 6 *USAFA Journal of Legal Studies* 5, 90-92 (1995-1996).

- 7 Brinsfield, John W., "Army Values and Ethics: A Search for Consistency and Relevance," *Parameters* (US Army War College Quarterly Autumn 1998). Brinsfield cites General Douglas MacArthur's "Duty, Honor, Country" speech at West Point in 1962 as encapsulating the "ethos" of the military professional.
- 8 The paramount value of unit cohesion is clearly evident in works such as *Black Hawk Down*, by Mark Bowden. (New York: Atlantic Monthly Press, 1999) and *Flags of Our Fathers*, by James Bradley, with Ron Powers. (New York: Bantam Books, 2000).
- 9 US Army Research Institute for the Behavioral and Social Sciences, *Determinants of Effective Unit Performance* (Alexandria, VA: US Army Research Institute for Behavioral and Social Sciences, 1994), cited in Brinsfield, *supra*, n.8.
- 10 Pennington, Hough and Case, *The Psychology of Military Leadership*, (Prentice-Hall, NY 1943).
- 11 Vriesenga, Major Michael P., "Thinking About Core Values," *Air Chronicles* (www.airpoer.maxwell.af.mil/airchronicles).
- 12 Black's Law Dictionary, (Sixth Edition, West Publishing Co., St. Paul, MN 1990) p. 864.
- 13 Black's Law Dictionary, (Fourth Edition, West Publishing Co., St. Paul, MN 1968) p. 1002.
- 14 Sir John Hackett, "Society and the Soldier: 1914-18," from *War, Morality, and the Military Profession*, Malam M. Wakin, ed., (Westview Press, Inc., Boulder, CO 1986) p. 88 as quoted in Vriesenga, Michael P., "Thinking About Core Values," *supra*, n. 12.
- 15 [Schlesinger v. Councilman, 420 US 738 \(1975\)](#).
- 16 [Parker v. Levy, 417 US 733 \(1974\)](#); also see [Goldman v. Weinberger 475 US 503 \(1986\)](#); [Orloff v. Willoughby, 345 US 83, 92 \(1953\)](#).
- 17 In its opinions dealing with military issues, the US Supreme Court has consistently deferred to the statutes and regulations created by Congress and the President. This deference is grounded in the Constitution itself, which places "plenary authority" for the maintenance of armed forces with Congress. Art. I, § 8, cls. 12-14. The court explained this deference in [Orloff, 345 US at 94](#): "[Judges] are not given the task of running the Army. The responsibility for setting up channels through which ... grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."
- 18 [Chappell v. Wallace, 462 US 296 \(1982\)](#).
- 19 [Greer v. Spock, 424 US 828, 840 \(1976\)](#).
- 20 Consider the "Leadership Special Edition" of the *Aerospace Power Journal* (Summer 2001).
- 21 Ellenbeck, *Der Kompegnie Fuehrer*. (Leipzig Detke, K.G. 1940), translated in Pennington, et al, *supra* n.11. This sentiment was penned by a German officer during World War II--a testament to the fact that the values providing the foundation for military effectiveness do not necessarily correlate with the values of a just society.
- 22 [In Re Yamashita, 327 US 1, 15 \(1946\)](#).
- 23 Report of Advisory Committee on Military Justice, War Department (1946), p. 12.
- 24 Gilligan, Francis A. and Lederer, Frederick I., *Court-Martial Procedure* § 1-30.00 (2nd Ed. 1999), cited in Grammel, Timothy "Justice and Discipline: Recent Developments in Substantive Criminal Law," *The Army Lawyer* 63 (April 2001). Gilligan and Lederer assert that in the military, the "United States uses a justice-oriented system to ensure discipline; [because] justice is essential to discipline."
- 25 [Article 25\(d\)\(2\), UCMJ](#).
- 26 *See, e.g.* [RCM 706](#); [RCM 403-405](#); [RCM 601-604](#)
- 27 [Article 37, UCMJ](#).
- 28 Committee Report, *supra*, n. 2, pg. 8.

29 In *United States v. Thomas*, 22 MJ 388 (1986), the Court of Military Appeals noted that “a commander who causes charges to be preferred or referred for trial is closely enough related to the prosecution of the case that the use of command influence by him and his staff equates to ‘prosecutorial misconduct.’ Indeed *recognizing the realities of the structured military society*, improper conduct by a commander may be even *more injurious* than such activity by a prosecutor.” (Emphasis added)

30 *Supra*, n. 24.

31 Among the organizations cited in the report supporting the perception of unfairness are the Citizens Against Military Justice (www.militaryinjustice.org), the United States Council on Veteran's Affairs (www.uscova.org), Sailors United For Self Defense, (communities.msn.com/SAILORSUNITEDFORSELFDEFENSE), American Gulf War Veterans Association (www.gulfwarvets.com), and (www.militarycorruption.com).

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