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*233 A REPLY TO THE REPORT OF THE COMMISSION ON THE 50 TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (MAY 2001): "THE COX COMMISSION"

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It is encouraging that, after all the evidence was examined, the commission, with its 150 years of collective experience, could find no actual problems with the UCMJ and MCM. It is disturbing that a commission with such a depth of experience would suggest changes based solely on perceptions. The better course of action would be to determine whether the perceptions were accurate, and if not, suggest ways to correct them.

I. INTRODUCTION

To note the 50 th anniversary of the Uniform Code of Military Justice (UCMJ), the National Institute of Military Justice sponsored a commission chaired by the Honorable Walter T. Cox III. [1] The Cox Commission reviewed the UCMJ, accepting testimony and documentary evidence from interested parties. At the conclusion of its investigation, the Commission produced a report recommending that a number of changes be made to the UCMJ and the Manual for Courts-Martial (MCM).

This article will examine the Cox Commission's recommendations for changing the current military justice system. Our position is that the changes *234 suggested by the Commission are not needed because there are no actual systemic problems with the UCMJ or the military justice system. The UCMJ should only be modified when the change will correct a real problem. This article will show that the current system already includes checks and balances that adequately address the Commission's concerns.

II. FAILURE TO KEEP PACE WITH STANDARDS OF PROCEDURAL JUSTICE

The Cox Commission Report (CCR) correctly notes that the UCMJ set the standard for modern criminal justice systems. It guaranteed certain rights to the accused years before those rights were recognized by the United States federal or state courts. [2] The UCMJ has served as the model for many systems of justice throughout the world. The CCR does not dispute that the UCMJ and the MCM led the way in implementing modern military criminal justice procedures. However, the CCR now finds that it is behind the times:

"This landmark legislation created the fairest and most just system of courts-martial in any country in 1951. 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, in 2001." [3]

It is difficult to discern what the Commission means by this statement. As discussed below, the UCMJ provides more procedural protection than an accused would get in the federal civilian criminal court system. [4] It also provides more protection than an accused would typically receive in state or foreign courts. The CCR does not define what it considers to be procedural justice, nor does it cite a single example of injustice under the UCMJ.

III. NO EXTERNAL SCRUTINY

The CCR states, "The UCMJ governs a criminal justice system with jurisdiction over millions of United States citizens, including members of the National Guard, reserves, retired military personnel, and the active-duty force, yet the Code has not been subjected to thorough or external scrutiny for thirty years." [5] This statement makes it appear that there are no provisions in place ***235** for reviewing the UCMJ. This is simply not the case. The UCMJ, as federal law, is subject to the oversight of the legislature. If the President proposes amendments to the UCMJ, there will be congressional oversight. Additionally, both the judiciary and the armed services committees have jurisdiction to review matters of military justice. There is even a Department of Defense directive [6] that establishes a Joint Service Committee on Military Justice that is required to report to the President annually and to propose legislation to improve military justice. The committee's annual review of the UCMJ is both thorough and extensive. [7]

Another check is in the U.S. code itself. Article 146 [8] provides: "A committee shall meet at least annually and shall make an annual comprehensive survey of the operations of this chapter." The term "this chapter" refers to 10 U.S.C. Chapter 47, which is the UCMJ. The committee consists of the judges of the United States Court of Appeals for the Armed Forces (USCAAF), who are all civilians, the Judge Advocate Generals (TJAGS) for each of the services, and the Commandant of the Marine Corps, along with two civilians appointed by the Secretary of the Air Force (SECAF). Moreover, another oversight is the American Bar Association which has a standing committee on Armed Forces Law that produces reports, recommendations, and investigations. Finally, in cases brought under the UCMJ, virtually all hearings are public hearings, including Article 32 investigations [9] and appellate procedures. [10] Indeed, it would be hard to identify a system of criminal justice that is more open or more carefully examined than the UCMJ.

IV. COMPARISON OF THE UCMJ WITH THE MILITARY JUSTICE SYSTEMS OF OTHER COUNTRIES

The Commission states, "In recent years, countries around the world have modernized their military justice systems, moving well beyond the framework created by the UCMJ fifty years ago." [11] The Commission cites the ***236** military justice systems of the United Kingdom, Canada, Austria, India, Ireland, Israel, Mexico and South Africa. [12] These countries did change their justice systems. However, the changes they made do not mean that the UCMJ is outdated. Rather, the countries that changed their military justice systems had other problems to correct. In the two cases cited by the Commission, *Findlay v. United Kingdom* [13] (England), and *R V. Genereux* (Canada), the legal issues decided were quite different than any that could be raised with regard to the UCMJ. [14]

A. Contrast with Findlay

In *Findlay*, the court was concerned about two issues. The first issue was the central role played by the convening officer in the organization of the court-martial. The second issue involved a review process that did not address Mr. Findlay's concerns about a fair and impartial trial. The *Findlay* court was concerned about the following facts: the convening officer decided the nature and detail of the charges and recommended the type of court-martial on his own; the convening officer could comment on the evidence and its admissibility; there was no independent review of the charges; no legal officer sat on the court-martial (the court did not state whether the accused had a right to examine the court members or challenge them for cause); the only safeguard to ensure court members were unbiased was the oath they took (there was no mention of any judicial review of the court member selection process); the convening officer could comment on the proceedings of a court-martial which required confirmation —these remarks would not form part of the record and could be communicated to the court members; the convening officer

appointed the prosecuting officer and the defense counsel; the convening officer ruled on applications by the defense during the trial; the sentence had no effect until confirmed by the convening officer, who could withhold confirmation, substitute or postpone or remit in whole or in part, any sentence; and finally, there were no statutory or formalized procedures set out for post-trial reviews and hearings. [15] The situation in *Findlay* stands in marked contrast to the procedures under the UCMJ.

Under the UCMJ, the convening authority determines the charges to refer and the type of court-martial to be convened. However, he or she does so only after reviewing the evidence (usually in the form of a report of investigation) and receiving advice on the charges from the base Staff Judge Advocate (SJA). The charges are drafted, not by the convening authority, but ***237** by lawyers in the base legal office. [16] For a case to be referred to a general court-martial, an independent review of the charges must be held at an Article 32 investigation. [17] The Article 32 investigation provides more procedural protections for the accused than a grand jury hearing. [18] Furthermore, once a case is referred to a court-martial, the military judge has the responsibility and authority to review the charges. The judge can dismiss one or all of the charges for multiplicity or simply based on equity. [19] Finally, even if court members are hearing the case, if the military judge believes a charge was not proven beyond a reasonable doubt, he may enter a finding of not guilty. [20]

The procedures for choosing court members are also very different than those questioned under *Findlay*. Under the UCMJ, the convening authority does appoint the court members, but the convening authority also has an obligation to pick the best-qualified members. [21] The court members are also required to take an oath. [22] In addition to the court members, a military judge is required at all special and general courts-martial. [23] The military judge is an independent member of the court and has a separate chain of command from the convening authority. [24] It is the military judge that overseas the actual seating of the panel that will serve on the court-martial.

Additionally, the court member selection process is documented, and a copy of this documentation must be given to the defense during the discovery process. [25] This enables the accused, through defense counsel, to better prepare questions for individual court members. The accused has the right to examine prospective court members and challenge them for cause. [26] The accused also has the right to challenge one member peremptorily, that is, for no reason at all. [27] Both trial and defense counsel may question the court members and may challenge them as stated above.

Members who are found to be "biased," whether the bias is actual or implied, may not sit on a court-martial, [28] and case law provides that military ***238** judges are to grant challenges for "implied" bias very liberally. [29] Military judges may also disqualify a court member for bias *sua sponte*. [30]

Another possible area of concern with the convening authority appointing members is unlawful command influence. Under the UCMJ, the defense can raise a motion with the military judge at trial concerning unlawful command influence or improper court member selection. There are provisions in place to preserve such an objection for appellate review. [31] Furthermore, if either unlawful command influence or improper court member selection is found, the case cannot proceed until the problem is corrected. [32] The military judge may also rule on the bias of the convening authority and disqualify the convening authority from any participation in the case. [33]

In addition to protecting the accused, the UCMJ also protects court members from unfair treatment based on their service in a court-martial. Article 37 of the UCMJ makes it unlawful for the convening authority to base an Officer Performance Report (OPR), promotion recommendation or assignment decision on a military member's performance as a court member. [34] Military members who believe they are victims of reprisal based on their service as a court member can complain through Inspector General (IG) channels.

To further protect the neutrality of the members, once a court is convened, the convening authority may not speak to the court members about the pending court-martial. [35] In fact, once a court-martial has been convened, neither the military judge, prosecution, nor defense may speak with the members off the record. [36] None of the parties may communicate with the members about the case, and the court members are instructed as to these rules. Once convened, the court-martial proceedings are open to the public and any conversations between the military judge and the court members must take place in the presence of the counsel and the accused and be recorded verbatim. [37] Any conversations between the military judge and the counsel, other than 802 conferences, [38] must be on the record as well.

In *Findlay*, the convening officer appointed both the prosecuting officer and the defense counsel. Under the UCMJ, the SJA appoints the trial counsel. The defense counsel is appointed by, and falls under the supervision of, a ***239** separate chain of command. [39] In *Findlay* the convening officer also controlled the trial and defense witnesses, with no review process of his decisions. Under the UCMJ, while the convening authority controls the production of trial and defense witnesses, her decisions are subject to judicial review. [40]

Finally, unlike the situation in *Findlay*, there are statutory, formalized procedures set out for post-trial reviews and hearings. [41] Under the UCMJ, the convening authority has the discretion to approve or disapprove the findings and sentence of the court and can lessen the degree of guilt to a lesser-included offense, set aside a finding of guilty, dismiss charges or direct a rehearing. The convening authority also has the power to lessen the severity of the punishment but cannot increase the severity of the sentence. [42] Convening authorities are required to review certain matters before taking final action on the case. [43] This review and the action are documented and a copy is provided to the defense. [44] Finally, there is appellate review of all cases, unless waived by the accused. [45]

B. Contrast with Genereux

In *Genereux*, the main issue was the independence and impartiality of the military judge. [46] In this case, certain members of the legal branch of the Armed Forces could be appointed to the Judge Advocate General's office. There they performed legal duties, but could also be detailed by the convening authority to serve as military judges on an ad hoc basis. The court also focused on military judges' lack of financial security, as the legal officer's salary was determined, in part, according to his or her performance evaluation. There were no formal prohibitions against evaluating an officer on the basis of his or her performance as a military judge at a court-martial. Additionally, the convening authority appointed the prosecutor, defense counsel and the military judge. In effect, the convening authority had complete control over each court-martial.

These concerns are not present in the United States' system. Under the UCMJ, the military judges are ultimately under the authority of The Judge Advocate General (TJAG) of each service. They are not in the same chain of command as the convening authority and are not detailed to the case by him. [47] Also, Article 37 of the UCMJ prevents the TJAG of each service, or anyone else, from censuring, reprimanding or admonishing a military judge for his ***240** functions at a court-martial. [48] Finally, in contrast to a major concern in *Genereux*, a military judge's salary is not determined by his performance evaluation. He is paid the same as any other military member of the same rank and time in grade.

Findlay and *Genereux* highlighted the need for reform in the English and Canadian military justice systems. However, those systems are quite distinguishable from the United States' under the UCMJ. The procedures that gave too much power to the convening authority in the British system, and did not ensure an independent judiciary in the Canadian system, do not exist under the UCMJ. Additionally, *Findlay* and *Genereux* do not apply to the UCMJ as the United States is not a party to the European Convention on Human Rights' nor is the military subject to the European Court of Human Rights. To recommend that we change our military justice system because other countries have done so, without producing evidence that our system has the same flaws, stands logic on its head.

V. GRASSROOTS ORGANIZATIONS AND "PERCEPTION"

The next reach is found where the Cox Commission Report notes that there is a "ground swell" of grassroots organizations devoted to dismantling the current system:

> As a result of the *perceived* [italics added] inability of military law to deal fairly with the alleged crimes of servicemembers, a cottage industry of grassroots organizations devoted to dismantling the current court-martial system has appeared, aided by the reach of the worldwide web and driven by the passions of frustrated servicemembers, their families, and their counsel. [49]

The report references several groups that maintain websites devoted to various military related causes. The Commission appears to reference these groups to bolster its conclusion that there is a need for reform.

A review of the sites, however, shows that these groups are not primarily concerned with reforming the military justice system. Instead, in general, they are opposed to the result in a particular case. As such, although the Commission uses these groups to bolster their case, none of the proposed CCR reforms would likely convince these individuals that the military justice system gives military members a fair trial.

For example, the report cites Citizens Against Military Justice (the group actually calls itself Citizens against Military Injustice, or CAMI) [50] as a group concerned with military justice reform. CAMI's site contains a mixed bag of complaints. The group is chaired by a mother who is upset because her ***241** son, a US soldier, was convicted of murder at a court-martial and is currently in confinement. The appellate process, including the then Court of Military Appeals (COMA—now renamed the US Court of Appeals for the Armed Forces, or CAAF, with Judge Walter Cox himself sitting as a member) upheld the conviction and sentence. The soldier's appellate rights were exhausted when the Supreme Court declined to review the case. For most of the other groups, military justice is not their primary cause. However, they come up on a web search because they are linked with the CAMI site. Thus, the commission attempts to bolster its conclusion that reform is needed by citing groups that either do not directly address the issues or ones that have an obvious bias.

The CCR does not cite one actual instance of injustice, unlawful command influence, reprisal or any other threat to justice under the current system. Instead, it sees perceptions and potential perceptions of injustice as a "threat to morale and a public relations disaster." [51] The CCR relied on the existence of these groups to bolster their argument because the conclusions are based on mere perceptions—commission members' perceptions, supported only by the statements of witnesses devoted enough to pay their own way and testify before them. *The commission finds in their report eight possible negative perceptions of justice, six bad impressions, two perceived injustices and one image problem*.

There are numerous reasons not to act based on perception alone; two bear mentioning. First, there will always be those who have a bias against the military justice system because of a result with which they disagree. No matter how fair the system, these people will not be deterred, and reforms should not be based on an attempt to please them. The goal of groups like CAMI is not fundamental fairness, but rather to obtain a particular result in a particular case. To follow such a course is to put justice at the mercy of the best publicist or the most dedicated partisan.

Second, a justice system that responds to this sort of political pressure will not be seen to do justice. Rather, it will be seen as a political arena where pressure can be applied to achieve a desired result. Sadly, we have seen this as some cases have been tried in the public relations realm, with results that many believe did not bring justice. [52] Justice is better served, in the long run, when incorrect perceptions are challenged and correct information is disseminated. The unfortunate alternative is a justice system modified to fit the perceptions of a few interested parties.

***242** It is encouraging that, after all the evidence was examined, the Commission, with its 150 years of collective experience, could find no actual problems with the UCMJ and MCM. It is disturbing that a commission with such a depth of experience would suggest changes based solely on perceptions. The better course of action would be to determine whether the perceptions were accurate, and if not, suggest ways to correct them.

VI. CONVENING AUTHORITIES AND UNLAWFUL COMMAND INFLUENCE

The first portion of the CCR executive summary reads as one long indictment of the convening authority and his role in the military justice system. This indictment should be dismissed as baseless as the Commission cites no evidence against convening authorities. The Commission is almost schizophrenic on this issue as it fluctuates from positive to negative to positive comments. Even as the committee condemns convening authorities in theory, it acknowledges that in practice, even in the area they find most troubling, *there is no actual problem*. The CCR stated "The Commission trusts the judgment of convening authorities as well as the officers and enlisted members who are appointed to serve on courts-martial." [53]

In direct contradiction of this statement, in line after line, the report suggests there could be trouble:

> There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection. The current practice is an invitation to mischief. It permits—indeed, requires—a convening authority to choose the persons responsible for determining the guilt or innocence of a servicemember who has been investigated and prosecuted at the order of that same authority. [54]

At the end of this dire warning, the Commission finds no abuse whatever. It condemns the appearance of evil without addressing some essential, relevant questions: 1) are there safeguards in place to prevent abuse; 2) are they being used; (3) and if so, do they in fact prevent the abuse the Commission is concerned about? When the facts are examined, each of these questions is answered in the affirmative. However, the Commission concluded its inquiry on this issue, based not on the facts, but on the "potential appearance" of improper influence.

This very issue was considered when the UCMJ was enacted into law. Both the drafters and the members of Congress who considered it were satisfied:

***243** "In an attempt to prevent unlawful command influence, Congress enacted Article 37, UCMJ, and provided for the punishment of violations of this article under Article 98, UCMJ. Congress also relied heavily on the UCMJ's appellate court system for protection from unlawful command influence, as indicated by this exchange between Senator Leverett Saltonstall and Mr. E. M. Morgan, Professor of Law, Harvard University:

Senator Saltonstall: Mr. Chairman, may I say this? ... We have provided this very high court on the law; we have provided a board of review of the facts —

Professor Morgan: That is right.

Senator Saltonstall: And if we have done those things, is not the accused amply protected from any influence?

Professor Morgan: That is exactly the way our committee felt about it .... [55]

Their reliance on UCMJ checks and the appellate process is reflected in the following statement by Professor Morgan:

> On the question of restriction of command control, we felt that when the board of review [predecessor of the Court of Military Review] in the Office of the Judge Advocate General, which is so far removed from any control of the convening authority, had power to handle law, fact and sentence, that that eliminated a great part of the evils of command control. [56]

The UCMJ makes any willful attempt to engage in unlawful command influence a crime:

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether ***244** a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member, as counsel, representing any accused before a court-martial. [57]

History has borne out the confidence expressed by the congressman and the professor. The convening authority is bound, not only by honor, but also by the UCMJ, to pick those officers (and if requested, enlisted members) who are best qualified to serve as court members:

> When convening a court-martial, the convening authority shall detail as member thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case. [58]

The many appellate cases that have dealt with the issue of unlawful command influence in panel selection seem to be grouped into two areas. They are: 1) stacking the panel with regard to rank; or, 2) stacking the panel with regard to gender. Even if the convening authority wanted to stack a panel to obtain a particular verdict or sentence, the safeguards in place provide ample protection against such an attempt.

The first safeguard is the discovery process. As part of discovery, the defense counsel must receive copies of the documentation regarding the convening authority's nomination and selection of court members. [59] The defense counsel can interview all the parties involved in the nomination and selection process, including the SJA and the convening authority. If the defense counsel believes that unlawful command influence has taken place, she can raise a motion at trial.

Even if the defense does not make a motion at trial, the military judge may address the issue *sua sponte* if he believes that unlawful command influence has taken place. For example, during the voir dire process, facts may be presented that cause the military judge to question whether unlawful command influence has taken place. Even without a motion from the defense, the military judge has the duty to explore the issue and resolve it before the court-martial proceeds.

Finally, if the defense counsel does not receive satisfaction at the trial level, the issue can be raised on appeal. In some cases, additional facts ***245** regarding potential unlawful command influence become known after a trial is over. When these facts are brought to the attention of the appellate court, a post-trial hearing can be ordered to explore the possibility of unlawful command influence. [60]

It is disturbing that the Commission seems willing to permit the triumph of form over substance in its recommendations. The CCR acknowledges the need of the commander to act decisively: "During hostilities or emergencies, it is axiomatic that commanders must enjoy full and immediate disciplinary authority over those placed under their command." [61] However, without taking evidence from a single commander, the Commission reached the self-serving conclusion that its recommendations to remove commanders from court member panel selection will not interfere with this need. The Commission members' vast military justice experience is indeed impressive. However, in fairness, they should have received evidence from those with even one year of command experience to temper their report.

VII. CONVENING AUTHORITY'S POWER OVER THE MILITARY JUSTICE PROCESS

The Commission found other faults with the role of the convening authority, stating, "As many witnesses before the Commission pointed out, the far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces." [62] This statement is a conclusion without a foundation. The CCR makes no effort to consider the bias of the witnesses, nor their background. It does not cite a single case to support the assertion that the convening authority is a barrier to justice. Nor did it cite a single case where the convening authority created an injustice. This amounts to slander against the men and women who perform their duties with honesty and integrity. Without any factual foundation, the CCR's conclusion should have no place in a serious discussion of the law.

The Commission's fear of commanding officers seems to come from a mistrust of the commander in general. In its view, the commander is a malevolent figure hovering over a court: "commanding officers still loom over courts-martial, able to intervene and affect the outcomes of trials in a variety of ways." [63] The commander/convening authority has not always been so viewed, nor has anything the Commission produced demonstrated that this view reflects reality.

***246** The UCMJ drafters trusted commanders, viewing them as a safeguard for the rights of an accused. They trusted the commanders more than they trusted prosecutors and lawyers. This fact has been fully understood by the Court of Appeals for the Armed Forces. The court has often recognized that, while unlawful command influence is the enemy of justice, most commanders are not. Commanders have long had the court's respect. Rather than deeming them, "the greatest barrier to operating a fair system of criminal justice within the armed forces," [64] the court finds the convening authority a protection for most service members:

> This Court also notes that one of the true cornerstones of the fair system of justice that our service members enjoy is the independence of the convening authority. His honor, professionalism, and integrity guarantee fairness and openness in the exercise of the courts-martial power. A frequent observer of the system knows that, when the convening authority makes a decision exercising power in this area, there are no unseen strings or superiors influencing his actions. Moreover, to influence a convening authority's exercise of power by exerting influence from a superior or on a superior's behalf either directly or indirectly is to violate the law. Arts. 37 and 98. A convening authority has to decide a case without any suggestion as to how the superior wants the case to be resolved. Art. 34, UCMJ, 10 U.S.C. S. 834. If the superior of a convening authority wants to properly influence the outcome of a criminal case, let that superior operate in the open and under the law by assuming the power of the court-martial convening authority under Article 22. [65]

The court has recognized the convening authority's role in protecting the rights the convicted airmen as well:
Moreover, as noted above, appellant's offenses were committed prior to the effective date of Article 58b. Thus, the convening authority still had the power to remit or suspend any or all of the adjudged forfeitures under the clemency powers granted him in Article 60, UCMJ, 10 USC § 860 (1983). We continue to believe that the convening authority remains "the accused's best hope for sentence relief." See United States v. Bono, 26 M.J. 240, 243 n.3 (CMA 1988), citing United States v. Wilson, 9 U.S.C.M.A. 223, 226, 26 C.M.R. 3,6 (1958). A recommendation by a military judge must be brought to the attention of the convening authority to assist him in considering the action to take on the sentence. [66]
The convening authority is bound by law to act fairly and impartially. If he fails to do so at any step in the proceedings, he must disqualify himself, or the military judge will remove him. Failure to do so can result in a case being overturned.

The fairness of the convening authority is carefully scrutinized. Convening authorities have been disqualified where there was a perception that ***247** their Staff Judge Advocate was biased [67] or where the conveying authority had personally found probable cause and authorized a search. [68] Convening authorities have also been disqualified for having granted immunity to witnesses, [69] for potential personal bias, [70] and for personal remarks. [71] In short, the convening authority's actions are continually reviewed by the military justice system. Any bias or perceived bias can cause the convening authority to be removed and may also require corrective action ranging from a new sentencing hearing to a new trial. [72]

The only unchecked authority the UCMJ gives to a convening authority is the ability to provide sentence relief to a convicted airman. If the convening authority finds the sentence too harsh, he may lessen the punishment. [73] This type of influence, the ability to provide mercy, certainly cannot be challenged as creating the appearance of injustice for a service member.

The other functions the commander carries out, from appointing the Article 32 investigating officer (IO); selecting the court members (and maybe trial counsel); deciding which witnesses to bring in for trial; deciding whether or not to order a sanity board; deciding on who gets immunity; and whether the findings should be approved are all subject to defense challenge and judicial review. While the commander may "loom" over a court-martial, it is inconceivable how the presence of a professional officer who is bound by law to do justice, select the most qualified members of a court, and not interfere with it once the court is formed threatens justice more than an unfettered prosecutor who is out to build a record. Indeed, the appellate system seems to have had to deal with just as many cases of overzealous government counsel as with convening authorities that attempt to achieve an unjust conviction or harsher sentence. [74] Absent evidence to the contrary, anyone defending cases under the UCMJ should consider carefully whether attorneys, who only deal with airman under criminal investigation, or commanders, who deal with all airmen, offer the most neutral and measured consideration of an individual case.

***248 VIII. COX COMMISSION PROPOSAL FOR COURT MEMBER SELECTION**

The Commission's proposal to stop convening authority selection of court members falls short of an actual remedy to the problem they concede does not exist:

> The Commission trusts the judgment of convening authorities as well as the officers and enlisted members who are appointed to serve on courts-martial. But there is no reason to preserve a practice that creates such a strong impression of, and opportunity for, corruption of the trial process by commanders and staff judge advocates. Members of courts-martial should be chosen at random from a list of eligible service members prepared by the convening authority, taking into account operational needs as well as the limitations on rank, enlisted or officer status, and same-unit considerations currently followed in the selection of members. Article 25 of the UCMJ should be amended to require this improvement in the fundamental fairness of court-martial procedure. [75]

The CCR states, “Members of courts-martial should be chosen at random from a list of eligible service members prepared by the convening authority.” [76] If the convening authority prepares the list, the convening authority is still selecting the members. It is difficult to see how this step would prevent the appearance of injustice problem sited by the CCR. The only difference is that the convening authority is building the pool from which members will be chosen for a particular case, rather than hand picking members on a case-by-case basis. Nevertheless, if he chose to do so, a convening authority could put only the toughest officers and enlisted members in the pool or those he knew would follow his slightest suggestion.

If this suggestion were implemented, it would not change the perception on which it is based. If the convening authority truly wanted to improperly influence the members under his command, he could do so prior to random selection. He can already influence the officer performance ratings, assignments, and disciplinary records of the potential members. Convening authorities today are ever mindful of their role in the military justice system and the potential impact of their remarks. If they are moved to the periphery, they may, in good faith, feel less restricted in their public statements. The convening authority can still make speeches and generate publicity, the source of many of the cases of unlawful command influence in the past. Those other than the convening authority, who, in the past have engaged in unlawful command influence, such as first sergeants speaking to potential witnesses or attorneys speaking to members, could continue such conduct.

Implementing random member selection would not in any way prevent these examples of unlawful command influence. In fact, it might make the ***249** potential problem worse. Removing the convening authority from the process also removes him from the advice and counsel of the SJA that went with the panel selection role. There would no longer be a legal requirement that the most qualified members serve. Consequently, the convening authority might feel less restrained to comment on the selected panel and its results. As the convening authority is removed from the process, courts and judges may feel his ability to influence a panel is lessened. Therefore, they may permit the convening authority more latitude when they determine the impact of remarks he may make or actions he may take. As a result, there may be more, rather than fewer, problems to address.

Giving the commander the authority to choose members also allows him the flexibility to minimize impact on mission accomplishment. First, the commander can remove from a list, or fail to nominate, select officers in key positions that are needed to accomplish the mission. For example, while preparing to deploy in support of combat operations, a commander can exclude the Operations Group Squadron Commanders and Operations Officers (and others specifically needed to prepare for the deployment). This flexibility does not deprive an accused of a fair trial yet it greatly enhances a commander's ability to accomplish his mission. Secondly, commanders are in a unique position to know of information regarding their officers that would render them unfit for a particular trial. This is especially true for disciplinary information that might impact their ability to perform their duty and that is otherwise protected by the Privacy Act. Rather than expose these officers to public inquiries, he can simply fail to nominate them.

Finally, giving the convening authority the responsibility for putting members on a court serves to protect the members from other influences. Were the members randomly chosen, others on base might feel more free to tell them what is expected of them on the court or to give them free advice or opinions as to how to deal with a certain case. They might be more likely to “brief” the members selected on what is expected of them, or the “military view” of their duty. Knowing that the commander has ownership of the process limits this kind of improper mentoring before trial. With random selection, rather than watch one commander, the system would be placed in the untenable situation of having to hunt for unlawful command influence under every bush.

Why should the commander's selection of those deemed most qualified to serve as court members be considered an invitation to corruption? The explanation appears to be simple mistrust of military leaders. Why? The commander makes similar choices every day, recommending promotions, command assignments, and school billets that impact careers. In wartime, the commander makes life and death decisions.

The commander's integrity is the very foundation of the military. If it is accepted that the system cannot trust its commanders, then the military as an institution cannot be trusted. The UCMJ incorporated the principle that service ***250** members benefit by having a commander involved in the military justice process. The commander reviews the information then decides whether to prosecute and, if so, what level of action to bring. The UCMJ drafters believed that the commander was the best individual to balance the interests of justice in each individual case. The Commission produces nothing that suggests the convening authority has failed in this function. They do not show that due process would be better served by placing an accused member in the hands of the lawyers or randomly selected court members. Absent a showing of actual, systemic improper influence, bias or unfairness, the principle of the convening authority selecting those best suited as court members should not be lightly abandoned.

IX. OTHER OBSERVATIONS REGARDING THE CONVENING AUTHORITY

The Commission's other observations regarding the convening authority also do not withstand scrutiny. The Commission cites several of the convening authority's pre-trial powers as potential sources of abuse:

> While the selection of panel members is clearly the focal point for the perception of improper command influence, the present Code entrusts to the convening authority numerous other pretrial decisions that also contribute to a perception of unfairness. For example, the travel of witnesses to Article 32 investigations, pretrial scientific testing of evidence, and investigative assistance for both the government and the defense are just a few of the common instances in which the convening authority controls the pretrial process and can withhold or grant approval based on personal preference rather than a legal standard. While the responsibility for such matters shifts to the military judge upon referral to court-martial, the delays created before the trial begins undermine due process for both sides at a court-martial. [77]

The rules provide that witnesses shall be produced if reasonably available. [78] The determination of reasonably available is set out in the rule, and it is further established by case law. [79] The convening authority may make the witnesses available based on the advice of the SJA. However, if he fails to do so, there are two levels of review. The Article 32 Investigating Officer (IO) has the independent authority to determine if a witness is reasonably available. [80] The nature of the Article 32 investigation is judicial, permitting the IO to suspend proceedings if the request is not complied with, and providing the IO with the same protections from unlawful command influence ***251** that a court enjoys. [81] The decision of the IO may then be reviewed by the trial court. Ultimately, if there is a conviction, the trial judge's decision will be reviewed at the appellate level.

The accused is not only entitled to have a witness present, but also to have his attorney thoroughly prepared to examine the witness. If either of these rights is denied, the accused may be entitled to a new Article 32 investigation. Although the right to witnesses under Article 32 is limited to those reasonably available, this is a greater right than granted to an accused in the grand jury process of the federal court system. [82] At a federal grand jury, the accused has no right to have witnesses cross-examined by his attorney, or to call witnesses. Also, the accused does not have a right to be present, except when called as a witness. Even if called as a witness, the accused does not have the right to have his or her counsel present inside the grand jury room.

The differences between the procedural rights of an accused at a grand jury hearing versus the Article 32 investigation do not stop there. The grand jury is a secret proceeding in which the prosecutor alone presents evidence to the grand jurors. Under the UCMJ, the Article 32 investigation is conducted by an impartial investigating officer, and is open to the public. [83] The accused must be present at the Article 32 investigation (unless he is disruptive) and he has the right to have his counsel cross-examine the government witnesses and to call his own witnesses. [84] The accused can also choose to make an “unsworn” statement at the Article 32. This statement is not subject to cross-examined by the government counsel. [85]

At a grand jury hearing, the decision to send the case to trial is made by the jury, with input from the prosecutor only.[86] Under the UCMJ, the charges are reviewed by the IO, who makes a written report of his findings and recommendations. The defense can present any evidence they choose for the IO's consideration. The defense will also receive a copy of the IO's report. The report is reviewed by the convening authority, prior to the charges going forward to a court-martial.[87]

The defendant at a federal grand jury has no right to the testimony provided the grand jury, or to challenge it. Also, there is no requirement that a minimum number of grand jurors who vote to indict must hear all of the ***252** evidence presented.[88] In every aspect, the accused has far more rights regarding the confrontation of witnesses against him and the presentment of evidence under the UCMJ than he would in any other federal pretrial hearing.

The accused also enjoys significant rights under the UCMJ with regard to pretrial scientific testing of evidence and investigative assistance.[89] In these matters also, the rules and the case law provide specific, strict, legal standards from which a convening authority cannot deviate.[90] Not only must the government provide any such witness that are necessary, the government must do so before the Article 32 begins. If the government does not, the trial judge may either order the witness produced, or order a new Article 32 investigation. The trial judge may also order scientific tests, and again, may order a new Article 32 investigation if the tests were not done prior to the investigation and the judge believes they should have been done.

Rule for Court Martial 703,[91] and the cases that have fleshed it out, tightly control the convening authority's ability to thwart the defense request for an expert witness,[92] an expert consultant,[93] and scientific testing of evidence.[94] In effect, even if the convening authority refuses to grant the proper request for anything the defense needs at trial, the defense has independent recourses to obtain a fair trial at every phase of the proceeding, beginning with the Article 32 investigation. Finally, although a recalcitrant convening authority might cause a delay, the UCMJ even has safeguards against a delay becoming burdensome. The government is held to strict accountability regarding the accused's right to a speedy trial.[95] If a convening authority unnecessarily causes delay, he risks having the charges forever barred by the expiration of the 120-day speedy trial clock. No other US system of criminal justice holds the government to such a strict time standard.

The power of the convening authority to make these decisions is limited by a number of factors that insure that the accused's procedural and substantive rights are protected. The convening authority may not "withhold or grant approval based on personal preference rather than a legal standard."[96] The convening authority must follow very exacting legal standards in each ***253** instance listed above. These rights are codified in the MCM and clarified in the case law that has developed around each one.[97]

Appointing a judge prior to referral of charges to rule on issues such as witnesses and experts would not provide the relief suggested by the Commission. In special courts-martial, the government averages less than 20 days between preferal and referral of charges. A delay of this modest length is certainly not one that would create a perception of injustice. For general courts-martial there is a longer period of time between preferal and referral. However, the intervention of a military judge during that period would not measurably speed up the process. It could result in a number of problems of perception and reality that the Commission does not address. The Article 32 investigating officer has evolved into a full-fledged judicial officer, with the powers to determine if witnesses are available and to have the witnesses produced. If the investigating officer should abuse her power to the extent the accused believes a substantive right was denied, he does not need a military judge standing by to provide a remedy. He already has the right to appeal by extraordinary writ to the next military appellate court.[98]

In *ABC, Inc. v. Powell*,[99] the decision as to whether to open an Article 32 investigation to the public was taken up by the US Court of Appeals for the Armed Forces after the Army Court of Criminal Appeals had ruled on the same issue. Based on that opinion, written by then Chief Judge Cox, it is clear that the military courts do exercise supervisory powers from the moment charges are preferred. The Army Court of Criminal Appeals finds its authority also extends to review of cases brought under Article 69 of the UCMJ.[100] This authority flows from what is commonly called the All Writs Act. The All Writs Act provides

that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." [101]

The military courts and judges already oversee every step of the court-martial process from preferral of charges. Once charges are preferred, and a general court-martial is contemplated, they are sent to an Article 32 investigation. The Article 32 IO has quasi-judicial powers to conduct an ***254** investigation with such independence that any effort to influence his decisions will amount to unlawful command influence. If a military judge were to oversee this process prior to referral, it is arguable that, under *current law*, the judge would be engaging in unlawful command influence if he attempted to interfere with the investigating officer's decision making process.

If a judge changes the IO ruling, or tries to force the IO to do as the judge rules, there would be a conflict of authority between sitting judicial officers. This would not necessarily protect the rights of an accused. Rather, it would create uncertainty where none now exists. Having an alternative source of rulings from that of the IO could only encourage both the government counsel and the defense to "shop" for the best ruling. This would cause delays, and lead to the appearance that justice was a matter of shopping for the right authority.

Imagine a worst-case scenario. At the Article 32, the defense requests that certain witnesses be made available. The Article 32 officer finds that the witnesses must be made available. The government attorney disagrees, and seeks a ruling from the trial judge. The trial judge rules that the witnesses need not be ordered to appear, and the government need not provide them. The Article 32 IO believes his ruling is correct. Because he is an independent judicial officer, he abates the proceedings until the witnesses are provided.

Whose ruling governs? Is the Article 32 process still an "independent judicial proceeding" if the trial judge can rule differently than the IO? Can the defense demand a new judge to rule on the issue at trial, as the trial judge now has a stake in upholding his previous decision? Obviously, adding a trial judge to the process adds neither clarity nor speed. What it would do is create the potential for far more conflict. Any judge making rulings in a case prior to referral should be disqualified from trying the case. If he were not disqualified, he would be in the position of ruling on his own decisions, contrary to current practice and to concepts of fairness and due process. Consequently, injecting a sitting judge into the process before referral is more likely to increase delays, burdensome motions, and the perception of injustice, rather than relieve them.

Finally, the MCM gives the military judge and appellate system, not the convening authority, the final word. From preferal of charges to final action, the convening authority may not engage in unlawful command influence. If the convening authority, or one of his staff, improperly influences a subordinate to prefer charges, the accused will get a new preferral. [102] The convening authority would then be disqualified from acting on the case.

If convening authorities "loom over courts-martial," they loom low indeed. The only way the convening authority can prevent the review of a sentence that triggers the full appellate process is to reduce the sentence. Even ***255** so, the office of the TJAG is charged with a review and may submit the issues to the appellate process on its own. Though the right to an appellate review is not absolute, [103] the review provided is more than is guaranteed in the civilian courts. In the civilian world, unless he is indigent, an accused must pay for the review process. Otherwise, unless an accused can pay, or find an attorney who will take the matter and move the court to waive its fees, meaningful appellate review may not be available.

Once the limitations on the convening authority are examined, it is clear that the perceptions that caused the Commission so much consternation are not well founded. The authority of the convening authority under the UCMJ is both limited and subject to proper, independent, judicial review at every stage in the courts-martial process. The UCMJ does not suffer any of the defects that caused the foreign justice systems cited in the report to undergo reforms. Consequently, rather than change a fair and just system, it would be better to change the misperceptions surrounding the convening authority's role in the military justice process. The Commission concludes their discussion of the convening authority by stating:

> The combined power of the convening authority to determine which charges shall be preferred, the level of court-martial, and the venue where the charges will be tried, coupled with the idea that this same convening authority selects the members of the court-martial to try the cases, is unacceptable in a society that deems due process of law to be the bulwark of a fair justice system [104]

This statement is simply not supportable. While the convening authority does determine which set of charges are preferred, this decision is reviewed, and if necessary modified, by the trial judge. The judge has the power to consolidate charges and specifications or dismiss them entirely. The judge may rule the convening authority's charges are multiplicious, both for findings and sentencing. [105] If true due process of law, rather than perception, is the standard, then the present allocation of responsibility among convening authorities and military judges should be retained.

The Commission stated it has confidence in convening authorities and members selected by them; it cited no actual prejudice in the military justice system; and the Court of Military Appeals found that the convening authority provides vital protections for the rights of accused in the military justice system. In the end, the only reason the Commission can cite to change the current system, are the perceptions of the misinformed. Truly, this is not enough to warrant “reform”.

*256 X. OTHER RECOMMENDATIONS OF THE COX COMMISSION

A. Increase the Independence, Availability, and Responsibilities of Military Judges

The substance of this proposal is very much contained in the proposal to limit the power of the convening authority. If the convening authority is properly fulfilling his duties, and there is effective appellate review, there is no need to expand the role of the military judge. The reasoning used to outline and defend the convening authority applies equally here. There are, however, a few statements the Commission made that bear comment.

The Commission stated, “complaints against the military justice system have long been fueled by allegations that military judges are neither sufficiently independent nor empowered enough to act as effective, impartial arbiters at trial.” [106] We have been unable to find a single case in the last 20 years that found the military trial judge was not independent. The perception that they are not may exist in the mind of some, but it certainly has not been borne out by the case law. They do not have merely “some modicum of judicial independence,” [107] but function as fully independent judicial officers, who are able, once assigned to a case, to overturn any decision a convening authority has made. This is not a power the convening authority has over the judge. Judges may dismiss cases outright, they may order relief to any party, and they may hear any motion. [108]

At the appellate level they may even find facts, [109] a power unique among judicial appellate systems in America. The Commission does not name a single power possessed by any other court that the military judge does not have under the UCMJ. We believe there are none. The judge may order a new service of charges, a new pretrial hearing, and new pretrial advice. He may find an accused not guilty when there are members, and may require the convening authority to act in appointment of experts, witnesses, testing, or anything else necessary for justice. If the convening authority does not act, the judge may abate the proceeding. The military judge may dismiss charges if the convening authority delays too much or if anyone engages in unlawful command influence. He can order remedies as he sees fit to correct unlawful command influence. He may dismiss members proposed by the convening authority for cause, and they are bound, if selected, to follow the judge's instructions as to the law. The judge may question witnesses. Under the ***257** UCMJ, the military judge has all the independence and authority required to ensure a fair trial. [110] He also has a duty to ensure that a fair trial is conducted.

The Commission stated that, until very close to trial, neither the defense nor the prosecutors have a judicial authority to which to turn. This is untrue, as demonstrated in the *ABC, Inc. v Powell* case. [111] There has been, to date, no evidence offered that the

current appointment system has prejudiced any right of a single accused. Moreover, the Supreme Court has upheld the method of appointing military judges and affirmed that it does not violate due process. [112] Absent some evidence of harm or prejudice, we should not tamper with a system that is working.

In its final recommendation regarding the role of judges, the Commission suggests: "Third, either the President through his rule making authority, or Congress through legislation, should establish clear processes and procedures for collateral attack on courts-martial and authorize appellate military courts to both stay trial proceedings and to conduct hearings on said matters within their jurisdiction." [113] Notwithstanding the Commission's perception, it appears, based on the cases cited as well as the All Writs Act, [114] that there already are in place adequate procedures to ensure judicial oversight at all steps in the courts-martial process.

In quickly addressing the issue of public confidence in the system, the Commission is only able to provide references to several fringe groups of individuals who advocate changing the military justice system. Those the Commission cites as believing the system is unfair are neither neutral observers, legal experts, nor the average American off the street. Rather, their beliefs revolve around cases with which they disagree. To entertain the idea of change based on these views is unwarranted. The general public has, in the most recent polls, shown a tremendous degree of respect for the military. [115] There is absolutely no evidence offered to suggest they have any less respect for the military justice system. In any event, a system of justice that attempts to change in the face of uninformed public opinion will find itself achieving neither popularity nor justice. Only by adhering to principle can a system be a ***258** true justice system. To bow to public pressure without a reason based in law and fact is to abandon justice for expediency. To educate the public is the far better answer. Absent a showing of a flaw in the UCMJ, we should not let the experience of others, whose systems and militaries are radically different from the United States', stampede us into rash movement just so we can claim reform. The many changes we have seen in systems of justice world-wide do not move those countries farther from the UCMJ, but rather, move them closer to it. We should defend a system that has served as a model for so many, rather then contemplate change because so many others have needed change.

B. Implement Additional Protections in Death Penalty Cases.

Given the increased scrutiny focused on capital litigation in the United States, the operation of the death penalty in the armed forces deserves close attention. Opponents of capital punishment have raised substantial questions regarding whether the modern military needs a death penalty, particularly during peacetime (an issue that the Commission feels deserves further study). [116] Even the most ardent supporters of the death penalty accept the critical need for procedural fairness in capital cases. The Commission recommends that three steps be taken to improve capital litigation in the military:
1. Require a court-martial panel of 12 members.

2. Require an anti-discrimination instruction.

3. Address the issue of inadequate counsel by studying alternatives to the current method of supplying defense counsel.

We have no comment on the suggested requirement of 12 panel members in a death penalty case. However, we would again point out the dearth of evidence the Commission has to support its suggestions.

On the second suggestion, we would note that trial defense counsel can already request an anti-discrimination instruction, if they believe it is in the client's best interests. If the instruction becomes mandatory, then counsel's ability to choose among possible tactics in seeking instructions or not seeking them is hampered. We would continue to allow counsel the latitude to try the case as they believe the interests of their client require it to be tried.

Finally, while the courts should be ever vigilant to ensure a fair trial, particularly in a death penalty case, the court has never reversed a military death penalty conviction based on inadequate military counsel. It is vital that counsel be qualified in every criminal case, and we believe that the court is best qualified to examine whether the counsel that are practicing before it are ***259** competent. While additional training may be a good idea, neither training nor experience guarantee a counsel will be competent.

C. Replace Sexual Misconduct Provisions

The CCR recommends repealing the rape and sodomy provisions of the Uniform Code of Military Justice, 10 U.S.C. §§ 920 & 925, and the offenses specified under the general article, 10 U.S.C. § 134, that concern criminal sexual misconduct and replacing them with a comprehensive Criminal Sexual Conduct Article, such as is found in the Model Penal Code or Title 18 of the United States Code. We have no objection to this recommendation. Though the report is silent as to why this should be done, it may be worthy of reasoned consideration. What is unacceptable is the Commission's swipe at those who oversee the courts-martial process, without a scintilla of evidence to support their proposition:

> Furthermore, the well-known fact that most adulterous or sodomitical acts committed by consenting and often married (to each other) military personnel are not prosecuted at court-martial creates a powerful perception that prosecution of this sexual behavior is treated in an arbitrary, even vindictive, manner. This perception has been at the core of the military sex scandals of the last decade. [117]

The Commission is, or should be, well aware that not all such acts are a crime under the UCMJ. In order to be an offense under the UCMJ, adultery must be shown to adversely impact good order and discipline, or be service discrediting. [118] The perception that enforcing these articles is done in an arbitrary, even vindictive manner, has not arisen out of the court process. It comes from carefully orchestrated campaigns of media spinning and trial by press release. Once again, the solution to this problem is educating the public, not bowing before the most articulate propagandist. The burden of proof that any such act is service discrediting, must be met by the government counsel. A search of the Lexis database on this issue revealed no cases of arbitrary prosecution in a case of sexual misconduct.

So long as defense counsel are willing to mischaracterize the evidence and charges to the media in an effort to rally public sympathy; and, so long as military authorities are willing to dismiss valid charges as a result of such public interest, the problem of public mistrust or misperceptions of the fairness of our system of military justice will persist. Changing the names of offenses or failing to prosecute those that have become unpopular or are misunderstood will not make the system fairer. Such modifications, whether *de facto* or *de jure*, may well result in a system that is less responsive to good order and discipline and casts even more discredit upon the military by demonstrating ***260** that we no longer hold our members to the high standard of morality and ethics the American people expect of their military. So long as manipulating perception is an advantage to one side, changing the law on the basis of perceptions so manufactured is unlikely to result in a more just system.

D. Discussion of Additional Issues

1. Role of the Staff Judge Advocate

The Commission attacks the role of the staff judge advocate (SJA) in the same manner as it did the convening authority, with the same absence of evidence. Conflict, or the appearance of conflict, may exist in some isolated cases. However, as demonstrated in the discussion of convening authorities and the restraints on their powers, there are safeguards in place to deal with any actual or apparent abuse. One aspect of the Commission's argument deserves further comment:

> The broad authority granted some staff judge advocates creates a number of unwanted, contradictory images of courts-martial: that over-zealous prosecutors can pursue charges at will and are rewarded for aggressive prosecution, that convening authorities routinely disregard the legal advice of their SJA's in order to pursue

> unwarranted or even vindictive prosecutions, and that lawyers, rather than line officers, control the military justice apparatus. [119]

It is difficult to reconcile the Commission's position that convening authorities have too much authority with the position that lawyers have hijacked the justice process. The UCMJ provides the necessary checks on an overzealous prosecutor. [120] In addition to the judicial oversight of the lawyers involved in the process, commanders are the ones in charge, not lawyers. Complaining early in the report that commanders have too much authority, then voicing the same concern about lawyers, undermines both positions.

2. Power of Prosecuting Attorneys

Regarding the power of lawyers in the justice system, prosecutors in the civilian justice systems have more power to charge, indict, and try an accused than do prosecutors in the military system. [121] Civilian prosecutors are either elected officials or political appointees. Their method of appointment makes them more subject to political pressures and concerns than a convening authority or SJA.

***261** The UCMJ provides more oversight of the prosecutorial function than civilian systems can. The same restraints that prevent a commander or convening authority from manipulating the system apply to his SJA, and the trial counsel, as well as every military member. To lash out at the good faith of military attorneys, without support in the case law, is to strike a foul blow. This contention, that SJAs may taint the military justice system as a class, is without merit. The Commission goes on to say, "The Code and the Manual for Courts-Martial should be amended to stress the need for impartiality, fairness and transparency on the part of staff judge advocates as well as all attorneys, investigators, and other command personnel involved in the court-martial process. These amendments should be drafted so as to make clear that violation of these principles as well as the trust inherent in these tasks is punishable under the UCMJ." [122]

This point could not be made clearer than it already is under Article 37 of the UCMJ, [123] and the various cases dealing with the SJA and the SJA role in courts. On the question of transparency, the SJA's role is more transparent than any government counsel in any criminal system of which we are aware. If a case is referred to a general court-martial, the defense is even entitled to a copy of the SJA advice. [124] The defense is also entitled to the SJA Recommendation before the convening authority takes action on the record of trial. [125] We know of no other system where the convicted may see and comment upon the government counsel's advice.

The Commission's comments on the administrative processing of military members is outside the scope of this paper. As such, we offer no comment on their remarks addressing that issue. Similarly, the discussion of the Feres Doctrine is outside the scope of this paper. [126]

3. Sentencing

The Commission's thoughts on sentencing bear some comment. The requirement that the sentence be passed by the members, when the case is tried before members, has served well for 50 years. Under military law, the sentence is determined on a case-by-case basis. There are no mandatory minimum sentences as there are in the civilian justice system. Indeed, a member may be challenged for cause if they take a rigid view of sentencing. A challenge for cause would be granted if the prospective court member said that ***262** they could not consider "no punishment" as a sentencing option. [127] We believe members listen to the

judge's instructions, honestly consider all the evidence, and arrive at what they believe to be a fair sentence for that case. They may only sit on one case their entire career, and they are disposed to attempt to do it correctly.

Judges, on the other hand, will listen to many cases over their term on the bench. They also have available all the sentencing statistics from courts throughout the military. The goal in sentencing is to be appropriate and fair, rather than enforce a standard throughout the military. The Commission offered no evidence that there are systematic problems with members determining a sentence after hearing the evidence and taking instructions from the military judge. However, they recommend that in member cases, the convicted airman should be able to choose whether the members or the judge will determine the sentence.

Adopting this recommendation would allow the accused to try his case before members, hoping for an acquittal, but be sentenced by a judge, who might be more predictable in that realm. The CCR does not give a reason why the military community should find this more just than allowing the members to decide both guilt and punishment. This recommendation by the CCR seems to be a request for defense counsel to get one more bite of the apple that will not render the system any more fair than it is now.

4. Appellate Court Jurisdiction

The CCR next addressed the issue of appellate court jurisdiction in the aftermath of the Supreme Court's decision to limit the authority of the United States Court of Appeals for the Armed Forces in *Clinton v. Goldsmith*.[128] The Commission recommended further study to clarify the jurisdiction of appellate courts. However, it seems that this case settles the issue of jurisdiction of the appellate courts, and that further study is unwarranted at this time:

Although military appellate courts are among those so empowered to issue extraordinary writs, see Noyd v. Bond, 395 U.S. 683, 695, n. 7, 23 L.Ed. 2d 631, 89 S. Ct. 1876, the All Writs Act does not enlarge those courts' power to issue process "in aid of" their existing statutory jurisdiction, see, *e.g*, Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34, 41, 88 L. Ed. 2d 189, 106 S. Ct. 355. The CAAF is accorded jurisdiction by statute to "review the record in [specified] cases reviewed by" the service courts of criminal appeals, 10 U.S.C. § 867 (a)(2), (3), which in turn have jurisdiction to "review court-martial cases," § 866(a). Since the Air Force's action to drop respondent from the rolls was an executive action, not a "finding" or "sentence," § 867(c), that was (or could have been) imposed in a court-martial proceeding, the elimination of Goldsmith from the rolls appears straightforwardly to have been ***263** beyond the CAAF's jurisdiction to review and hence beyond the "aid" of the All Writs Act in reviewing it. Goldsmith's claim that the CAAF has satisfied the "aid" requirement because it protected and effectuated the sentence meted out by the court-martial is beside the point, for two related reasons. First, his court-martial sentence has not been changed; another military agency has simply taken independent action. Second, the CAAF is not given authority, by the All Writs Act or any other source, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed. The CAAF spoke too expansively when it asserted that Congress intended it to have such broad responsibility. (b) Even if the CAAF had some seriously arguable basis for jurisdiction in these circumstances, resort to the All Writs Act would still be out of bounds, being unjustifiable either as "necessary" or as "appropriate" in light of alternative remedies available to a servicemember demanding to be kept on the rolls.[129]

This decision seems clear and unambiguous. It is also consistent with the constitutional proposition that the armed forces fall under the executive branch of the government, rather than the judicial. That some part of the president's command is outside the court's supervision is both reasonable and consistent with our constitutional system.

5. Enhanced Powers for Article 32 Investigation Officers

Finally, the CCR recommends enhancing the powers of the Article 32 investigating officer so that his report is binding on convening authorities. This recommendation should be considered with caution. Though more extensive and open than a grand jury, the Article 32 investigation has limits not imposed on a court at a trial. For example, the IO cannot subpoena civilian witnesses. To make the IO's report, which may or may not consider all the evidence that a court could, binding on the convening

authority, is to invite injustice. For example, an IO could recommend that a case be dismissed, without having seen all the evidence that could be offered at trial. If the report was binding on the convening authority, justice would not be served. Conversely, imagine the situation if the IO recommends the charges go to trial, but the SJA believes they are not legally sufficient. This puts a heavy burden on the accused that should not be imposed. Finally, consider the possibility that evidence may be discovered or developed after the Article 32. If the IO's recommendations are binding on the convening authority, with no provision to re-open the Article 32 investigation, the interests of justice would be harmed.

The CCR discusses the suggestion that the Article 32 officer should be either a military judge or a field grade judge advocate with enhanced powers. These powers would include the ability to issue subpoenas, and to make binding recommendations to dismiss charges where no probable cause is found. This suggestion equates to having a "judge alone trial before a trial." An acquittal at this "enhanced Article 32" would be binding on the ***264** government. However, the defense would be fully able to fight the case at trial again. This asymmetrical burden would force government representatives to fully litigate Article 32 investigations, while permitting the defense to pick its strategy.

Though advantageous to an accused, this would not make the system more just. As with all the suggestions made, such as changing the number of challenges to court members, giving military judges contempt powers, and permitting lawyer voir dire, the Commission seems to ignore some facts [130] and not examine others.

XI. CONCLUSION

The Cox Commission stated that there are systemic problems with the military justice system. Throughout the CCR, however, there is no evidence presented that supports the claim of "systemic problems." The UCMJ provides for greater procedural protection that an accused would receive under the federal criminal court system such as are present within the Article 32 hearing process. The military justice system already includes checks and balances within it to address all of the Commission's concerns.

First, the UCMJ is subject to external scrutiny by the legislature and the Joint Service Committee on Military Justice. The concerns present within the military justice systems of England and Canada are not present within our system. Our military justice system already provides scrutiny of the convening authority's actions, as well as providing for the independence and impartiality of military judges and an effective and unbiased appellate review process.

The military justice system also provides checks and balances to ensure that an accused's procedural and substantive rights are protected. There is both trial judge and appellate review of the actions of the convening authority, the SJA and the prosecutors. The Commission could cite no specific instances where the military justice system had failed to address the concerns they noted in their report, let alone show evidence that the problems of a biased convening authority or overzealous lawyers are systemic problems. The independence of the judiciary is ensured by the structure of the system and the powers given to the military judge. The Commission's proposals regarding sexual misconduct provisions, sentencing, appellate court jurisdiction and the powers of Article 32 Investigation Officers have also been shown to be unnecessary.

In the end, what the Commission ultimately proposes, is to change the military justice system simply because of the perceptions of some individuals, ***265** many of whom are biased and motivated by their opposition to particular results in their loved ones' cases. As stated previously, there will always be those who have a bias against the military justice system because of a result with which they disagree. If changes are made based solely on perceptions rather than evidence, then the military justice system will be forever at the mercy of anyone who doesn't agree with a particular result.

We will close with the timely remarks of Judge J. De Meyer, in a concurring opinion in the *Findlay* case cited by the Commission:

> To this judgment, the result of which I fully approve, I would add a brief remark. Once again reference is made in its reasoning to "appearances" (paragraphs 73 and 76). First of all, I would observe that the Court did not need to rely on "appearances", since there were enough convincing elements to enable it to

> conclude that the court-martial system, under which Lance-Sergeant Findlay was convicted and sentenced in the present case, was not acceptable. Moreover, I would like to stress that, as a matter of principle, we should never decide anything on the basis of "appearances", and that we should, in particular, not allow ourselves to be impressed by them in determining whether or not a court is independent and impartial. (emphasis added). We have been wrong to do so in the past, and we should not do so in the future. [131]

Nor should the UCMJ be changed based on perceptions. We may need a campaign to educate the public and military members, but we do not need to change the law because of perceptions. In the end, we believe a cautious approach to change, rather than a preference for the new, simply because it is new, will best serve the needs of the military and its members in the new century.

Footnotes

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1 Report of the Cox Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001) [hereinafter CCR]. The Commission Executive Summary can be located at the website of the National Institute of Military Justice found at www.nimj.org (last accessed 29 Jun. 02).

2 *See* Miranda v. Arizona, 384 U.S. 436 (1966) (giving civilians the equivalent of Article 31 or Miranda rights); *also* Gideon v. Wainwright, 372 U.S. 335 (1963) (giving rights to counsel for indigent defendants); these Supreme Court cases giving civilians two of the most important substantive rights, both came after the UCMJ, which was enacted on 5 May 1950, with an effective date of 31 May 1951; *See* Act of May 5, 1950, 64 Stat. 108 (codified as amended at 10 U.S.C. § 801-946).

3 CCR, *supra* note 1 at 1.

4 Federal Rules Criminal Procedure, 18 U.S.C. § 201-235 [hereinafter F.R.C.P.].

5 CCR, *supra* note 1, at 2.

6 US Dep't of Defense, Directive 5500.17, Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice (8 May 1996).

7 For a summary of the 1998-2000 annual reviews done by the Joint Service Committee on Military Justice see https://aflsa.jag.af.mil/GROUPS/AIR_ FORCE/JUSTICE/JAJM/LEGISLAT.htm (last accessed 22 Apr 02).

8 UCMJ, art. 146 (2000).

9 MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405(h)(3) (2000) [hereinafter MCM]; *see also* San Antonio Express-News v. Morrow, 44 M.J. 706 (A.F.C.C.A. 1996) (Article 32 hearings are presumptively public); ABC News, Inc. v. Powell, 47 M.J. 363 (1997) (absent cause shown that outweighs the value of openness, the military accused is entitled to public Article 32 hearing).

10 MCM, *supra* note 9, at R.C.M. 1203 and 1204. *See also* www.armfor.uscourts.gov/Calendar.htm for the published calendar of hearings before the United States Court of Appeals for the Armed Forces (last accessed 22 Apr 02).

11 CCR, *supra* note 1, at 3.

12 *Id.* at 4.

13 Findlay v. United Kingdom, 24 Eur. Ct. H.R. 221 (1997).

14 For a line by line comparison of the UCMJ and the British system prior to the *Findlay* case, see Appendix.

15 Findlay, *supra* note 13.

16 MCM, *supra* note 9, R.C.M. 307(c).

17 *Id.* at R.C.M. 405(a).

18 Compare MCM, *supra* note 9, R.C.M. 405 with F.R.C.P. *supra* note 4, 18 U.S.C. § 201-235. *See also* Major General Jack L. Rives and Major Steven J. Ehlenbeck, *Civilian v. Military Justice in the United States: A Comparative Analysis*, 52 A.F.L. REV. 215 (2002) (this volume).

19 MCM, *supra* note 9, R.C.M. 801(e)(1)(A); *see also* Weiss v. United States, 510 U.S. 163 (1994).

20 *Id.* at R.C.M. 801(e)(1)(A) and R.C.M. 907.

21 UCMJ art. 25(d)(2) (2000).

22 MCM, *supra* note 9, R.C.M. 911 Discussion.

23 *Id.* at R.C.M. 501.

24 UCMJ, art. 26 (2000); MCM, *supra* note 9, R.C.M. 503(b).

25 MCM, *supra* note 9, R.C.M. 701(a)(1).

26 *Id.* at R.C.M. 912(b-f).

27 *Id.* at R.C.M. 912(g).

28 *Id.* at R.C.M. 912(e); s*ee also* United States v. Wiesen, No. 9801770, 2001, CAAF LEXIS (Dec. 13, 2001).

29 United States v. Rome, 47 M.J. 467 (1998).

30 MCM, *supra* note 9, R.C.M. 906 and 912; United States v. Thomas, 43 M.J. 550 (N-M. Ct. Crim. App. 1995).

31 MCM, *supra* note 9, R.C.M. 912(f)(2)(B)(4).

32 *Id.* at R.C.M. 912(b)(1-2).

33 *Id.* at R.C.M. 801(e)(1)(A).

34 UCMJ, art. 37 (2000).

35 *Id.*

36 MCM, *supra* note 9, R.C.M. 802, 803, 804, and 805.

37 *Id.* at note 37.

38 *Id.* at R.C.M. 802 (a summary of the discussion is required to be put on the record).

39 *Id.* at R.C.M. 503(c)(1) (detailed in accordance with regulations of the Secretary of each service).

40 *Id.* at R.C.M. 906(a).

41 *Id.* at R.C.M. 1101, 1107 and 1209.

42 *Id.* at R.C.M. 1107, 1108 and 1109.

43 *Id.* at R.C.M. 1107(a)(3).

44 *Id.* at R.C.M. 1107(h).

45 *Id.* at R.C.M. 1201-1210.

46 R v. Genereux, 1 S.C.R. 259.

47 UCMJ, art. 26 (2000).

48 *Id* at 34.

49 CCR, *supra* note 1, at 3.

50 *See* www.militaryinjustice.org (last accessed 22 Apr 02).

51 CCR, *supra* note 1, at 3.

52 Tony Cappacio, *Pilot Errors*, AM. JOURNALISM REV., Oct. 1997, at 18 (summarizing the entire Kelly Flinn incident); *see also* Tom Curley & Steven Komarow, *For Army, the Focus Now Turns to Remaining Cases*, USA TODAY, Apr. 30, 1997 (summarizing charges and verdicts related to Aberdeen Proving Ground cases); McKinney v. Ivany, 48 M.J. 908 (Army Ct. Crim. App. 1998); and Mark Thompson et al., *So, Who's to Blame*?, Time, Volume 146, No. 1, July 3, 1995.

53 CCR, *supra* note 1, at 7.

54 *Id.* at 7.

55 Hearings on S. 857 and H.R. 4080 Before a Subcomm. Of the Comm. On Armed Services, 81st Cong., 1st Sess. 90 (1949)(statements of Senator Leverett Saltonstall and Mr. E. M. Morgan, Professor of Law, Harvard University) [hereinafter Hearings]; *see also* Hearings on H.R. 2498 Before a Subcomm. of the Comm. On Armed Services, 81st Cong., 1st Sess. 652 (1949) *and* United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985), *rev'd on other grounds* 25 M.J. 326 (C.M.A. 1997).

56 Hearings, *supra* note 55, at 45.

57 UCMJ, art. 37 (2000).

58 UCMJ, art. 25 (d)(2) (2000).

59 MCM, *supra* note 9, R.C.M. 701(a)(1).

60 *See* United States v. Dinges, 55 M.J. 308 (2001); *see also* United States v. Baldwin, 54 M.J. 308 (2001).

61 CCR, *supra* note 1, at 5.

62 *Id.* at 6.

63 *Id.*

64 *Id.* at 6-7.

65 United States v. Hagen, 25 M.J. 78 (C.M.A. 1987), *cert. denied* 484 U.S. 1060 (1988).

66 United States v. Lee, 50 MJ 296 (1999) (*Opinion of the Court*, Cox); *see also* United States v. Johnston, 51 M.J. 227, 229 (1999) (*Opinion of the Court*, Cox).

67 United States v. Johnson-Saunders, 48 M.J. 74 (1998).

68 United States v. Wilson, 1 M.J. 694 (1975).

69 United States v. Hernandez, 3 M.J. 916 (A.C.M.R. 1977).

70 United States v. Nix, 40 M.J. 6 (C.M.A. 1994).

71 United States v. Fisher, 45 M.J. 159 (1996).

72 United States v. Voorhees, 50 M.J. 494 (C.A.A.F. 1999).

73 MCM, *supra* note 9, R.C.M. 1107(d)(1).

74 A review of the cases in each area yielded an equal amount of "court stacking" and "prosecutorial misconduct" cases.

75 CCR, *supra* note 1, at 7.

76 *Id.*

77 *Id.*

78 MCM, *supra* note 9, R.C.M. 405(g)(1)(A).

79 United States v. Chuculate, 5 M.J. 143 (C.M.A. 1978); United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976); United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

80 MCM, *supra* note 9, R.C.M. 405(g)(1)(A).

81 United States v. Reynolds, 24 M.J. 261 (C.M.A. 1987) (IO is a quasi-judicial official who must act in a neutral and independent manner); *see also* United States v. Freedman, 23 M.J. 820 (N.M.C.M.R. 1987) (where found interference with IO decision by convening authority).

82 F.R.C.P., *supra* note 4, (effectively the US Code of Criminal procedure provides for no rights to an accused before a grand jury at all-see sections 3321, 3322, and 3332).

83 MCM, *supra* note 9, R.C.M. 405(d)(1); *see also* San Antonio Express-News v. Morrow, 44 M.J. 706 (A.F.C.C.A. 1996).

84 MCM, *supra* note 9, R.C.M. 405(f) and (g).

85 *Id.* at R.C.M. 405(f)(12).

86 F.R.C.P., *supra* note 4.

87 MCM, *supra* note 9, R.C.M. 405(j) and 406.

88 United States v. Leverage Funding Systems Inc., 637 F.2d. 645 (9th Cir. 1980), *cert. denied* 452 U.S. 961 (1981).

89 United States v. Mustafa, 22 M.J. 165 (C.M.A. 1986) (Nevertheless, as a matter of military due process, service members are entitled to investigative or other expert assistance when necessary for an adequate defense, without regard to indigency); *see also* United States v. Toledo, 15 M.J. 255 (C.M.A. 1983) (accused entitled to access to qualified psychiatrist for purpose of presenting insanity defense).

90 MCM, *supra* note 9, R.C.M. 703(d); *see also* United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986).

91 MCM, *supra* note 9, R.C.M. 703.

92 United States v. Robinson, 24 M.J. 649 (N.M.C.M.R. 1987).

93 Garries, 22 M.J. 288.

94 United States v. Reinecke, 31 M.J. 507 (A.F.C.M.R. 1990), *aff'd* 32 M.J. 63 (C.M.A. 1990).

95 MCM, *supra* note 9, R.C.M. 707.

96 CCR, *supra* note 1, at 7.

97 MCM, *supra* note 9, R.C.M. 405(f), 703 (right to witnesses, evidence, appointment of expert witnesses); *see also* U.S. v. Miro, 22 M.J. 509 (A.F.C.M.R. 1986); U.S. v. Garries, 22 M.J. 288 (C.M.A. 1986); US v. Tornowski, 29 M.J. 578 (A.F.C.M.R. 1989); Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 LE 2nd 53, (1985); and U.S v. Van Horn, 26 M.J. 434, (C.M.A. 1988).

98 San Antonio Express-News v. Morrow, 44 M.J. 706 (A.F.C.C.A. 1996); *see also* McKinney v. Jarvis, 46 M.J. 870 (Army Ct. Crim. App. 1997); and ABC News, Inc. v. Powell, 47 M.J. 363 (1997).

99 47 M.J. 363.

100 UCMJ, art. 69 (2000) (provides for appellate review by judge advocate of each general court-martial resulting in a conviction, not otherwise reviewed by court of criminal appeals); *see also* Dew v. United States, 48 M.J. 639 (Army Ct. Crim. App. 1998).

101 All Writs Act of 1948, 28 U.S.C. § 1651 (2001).

102 United States v. Miller, 31 M.J. 798 (A.F.Ct. Crim. App. 1990), *aff'd* 33 M.J. 235 (C.A.A.F. 1991).

103 MCM, *supra* note 9, R.C.M. 1201.

104 CCR, *supra* note 1, at 8.

105 MCM, *supra* note 9, R.C.M. 801 and 906(b)(4), (5), (10) and (12).

106 CCR, *supra* note 1, at 8.

107 *Id.*

108 MCM, *supra* note 9, R.C.M. 801 and Discussion.

109 *Id.* at R.C.M. 1203(b).

110 UCMJ, art. 26; *see also* MCM, *supra* note 9, R.C.M. 801 and Discussion, 802, 803, 809, 910-915, 917, 981, 920 - 922, and 1007(a); United States v. Quintanilla, No. 00-0499, 2001 CAAF LEXIS 1256 (Oct. 19, 2001) (where the court stated that the judge has broad discretion in carrying out this responsibility, including the authority to call and question witnesses, hold sessions outside the presence of members, govern the order and manner of testimony and argument, control voir dire, rule on the admissibility of evidence and interlocutory questions, exercise contempt power to control the proceedings, and, in a bench trial, adjudge findings and sentence.); Weiss v. United States, 510 U.S. 163 (1994).

111 ABC, 47 M.J. 363.

112 Weiss, 510 U.S. 163.

113 CCR, *supra* note 1, at 9.

114 *See supra* note 101.

115 *See* The Gallup Organization, *Military Retains Top Position in American's Confidence Ratings*, June 25, 2001, accessible at http://www.gallup.com/poll/releases/pr010625.asp (last accessed 22 Apr 02).

116 CCR, *supra* note 1, at 9.

117 *Id.* at 11.

118 UCMJ, art. 134 (2000).

119 CCR, *supra* note 1, at 12.

120 MCM, *supra* note 9, R.C.M. 405, 906(b)(4), (9-12) (judicial authority to amend or dismiss charges and specifications), and 915 (military judge can grant a mistrial); also the appellate process serves as a check on prosecutorial power; *see* U.S. v. Meek, 44 M.J. 1 (1996).

121 F.R.C.P., *supra* note 4, § 3321, 3322, and 3332.

122 CCR, *supra* note 1, at 13.

123 UCMJ, art. 37 (2000).

124 MCM, *supra* note 9, R.C.M. 406.

125 *Id.* at R.C.M. 1106.

126 The Feres Doctrine, Feres v. U.S., 340 U.S. 135 (1950), stems from the Federal Tort Claims Act, 28 U.S.C. §1346 (b), and bars most service member claims against military.

127 MCM, *supra* note 9, R.C.M. 912(f)(1)(N).

128 526 U.S. 529 (1999).

129 *Id.*

130 MCM, *supra* note 9, R.C.M. 912(d). (It is the experience of the authors that attorneys conducting voir dire is the preferred practice in military courts. While some military judges conduct the actual questioning of members, they almost always allow counsel to submit questions for them to ask and allow counsel to follow-up on any information that is given during the group voir dire, during the individual voir dire of members. Even when lawyer voir dire is permitted, the military judge has the final say as to what court members are asked).

131 Findlay, *supra* note 13.

*266 APPENDIX

COMPARISON OF UCMJ WITH FINDLAY CASE

In the case of *Findlay v. the United Kingdom*, the court found basically two main areas of concern that led them to find that "for all these reasons, and in particular the central role played by the convening officer in the organization of the court martial, the Court considers that Mr. Findlay's misgivings about the independence and impartiality of the tribunal which dealt with his case were objectively justified." The two main areas of concern for the Court were the central role played by the convening officer in the organization of the court martial, and that the process of review did not address Mr. Findlay's concerns about a fair and impartial trial. In the table below, we have listed the Court's concerns and the differences found in the UCMJ.

Convening Officer Under British System	Convening Authority Under UCMJ
Decided nature of the charges and type of court martial to be brought. The court does not state whether the JAG drafted the charges or made recommendation on the type of court martial. No provision for JAG to assist and advise convening authority.	Decides which charges to prefer, after review of the evidence and advice of JAG. Charges are drafted by JAG. Decides type of court martial with advice of JAG. JAG assists and advises throughout the process.
The convening officer sends an abstract of the evidence to the prosecuting officer and the judge advocate. The	Military Judge can dismiss any or all of the charges at trial if they are multiplicious. Even if charges are not "technically" multiplicious, the judge may give equitable

convening officer could include passages that might be inadmissible. No independent review of charges.	relief in sentencing. If a charge is unproven, the military judge may enter a finding of not guilty to that charge, even in a trial before members. If the convening authority decides to send the case to a general court martial (GCM), there must be an Article 32 investigation. An independent investigating officer is appointed. The accused has the following rights: to be present with counsel, to receive a fair and impartial hearing (which can later be challenged at court), to request the government produce witnesses if "reasonably available," and to present evidence and make an unsworn statement. Prosecution and defense counsel present evidence, not the convening authority. Defense may challenge government evidence. Investigating officer conducts independent review of charges, determines whether government has a prima facie case, and makes recommendations on the appropriate disposition of the charges.
Convening officer appointed 5 court members, none of whom were legal officers. Court did not state accused had right to question members or challenge them for cause.	A military judge is required at a court-martial. Court members are appointed by the convening authority, unless waived by accused (judge alone trial). The member selection process is documented, and the documentation is provided to the defense during discovery.
Taking an oath was the only safeguard to ensure that the court members were unbiased.	The UCMJ requires that the convening authority pick the best qualified members. Both trial and defense counsel may question members. Members can be challenged for cause. Each side has one preemptory challenge. Members who are biased may not sit on the court. Members may be disqualified for actual or "implied" bias. Case law provides that judges are to grant implied bias challenges liberally.
Court did not state that there was judicial/appellate overview of the selection process.	Defense can raise motion with military judge at trial as to command influence/improper selection of court members; and can appeal the judge's decision. If the motion decided in favor of defense, case cannot go forward until command influence is corrected. Military judge may rule on bias of convening authority and disqualify the convening authority from any participation in the case.
Court did not state IG or similar process by which court members could bring complaint.	Article 37 of the UCMJ makes it unlawful for the convening authority to base OPR, promotion recommendation or assignment/transfer decisions based on performance as court member. Inspector General (IG) process by which court members can raise complaint of reprisal for unfair treatment based on their service as a court member.
Convening officer could comment on the 'proceedings of a court martial which require confirmation'. These remarks would not form part of the record. Could be communicated to members of the court.	Once court is convened, convening authority may not speak to the members regarding the court. Military judge has sweeping powers to prevent any unlawful command influence, including dismissing the case.
Members of court communicated with judge advocate in private, without a record.	Military judge may only communicate with members in open court, with verbatim record kept of the proceeding. All parts of the hearing must be public or held with the attendance of counsel.
	Accused can potentially choose from three different forums: judge alone, officer members; or if the accused is enlisted, 1/3 enlisted members.
Judge advocate not a member of court.	Military judge is independent member of court. Separate chain of command from convening authority.

Convening officer appointed the prosecuting officer, assistant prosecuting officer, and defense counsel.	Defense counsel not appointed by convening authority. Defense counsel is not in convening authority's chain of command.
Convening officer controlled production of witnesses for the prosecution and the defense; provided witnesses for the defense if "reasonably requested" by defense. No check on convening authority's decision on witnesses.	Convening authority may refuse defense witness request; however, defense can seek relief from military judge if witness request is denied. The military judge can order production of witness and stay proceedings if the witness is not produced. Accused has a right to expert witnesses; convening authority refusal may be overturned by military judge.
During the trial, the convening officer may rule on applications of the defense.	Once the trial begins, the military judge rules on any motions. Once a case is referred, the defense may seek relief from the military judge if convening authority denies a defense request.
Judge advocate who gives advice in secret does not cure lack of court's independence.	Military judge, independent defense counsel, and rejection of members for cause, all ensure an independent tribunal.
Sentence has no effect until confirmed, usually by the convening officer. Convening officer could withhold confirmation or substitute or postpone or remit in whole or in part any sentence.	Sentence effective immediately, unless stayed. Convening authority has discretion to approve/disapprove findings and sentence of the court. Can lessen degree of guilt to a lesser included offense, set aside finding of guilty, dismiss charges or direct a rehearing. The convening authority may ONLY lessen the severity of the punishment, cannot increase it. Can defer sentence of confinement. Required to review certain matters before he takes action, including the trial result, the staff judge advocate recommendation, and the matters presented by the accused. (Can also review record of trial and other matters considered appropriate) Review by convening authority is documented and copy is provided to the accused and defense counsel.
Second set of appeals goes to non-legal qualified board of officers. No statutory or formalized procedures were laid down for the conduct of post-hearing reviews and no reasons given for decisions made. Also, there was a lack of participation by the accused in the post-hearing review process.	There is appellate review of all cases, unless accused affirmatively waives review.
Next level review also not legally qualified.	Cases reviewed by judge advocate (summary courts-martial, special court if no bad conduct discharge, and general courts-martial if no punitive discharge and less than 1 year confinement adjudged)
Legal advice to the review officials kept private.	All correspondence is documented and available for review by defense.
Must obtain leave to appeal to Divisional Court, first level of legally trained review.	Court of Criminal Appeals (one for each service, composed of judge advocates) reviews all cases where a dismissal, punitive discharge or 1 year or longer of confinement is adjudged. Court has authority to do factual and legal review of cases. Appellate defense counsel provided free of charge, unless the accused waives this right. Court of Appeals for the Armed Forces is next appellate level and is composed of civilian judges. Accused can also appeal to Supreme Court as final appellate authority. All levels of appeal are open to scrutiny, hearings open to the public, and opinions of the courts published.
A court-martial appeal court (made up of civilian judges) could hear appeals against conviction from a court-martial, but may not hear appeals against sentence in guilty plea case.	Right to appeal is same regardless of plea.

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