A FACE LIFT (AND MUCH MORE) FOR AN AGING BEAUTY: THE COX COMMISSION RECOMMENDATIONS TO REJUVENATE THE UNIFORM CODE OF MILITARY JUSTICE

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INTRODUCTION

Between May 5, 2000 and May 31, 2001, the United States of America marked the fiftieth anniversary of the nation's modern military justice system, which came into being with the enactment of the Uniform Code of Military Justice (UCMJ) on May 5, 1950.[1] A number of efforts to celebrate this anniversary took place during that period, sponsored largely by the various armed forces and by the United States Court of Appeals for the Armed Forces (CAAF). Most of the activities were celebratory in nature, to pay tribute to the UCMJ, the remarkable statute and justice system that replaced the Articles of War and the Articles for the Government of the Navy, which had for 175 years served as the statutory basis for military justice in the United States.[2]

These earlier systems of military justice had been periodically modified and amended to improve efficiency, to respond to criticisms, or to meet changes in perception concerning the requirements of due process. However, the changes which had been made prior to 1950 never altered the fundamental nature of the system: it was never so much a system of criminal *justice* as it was a tool of command, which had as its primary function the enforcement of *discipline* in the armed forces. However, during World War II there were millions of men and women in uniform, and there were widespread perceptions of fundamental unfairness, particularly of "unlawful command influence," in the system. It was this outcry over such perceived abuses that led to a variety of studies to examine the system, and to propose changes. The UCMJ was the result: the enactment of a uniform system of justice to remedy abuses and, for the first time, to apply a single justice system to all the nation's armed forces. It is generally agreed that the UCMJ has served the nation and its military forces well, and that it was appropriate to mark its fiftieth anniversary with suitable ceremony.

One effort to commemorate the anniversary stood apart from the rest. In the fall of 2000, spurred by Congress' call for interested organizations to mark the fiftieth anniversary in meaningful ways, and believing that an integral part of those commemorative activities should be a critical appraisal of the current operation of the Code and an evaluation of the need for change, the National Institute of Military Justice (NIMJ), in coordination with The

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1. *See* Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) [hereinafter UCMJ]. The original 140 articles of the UCMJ were codified at 50 U.S.C. §§ 551-736 (repealed 1956). Today the Code is comprised of 146 articles, codified at 10 U.S.C. §§ 801-846 (2000). Under Section 5 of the Act, the Code went into effect on May 31, 1951. *See* UCMJ, Pub. L. No. 81-506, 64 Stat. 107, 145 (1950).

2. The UCMJ also replaced the much more recent disciplinary laws of the Coast Guard.

George Washington University Law School in Washington, D.C. (GWU), sponsored a *Commission on the 50th Anniversary of the Uniform Code of Military Justice*.[3] Senior Judge Walter T. Cox, III, recently retired from the position of Chief Judge of CAAF, agreed to chair the Commission, which soon became known as *The Cox Commission.* The Commission issued its Report in May 2001, to coincide with the fiftieth anniversary of the implementation of the UCMJ.[4] The proceedings and the Report of the Cox Commission constitute one of the most important events in U.S. military justice in decades, and it is the only celebration of the fiftieth anniversary of the UCMJ which will have lasting importance for – and a profound influence on – the U.S. military justice system.

In this article, I will endeavor first to describe the derivation and history of the U.S. military justice system, and its development for the first 175 years. Secondly, I will discuss the adoption and subsequent development of the UCMJ, and set forth the major features and operation of the Code in the fifty years since its enactment in 1950. Then, I will briefly describe the organization and function of NIMJ in its ten years of existence, and the establishment of the Cox Commission. Finally, and most importantly, I will set forth – with my comments – the Report of the Cox Commission and its far-reaching recommendations for modernizing the military justice system.[5]

My thesis is that the Cox Commission recommendations can be understood fully only if viewed in the context of the historical development of the military justice system, and by one cognizant of the *systemic flaws* in that system – flaws which derive from the nature and purpose of the original courts-martial as simply tools of command intended to ensure discipline, and

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3. *See* Floyd D. Spence National Defense Authorization Act, Pub. L. No. 106-398, 114 Stat. 1654 (2000). In section 556 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Congress commemorated the fiftieth anniversary of the UCMJ, asked the President to issue a suitable proclamation, and called "upon the Department of Defense, the Armed Forces, and the United States Court of Appeals for the Armed Forces and interested organizations and members of the bar and the public to commemorate the occasion of [the] anniversary with ceremonies and activities befitting its importance." Pub. L. No. 106-398, 114 Stat. 1654A-128-129 (2000).

4. *See* Honorable Walter T. Cox III et al., *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* § I (May 2001), *available at* http://www.badc.org/html/militarylaw_cox.html [hereinafter Cox Commission Report].

5. The Commission's recommendations go beyond the military justice system per se, and address other aspects of military law which in some way affect the military justice system. For example, the Commission addressed certain administrative law processes, arguing: "[W]e would be remiss in ignoring the impression of unfairness created by the growing use of administrative discharge action in lieu of court-martial." Cox Commission Report, *supra* note 4, § IV.B. The Cox Commission Report, less Appendices, is reproduced in this article. *See infra* Part VI.

not as courts of justice. The UCMJ was a large step forward in transforming courts-martial into instruments of justice, but it was an incomplete reform, and it has been overtaken by advances in concepts of fundamental fairness both here and abroad in the intervening fifty years. Only if the vestiges of inappropriate command control are eliminated will the system be free to function as a true and fully effective system of criminal justice.

My conclusion is that substantial structural reforms *must* be implemented if the U.S. military justice system is to be allowed to continue to function, for it no longer meets the standards which today define due process and fundamental fairness. As it now exists, if any conviction under the UCMJ were appealable to an appellate court applying the constitutional standards applicable to every other criminal justice system in the United States, federal or state, that conviction almost certainly would be set aside. Its defenders may argue, however, that this is not a *civilian* justice system, and therefore is properly subject to different standards. Even if we assume this argument to be valid, however, it must nevertheless fail on a comparative law analysis, for if any UCMJ conviction were appealable to a court applying the standards applicable to the *military* justice systems of most of our major allies, the conviction would be similarly suspect and likely would be overturned as violating fundamental fairness doctrines. No criminal justice system with the inherent deficiencies of the current UCMJ system would survive a constitutional challenge and be permitted to adjudicate such important issues involving criminal culpability. The several million Americans who volunteer to serve in our armed forces deserve better. The military justice system must be changed, or it should be abolished.[6]

I. ORIGINS OF THE U.S. MILITARY JUSTICE SYSTEM

At its origin, the U.S. military justice system is derived from the 1774 British Articles of War, which were first adopted "with little change" by the Provisional Congress of Massachusetts Bay in April 1775.[7] The following

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6. By way of clarification, let me emphasize that the subject of this article is the "military justice system," under which persons subject to the UCMJ are liable to trial by court-martial for offenses set forth in the "punitive articles" of the Code. On November 13, 2001, the President issued a military order authorizing "military commissions" to try certain noncitizens who might be determined by the President to be subject to the order. Military Order of November 13, 2001, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001). A military commission is a type of military tribunal separate and distinct from a court-martial. This article does not address issues related to military commissions.

7. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 24 (5th ed. 1999). The British Articles were adopted from "Gustavas Adolfus and the Roman Empire." Honorable Walter T. Cox, III, *The Army, the Courts, and the Constitution: The*

June, the Second Continental Congress adopted the first "national" military code, relying on the existing British Articles of War of 1774 and the 1775 Massachusetts Articles of War.[8] When Naval Articles were adopted later that year, they were based on the British Naval Articles of 1749.[9] John Adams, who served on the committees that adopted the British models for both the Army and the Navy discipline systems, recorded that:

> There was extant one system of articles of war, which had carried two empires to the head of command, the Roman and the British, for the British Articles of War were only a literal translation of the Roman . . . . I was therefore for reporting the British articles *totidem verbis* . . . . The British articles were accordingly reported.[10]

The theory underlying these precedent systems, and the original American articles, were that courts-martial were "in fact simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein."[11]

Evolution of Military Justice, 118 MIL. L. REV. 1, 5 (1987). For a detailed early history of the U.S. military codes, see WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 21-24 (William S. Hein & Co., Inc. 1979) (1920). For later developments, particularly the amendments to the Articles of War of 1916 and 1920, see A MANUAL FOR COURTS-MARTIAL, U.S. ARMY v-xx (1921) [hereinafter MCM 1921]. *See also* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 8-14, ¶ 1-40.00 to 1-44.00 (2nd ed. 1999).

8. *See* SCHLUETER, *supra* note 7, at 25; WINTHROP, *supra* note 7, at 22.

9. *See* Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953). For the history of the Navy's system of justice, see also EDWARD M. BYRNE, MILITARY LAW 4-5 (3rd ed. 1981). "The [Navy] rules were largely the work of John Adams and they were based almost entirely on British law." *Id.* at 4. They were adopted in December 1775 as the "Rules for the Regulation of the Navy of the United Colonies," and changed little for decades, until the adoption of the "Articles for the Government of the Navy" in 1862. *Id.* at 4-5. As with the Articles of War, changes to the Navy rules adapted them to changing perceptions of fairness, but such actions were not always consistent. For example, Congress abolished flogging in the Army in 1812, but it was not until 1850 that the same practice was abolished in the Navy. *See* Cox, *supra* note 7, at 8. Notwithstanding the rules in place, abuses and overt command influence were more than merely possible in the Navy, as also they were in the Army. In an infamous case on board the U.S.S. Somers in 1842, Acting Midshipman Philip Spencer, the son of the Secretary of War, was hanged at sea along with two enlisted men on charges of mutiny, without the benefit of a court-martial or even an appearance before the board of officers that conducted an informal inquiry into the matter and recommended the three be put to death. *See id.* at 8-9. As soon as that recommendation was reported to the commanding officer, the three men were immediately hanged from the yardarm. *Id.*

10. Morgan, *supra* note 9, at 169 (quoting 3 JOHN ADAMS, THE WORKS OF JOHN ADAMS 93 (1850)).

11. *Id.* at 170 (quoting 1 W. WINTHROP, MILITARY LAW 53 (1886)) (emphasis in original). The current article concentrates on the development of the Army's system, which, as

The Articles of War of 1775 provided for two military courts: the "general" court-martial consisting of at least thirteen officers, and a "regimental" court-martial, consisting of not less than five officers.[12] The Articles were enlarged and modified in 1776, primarily to deal with punishing spies. A more substantive revision in 1786 reduced the minimum number of members for the general court-martial from thirteen to five, and for inferior courts-martial, regimental and garrison, to three, and these numeric limitations for general and inferior courts-martial have remained essentially unchanged to the present day.[13]

The Articles of War were continued in force after the adoption of the Constitution by statutes adopted in 1789 and again in 1790. Thus, "the court-martial is older than the Constitution and predates any other court authorized or instituted by the Constitution."[14] In 1806, the Articles of War were modified in a statute which added certain minor procedural changes and a few "progressive procedural and substantive safeguards" for accused persons.[15] The 1806 Articles of War would remain virtually unchanged until 1874, when Congress added a "field court-martial," and certain further procedural protections, which:

> [M]arked an increased realization by Congress that due process considerations should apply. But the court-martial, at least to this point, was considered primarily as a function or instrument of the executive department to be used in maintaining discipline in the armed forces. It was, therefore, not a "court," as that term is normally used.[16]

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amended by the 1948 Articles of War, commonly known as the Elston Act, Pub. L. No. 80-759, 62 Stat. 604 (1948), was the primary source for the UCMJ. "[T]he UCMJ is far closer to the existing Articles of War than to the existing Articles for the Government of the Navy. The bluewater lads will have to relearn their naval law from at least sea level up." COLONEL FREDERICK BERNAYS WIENER, THE UNIFORM CODE OF MILITARY JUSTICE 1 (1950). Both systems, however, suffered from many and often similar systemic flaws, which the UCMJ was intended to correct.

12. *See* Articles of War of 1775, art. XXXIII, XXXVII, *available at* http://www.Yale.edu/lawweb/avalon/contcong/06-30-75.htm.

13. *See* SCHLUETER, *supra* note 7, at 25-26; WINTHROP, *supra* note 7, at 22-23. The reduction in the number of members apparently was necessitated by the extraordinarily small number of officers available for court-martial duty in the peacetime army after 1783.

14. SCHLUETER, *supra* note 7, at 27.

15. *Id*. at 27-28.

16. *Id*. at 30. The question of the primary purpose of the military justice system, vis-a-vis being a "tool of discipline" or rather primarily striving to be an "instrument of justice," continues into the modern era. Professor Schlueter, in his 1991 Kenneth J. Hodson Lecture, recognized the continuing tension, and argued that a court-martial can enhance discipline only to the extent that it is perceived to be an instrument of justice, free from "command influence." *See* David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's – A Legal System Looking For Respect*, 133 MIL. L. REV. 1, 10-13 (1991). The

Other changes to the Articles of War came in the following years. In 1890, Congress established a "summary" court-martial, which "in time of peace was to replace the regimental or garrison court-martial in the trial of enlisted men for minor offenses."[17] This was a one-officer court which would hear the case within twenty-four hours, determine guilt and adjudge a sentence. However, the enlisted man had an absolute right to refuse a summary court-martial and demand a higher level court-martial. In addition, by an 1895 executive order, a table of maximum punishments for individual offenses was established.[18]

During the first half of the twentieth century, a variety of somewhat more substantial changes were implemented. In 1916, changes to the Articles of War brought into being the current three-level court-martial system: general court-martial (GCM), special court-martial (SPCM), and summary court-martial (SCM). Other changes provided for the appointment of a judge advocate, to prosecute, and for the appointment of counsel for the accused, at both general and special courts-martial.[19] Compulsory self-incrimination was prohibited, and a ten-day speedy trial rule was implemented, along with a prohibition from trial by general court-martial commencing within five days of service of charges, except with consent of the accused.[20] Apparently, however, these various changes were not viewed at the time as making any material change to the system.[21]

The small peacetime army was vastly expanded during World War I, and the operation of the system in this war revealed substantial weakness in the 1916 Articles. "Troops, officers, and soldiers alike returned with bitter complaints about military justice."[22] General Samuel T. Ansell, the Acting

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importance of the question of "justice" versus "discipline" in the past *and future* development of the U.S. military justice system can hardly be overstated, and is further discussed below. *See*, *e.g.*, *infra* notes 32-34 and accompanying text.

17. SCHLUETER, *supra* note 7, at 30-31.

18. *See id.* at 31.

19. "Counsel" in this case did not mean a lawyer.

20. *See* SCHLUETER, *supra* note 7, at 31-32.

21. As Samuel T. Ansell stated:

> Nobody, neither The Judge Advocate General, the Secretary of War nor either of the Committees of Congress, has ever regarded the project of 1916 as a real substantial revision; indeed, the Judge Advocate General took occasion to deny that it was anything but a restatement of existing law for the sake of convenience and clarity.

S.T. Ansell, *Military Justice*, 5 CORNELL L.Q. 1, 5 (1919). Brigadier General Samuel T. Ansell had served from 1917 to 1919 as Acting Judge Advocate General of the Army. *See* SCHLUETER, *supra* note 7, at 24. He went on to confirm this earlier perception: "That was the truth. Nobody has experienced any change for the better." Ansell, *supra*, at 5.

22. SCHLUETER, *supra* note 7, at 32. These complaints were nothing like the firestorm of criticism which broke after World War II, which led to the adoption of the UCMJ.

Judge Advocate General of the Army, became the system's severest critic. He opened his 1919 article:

> I contend – and I have gratifying evidence of support not only from the public generally but from the profession – that the existing system of Military Justice is un-American, having come to us by inheritance and rather witless adoption out of a system of government which we regard as fundamentally intolerable; that it is archaic, belonging as it does to an age when armies were but bodies of armed retainers and bands of mercenaries; that it is a system arising out of and regulated by the mere power of Military Command rather than Law; and that it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from the Army that insists upon maintaining it. Intemperate criticism of those who have pointed out these defects will not serve to conceal them.[23]

Ansell's criticisms resulted in a re-examination of the system, and new articles, imposing additional procedural safeguards, were enacted in 1920. Among the changes were the requirement of a pre-trial investigation at which the accused had a right to be present, to examine and cross-examine witnesses, and to present evidence in defense or in mitigation; the requirement for a unanimous vote, versus the prior two thirds vote, to impose the death penalty; and the establishment of a board of review within the office of the judge advocate general to review courts-martial.[24]

While these 1920 changes did, in some measure, further conform the military justice system to the changing perception of the requirements of due process, they did not fundamentally alter the system, or the role and ability of the commander, as convening authority, to exercise overarching control over the entire process. "A single commander could prefer charges, convene the court, select the members and counsel, and review the case," with the result that "[t]he spectre of unlawful command influence lingered."[25] So it would, since the Articles of War would remain unchanged in any material way for the next thirty years. However, when the military services saw their largest expansion in history during World War II, the perceptions of unlawful

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23. Ansell, *supra* note 21, at 1. Ansell's aggressive efforts to implement reforms led to a controversy with The Judge Advocate General (TJAG) of the Army, Major General Enoch Crowder. Ansell was "acting TJAG" while Crowder was detailed to serve as the Provost Marshal General. Ansell was deeply concerned not only with the fairness of the system, but also with clearly establishing the power of the JAG to review and "revise" – reduce or set aside the findings or sentence of – courts-martial. For a thorough analysis of the Ansell-Crowder dispute, see JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980, at 28-75 (2001).

24. *See* SCHLUETER, *supra* note 7, at 32; MCM 1921, *supra* note 7, at vii-x.

25. SCHLUETER, *supra* note 7, at 32. In fact, few of the changes that Ansell had sought were addressed in the 1920 Articles of War. Most awaited the end of World War II to be seriously considered. Some have yet to be adopted.

command influence and of a fundamentally unfair system became so widespread that the clamor for reform became overwhelming. Many returning service members reached positions of influence, and added their voices to those calling for change. One example was the 1949 testimony of then-Congressman Gerald Ford, a World War II Naval officer who would later become President. He testified that he:

> [R]ecalled hearing conversations among members of courts-martial during his several years in the navy "along this line: What does the Old Man . . . want us to do?" Ford concluded that all too often such individuals were concerned less with determining guilt or innocence, than "with what the captain of a ship, or the commanding officer of a station, wants done with the man . . . . I also participated in various courts martial; and the whole system is fundamentally wrong; and I am particularly pleased to see something being done about it."[26]

In fact, in the 175 years from the adoption of the first Articles of War in 1775 to the adoption of the Uniform Code of Military Justice in 1950, little had changed in the fundamental nature of the military justice system in the United States. It remained a tool of the commander, and its purpose was to enforce discipline as prescribed by the commander. Perhaps the most aggressively caustic, yet largely accurate, assessment of the flaws in the military justice system, remains that of General Ansell in 1919. He viewed the entire process as antithetical to the rule of law.

> Out of these opposite basic theories – on the one side that Military Justice is to be controlled by the power of Military Command and on the other that it is to be regulated by established principles of Law – arise the two antagonistic views as to the character of courts-martial. One is that a court-martial is an executive agency belonging to and under the control of the military commander; is, indeed, but a board of officers appointed to investigate the accusation and report their findings to the commander for his approval. Under such a theory, a commander exercises an almost unrestrained and unlimited discretion in determining (1) who shall be tried, (2) the *prima facie* sufficiency of the proof, (3) the sufficiency of the charge, (4) the composition of the court, (5) all questions of law arising during the progress of the trial, (6) the correctness of the proceedings and their sufficiency in law and in fact. Under such a theory all these questions are controlled not by law but by the power of Military Command.
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> Thus it is said by Winthrop, the greatest departmental authority upon Military Law:
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> "Courts-martial are not courts, but are, in fact, simply instrumentalities of the executive power provided by Congress for the President as Commander-in-Chief to

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26. I JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, 221-22 (1992) [hereinafter LURIE, ARMING MILITARY JUSTICE]. This volume, and the second volume in the series, II JONATHAN LURIE, PURSUING MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980 (1998), were later abridged in the volume referenced at note 23. *See* LURIE, *supra* note 23.

aid him in properly commanding the army and enforcing discipline therein, and utilized under his orders or those of his authorized military representative; they are, indeed, creatures of orders and except in so far as an independent discretion may be given them by statute, they are as much subject to the orders of a competent superior as is any military body of persons."

This, of course, is in accordance with the old monarchical view. At the time of our separation, the King was not only the commander of the Army, he was the legislator of the Army; he prescribed the Articles of War, the offenses and the penalty; he prescribed both the substantive and procedural law; he prescribed the courts-martial, their jurisdiction and their procedure. He controlled the entire system of discipline and the methods of its administration. The Army was his, the officers were his officers and from him drew their authority. Courts-martial were courts-martial of the King and of the officers representing him and his power of command. The courts-martial, therefore, applied his law, his penalties, followed his procedure and were subject to his command. Under such a scheme, a court-martial was but an agency of command, nowhere in touch with the popular will, nowhere governed by laws established by the people to regulate the relation between sovereign and subject. It was not a judicial body. Its functions were not judicial functions. It was but an agency of the power of military command to do its bidding.

Basically, such is our system today. It does not contemplate that a court-martial shall be a court doing justice according to established principles of jurisprudence and independently of all personal power. Quite the contrary. It regards the court-martial simply as the right hand of the commanding officer to aid him in the maintenance of discipline. It is his agent; he controls it. It is answerable not to the law but to him. The court-martial is not a court at all; it is but an agency of military command governed and controlled by the will of the commander. Under such a system an officer, of course, belongs to a caste. Any officer can prefer charges against a man and at his will can succeed in getting him tried. The statute requires no preliminary investigation to determine whether or not the accused should be tried, and such investigation as is required by regulation is also controlled by the military commander, and is neither thorough nor effective. From then on everything is governed not by law but by the power of military command. The detail of counsel, the membership of the court, the question of the validity of the charge, the sufficiency of the evidence, the correctness of the procedure, the validity of the judgment and sentence and the thousand and one questions arising in the progress of a criminal trial are all left finally to the judgment of the commanding general. Even the ultimate conclusion of guilt or innocence is subject to his control. There is no right of review; there is no legal supervision. All is to be determined by the commanding general. Whatever he says is right; is right and becomes right as his *ipse dixit* regardless of general principles of jurisprudence, and right beyond any power of review. He is the law. No matter how great the departures are from the well established principles of law and right and justice, these departures become error or not, just as the commanding officer may choose to regard them. There is no legal standard to which court-martial procedure must conform and, therefore, there can be no error adjudged according to a legal standard. In other words, military justice is administered not according to a standard of law at all, but under the authority of a commanding officer. The results are as might be expected when one man is left to be judged at the will of another – the penalties and sentences are shockingly harsh, and frequently shamefully unjust.

> Such is our system conceded to be; and such, according to the militaristic view, ought it to be. The departmental view, as expressed in the hearings before the Committees in 1912, is that "the introduction of fundamental principles of civil jurisprudence into he administration of military justice is to be discouraged."[27]

The harshness of General Ansell's assessment does not detract from its importance. General Ansell has been described as one whose "views were a generation ahead of their time."[28] That is probably an understatement – he was in fact several generations ahead. Judge Cox considered him "the father of modern American military law."[29] His perceptions were clearly at odds with the common view in 1917, and were only partially accepted even in 1950. Indeed, it was not until the 1970s, when General Kenneth J. Hodson offered his own visionary recommendations, that many of General Ansell's views were seemingly validated.[30] It is worth noting, however, that even today – almost thirty years after he wrote – most of General Hodson's recommendations still have not been adopted.[31]

There was, in 1919, and there still exists today, a palpable tension between the demands of discipline and the requirements of justice under law. What Ansell referred to as the "militaristic" point of view[32] tends to demand strict discipline, and argues for a military justice system which will ensure that the commander can – through "legal" command influence – retain some significant control over the system which effects that discipline. Those such as General Ansell and General Hodson, who put the demands of justice and the rule of law as equally important priorities along with "discipline," have severely criticized the system – a system that has allowed for unlawful command influence, sometimes to the detriment of a just and fair result, to continue. The enactment of the Uniform Code in 1950 was an effort to change

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27. Ansell, *supra* note 21, at 5-7 (citations omitted). Two of his complaints, those regarding the lack of a pre-trial investigation, and the need for some system of post-trial review, were addressed, though with doubtful effectiveness, in the 1920 legislation. The other flaws continued, some until 1950 or beyond, others in varying degrees remain even today.

28. SCHLUETER, *supra* note 7, at 24 n.1.

29. Cox, *supra* note 7, at 9.

30. In 1973, Major General Kenneth J. Hodson, former Judge Advocate General of the Army and former Chief Judge of the Army Court of Military Review, recommended a number of changes to the military justice system. *See* Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1973). The author is aware of no other U.S. military lawyer in the modern era who has contributed as much to the profession or who is more highly respected.

31. This point is discussed further later in this article. *See infra* notes 132-35 and accompanying text.

32. *See* Ansell, *supra* note 21, at 7.

175 years of history.[33] It has proved to be a significant, yet still only a partial and incomplete, success.

A number of commentators in the latter half of the twentieth century have made reference to the tension that still exists between "justice" and "discipline," and the debate as to the ultimate purpose of and justification for a separate system of military justice continues. All of the leading commentators conclude that the court-martial process itself must be free of the types of command influence against which General Ansell railed, and that a court-martial will enhance discipline only to the degree that it does – and that it is *perceived* to do – justice. As expressed by General Hodson in 1973:

> [T]here is good reason to doubt the value of military justice in "enforcing" discipline in the traditional sense. A more enlightened view has been expressed by General Westmoreland, former Army Chief of Staff: "A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline."[34]

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33. In 1998, Brigadier General John S. Cooke, former Chief Judge of the Army Court of Criminal Appeals, gave the Twenty-Sixth Annual Hodson Lecture, and addressed the system's underlying historical philosophical base as a discipline system, and the change effected in 1950.

> In essence, enacting the UCMJ was the beginning of an effort to erect a true judicial system within the body of the military organization. This marked a radical shift. Instead of asserting, as General Sherman and many others did, that civilian forms and principles of justice are incompatible with military effectiveness, this effort rested on the largely untested precept that military effectiveness depends on justice and that, by and large, *civilian forms and principles are necessary to ensure justice*.

John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 8-9 (1998) (emphasis added) (citation omitted). The reliance on civilian forms to ensure justice in a military system is not unique to the United States.

> The creation of a civilian appellate tribunal in New Zealand started a trend of military justice civilianisation that is still evolving – a trend that has greatly enhanced the administration of military justice and consequently the enforcement of discipline . . . [and] serves to give the ordinary service person greater confidence in the system of military justice applying to him or her.

Commander Gordon Hook, RNZN, *Civilian Supervision of New Zealand Military Tribunals*, N.Z. Armed F. L. Rev., Oct. 2001, at 15.

34. Hodson, *supra* note 30, at 36. Almost twenty years later, in 1991, the issue again was directly addressed by Professor David Schlueter in the Twentieth Annual Hodson Lecture, when he specifically focused on the tension between discipline and justice. In so doing, he cited with approval from the "Powell Report," the 1960 Report of the Committee on the Uniform Code of Military Justice to the Secretary of the Army, chaired by Lieutenant General Herbert B. Powell. The Powell Report provided the language used by General Westmoreland:

> Once a case is before a court-martial it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean justice as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual

Nevertheless, the issue has yet to die.[35] The question that remains concerns the degree to which the UCMJ was, in 1951 – or, more properly, the degree to which it is today – effective in addressing General Ansell's concerns, and what further ought to be done to improve it.

II. THE ADOPTION OF THE UCMJ AND MAJOR FEATURES OF THE CODE

After World War II, in response to the outcry which arose from widespread perceptions of severe injustice in the court-martial system, a substantial number of studies of the military justice system were undertaken. The most important of these was that by the Committee appointed by Secretary of Defense Forrestal and chaired by Professor Edmund M. Morgan of the Harvard Law School.[36] The process followed by the Morgan Committee, and the results it achieved, are worthy of a separate treatment, and indeed others have addressed the subject admirably.[37] Suffice it to say, the Committee, comprised of Morgan and a civilian undersecretary from each of the three services, Army, Navy and Air Force, was tasked to review all the prior studies, and to prepare a "uniform code of military justice which would be applicable alike to all three Services, and which could be submitted to the 81st Congress as the recommendation of the National Military establishment."[38]

> function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.

Schlueter, *supra* note 16, at 11 (quoting The Powell Report 11, 12 (1960)).

35. Despite the clear trend in favor of this being a system of justice rather than one of discipline, regulations in at least one service continue to this day to use language that, while acknowledging the need for "fairness," seems to interpret the Code as giving primacy to the command control/command discipline paradigm:

> Courts-martial are instruments of leadership and command that have been balanced to ensure fairness to accused servicemembers. The UCMJ preserved a substantial amount of command control over military justice proceedings, but the UCMJ requires independent discretion and judgment on the part of court-martial participants. This is how the UCMJ seeks to ensure fairness *while preserving the Code as an instrument of command.*

MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION, MCO P5800.16A, ¶ 1003.1 (1999) *available at* http://www.usmc.mil/directiv.nsf/ (emphasis added).

36. *See* LURIE, *supra* note 23, at 89-94.

37. *See, e.g., id.* at 89-154; *see also* LURIE, ARMING MILITARY JUSTICE, *supra* note 26, at 150-255.

38. LURIE, *supra* note 23, at 90. Prior to this time, the Army and the Navy had been treated separately by Congress, and had separate legislative authorization for their justice systems.

The draft bill was prepared by the Morgan Committee during the latter half of 1948, and was accepted with little change by Secretary Forrestal.[39] It then was considered by Congress for almost a year and a half before Congress enacted a modified version of the Morgan proposals that President Truman signed into law on May 5, 1950.[40] Under Section 5 of the Act, implementation of the new Code was delayed until May 31, 1951 to allow for the preparation and promulgation of a new Manual for Courts-Martial (MCM) by the President, pursuant to the rulemaking authority granted in Article 36 of the new Code.[41]

The system put in place by the new Code was a compromise which adopted a number of significant reforms, but did not remove the military commander from the process. Instead, the drafters attempted to be responsive at least in some measure to the historical role of the commander, and military circumstances, while providing that the process be one which would effectively be subject to law and which would administer justice:

> The UCMJ was clearly an effort to limit the control of commanders over courts-martial; it increased the role of lawyers and it established a number of important rights for servicemembers, including extensive appellate rights. Among its most important features, it created the Court of Military Appeals which was intended to play, and has played, a critical role in protecting the integrity of the system. At the same time, it preserved many unique features of the old system, including a still very substantial role for commanders, in order to ensure that it would remain responsive to the special needs and exigencies of the military.[42]

Since its adoption, the Code has been amended a number of times, with major amendments coming in 1968[43] and in 1983.[44] In addition, the MCM, which contains the rules of evidence and procedure as well as a fair amount of substantive law, has been amended frequently, with major revisions in 1969 and 1984, responding to the major statutory changes, and with a format change to a modern soft cover paper edition coming in 1995.[45] These various

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39. The process followed by the Morgan Committee was that once the Committee agreed on an article of the Code, it was final and would not be revisited. If the Committee did not agree, the matter was to be resolved by Secretary Forrestal. *See* Cox, *supra* note 7, at 14. Only three issues needed to be so resolved: whether to establish the "judicial council," whether to permit enlisted court members, and whether there would be a law officer at a general court-martial. *See id.* "Secretary Forrestal resolved all of these in the affirmative, as Professor Morgan had recommended." *Id.*

40. *See supra* note 1 and accompanying text.

41. *See* UCMJ § 836. The articles of the UCMJ, codified at 10 U.S.C. §§ 801-846, are commonly referred to by their serial number (1-146) in the Code.

42. Cooke, *supra* note 33, at 8.

43. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

44. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).

45. For a more detailed description of the changes to the MCM, see Kevin J. Barry,

statutory and regulatory changes have served to further limit the role of the commander, and in some cases to enhance and in others to reduce protections afforded to accused persons. The result is that the military justice system in operation today is in some ways a considerably different one than the system which went into effect in 1951. Nonetheless, it retains some of the flaws which caused such consternation to General Ansell from 1917 to 1919.

The 1950 UCMJ made a number of major changes to prior codes. Many involved the insertion of lawyers into the process, and limitations were placed on commanders, who are the usual court-martial convening authorities, which required, prior to taking certain actions, that convening authorities (CAs) refer the case to their lawyer, the staff judge advocate (SJA), for the SJA's review, (e.g., for legal sufficiency), and advice. As summarized by Felix Larkin, the chair of the Morgan Committee Working Group, there were eight provisions that were "designed to prevent interference with the due administration of justice:"

1. The convening authority could not refer charges for trial until "they are found legally sufficient" by the staff JAG [SJA].
2. The staff JAG could communicate directly with the judge advocate general without having to go through the commander.
3. All counsel at general courts-martial had to be lawyers and certified by the JAG "as qualified to perform their legal duties."
4. The law officer was to be "a competent lawyer" who would rule on most legal questions.
5. The convening authority could not act on a finding or sentence "without first obtaining the advice of his staff judge advocate or legal officer."
6. The boards of review were to be established in the JAG office and thus "removed from the convening authority," to be composed of lawyers empowered to review a trial record for errors in both law and fact.
7. A civilian judicial council would pass finally on all questions of law.
8. Defendants appearing before either the board of review or the judicial council must be represented by qualified lawyers.[46]

Each of these provisions was included in the law when the UCMJ was finally enacted, with one modification: Morgan's "civilian judicial council" was transformed by Congress into the Court of Military Appeals (CMA), with three judges appointed by the President "from civilian life,"[47] with the advice

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Modernizing The Manual For Courts-Martial Rule-Making Process: A Work in Progress, 165 MIL. L. REV. 237, 242 n.16 (2000).

46. LURIE, *supra* note 23, at 116. Larkin noted as well the punitive provision prohibiting any attempt to improperly influence official action on any aspect of trial. *See* UCMJ §§ 837, 898 (2000).

47. UCMJ § 942. From 1956 until 1990, the text had been changed to read "from civil life." In 1990, when the original language was reinserted, Congress also adopted an amendment

and consent of the Senate, to fifteen-year terms of office. This civilian "supreme court for the military" was the culmination of the quest for meaningful appellate review argued for so vigorously by General Ansell. It is also noteworthy that the establishment of boards of review within the office of the JAG was viewed as diminishing the power of the JAG, instituted in the 1920 Articles of War and extended in the 1948 Articles of War, to pass on the sufficiency of records of trial.[48]

Various other changes to prior law are worth noting, particularly two of which the military remains proud even today, since they preceded similar, indeed, *constitutional*, requirements for civilians by many years. First, the Code required that prior to questioning, members suspected of an offense be advised of their rights: the nature of the offense of which they were suspected, the right to remain silent, and that any statement made could be used against them in trial by court-martial.[49] Second, under the Code the right to an appointed lawyer counsel, without cost, was provided for all accused tried at

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which added a new provision at section (b)(4) of Article 142, which stated that "[f]or purposes of appointment of judges to the court, a person retired from the armed forces after 20 or more years of active service (whether or not such person is on the retired list) shall not be considered to be in civilian life," thus reaffirming the nature of the court as a "civilian" court overseeing the military. *See* Pub. L. No. 101-510, 104 Stat. 1565 (codified at 10 U.S.C. § 942(b)(4) (2000)).

48. For a perspective of how the changes were viewed by one of the military law experts who would have been viewed by General Ansell as a "militarist," and who strenuously objected to many provisions of the Code, such as the establishment of a "civilian" CMA, and the provision which removed the "law member" from the court, see WIENER, *supra* note 11, at 1-24. Colonel Wiener successfully argued against the efforts of many in the bar to remove the commander from directly selecting the members of the court. *See id.* at 3. Wiener considered Morgan's proposed bill a "distinct retrogression" and a "step backward" from the 1948 Articles of War that it would replace. LURIE, *supra* note 23, at 129. He thought the requirement that trial and defense counsel at GCMs be lawyers to be "worse than unnecessary, it is impractical," and in time of peace to be "utterly impossible." *Id.* It may be surmised that in 1950, Weiner, though a lawyer, spoke for a substantial number of those in uniform who were deeply concerned about the new Code, and the expanded role of lawyers in administering it. Later, however, his views seemingly moderated, and he recognized with apparent approval that the CMA had given the statutory provisions extending rights, such as counsel rights, to military members "a content which, in most instances, is indistinguishable from that of the constitutional norms regularly formulated and applied [to civilians] in the federal courts." Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pt.1), 72 HARV. L. REV. 1 (1958); *see also* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pt. 2), 72 HARV. L. REV. 266 (1958).

49. *See* UCMJ § 831(b) (2000). It was not until 1966 that the Supreme Court mandated warnings for civilians, and then only under circumstances where they were in custody. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

a GCM, and this right was extended to accused persons tried at SPCMs in 1968.[50]

At least one other significant change was made in the Code. The former "law member" of a general court-martial became the "law officer," and no longer would enter the closed session of the court or have a vote, but rather would function much as a judicial officer, ruling on questions of law, and instructing the members of the court, who constituted the "jury" and the sentencing body, on their duties. Thus began the "judicialization" of the military justice system.

The first major change to the Code came in 1968, and greatly expanded the judicial aspect of the system. The "law officer" was changed in title to "military judge," and the requirement for a military judge to preside at courts-martial was expanded beyond the general court-martial to include the special court-martial as well.[51] The powers of the military judge were greatly expanded over those exercised by the law officer. The military judge was empowered to hold sessions of court out of the hearing of the members, to rule finally on questions of law,[52] and to sit alone in a bench trial and render

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50. *See* UCMJ §§ 827, 838 (2000). It was not until 1963 that the Supreme Court recognized a parallel right to free counsel for civilians, and then only in circumstances of indigency. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 9 (2000). Though the military today is proud to have been "out in front" on such provisions in 1950, it is also clear that such provisions were a result of civilian efforts and were adopted over the objections of those then in uniform. *See*, *e.g.*, the views of Colonel Wiener, *supra* note 48.

51. *See* UCMJ § 826.

52. The ability of the military judge to "rule finally" on issues of law was not absolute – at least not at first. If a specification were dismissed by the military judge and the ruling did not amount to a finding of not guilty, the convening authority (CA) could return the record to the court for reconsideration of the ruling. *See* UCMJ § 862(a) (2000). Article 62 remained unchanged after the 1968 UCMJ amendments. Where the issue was solely a question of law, the CA action in returning the record *required* the court to *reverse* the contested ruling, and yield to the wishes of the CA:

> To the extent that the matter in disagreement relates solely to a question of law, as, for example, whether the charges allege an offense cognizable by a court-martial, the military judge or the president of a special court-martial without a military judge *will accede* to the view of the convening authority.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.) 12-3, ¶ 67f (emphasis added). It was not until 1976 that the Court of Military Appeals overruled its prior precedent and found this MCM provision to be unacceptable. "It appears to us to be inherently inconsistent with the action of Congress in creating an independent judicial structure in the military, to strain the clear meaning of Article 62(a) to the point of permitting the *lay* convening authority to *reverse* a ruling of *law* by the trial *judge*." United States v. Ware, 1 M.J. 282, 287 (C.M.A. 1976) (emphasis in original). Henceforth, though the CA could still return the record, any

findings and determine a sentence, if requested by the accused. Finally, as previously noted, the requirement that a lawyer serve as defense counsel was extended to accused individuals tried at SPCMs as well as at GCMs. In the same statutory change, the boards of review were renamed courts of military review, and the members were changed to appellate military judges, who, like the prior board members, could be either military officers or civilians. All military judges and appellate military judges had to be certified as qualified by the appropriate JAG.[53]

In 1980, the military justice system was further modified with the adoption of Military Rules of Evidence, patterned after the Federal Rules of Evidence applicable in trials in the federal district courts of the United States. Several of the rules, however, including those addressing searches and inspections, go beyond the law of evidence and adopt substantive law provisions.

The second major statutory change came in 1983, and added the option for a petition for a writ of certiorari for direct review of courts-martial by the Supreme Court of the United States in any case on which review had been granted by the Court of Military Appeals, later renamed the Court of Appeals for the Armed Forces (CAAF). It also provided for prosecutorial appeals to the courts of military review of certain rulings made by the military judge.[54] This statute also streamlined and abbreviated the requirements of the pre- and post-trial reviews by the SJA prior to convening authority action. This latter provision was a two-edged sword, and one of the initial instances of a movement away from more protections and "due process" for accused persons, in favor of efficiency of administration of the system.[55] Another

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reconsideration had to be the result of the military judge's "own, independent legal judgment." *Ware*, 1 M.J. at 287. Another of General Ansell's complaints regarding the unchecked power of the commander to control the court-martial had finally – 57 years later – been corrected.

53. For a discussion of these changes and the functions, powers, and status of military judges in light of a challenge to a court of military review, see Joseph H. Baum & Kevin J. Barry, *United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence*, 36 FED. B. NEWS & J. 242 (1989).

54. It appears that this amendment to UCMJ Article 62, giving the government an appeal of certain rulings of the military judge, was deemed necessary once the prosecution no longer could obtain automatic "reversal" of such rulings by fiat of the convening authority. *See supra* note 52; *see also* SCHLUETER, *supra* note 7, at 487.

55. While it simplified the workload of the SJA, the change to the SJA advice and review functions drastically reduced the information given to the convening authority both pre- and post-trial. The detriment is to the accused. The post-trial review in all serious cases previously had been required to be a thorough legal and factual analysis of the case and of the verbatim record of trial by the SJA, in writing, which informed the judgment of the CA prior to exercising discretion when taking action on the record. Now all that is generally required for the post-trial "recommendation" is for the SJA to write that in her opinion the case does or does

indication of a change which favored the administrators of the system at the expense of a former right of the accused was the provision allowing the services to designate those military attorneys who would, by regulation, never be deemed "reasonably available" to serve as defense counsel. As a result, it has been made difficult to impossible in many cases for an accused person to exercise the "right" to obtain counsel of choice in lieu of, or in addition to, the "detailed" counsel required to be assigned to every person being tried by GCM or SPCM.[56]

Finally, a major change to the operation of the system came in 1984 with the promulgation of a new MCM, which substituted numbered Rules for Courts-Martial (RCM) for the prior narrative discussion of the various procedural provisions. This made the MCM notably easier to use. Over the years, other changes to the system have flowed steadily, with the result that today, the 140 articles of the 1950 UCMJ have expanded to 146, and the 665-page 1951 MCM has now expanded to a tome perhaps twice as large – but considerably easier to use.

III. THE CURRENT STRUCTURE OF THE U.S. MILITARY JUSTICE SYSTEM

The U.S. military justice system is established by statutes enacted by Congress[57] pursuant to authority contained in the U.S. Constitution.[58] Article

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not require remedial action; no written analysis is required, nor is the convening authority required to address or correct asserted legal errors. As a result, the first thorough legal and factual review of the case does not take place until the case is reviewed by the service's court of criminal appeals (CCA), formerly named the court of military review (CMR). This CCA review can take place months or even years after trial, often after all confinement has been served. *See, e.g.*, United States v. Pineda, 54 M.J. 298 (C.A.A.F. 2001) (accused's August 1997 four-month sentence to confinement virtually complete even before CA action in December 1997; CCA review and decision not rendered until October 1999; CAAF decision not until January 2001). In addition, court-mandated time limits for SJA review and CA action have been removed. Formerly, both were required to be completed within ninety days of the announcement of a sentence or there would be a presumptive denial of the right to a speedy review, with the remedy being dismissal of the charges. *See, e.g.*, United States v. Brewer, 1 M.J. 233 (C.M.A. 1975); Dunlap v. Convening Auth., 23 C.M.A. 135 (1974). These two changes together have resulted in considerably less "due process" during post-trial review than formerly existed.

56. A 1981 amendment to UCMJ § 838(b)(7) allowed for the promulgation of regulations to establish procedures by which the determination of whether the "individual military counsel" – counsel of *choice* authorized from the first enactment of the UCMJ – is determined to be "reasonably available," and thus *required* to be assigned to the accused. Pub. L. No. 97-81, 95 Stat. 1088 (1981). Under such regulations, the reasonable availability of counsel in some services has been so circumscribed as to make this statutory right a virtual nullity.

57. *See supra* note 1. Court-martial jurisdiction extends to a variety of classes of

36 of the Code authorizes the President to make regulations to implement the UCMJ.[59] The Manual for Courts-Martial (MCM) is the principal regulation implementing the UCMJ,[60] but each service has implemented additional service-specific regulations.[61]

There are three types of courts-martial: general, special, and summary. Each court-martial is a temporary tribunal, called into being by the order of a convening authority, generally a military, and often an operational, commander.[62]

The GCM[63] is the court-martial with full jurisdiction, empowered to try any offense under the Code and to award any punishment authorized by the Code, as limited by the maximum punishment for the offense established in the MCM. Required personnel include a certified military judge, a prosecutor known as the trial counsel (TC), and a defense counsel known as the detailed defense counsel (DDC) who are both licensed lawyers certified by the JAG under Article 27(b) as qualified to serve as trial and defense counsel,[64] and at

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"persons . . . subject to this chapter," UCMJ § 802 (2000), and may be exercised "in all places," thus extending world-wide and beyond. UCMJ § 805 (2000).

58. U.S. CONST. art. I, § 8, cl. 14 sets forth the power of Congress to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.

59. Under UCMJ § 836(a), the rules which the President prescribes are supposed to follow the civilian model:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

UCMJ § 836(a) (2000).

60. The current edition is MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

61. For a detailed discussion of these service regulations, see SCHLUETER, *supra* note 7, at 11-12.

62. Courts-martial in the United States have never been permanent, or "standing-courts," with one exception. Under the military justice system established by the Confederate States of America during the Civil War, courts-martial were established as permanent tribunals, and initially such a court accompanied each army corps. Later reorganizations gave certain of these permanent courts jurisdiction within a particular state or geographic area. *See id.* at 28-29. The recommendation for permanent or standing courts-martial is further discussed below as part of the Cox Commission Report.

63. *See generally* UCMJ § 818 (2000).

64. In earlier periods under the Code, both the trial counsel (prosecuting attorney) and the defense counsel worked for and received performance evaluations from the SJA, and thus were in the chain of command of the GCM CA. However, for more than twenty-five years in the Army and for lesser periods in the other services, defense counsel now have been removed – either completely or partially, for reporting purposes on their performance as defense counsel – from the chain of command of those who exercise some role in the prosecution function,

least five members, selected by the CA pursuant to statutory criteria.[65] In addition to the DDC, who is appointed without cost, regardless of indigency, the accused has an absolute right to be represented by civilian counsel at no cost to the government, in which case the military counsel will act as associate counsel, unless excused by the accused. In addition, the accused may request military counsel of choice, known as individual military counsel (IMC), if that counsel is reasonably available.[66] The GCM is the only court with power to confine officers, or to impose the death penalty.

The SPCM[67] might well be thought of as the "misdemeanor" level court-martial, empowered in general to try any noncapital offense under the Code and to award punishment not to exceed a bad-conduct discharge, confinement for not more than six months, and monetary penalties not to exceed two thirds pay per month for not more than six months. By a recent amendment to Article 19 of the Code, the SPCM punishment limitations have been raised from not more than six months to not more than one year, but the former penalties remain in effect until the MCM is amended to conform to the new statute.[68] As for required personnel, a special court-martial can be tried before a court with a minimum of three members without a military judge, but SPCMs almost always have a military judge detailed, in addition to the required three members. The trial counsel need not be, but almost always is, a lawyer. Except under extraordinary circumstances, the defense counsel must be a lawyer who meets the standards of Article 27(b).[69] As with GCMs, the members are selected by the CA pursuant to above-mentioned statutory criteria.

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including the CA and the SJA. These organizational changes have added credibility to the system and have largely, but not completely, removed one aspect of the appearance of unlawful command control.

65. Under UCMJ § 825(d)(2), the CA is required to "detail as members 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." UCMJ § 825(d)(2) (2000).

66. *See* UCMJ §§ 827, 838(b) (2000) for provisions relating to defense counsel; *see also supra* note 56 and accompanying text for limitations on the right to IMC.

67. *See generally* UCMJ § 819 (2000).

68. *See* Pub. L. No. 106-65, § 577(a), 113 Stat. 625 (1999). This is one of the recent statutory amendments, most of which have been adopted without hearings by Congress and without any clear statutory or legislative history establishing why the change was sought by the proponent, in this case the Department of Defense. The Cox Commission lamented the failure of Congress to take a more active role in oversight of this system. *See* Cox Commission Report, *supra* note 4, at § I n.2 and accompanying text.

69. *See* UCMJ § 827(b).

The SCM[70] is a one-officer court, which may try only enlisted persons, and only with their consent, for noncapital offenses, wherein the summary court officer plays the roles of trial counsel, defense counsel,[71] judge, and jury. Punishments are limited to thirty-days confinement, forty five-days hard labor without confinement, and monetary penalties of two-thirds of one months pay.[72]

Courts-martial are called into being by a convening authority, who is generally a commander or commanding officer. Commanders of major commands, generally flag or general officers, as well as the President, the Secretary of Defense, or the Service Secretary,[73] and certain others, are empowered, to convene GCMs. All GCM CAs, and most commanding officers of smaller units, are empowered to convene SPCMs.[74] All of these, and certain others in command, may convene SCMs.[75] In the early years under the UCMJ, the CA would issue a "convening order" which detailed not only the court members, but trial and defense counsel and the law officer, or later the military judge, as well. Those procedures since have been modified in each of the services, so that the CA now appoints only the court members. This change avoids any appearance that the CA exercises control over the military judge and the defense counsel, officials who are charged to operate independently of the commander who exercises prosecutorial discretion.[76]

The process of a charged offense coming before a court-martial varies with the circumstances, but typically an offense is reported to the military chain of command, where it is investigated by the immediate commander. If, as a result of the investigation, an offense appears to be established, a decision will be made as to disposition. Commanders have a wide range of

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70. *See generally* UCMJ § 820 (2000).

71. There is no requirement for appointment of defense counsel, as the Supreme Court has determined that this court-martial is a "disciplinary" proceeding, limited to offenses not declared criminal in the civilian community. *See* Middendorf v. Henry, 425 U.S. 25 (1976); *see also* SCHLUETER, *supra* note 7, at 39 n.13. In practice, counsel may be appointed or the accused may retain and be represented by civilian counsel.

72. *See* UCMJ § 820.

73. UCMJ § 822 lists those persons empowered to convene GCMs, and the list includes "the Secretary concerned," which is a term of art for the secretaries of the Army, Air Force and Navy, and the Secretary of the Department in which the Coast Guard is operating. UCMJ § 822(a)(4). Generally this is the Department of Transportation, but it changes – generally only in time of war – when the Coast Guard operates as a service within the Department of the Navy.

74. *See* UCMJ § 823 (2000).

75. *See* UCMJ § 824 (2000).

76. Of course, the trial counsel continues to function as an advisor to and an arm of the CA. In practice, the trial counsel may well be an attorney on the staff of the staff judge advocate (SJA), the principal legal advisor to the CA. In the Navy, the trial counsel is part of an independent unit which provides trial support to CAs.

alternatives, including a variety of administrative measures, which often are effective in dealing with minor offenses. As an alternative to such measures, which are not part of the UCMJ, the commander may elect to treat the matter as a disciplinary infraction, and impose nonjudicial punishment (NJP) under Article 15 of the Code.[77] Except for members "attached to or embarked in a vessel," the member has an absolute right to refuse NJP.[78]

If the determination of the immediate commander is that the matter ought to be disposed of by court-martial, then the commander, or the officer who has investigated the charges, will "prefer" the charges. This is accomplished by swearing to the truth of the charges before a commissioned officer authorized to administer oaths.[79] The accused is informed of the charges, often by being provided a copy of the charge sheet, as soon as practicable.[80] If warranted, the accused may be apprehended, the military term for being taken into custody,[81] and may be placed in suitable restraint, which may be a moral restraint such as arrest or restriction to the unit, or a physical restraint such as confinement, but confinement with convicted or enemy prisoners, or punishment prior to trial, is prohibited.[82] Prior to any questioning, a servicemember must be advised of his or her rights under Article 31(b), and of the right to counsel, and to have that counsel present prior to and during questioning.[83]

If the commander has authority to convene an appropriate lower level court-martial, the commander may then convene a SCM or SPCM and "refer"

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77. Nonjudicial punishment, referred to as "article 15," "NJP," "office-hours," or "captain's mast," is a summary proceeding in which the member has no right to counsel, but is generally afforded the right to have a representative, typically a more senior enlisted member, to speak on his or her behalf. Punishments are limited depending on the rank of the commanding officer conducting the proceeding and the grade or rank of the person accused. It is not a criminal proceeding and does not result in a conviction; however, it typically results in an entry of some sort in the member's service record, and in recent years, even one instance of NJP can seriously affect – or even act as a death-knell to – the member's military career.

78. UCMJ § 815(a) (2000). This so-called "vessel exception" has been severely criticized, largely because of perceived abuses in the Naval service, wherein members have been temporarily transferred to a vessel, or retained as "attached to" a vessel, long after being relieved and ordered off the vessel, apparently for the sole purpose of denying them the right to refuse punishment under Article 15, and demand a court-martial. As a result, and "[u]nlike their shore-based counterparts," such servicemembers "can be punished based on unconstitutionally-obtained evidence . . . without any opportunity to confront their accusers . . . without receiving a right to legal representation . . . and without having their guilt or innocence decided by a panel of disinterested members." Major Dwight H. Sullivan, *Overhauling the Vessel Exception*, 43 NAVAL L. REV. 57, 57-59 (1996).

79. *See* UCMJ § 830 (2000).

80. *See id.*

81. *See* UCMJ §§ 807, 808 (2000).

82. *See* UCMJ §§ 809-813 (2000).

83. *See* United States v. Tempia, 16 C.M.A. 629 (1967).

the case to that court.[84] Otherwise, the commander should forward the file to a higher level command for disposition.[85] If a GCM is contemplated, the charges first will be investigated pursuant to Article 32 of the Code, usually prior to being forwarded.[86] The Article 32 investigation is to be a "thorough and impartial investigation" at which the accused has the right to be present, to be represented by counsel provided pursuant to Article 38, to examine and cross-examine witnesses, to introduce evidence and request witnesses, and to testify or refuse to testify.[87] The accused is entitled to a copy of the report of the investigation, which must contain a summary of the evidence, as well as the recommendation of the investigating officer regarding disposition.[88] If the matter is thereafter to be referred to a GCM, the CA must first obtain the advice of his or her SJA, pursuant to Article 34, that the specifications allege offenses under the code, that the specifications are warranted by the evidence indicated in the investigation, and that the court would have jurisdiction over the accused and the offense.[89]

The procedures at trial are quite similar to those in a federal district court criminal trial, with an arraignment of the accused, followed by a trial which follows rules of evidence and procedure that parallel those in federal court.[90] After the prosecution rests, the accused may, but is not required to, present evidence, and may testify or not, with no inferences being drawn if he or she remains silent.[91]

If there are guilty findings after a trial on the merits, the trial will enter a second, sentencing phase, at which the prosecution may offer certain service records and evidence in aggravation. The accused may offer evidence in extenuation and mitigation and, at this stage, has a right to testify, subject to

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84. *See* UCMJ §§ 830, 834 (2000); *see also* Rule for Courts Martial (RCM) 601, MCM.

85. *See* UCMJ § 833 (2000).

86. *See* UCMJ §§ 833-834.

87. UCMJ § 832 (2000).

88. The Article 32 investigation is often compared with a "grand-jury" investigation, but it is, in theory, at least, if not always in practice, considerably more, providing the accused with an excellent means of discovery and the opportunity to thwart the process by undermining the government's evidence, cross-examining government witnesses, and presenting evidence in defense or in extenuation and mitigation. The Article 32 investigation, combined with the Article 34 advice requirement, effectively answer several of the concerns expressed by General Ansell regarding the ability of a commander to drive a case to trial even in the absence of evidence supporting the charges.

89. *See* UCMJ § 834.

90. *See* UCMJ §§ 836-854; *see also* the Rules for Court-Martial (RCM) and the Military Rules of Evidence (MRE), set forth in the MCM.

91. *See* UCMJ §§ 831, 846; *see also* RCM 502(d)(6) (Discussion), MCM; United States v. Kind, 13 M.J. 863, 867 (N.M.C.M.R. 1981), *petition denied*, 14 M.J. 205 (C.M.A. 1982).

cross-examination, or to remain silent, or to make an unsworn statement, on which cross-examination is not allowed.

The main difference in the military trial is that the "jury of one's peers" required in civil court is replaced with a (usually smaller) panel of members, who are usually officers,[92] and are required to be personally selected by the CA.[93] Unless the accused chooses trial by judge alone – in which case the members are discharged and the military judge makes findings and determines an appropriate sentence – the members will determine guilt or innocence, and in the event of a conviction, will thereafter determine an appropriate sentence.[94] Under Article 52, only a two-thirds vote of the members is required to convict, except for capital offenses where the vote must be unanimous, and only two-thirds of the members are required to concur in a sentence, except that a three-fourths vote is required for a sentence which includes confinement for life or for more than ten years, and a unanimous vote is required on the death penalty.[95] There are no "sentencing guidelines" as there are in federal district court, and the court is free to impose any sentence, from "no punishment" to the maximum authorized for the offenses.[96] Only one sentence is imposed – the maximum being determined by combining the maximums for each offense for which the accused is convicted.

All court-martial convictions are subject to review.[97] First, the CA must take "action" on the record, and has absolute discretion to approve or set aside any finding, and to approve, disapprove, suspend, or mitigate any sentence.[98] Thereafter, review of the file is conducted by a judge advocate, or in the office of the JAG, if it is a SCM, or if it is an SPCM or GCM in which the punishment does not meet the threshold for review by the service's court of criminal appeals (CCA).[99] Cases which do meet the threshold must be

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92. At the request of the accused, one-third of the members must be enlisted members, who are selected by the CA from a unit other than the accused's. *See* UMCJ § 825(c)(1).

93. *See* UMCJ § 825(d)(2).

94. A variation on this theme occurs when the accused pleads guilty, in which case the judge will conduct an inquiry into the propriety of the plea, and enter findings pursuant to the plea. Thereafter the members will fulfill only the function of determining a sentence.

95. *See* UMCJ § 852 (2000).

96. *See* UCMJ § 856 (2000).

97. *See* UCMJ § 860-869 (2000).

98. *See* UCMJ § 860. The CA can not "disapprove" a finding of not guilty or increase the sentence.

99. *See* UCMJ §§ 864, 866, 869. A sentence to death, to a dismissal or discharge, or to confinement for a year or more warrants review by the CCA. *See* UCMJ § 866(b). The CCA may affirm only such "findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." UCMJ § 866(c). Thus the CCA has power which goes beyond most appellate courts, which are limited to reviewing only errors of law. The CCA also reviews any

referred to the court by the JAG.[100] If the CCA affirms the conviction, the accused may petition for review by CAAF.[101] The accused or the government may petition for a writ of certiorari from the Supreme Court of the United States in any case in which CAAF has granted review.[102]

Servicemembers also may seek to challenge certain court-martial convictions through collateral review in other federal courts.[103] One such route is to the Court of Federal Claims through a "back pay" claim for pay lost as a result of a court-martial at which a constitutional right was denied.[104] Such challenges are rare since the military appellate courts review and enforce both constitutional and statutory rights of servicemembers.[105] Another potential collateral attack is to a federal district court seeking habeas corpus relief, a remedy most likely to be taken in a death case.[106]

Finally, the question is often asked whether rights guaranteed in the Constitution extend to persons subject to trial under the Code. There has been great debate, even in the modern era, as to the degree to which the protections of the Bill of Rights apply to the military.[107] The answer, as expressed by Judge Cox, is that "the protections in the Bill of Rights apply to service

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other case that the JAG refers to the court pursuant to Article 69(d)(1). *See* UCMJ § 869(d)(1).

100. *See* UCMJ § 866(b).

101. *See* UCMJ § 867. CAAF also is required to review all cases in which the sentence, as affirmed by the CCA, extends to death and all cases in which any issue is "certified" to it by the JAG. *See id*. Historically, most certifications have been of issues on which the CCA found in favor of the accused and against the government. Thus, this certification process has been perceived as granting the government a virtual guaranteed right of appeal to CAAF in any case it chooses, while the accused may only petition for discretionary review. Over the years, CAAF has granted review in only about ten percent or fewer of the cases in which a petition for review has been filed. CAAF and the CCAs also exercise "extraordinary writs" jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a) (1994), but that jurisdiction is not unlimited and does not extend to administrative matters outside the UCMJ, which are no more than collateral administrative consequences of courts-martial. *See* Clinton v. Goldsmith, 526 U.S. 529 (1999).

102. *See* UCMJ § 867(a); *see also* 28 U.S.C. § 1259 (1994).

103. The collateral attacks discussed in this section are outside of the military justice system, and are not addressed within the UCMJ.

104. *See* 28 U.S.C. § 1491 (1994 & Supp. V 1999).

105. *See, e.g.*, UCMJ §§ 866(c), 867(c) (2000).

106. *See, e.g.*, Captain Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1 (1994).

107. For example, Frederick Bernays Weiner argued strenuously that the Sixth Amendment right to counsel was never *intended* to apply in the military justice system, and did not for many years. Wiener, *supra* note 48, at 189-212. Immediately upon the adoption of the Code, he railed against the provisions providing lawyer counsel to accused persons at a GCM. *See* WIENER, *supra* note 11, at 8-9. As previously noted, he later accepted as fact that protections equivalent to those set forth in the Bill of Rights generally applied in the modern era. *See* Wiener, *supra* note 48, at 236.

members, unless expressly or by necessary implication they are made inapplicable."[108] Many rights have been extended by statute, such as the Fifth Amendment right not to incriminate oneself and to appropriate warnings under Article 31, the Fifth Amendment double jeopardy protection under Article 44, the Sixth Amendment right to counsel under Articles 27 and 38, and the Eighth Amendment right against cruel or unusual punishment under Article 55.[109] Other protections, such as the Fourth Amendment right to be free from unreasonable searches and seizures, and the First Amendment right to free speech and assembly, generally are held to apply in the military, but the application of these rights is limited by military necessity.[110] What is clear is that the general trend – over the last eighty years in particular – has been to extend due process and other protections to the citizen-servicemember subject to the jurisdiction of this system. "The man who dons the uniform of his country today does not discard his right to fair treatment under law."[111]

IV. THE NATIONAL INSTITUTE OF MILITARY JUSTICE

In 1991, the National Institute Military Justice (NIMJ) was established as a nonprofit, nongovernmental organization "for the purpose of advancing the administration of military justice within the Armed Services of the United States."[112] In support of this generic goal, NIMJ has indicated that it is available:

> [T]o foster coordination and cooperation between military and civilian practitioners and among the various Armed Services; to appear as a friend of the court in cases involving issues of military law; to cooperate with individuals, agencies and organizations involved in the study or administration of military justice in other countries; to work with military lawyers to fashion litigation and appellate strategies; to work with the news media to ensure proper, balanced, and accurate coverage of newsworthy events in military justice, in order to improve public understanding of this important, specialized and little-known field of the law; to encourage, conduct and cooperate with studies relating to judicial administration, criminal justice and correctional practices within the military; and to furnish general backup legal assistance to civilian and military defense counsel in courts-martial and appeals and collateral litigation.[113]

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108. Cox, *supra* note 7, at 23 (citation omitted).

109. *See* UCMJ §§ 831, 844, 827, 838, 855 (2000).

110. *See* Cox, *supra* note 7, at 23-24; *see also* Wiener, *supra* note 48, at 236-45.

111. Cox, *supra* note 7, at 19 (quoting Remarks of President Lyndon B. Johnson on the occasion of signing into law the Military Justice Act of 1968 (Oct. 24, 1968)).

112. NATIONAL INSTITUTE OF MILITARY JUSTICE, SUMMARY OF ACTIVITIES - 1991-1998 AND FUTURE PLANS 36 (1998) [hereinafter NIMJ SUMMARY].

113. *Id*. at 4-5.

In pursuing its goals, NIMJ has engaged in a variety of activities, including publishing the *Military Justice Gazette*, a monthly newsletter on military justice events, and the *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces*; sponsoring a number of meetings or training programs, including an international military justice program in London in 1998; filing amicus curiae briefs at the Supreme Court of the United States, the Court of Appeals for the Armed Forces, and the Coast Guard Court of Criminal Appeals; and participating in a variety of congressional hearings or court rulemaking proceedings.[114]

NIMJ was established to fill a void, and is the only nongovernmental organization in the United States dedicated to the enhancement of the operation of the military justice system, and which has remained active in an ongoing review and oversight of that system. NIMJ's focus extends beyond the United States, as it attempts to monitor military justice developments worldwide. It is a nonmember organization, operated by its board of directors with the assistance of an Advisory Committee. It is not in any way affiliated with or supported by the armed forces or the government of the United States, and thus is able to maintain independence from, and has established credibility with, the armed services and the various other entities such as bar associations and bar committees, which also have an interest in military law.[115]

V. NIMJ SPONSORS THE COMMISSION ON THE FIFTIETH ANNIVERSARY OF THE UCMJ

In November 2000, NIMJ announced the formation of the Commission on the fiftieth anniversary of the Uniform Code of Military Justice. The

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114. NIMJ's website, http://www.nimj.org, and its Summary of Activities contain detailed descriptions of its activities and future plans, as well as back issues of its publication, the *Military Justice Gazette*. *See* NIMJ SUMMARY, *supra* note 112. In October 2001, NIMJ published in book form the first 100 issues of the *Gazette*. *See* NATIONAL INSTITUTE OF MILITARY JUSTICE, MILITARY JUSTICE GAZETTE: THE FIRST TEN YEARS (2001).

115. *See, e.g.*, Major Walter M. Hudson, *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III*, 165 MIL. L. REV. 42, 62-63 (2000) (where, in responding to a question about the system's perceived "lack of critical civilian scrutiny [and] constructive interplay with civilian jurisprudence," Judge Everett stated: "We're getting more and more civilian scrutiny. I think groups like the National Institute of Military Justice, which people like Gene Fidell, Kevin Barry, Steve Saltzburg have been involved in have done an excellent job in that regard."). The author is one of the founding directors of NIMJ, along with Eugene R. Fidell, President, and Stephen A. Saltzburg, General Counsel. The fourth NIMJ founder is Rear Admiral John S. Jenkins, JAGC, USN (Ret.), who served for ten years as Chair of the NIMJ Advisory Committee, and now serves as a Director. The author also served as NIMJ Secretary-Treasurer from 1991 to 2001, and has been a frequent contributor to the *Military Justice Gazette*.

purpose of the Commission was to examine the current operation of the Code and to evaluate the need for change.[116] The decision to sponsor the Commission arose out of a specific congressional call for meaningful activities to mark the fiftieth anniversary.[117] It also was taken with the knowledge that the American Bar Association's Standing Committee on Armed Forces Law (SCAFL) had seriously considered recommending just such a review commission as part of the fiftieth anniversary activities.[118]

In effecting its vision of sponsoring the Commission, NIMJ President Eugene R. Fidell first contacted Senior Judge Walter T. Cox, III, recently retired chief judge of CAAF, to discuss the concept of a Commission, and to solicit his ideas and willingness to participate.[119] Judge Cox agreed to the concept, and agreed to serve as chair, and thereupon he and Mr. Fidell discussed possible commissioners. It was agreed that to be independent, it would be appropriate that the commissioners not be currently on active duty or actively engaged on behalf of the government in the administration of the military justice system. It also was agreed that it would be necessary to obtain commissioners of stature, with good balance, if the Report of the Commission was to have the requisite credibility. Together they agreed on four potential commissioners, each of whom subsequently was contacted and agreed to serve.

Those who served with Judge Cox were Captain Guy R. Abbate, Jr., JAGC, USN (Ret.), a consultant to the Defense Institute of International Legal Studies and the Naval Justice School; Mary M. Cheh, the Elyce Zenoff Research Professor of Law at the George Washington University Law School, and an expert in constitutional law and criminal procedure, who had been a member of the CAAF Rules Advisory Committee; Rear Admiral John S. Jenkins, JAGC, USN (Ret.), Senior Associate Dean of the George Washington University Law School and formerly the Judge Advocate General of the Navy;

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116. *See* Cox Commission Report, *supra* note 4.

117. *See supra* note 3 and accompanying text; *see also* MIL. JUST. GAZ. (Nat'l Inst. of Mil. Just.) 86 (Nov. 2000), which was devoted entirely to the Commission, and included the biographies of each of the commissioners and staff. It called for comments from all interested persons, and included a list of "Sample Topics" proposed by NIMJ for people to consider. *See id*.

118. *See* MIL. JUST. GAZ. (Nat'l Inst. of Mil. Just.) 75 (March 2000). SCAFL had decided not to go forward with its proposal in the face of opposition from the services' TJAGs, and in view of actions taken by the TJAGs to institute certain reforms to the miliary rulemaking process, which had long been called for by the ABA. *See* Barry, *supra* note 45, at 260-63 nn.90-97 and accompanying text.

119. This discussion is adapted from the remarks of Judge Cox on June 12, 2001 to the Code Committee on Military Justice at its Annual Meeting held at the CAAF Courthouse in Washington, D.C. *See* UCMJ § 946 (2000).

and Lieutenant Colonel Frank J. Spinner, USAF (Ret.), a private practitioner who represents military personnel in courts-martial and appeals. In addition, two others agreed to serve in supporting capacities. Elizabeth Lutes Hillman, Assistant Professor of Law at Rutgers University School of Law, and formerly a member of the U.S. Air Force and a history professor at the U.S. Air Force Academy, was appointed Reporter for the Commission; and Kathleen A. Duignan, a member of the Coast Guard Reserve and a former commissioner to Judge Cox, served as assistant to the Chair. Once the Commission was constituted, it operated independently. NIMJ provided limited administrative assistance, such as posting Commission notices on its website and announcing Commission activities in its *Military Justice Gazette.*

The Commission had no funding; all commissioners and staff agreed to serve without compensation and to pay their own expenses. To accomplish the task under these circumstances, the Commission decided to try an experiment to see if the Internet could be effectively used as the principal vehicle for communications.

The announcement of the formation of the Commission was broadcast worldwide through the NIMJ website and through the distribution of the *Military Justice Gazette*, by both mail and e-mail, on November 13, 2000.[120] All persons wishing to comment were asked to forward their comments to Judge Cox by e-mail and a deadline for initial comments was set as December 1, 2000. The commissioners then would evaluate all comments and issue a final list of topics, with a request for any final comments to be submitted to Judge Cox. A public hearing would thereafter be held at the George Washington Law School in Washington D.C., and all interested parties wishing to appear would be heard.

The commission received more than 250 e-mailed and mailed comments. In the February 2001 issue of the *Military Justice Gazette*, NIMJ announced that the final list of topics had been posted on its website and that final comments should be received by March 1, 2001. The public hearing was set for 10:00 a.m., March 13, 2001 at the George Washington University Law School.[121]

120. *See* MIL. JUST. GAZ. (Nat'l Inst. of Mil. Just.) 86 (Nov. 2000).
121. *See* MIL. JUST. GAZ. (Nat'l Inst. of Mil. Just.) 89 (Feb. 2001).

More than twenty organizations or individuals appeared and testified, some from great distances.[122] Extensive materials also were submitted.[123] After receiving testimony and written submissions, the Commission met in closed session to deliberate and to begin preparation of its report, which was issued in late May 2001 to coincide with the fiftieth anniversary of the implementation of the Code on May 31, 1951.[124]

VI. REPORT OF THE COMMISSION ON THE FIFTIETH ANNIVERSARY OF THE UCMJ

The Cox Commission and its Report are perhaps the most important event in military justice in the United States in decades. It is the first comprehensive review of the operation of the system in at least three, if not five, decades.[125] Because of its importance, and due to the fact that it largely stands on its own, I have reproduced herein the entire Report, less Appendices. The Report's internal footnotes are reproduced with their original numbering at the end of the paragraph in which they appear – the symbol "<Fn #>" is used to designate these internal footnotes. Throughout the Report, and in response to most of its recommendations, I have added my own comments. To distinguish the Commission's Report from my commentary, the Report appears in a distinct typeface, and indented left and right.

It is quite clear that the Commission's recommendations, in *every* case, warrant thoughtful, careful consideration and study. In many cases, such studies should include surveys and the gathering of empirical data, things too often lacking in changes to the UCMJ or the MCM proposed under current regulations and practices. In all cases, the Commission's recommendations and its other discussions are either precisely on the money, or point to important issues requiring further study and the formulation of appropriate remedies.[126]

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122. *See* MIL. JUST. GAZ. (Nat'l Inst. of Mil. Just.) 91 (Apr. 2001).

123. *See, e.g.*, the Resolution of the Board of Directors, and related supporting documents, submitted by The Bar Association of the District of Columbia, *available at* http://www.badc.org/html/militarylaw_art.htm [hereinafter BADC Recommendations]. The author was a member of the BADC Military Law Committee, and played a substantial role in preparing these materials.

124. *See* Cox Commission Report, *supra* note 4.

125. There is some question whether the studies conducted between 1950 and the early 1970s were limited studies, or were "comprehensive," as the Cox Commission was designed to be. It would appear that the 1972 study, referenced at internal footnote 2 of the Cox Commission Report, was also a limited study, focusing on allegations of racism.

126. Although the Commission's scope was comprehensive, and was intended to

Report of the
Commission on the 50th Anniversary of the
Uniform Code of Military Justice

May 2001
The Commission
The Honorable Walter T. Cox III, Chair

Captain Guy R. Abbate, Jr., JAGC, USN (Ret)
Professor Mary M. Cheh
Rear Admiral John S. Jenkins, JAGC, USN (Ret)
Lieutenant Colonel Frank J. Spinner, USAF (Ret)

Professor Elizabeth Lutes Hillman, Reporter
Kathleen A. Duignan, Esquire, Assistant to the Chair

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Rutgers School of Law at Camden

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evaluate the operation of the Code and the military justice system in its entirety, it was not intended or able to be the kind of in-depth, "bottom-up" review that the Commission noted was needed. *See* Cox Commission Report, *supra* note 4, at § I n.4 and accompanying text. Thus, further studies and surveys, adequately funded and staffed, by a diverse and well-balanced commission including military law experts from both within the Department of Defense and from outside, are now appropriate and necessary. In 1983, a commission was established pursuant to congressional mandate, and produced an extensive multi-volume report of its very detailed study of only five specified issues. *See* S. REP. NO. 98-53 (1984). That commission was not without its flaws, one being that it was unbalanced, with the majority of its members being the five uniformed military officer members of the DOD Joint Service Committee, the officers who are directly responsible for the administration of military justice in the five services. *See infra* notes 156-58 and accompanying text. Nonetheless, it is that sort of commitment of resources, and that level of effort, that now are needed to review the entire system.

A Modify the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that best rest within the purview of a sitting military judge.
B Increase the independence, availability and responsibilities of military judges.
C Implement additional protections in death penalty cases.
D Repeal 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. Replace 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.

IV. DISCUSSION OF ADDITIONAL ISSUES

V. APPENDICES

I. Statement of Purpose

Sponsored by the National Institute of Military Justice, a private non-profit organization dedicated to the fair administration of military justice, this Commission was formed on the occasion of the 50th anniversary of the Uniform Code of Military Justice, the greatest reform in the history of United States military law. <Fn 1> The UCMJ was drafted in the aftermath of World War II, at a time when protecting the rights of military personnel was foremost in the minds of lawmakers. The outcry of veterans' organizations and bar associations made legislators aware of the arbitrary and summary nature of many of the two million courts-martial held during the war. By setting a higher standard of due process for servicemembers accused of crimes, the UCMJ, augmented by significant revisions in 1968 and 1983, became a model for criminal justice. It protected accused servicemembers against self-incrimination fifteen years before Miranda v. Arizona, provided for extensive pretrial screening investigations, permitted relatively broad access to free counsel, and incorporated many of the best features of federal and state criminal justice systems.

<Fn 1> As the initial announcement of the Commission explained: "The Uniform Code of Military Justice was approved on May 5, 1950 and took effect on May 31, 1951. In § 556 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Congress commemorated the 50th anniversary of the Code. Among other things, Congress noted that it had enacted major revisions of the [Code] in 1968 and 1983 and, in addition, has amended the code from time to time over the years as practice under the code indicated a need for updating the substance or procedure of the law of military justice.' Section 556 asks the President to issue a suitable proclamation and calls upon the Department of Defense, the Armed Forces, and the United States Court of Appeals for the Armed Forces and interested organizations and members of the bar and the public to commemorate the occasion of [the] anniversary with ceremonies and activities befitting its importance.' Believing that an integral part of those activities should be an appraisal of the current operation of the Code and an evaluation of the need for change, the National Institute of Military Justice is sponsoring a Commission on the 50th Anniversary of the Uniform Code of Military Justice, in coordination with The George Washington University Law School."

> 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. 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. The last comprehensive study of courts-martial took place in 1971, when Secretary of Defense Melvin Laird, troubled by allegations of racism at courts-martial, appointed a task force to study the administration of military justice. <Fn 2> This legislative and executive inattention is a new phenomenon; between 1951 and 1972, military justice was the focus of dozens of congressional hearings and the subject of countless official reports from government agencies. <Fn 3>
>
> <Fn 2> Department of Defense, Report of the Task Force on the Administration of Justice within the Armed Forces (Washington, D.C., Nov. 30, 1972). A limited review was undertaken more recently, in 1983, when Secretary of Defense Caspar Weinberger appointed an Advisory Commission to consider whether military judges should have tenure and whether they should be solely responsible for sentencing, whether the Court of Military Appeals should be an Article III court, and whether the jurisdiction of the special court-martial should be expanded. See 1 THE MILITARY JUSTICE ACT OF 1983, ADVISORY COMMISSION REPORT, COMMISSION RECOMMENDATIONS 2 (1984).
>
> <Fn 3> For example, extensive, multi-day hearings were held by the House and Senate Armed Services Committees on topics related to military justice in 1962, 1965, 1966, 1968, 1971, and 1972. The services also conducted their own internal studies as well, perhaps the best known commissioned by Secretary of the Army Wilber M. Brucker, which resulted in the 1960 Powell Report.[127]

It is undisputed that in 1951, the UCMJ was landmark legislation that created the fairest system of military justice in the world.[128] It also is clear that in the early years, when Congress was populated with many members who had served in the armed forces, frequent oversight hearings were held. In addition to those hearings by the Armed Services Committees referred to in internal footnote three of the Cox Commission Report, significant hearings were conducted by Senator Sam Ervin's Subcommittee on Constitutional Rights of the Senate Judiciary Committee in both 1962 and again in 1966, which influenced, in considerable measure, the substantial reforms instituted in the Military Justice Act of 1968.[129] Starting in the early 1970s, however,

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127. Cox Commission Report, *supra* note 4, § I.

128. *See id.*

129. For a fascinating, first-person account of these events by a participant, see Hon. Robinson O. Everett, *The First 50 Years of the Uniform Code of Military Justice: A Personal Perspective*, FED. LAW., Nov. 2000, at 28.

as noted in the Report, a remarkable and unhealthy "legislative and executive inattention" to the military justice system came to the fore; regrettably this general hands-off indifference has prevailed even to the present day.[130]

It is particularly remarkable that this "inattention" began during the Vietnam era, precisely at the time that the system was coming under tremendous scrutiny and criticism, from both within and without, and when its continuing due process flaws were being questioned or condemned. Perhaps the most well known and caustic of these criticisms was the 1969 diatribe, *Military Justice Is to Justice as Military Music Is to Music*,[131] but the professional literature also focused on the same systemic faults.

Perhaps the most important of the professional critics was Major General Kenneth J. Hodson. In the early 1970s, he wrote several pieces calling for reform.[132] In one of these pieces published in 1973, the very title he chose makes it at least implicitly, if not explicitly, clear that he viewed the changes he specifically called for as a necessary alternative to abolishing the separate system of military justice.[133] In its submissions to the Cox Commission, The Bar Association of the District of Columbia specifically called the attention of the Commission to the views of General Hodson:

> BADC strongly recommends that the Commission commence it's [sic] consideration with a thorough review of the changes which General Hodson recommended almost 30 years ago as the preferred alternative to "abolishing" the military justice system. Of General Hodson's seven recommendations, only three have been implemented, and these only in part.[134]

In endorsing Hodson's recommendations, BADC quoted, in slightly altered order, for clarification, Hodson's recommendations:

> General Hodson made seven recommendations, Three have been, at least to some degree, implemented:

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130. Cox Commission Report, *supra* note 4.

131. *See* ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1969). The Vietnam War was the catalyst for the bulk of the criticism, but it was the underlying systemic flaws in the system which allowed for such criticisms to have credence. See, for example, Cox, *supra* note 7, at 16-17 for an assessment of some of the early 1970s critiques of the system. Judge Cox makes reference to a 1970 *Newsweek* magazine cover story, *Military Justice on Trial*, which concluded that "'the number one evil with military justice remained command influence.'" Cox, *supra* note 7, at 17.

132. *See* Hodson, *supra* note 30; *see also* Kenneth J. Hodson, *The Manual for Courts-Martial–1984*, 57 MIL. L. REV. 1 (1972).

133. *See* Hodson, *supra* note 30.

134. *See* BADC Recommendations, *supra* note 123, *at* http://www.badc.org/html/militarylaw_art_intro.htm.

> (4) an accused . . . be permitted to petition the Supreme Court for a writ of certiorari;
> (5) defense counsel be made as independent of command as possible . . . ;
> (6) adequate administrative and logistical support be provided to permit the military judiciary to function independently and efficiently.
>
> The remaining four recommendations made by General Hodson, have not been implemented at all:
>
> (1) military juries be randomly selected;
> (2) military judges of general courts-martial (as well as military appellate judges) be appointed by the President to permanent courts for a term of years [and be given all writs authority, full sentencing authority, and contempt powers] . . . ;
> (3) a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence; . . .
> (7) commanders, at all levels, be completely relieved of the responsibility of exercising any function related to courts-martial except, acting through their legal advisors, to file charges with a court for trial, to prosecute, and, in the event of conviction, to exercise executive clemency by restoring the accused to duty.[135]

General Hodson's recommendations in large measure addressed the same underlying concerns of command control and lack of independence of courts-martial that had so concerned General Ansell more than fifty years earlier. It seems in hindsight that Hodson, like Ansell, was at least a generation ahead of his time. As will be noted below, the Cox Commission's recommendations are much in accord with General Hodson's proposals.

Another professional critic of the period was Yale Law School professor Joseph W. Bishop, Jr., who thoroughly reviewed the current state of military justice in 1974, and concluded that a number of substantial reforms were necessary.[136] He prefaced his recommendations with a review of the significant changes which had taken place in the previous decade, such as "the creation of a relatively independent military judiciary," and "the reduction of command influence by giving soldiers a right to trial by military judges" and "the expansion of the accused's right to counsel."[137] However, he found there

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135. *Id.* (citations omitted).

136. *See* JOSEPH W. BISHOP, JR., MILITARY JUSTICE UNDER FIRE (1974).

137. *Id.* at 300. It is significant that the *first* item in Bishop's list of improvements that had been accomplished was the "curtailment of court-martial jurisdiction over crimes that do not affect military discipline." *Id.* This curtailment had occurred as a result of the Supreme Court's decision which limited court-martial jurisdiction over the offense to offenses which were "service-connected." *See* O'Callahan v. Parker, 395 U.S. 258 (1969). It was in this case that Justice Douglas, writing for the majority, made his famous, or perhaps infamous, statement that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of

was "room for further reform before more change would present a substantial threat to military discipline."[138]

Bishop proposed that the role of the independent military judiciary be expanded. First, he favored the creation of permanent military courts in place of current SPCMs, and three- or five-judge courts in lieu of GCMs, and the use of civilian judges for both trial and at the service appellate courts. While the commander would retain discretion to handle an issue as a disciplinary matter, or refer it for a court-martial, and to reduce, suspend or commute punishment, he would have no other role.[139] Second, he would remove any doubt about the accused's right to counsel, and use civilian lawyers as well as military counsel, and make them responsible only to the JAG.[140] Third, he would abolish the "bad-conduct discharge" as an anachronism, and limit discharge authority, for dishonorable discharges or dismissals, to the three- or five-judge trial courts.[141] Fourth, he would repeal the "general article."[142]

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constitutional law." *O'Callahan*, 395 U.S. at 265. However, the Court later abrogated the "service-connection" doctrine, and reinstated the status of the accused, as a military member subject to "personal jurisdiction" under the UCMJ, as the sole test for exercising court-martial jurisdiction. *See* Solorio v. United States, 483 U.S. 435 (1987). Thus, a major "reform" in Professor Bishop's mind has now been reversed. For one example of a case where this change worked to the detriment of a military accused, see United States v. Hutchinson, 49 M.J. 6 (C.A.A.F. 1998), where the local civilian authorities had already commenced a criminal prosecution for a larceny which had been committed in the civilian community, which appeared to have no "service connection" at all. As an alternative disposition to going forward with the trial, the state court had entered the accused into a diversion program which, if completed successfully, would avoid both a trial and a conviction. *See Hutchinson*, 49 M.J. at 7. Had the civilian court actually tried and convicted the member, Air Force regulations would have precluded the Air Force from exercising jurisdiction. However, when the state court decided to handle the matter through a diversion program, the Air Force decided to try the accused by court-martial for the same criminal activity. *See id.* As a result of the military prosecution, the accused was convicted and sentenced to eight months' confinement and a discharge. *See id.* at 6. Once confined, he was unable to attend and participate in the state court's weekly diversion program sessions, and when his absence was noted, a bench warrant for his arrest on the state charges was issued. *See id.* at 7. At the end of the process, instead of having *no* criminal conviction, due to the exercise of judicial discretion in the state court, the member both had a military (federal) criminal conviction and was facing an arrest warrant, and likely state trial and conviction, for the identical criminal conduct.

138. BISHOP, *supra* note 136, at 300.

139. *See id.* at 300-01.

140. *See id.* At the time he was writing, defense counsel still often were located in the chain of command of the CA and worked directly for the CA's SJA, as did trial counsel.

141. *See id.* at 301-02.

142. *See id.* at 302. Bishop argued that even if Article 133 and 134 of the Code were held constitutional, these "general articles" should be revoked, and replaced with articles specifically proscribing the offenses now spelled out not in statute but only in the MCM. These two are the articles which, in general, make criminal any actions which are "unbecoming an

Fifth, he would abolish jurisdiction over reservists not on active duty, would repeal Article 88, which makes criminal a commissioned officer's use of certain contemptuous words against the President and other named officials, and would make military cases appealable to the Supreme Court.[143]

Bishop's analysis and recommendations are instructive, and though they differ from Hodson's, both the actual recommendations and the underlying rationale for them closely parallel Hodson's. Remarkably, few of Bishop's or Hodson's recommendations have even received serious consideration, much less implementation, by the Congress or the President in the last three decades. Yet their influence can readily be seen in the Cox Commission Report.

> Based on the response to the Commission's request for comments on the current military justice system, a "bottom-up" review of military justice is long overdue. 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. <Fn 4> In contrast, military justice in the United States has stagnated, remaining insulated from external review and largely unchanged despite dramatic shifts in armed forces demographics, military missions, and disciplinary strategies. Since the Tailhook episode in 1991, the armed forces have faced a near-constant parade of high-profile criminal investigations and courts-martial, many involving allegations of sexual misconduct, each a threat to morale and a public relations disaster. As a result of the perceived 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. <Fn 5> The Commission—which could not pay for the travel of witnesses, and which publicized its hearings largely by word-of-mouth—heard testimony from citizens who traveled to Washington, D.C., from states around the country, including those who came from Washington, Colorado, Massachusetts, and Louisiana to make their voices heard, joining hundreds who submitted written comments.
>
> <Fn 4> This modernization has focused on both increasing the impartiality of court-martial procedures and respecting the human rights of servicemembers. Two of the most prominent cases decided during the last decade are Findlay v. United Kingdom, 24 EUR. CT. H.R. 221 (1997) and R. v. Genereux, [Canada 1992] 1 S.C.R. 259, 88 D.L.R. 4th 100 (1992), but reform efforts have affected military justice in Australia, India, Ireland, Israel, Mexico, and South Africa as well as in the United Kingdom and

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officer and gentleman," Article 133, or which constitute (1) disorders and neglects to the prejudice of good order and discipline in the armed forces, (2) conduct of a nature to bring discredit on the armed forces, or (3) unnamed crimes and offenses not capital, Article 134. Both articles remain in the Code today.

143. *See id*. at 302-303. Of these, only the latter has been effected in the twenty-seven years since Bishop wrote. Whether Article 88, and a variety of other articles, can constitutionally be applied to "retired" members, who remain subject to the Code, is an open question.

Canada. *See* Eugene R. Fidell, A WORLD-WIDE PERSPECTIVE ON CHANGE IN MILITARY JUSTICE, 48 A.F. L. REV. 195, 195-96 (2000) (analyzing military-legal reform in countries around the world).

<Fn 5> See, e.g., the websites of Citizens Against Military Justice (www.militaryinjustice.org), the United States Council on Veterans Affairs (www.uscova.org), Sailors United For Self Defense (http://communities.msn.com/SAILORSUNITEDFORSELFDEFENSE), American Gulf War Veterans Association (http://www.gulfwarvets.com), and www.militarycorruption.com.[144]

As noted previously, there is general agreement that in 1951 the UCMJ was a "shining star" among the world's military justice systems. There also is substantial agreement that the reforms of 1968 further enhanced the status of the UCMJ as a premier system of military criminal justice. However, in the more than three decades since those reforms, reasoned and credible calls for substantial further reforms, particularly of those aspects of the system which allow for the continued perception of unlawful command influence and control, have largely gone unheeded.[145] One often-touted reform enacted in 1983 allowed for the possibility of direct review by the Supreme Court, but this is a very limited opportunity to petition for Review, and for most military accused persons, the "right" to Supreme Court review simply does not exist.[146]

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144. Cox Commission Report, *supra* note 4.

145. For example, the calls for reform by General Hodson, see *supra* notes 132-35 and accompanying text, and by Professor Schlueter, see Schlueter, *supra* note 16, have generally been ignored. There is strong sentiment within the uniformed military community that disputes any need for a "bottom-up" review of the system, the type of review which the Cox Commission believed "long-overdue." For example, the JAG of the Air Force, Major General William A. Moorman, USAF, while arguing *for* the need for continued openness to change within the system, plainly rejected the suggestions, such as discussed by the ABA SCAFL, see *supra* note 118 and accompanying text, that a "bottom-up" review was desirable. *See* William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need To Be Changed?*, 48 A.F. L. REV. 185, 194 (2000). The senior JAG leadership had uniformly opposed the ABA proposal. *See, e.g.*, Barry, *supra* note 45, at 261 n.92 and accompanying text; MIL. JUST. GAZ. (Nat'l Inst. of Mil. Just.) 71, Nov. 1999. In fact, it is precisely that sort of in-depth, comprehensive review which now is so sorely needed. *See supra* note 126.

146. The accused has no right of appeal to CAAF, only the opportunity to petition for discretionary review. If CAAF does not grant a petition for review – and CAAF does not grant in approximately nine of ten of the cases in which a petition is filed – the accused is precluded from ever obtaining direct review of the case by the Supreme Court. Worse, in these cases the accused never can obtain *civilian* court direct review of his or her court-martial. Civilian court review, by CAAF, of a court-martial should be made a matter of right. Because it is not, for the overwhelming majority of accused persons, Supreme Court review is an illusion. This tragic flaw in the system is not remedied by the fact that in some minuscule percentage of cases, there may be the possibility of a collateral civilian court remedy. *See supra* notes 103-06 and accompanying text.

Other changes made to the Code over the last two decades have worked rather to the benefit of the government, and had the effect of limiting and delaying review of courts-martial.[147] Subsequent statutory and regulatory changes similarly have often worked against rights and prerogatives which formerly accrued to accused persons. But it is primarily in the last decade that 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,"[148] and thus the Code now has lost its former position as *the* model for other countries' military justice systems. The Cox Commission Report makes reference to two of the cases which reflect such developments: the cases of *Findlay v. United Kingdom*[149] in the European Court of Human Rights, and *Genereux v. The Queen*[150] in the Supreme Court of Canada. Both are important and instructive. *Findlay* and *Genereux* both will be further addressed below in the context of the relevant Cox Commission recommendations.

> In order to address this need for public scrutiny and reform, the Commission began its work by soliciting comments in order to formulate a list of topics to be addressed. <Fn 6> Thereafter, a public hearing was held on Tuesday, March 13, 2001, at The George Washington University Law School. <Fn 7> More than 250 individuals, representing themselves and more than a dozen organizations, submitted written comments to the Commission. Nineteen testified in person. <Fn 8> This Report, intended for submission to the House and Senate Committees on Armed Services, the Secretary of Defense, the Service Secretaries, and the Code Committee, was prepared to convey the results of the hearing and the Commission's deliberations about military justice to those who can help the UCMJ live up to its promise when it was implemented in 1951.
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> <Fn 6> This list of topics, reflecting the concerns of the Commissioners as well as those who submitted suggestions for topics, is at Appendix A.
>
> <Fn 7> The proceedings were recorded on videotape. Copies may be ordered by contacting Mr. Andrew Laurence, Media Center Supervisor, The George Washington University School of Law, Jacob Burns Law Library, 716 20th Street N.W., Washington, D.C., 20052.
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> <Fn 8> See Appendix C for the submissions and Appendix B for the list of witnesses.

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147. For example, because of the 1983 transformation of the SJA Review into an SJA Recommendation, no detailed written legal or factual review is now required prior to convening authority action. Thus, many, if not virtually all, SPCM sentences, and some GCM sentences, to confinement are completely served prior to the first required legal review of the case. *See supra* note 55.

148. Cox Commission Report, *supra* note 4, § I (paragraph accompanying internal footnote 2).

149. 24 Eur. H.R. Rep. 221 (1997).

150. [1992] 1 S.C.R. 259, 1992 S.C.R. LEXIS 672 (Can. 1992).

> In this Report, the Commissioners seek to:
>
> (1) Provide a record of submissions and testimony;
> (2) Make specific recommendations for improvement; and
>
> (3) Identify issues warranting further study and consideration.
>
> The Commission's work is not intended to substitute for congressional hearings or officially sponsored government studies of military justice, both of which the Commissioners would heartily welcome. However, the depth and breadth of the Commission's experience should make any observer pause before dismissing its recommendations. Chaired by the Honorable Walter T. Cox III, the Commission's cumulative experience with the armed forces and the law exceeds 150 years. Its members have served in the uniforms of the United States Army, Navy, Air Force, and Coast Guard and are members of multiple bars. They have practiced, studied, taught – and made – military law under the UCMJ.
>
> Judge Cox, in addition to serving in the United States Army, has been a Judge of the South Carolina Circuit Court and an Acting Associate Justice of the Supreme Court of South Carolina, and has served on the United States Court of Military Appeals and the United States Court of Appeals for the Armed Forces, including four years as Chief Judge. Captain Guy R. Abbate, Jr., JAGC, USN (Ret), a senior instructor at the Naval Justice School and a consultant to the Defense Institute of International Legal Studies and the Naval Justice School, served in the Navy Judge Advocate General's Corps for 20 years. Professor Mary M. Cheh is the Elyce Zenoff Research Professor of Law at The George Washington University Law School and a member of the Rules Advisory Committee of the United States Court of Appeals for the Armed Forces. A former Judge Advocate General of the Navy and a veteran of 28 years of service, Rear Admiral John S. Jenkins, JAGC, USN (Ret), is Senior Associate Dean for Administrative Affairs at The George Washington University Law School. Lieutenant Colonel Frank J. Spinner, USAF (Ret), represents military personnel in court-martial trials and appeals as an attorney in private practice after retiring from the United States Air Force Judge Advocate General's Department in 1994.[151]

While it may seem unusual for the Commission be concerned about someone "dismissing its recommendations,"[152] and thereafter bolstering its Report with references to the corporate experience of the Commissioners, there in fact is good reason for this concern. Those within the Department of Defense charged with administering the military justice system historically have paid little attention to credible and well-justified recommendations, such as those made in 1973 by General Hodson. The Commission also was well aware of the inhospitable reception by the Department of Defense (DOD) in more recent years to recommendations for reform presented by distinguished and knowledgeable panels, such as the ABA's SCAFL Committee.[153]

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151. Cox Commission Report, *supra* note 4, § I.
152. *Id.*
153. SCAFL made recommendations for modest reform to the military justice (MCM)

> Before setting forth its recommendations, the Commission wishes to acknowledge the unique atmosphere in which military justice operates. During hostilities or emergencies, it is axiomatic that commanders must enjoy full and immediate disciplinary authority over those placed under their command. The Commission believes that none of its suggestions will interfere with the recognized need of commanding officers to function decisively and effectively during times of war as well as peace.[154]

As noted throughout this article, it is the author's view that the tension between "justice" and "discipline" is the fundamental issue which has caused so much debate over so many years. It was at the core of General Ansell's concerns, as it was of General Hodson's. The Commission was no less aware of this ongoing tension, but clearly believed that its recommendations struck a proper balance, and did not disparage the commander's need for, or ability to ensure, discipline.

> II. Executive Summary
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> The Commission recommends immediate action to address four problem areas of court-martial practice and procedure. These recommendations, addressed at length in Part III below, are:
>
> 1. Modify the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that best rest within the purview of a sitting military judge.
> 2. Increase the independence, availability, and responsibilities of military judges.
> 3. Implement additional protections in death penalty cases.
> 4. Repeal 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. Replace 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.

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rulemaking process both in 1995 and in 1997, and both were opposed by the services. When the 1997 recommendations were under consideration, they were opposed by the TJAGS, DOD, and the service general counsels, in surprisingly strong terms. *See* Barry, *supra* note 45, at 268 nn.118-25 and accompanying text. This is, of course, consistent with history, which has seen the services oppose most every reform proposed. The abolition of flogging in the Navy in 1850, thirty-eight years after its abolition in the Army, was "over Navy objection." GILLIGAN & LEDERER, *supra* note 7, at 13 n.58. Referring to changes to Naval discipline from the beginning through to the adoption of the UCMJ, one noted commentator observed: "Traditional opinion within the service has always held that each successive reform would bring ruin and collapse." JAMES E. VALLE, ROCKS AND SHOALS: NAVAL DISCIPLINE IN THE AGE OF FIGHTING SAIL 277 (1980). It will be for history to record whether the services, in their response to the Cox Commission Report, are able to break from the "traditional" course.

154. Cox Commission Report, *supra* note 4, § I.

> Other issues warrant consideration as well. Part IV lists several concerns of the Commission, including the proper role of the staff judge advocate, the question of fairness in administrative processes, the wisdom of the Feres doctrine in light of present-day tort practice, the sentencing authority of military judges, the trial instructions used in cases of conscientious objection, and the jurisdiction of military appellate courts. Further study and more extensive hearings would help to resolve the many questions that plague servicemembers and military legal practitioners who confront these important areas of military law.
>
> Consistent with its emphasis on enhancing the perceived and actual fairness of military justice under the UCMJ, the Commission also urges the adoption of a more open process for studying and altering the UCMJ as necessary. The current system of recommending changes to the Code, which involves closed meetings and little opportunity for input from civilian and military practitioners, has failed to encourage much-needed reform while contributing to a public image of courts-martial as immune from external scrutiny. Implementing a more transparent process to consider changes to court-martial rules and procedures would correct the impression that the military justice system is unresponsive to the legitimate concerns of the public.[155]

The operation of the military justice system is based on the UCMJ, but many of the details and procedures, and indeed much of the substantive law applied, is contained in the MCM. For most of the last ten years, the American Bar Association (ABA) has been at the forefront of an effort to make *the process* by which the MCM is modified much more open and transparent, and to introduce diversity into the committee responsible for proposing changes.[156] Currently, a small, five member military committee within DOD[157] is responsible for proposing all changes to the MCM, and, as noted by the Cox Commission, their work is done almost completely in closed session, and their proposed changes, or failure to propose changes, are largely or completely without adequate, often without *any*, published rationales. It is a process which does not inspire confidence either that it is fair or that it produces the best rules and procedures possible. While not one of the Commission's major recommendations, the call to change the rulemaking process is in fact one of their most important proposals, and is fully in accord with Hodson's third recommendation calling for a Military Judicial

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155. Cox Commission Report, *supra* note 4, § II.

156. For a detailed critique of the MCM rulemaking process, see Barry, *supra* note 45; Captain Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual For Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry*, 166 MIL. L. REV. 1 (2000); Kevin J. Barry, *A Reply to Captain Gregory E. Maggs' "Cautious Skepticism" Regarding Recommendations to Modernize the Manual for Courts-Martial Rule-Making Process*, 166 MIL. L. REV. 37 (2000) [hereinafter Barry, *Reply*].

157. The Committee, known as the Joint Service Committee on Military Justice (JSC), is comprised of the senior officer of each of the five services responsible for the administration of military justice within that service.

Conference to be responsible for prescribing rules of evidence and procedure.[158]

III. Recommendations

The Commission identified four areas in need of immediate attention, based on its first-hand observations as well as the submissions received and the testimony heard. We recommend the following changes be effected as soon as possible:

A. Modify the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that best rest within the purview of a sitting military judge.

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. Fifty years into the legal regime implemented by the UCMJ, commanding officers still loom over courts-martial, able to intervene and affect the outcomes of trials in a variety of ways. The Commission recognizes that in order to maintain a disciplinary system as well as a justice system commanders must have a significant role in the prosecution of crime at courts-martial. But this role must not be permitted to undermine the standard of due process to which servicemembers are entitled.

The submissions that appear in Appendix B describe many possible ways to reduce the impression of unfairness created by the role of convening authorities in military criminal justice. The question of what role such authorities should play in the disciplinary and criminal structure of the modern armed forces warrants further study. But based on the Commission's experience, and on the input received in submissions and testimony, there is one action that should be taken immediately: Convening authorities must not be permitted to select the members of courts-martial.

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. 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 servicemembers 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.

158. *See supra* note 135 and accompanying text.

> 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 hearings, 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. The need for the availability of a sitting judge, from at least the moment of preferral of the charges, is discussed at length in III.B. below, but it is the perception that the convening authority can manipulate the pretrial process to the [advantage] of either side that mandates this change in authority over pretrial legal matters. This issue goes to the core of a serviceperson's rights to due process and equal protection under the law. Pretrial decisions involve legal judgments that can – and often do – affect the outcome of trials. For that reason, like the selection of panel members, decisions on pretrial matters should be removed from the purview of the convening authority and placed within the authority of a military judge.
>
> The Commission is aware of the 1999-2000 comprehensive study completed by the Joint Service Committee on Military Justice of the Department of Defense, which concluded that the present allocation of responsibility among convening authorities and military judges should be retained. We respectfully disagree with the conclusions reached by that body. 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.[159]

The strength and power of the language used by the Cox Commission when addressing the role of the convening authority, particularly in selecting court members, is breathtaking. In the Commission's view, convening authorities *must not be permitted* to select the members of courts-martial, and action to institute this change should be taken *immediately.* The Commission also addressed the variety of other roles played by the convening authority in the pre-trial process, and the perception of unfairness and the potential for manipulation by the CA that can occur, and recommended these be changed to eliminate the CA's role.

No doubt General Ansell would agree with the Commission's recommendations, indeed he might well go much further, and no doubt he would be delighted to see this Commission call this member selection process "antiquated" and an "invitation to mischief." However, I suggest he also would be appalled that more than eighty years have elapsed since he wrote,

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159. Cox Commission Report, supra note 4, § III.A.

with the CA still playing such a vital and inappropriate role, and his angst would be that much greater once he became aware that even the United Kingdom no longer allows this practice.

The Cox Commission earlier made reference to changes in other countries, including the *Findlay* case. In *Findlay*,[160] the European Court of Human Rights considered the propriety of the United Kingdom's court-martial process which, at the time, was quite similar in many respects to the U.S. system, in that the same officer, the "convening officer," who exercises prosecutorial discretion and decides who goes to trial and for what charges, also decides the level of court-martial, convenes, or creates, the court, and appoints the members, as well as appointing the prosecutor and defense counsel.[161] The same officer thereafter serves as "confirming officer" to approve the court, a step necessary before the decision of the court-martial can have any effect.[162]

The European Court determined that this organizational structure violated Mr. Findlay's right to a fair hearing before an independent and impartial tribunal, under Article 6, Section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[163] It determined that under the above scenario, with the multiple roles of the convening authority/confirming officer, Mr. Findlay's "doubts about the tribunal's independence and impartiality could be objectively justified."[164]

Judge Rant, Judge Advocate General of the Armed Forces of the United Kingdom, summarized the basis for the holding of the court as having three parts: (1) the convening officer appeared to be at least in part a prosecutor; (2) the post-trial procedure did not cure this difficulty because it was held in private; and (3) neither the oath of the members, nor the presence of the judge advocate cured the defect.[165]

Through a 1996 statute, which preceded the decision in the case, the United Kingdom has completely revised its court-martial system: the convening authority no longer exists, and the functions formerly performed by the CA are spread among three different authorities, each of which operates

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160. Findlay v. United Kingdom, 24 Eur. H.R. Rep. 221 (1997).

161. *See Findlay*, 24 Eur. H.R. Rep. ¶ 15. All the members were "directly or ultimately under his command." *Id.* ¶ 75.

162. *See id.* ¶ 24.

163. *See id.* Pre-¶ 1.

164. *Id.* ¶ 76.

165. His Honour Judge James W. Rant, CB, QC, *Findlay, the Consequences: Judge Advocate General School, November 1997,* 25:3 THE REPORTER 3 (1998).

with independence.[166] By these changes, the United Kingdom has eliminated the multiple roles of the convening authority as a systemic issue, and has removed from the CA the duty of exercising prosecutorial discretion. Thus, the impropriety Judge Rant saw in that the CA "appeared to be at least in part a prosecutor" has been completely resolved. Canada also has recently taken precisely the same remedial action by creating the Director of Military Prosecutions, an independent military prosecutor appointed by civilian authority, who makes all prosecutorial discretion decisions.[167]

In the United States, however, this troublesome issue of the CA as prosecutor remains. The Cox Commission directly recommended removing the CA from the member selection process, and from certain other pre-trial decisions, all of which should be implemented. But the Cox Commission did not itself recommend, and only recommended further study of, other changes to the CA's role as prosecutor. Those further studies, which now ought necessarily to follow the Cox Commission review, should carefully examine the question of whether in the twenty-first century, in the U.S. armed forces, the retention of the prosecutorial role of the CA is still necessary or desirable to preserve the commanders disciplinary authority.

> B. Increase the independence, availability and responsibilities of military judges.
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> 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. Since the adoption of the UCMJ, the authority of military judges (initially "law officers" under the 1950 UCMJ) has gradually increased, to the point where many judges now possess, either by regulation or by custom and tradition of the services, at least some modicum of judicial independence. The Commission is convinced that further and innovative change is needed to complete the process of making military trial and appellate judges full-fledged adjudicators of criminal law and procedure.
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> The Commission believes that three immediate changes would enhance the military judiciary and its ability to accomplish its mission and, at the same time, provide greater protections for accused persons. The changes would also enhance the prosecutors' ability to process courts-martial in an orderly and effective fashion. First, the Commission recommends the creation of standing judicial circuits, composed of

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166. *See Findlay*, 24 Eur. H.R. Rep. ¶¶ 52-57. The three bodies are the higher authorities, the prosecuting authority, and the court administration officers. *See id*; *see also* J.W. Rant, *The British Courts-Martial System: It Ain't Broke, But It Needs Fixing*, 152 MIL. L. REV. 179 (1996).

167. *See* Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 September 1999 to 31 March 2000, §2.6, *available at* http://www.dnd.ca/jag/hl_annualreport_e.html [hereinafter First Canadian JAG Report].

> tenured judges and empowered to manage courts-martial within geographic regions. Variants of this system are already in use in some regions and branches of the service, but it is crucial that a judge be identified and made available to all accused servicemembers, as well as to the prosecution, after charges are preferred. Under the current system, neither defense counsel nor prosecutors have a judicial authority to whom to turn until very close to the date of trial. This creates delay, inefficiency, and injustice, or at a minimum, the perception of injustice, as described in III.A. above.
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> Second, establishing fixed terms of office for military judges would also enhance the overall independence of the military judiciary. The Joint Service Committee of the Department of Defense in a recent report to the Code Committee recognized that this was desirable and feasible, but stopped short of recommending a legislative fix. The Commission believes that increased judicial independence is critical, given the central role of judges in upholding the standards of due process, preserving public confidence in the fairness of courts-martial, and bringing United States military justice closer to the standards being set by other military criminal justice systems around the world.
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> 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. The present ad hoc system of appellate courts ordering post-trial hearings without any clear guidelines or procedures is contrary to the practice of the United States District Courts and state trial courts throughout the land.[168]

As in the case of the role of the convening authority, the Cox Commission again made reference to a change in another country on an issue of longstanding concern in the United States. In *Genereux*,[169] the Supreme Court of Canada held that general court-martial judges of the Canadian Forces must, inter alia, have fixed terms of office, in order to satisfy the "independent tribunal" guarantee of the Canadian Charter of Rights and Freedoms. By the time the ruling was issued, the Department of National Defence already had changed its own rules to provide for such terms of office.[170]

At least as significant as *Genereux* was the recent Court Martial Appeal Court of Canada case of *Lauzon v. The Queen*,[171] in which one question was whether the standing court-martial was an independent tribunal within the meaning of Section 11(d) of the Canadian Charter of Rights and Freedoms.[172] Once again, inter alia, the status of military judges was at issue. The court found that the arrangements currently in place did not satisfy the Charter, not

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168. Cox Commission Report, *supra* note 4, § III.B.

169. [1992] 1 S.C.R. 259, 1992 S.C.R. LEXIS 672 (Can. 1992).

170. *See* MIL. JUST. GAZETTE (Nat'l Inst. of Mil. Jus.) 2, Apr. 1992.

171. 56 C.R.R. (2d) 30, 1998 C.R.R. LEXIS 307 (C.M.A.C. Sept. 18, 1998).

172. *See Lauzon v. The Queen*, 56 C.R.R. (2d) 30, 1998 C.R.R. LEXIS 307, at *12 (C.M.A.C. Sept. 18, 1998).

because the military trial judges did not have terms of office – they did – but because their *reappointment* at the end of their fixed terms was done by the Minister:

> [W]ho can decide not to renew the term of a military trial judge who has taken positions which are unpopular with the department or more generally with the executive. While the recommendation to renew the term of a military trial judge comes from the Chief Military trial judge, the Chief Military trial judge's own posting is also done by the minister. And that is not all. This reposting is done on the recommendation of the Judge Advocate General who, with his or her staff, regularly argues cases for the minister before the military trial judges and the Chief Military trial judge. Furthermore, while the military trial judge may only be removed for cause, a refusal to repost is entirely within the discretion of the minister, without any protective standard or guideline which, for all practical purposes, is equivalent to removal from the performance of duties without cause.[173]

The court, clearly, also was concerned with appearances: "An informed person can reasonably conclude that the office of military trial judge is not free from discretionary or arbitrary intervention by the executive or by the authority responsible for appointments."[174] The court went on to state in addition that "an informed observer would be justified in believing that military trial judges who preside over Standing Courts Martial have no institutional independence in terms of financial security in their dealings with the executive."[175] The court found the arrangement violated fundamental rights guaranteed in the Charter, and declared invalid the governing statutory provision. However, recognizing that reform measures already had been

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173. *Lauzon*, 56 C.R.R. (2d) 30, 1998 C.R.R. LEXIS 307 at *18-19, ¶ 27. The ethical and conflict of interest concerns regarding *reappointment* of judges are viewed similarly in the United States as in Canada, and extend beyond the realm of uniformed military judges, as was demonstrated in 1992 when the chief judge of CAAF sought an advisory opinion from the Judicial Conference Committee on Codes of Conduct whether a CAAF judge seeking reappointment for a second fifteen-year term may sit on any pending case. The concern arose from the dual facts that the United States, represented by the Department of Defense, is a litigant in every case before the court, and that DOD is also the agency which has the responsibility for recommending to the President individuals to be appointed to any vacancy on the court. The Judicial Conference Committee responded that recusal was required. While certain salary concerns were part of the reasoning, the underlying rationale was that "a litigant opposing the Department of Defense in a case before your court might reasonably question the impartiality of a judge to sit on his case when the judge is seeking the approval of the Department of Defense for the judge's reappointment." Letter from Walter K. Stapleton to Chief Judge Eugene R. Sullivan (July 6, 1992), *reprinted in* MIL. JUST. GAZETTE (Nat'l Inst. of Mil. Jus.) 5, Jan. 1993, *cited in* United States v. Mitchell, 39 M.J. 131, 151-52 (C.M.A.), *cert. denied*, 513 U.S. 874 (1994).

174. *Lauzon*, 56 C.R.R. (2d) 30, at *22.

175. *Id*. at *27. For a discussion of this case, see also MIL. JUST. GAZETTE (Nat'l Inst. of Mil. Just.) 60, Oct. 1998.

proposed by the Department of National Defence and were being considered by the Parliament, the court suspended its determination for a year to allow for remedial statutes to be enacted.[176] On December 10, 1998, amendments to the National Defence Act resolving the Charter violations received Royal assent, and became law.[177]

The decisions in Canada are of particular interest in the United States, since our system of selecting, compensating, and reappointing military judges suffers from virtually the same flaws as the Canadian system. When the U.S. system was challenged, however, rather than moving to enact statutory or regulatory reforms as the Canadian Ministry of Defense did, the U.S. Departments of Defense and Justice chose to defend the status quo. Though they were successful, it cannot be considered a "pretty" victory, particularly in light of the words of Justice Scalia, in his concurring opinion in the Supreme Court case that upheld the process of appointing military judges:

> [T]he present judgment makes no sense except as a consequence of historical practice . . . . [N]o one can suppose that similar protections against improper influence [as provided in the UCMJ] would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive. I am confident that we would not be satisfied with mere formal prohibitions [as provided for in the UCMJ] in the civilian context, but would hold that due process demands the *structural* protection of tenure in office, which has been provided in England since 1700, was provided in almost all the former English colonies from the time of the Revolution, and is provided in all the States today. It is noteworthy that one of the grievances recited against King George III in the Declaration of Independence was that "[h]e has made Judges dependent on his Will alone, for the tenure of their offices."[178]

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176. *See Lauzon*, 56 C.R.R. (2d) 30.

177. *See* First Canadian JAG Report, *supra* note 167, § 2.8, indicating that each of the flaws identified by the court had been resolved. The Canadian approach to judicial independence is followed in New Zealand:

> In Canada, even though a tribunal with power to impose punitive consequences (or one which acts in an appellate capacity) may be part of the executive (e.g., Canadian military courts), the judicial guarantees of independence and impartiality, and all of the various points (such as security of tenure, financial security, institutional independence, judicial immunity, etc.) are applicable, [and] are required to inhere in those tribunals in the same way as in section 96 Courts, which are the Canadian equivalent of Art. III courts in the United States. The same constitutional safeguards required in Canada also apply here in New Zealand by virtue of section 25 of the Bill of Rights Act 1990. Courts are courts whether they are executive (including military courts) or otherwise. Public confidence demands that structural safeguards be based on function as opposed to classification only.

E-mail from Commander Gordon Hook, RNZN, to Kevin J. Barry (Dec. 20, 2001, 21:06 EST) (on file with author).

178. Weiss v. United States, 510 U.S. 163, 198-99 (1994) (Scalia, J., concurring)

Thus, of all jurisdictions, federal and state, trying criminal cases in the United States, only this one jurisdiction is allowed, purely as an anomaly of history, to function with judges whose independence would not have passed the scrutiny of the signers of the Declaration of Independence in 1776. While this system may thus be "legal," it should shock the conscience of all who observe it, and it should be immediately reformed.

Since *Weiss v. United States*,[179] however, there has been but little such movement. At the urging of SCAFL and others, two of the U.S. services have made limited advances, and regulations requiring fixed terms for military judges have been issued by the Army, and more recently by the Coast Guard. While earlier indications were that the Navy Department and the Air Force would follow suit, those services have now advised SCAFL that they will not issue such regulations.[180]

From a philosophical and policy perspective, it is worthy of considerable attention that in both the United Kingdom and in Canada, when faced with court challenges to the fundamental fairness of their systems, the governments either had already completely resolved the systemic flaws, or had commenced statutory or regulatory reforms designed to accomplish that result, before the court ever reached a decision. This has not been the approach in the United States; rather the U.S. governmental administrators generally have elected to ignore not only comparative law and the present views of the demands of due process in other jurisdictions,[181] but also many years of criticism and calls for

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(citations omitted); *see also* Barry, *Reply*, *supra* note 156, at 45 nn.36-46 and accompanying text.

179. 510 U.S. 163 (1994).

180. *See* MIL. JUST. GAZETTE (Nat'l Inst. of Mil. Just.) 62, Dec. 1998; MIL. JUST. GAZETTE (Nat'l Inst. of Mil. Just.) 89, Feb. 2001. SCAFL had been seeking such regulations for several years, see MIL. JUST. GAZETTE (Nat'l Inst. of Mil. Just.) 71, Nov. 1999, and all services had earlier advised MG Keithe E. Nelson, USAF (Ret.), the chair of SCAFL, that they would issue tenure rules for military judges. *See* Barry, *Reply*, *supra* note 156, at 47 n.41. Of course, the terms of office protection that may be provided in service regulations or military policy documents do no more than assure a military officer, temporarily serving as a military judge, that he or she will remain in that billet for a specific, finite period of time, prior to being reassigned to some other duty. It does nothing to answer the kinds of constitutional issues with which Justice Scalia in *Weiss*, and the court in *Lauzon*, and to some degree the Cox Commission, were concerned. Much more than simple limited terms of office will be required if military judges are to have the kind of security and independence that Justice Scalia believes all other federal and state judges trying felony criminal cases should enjoy. *See supra* note 178 and accompanying text.

181. "It is an unfortunate but undeniable fact that historically, American military justice jurisprudence has shown little interest in foreign military justice developments." Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195, 197 (2000).

reform by professional and credible commentators in this country. Instead, these administrators have chosen simply to defend the current system. The result has been a system which has continued to generate ever-stronger calls for fundamental, systemic reform from ever-widening sources.[182]

The Cox Commission, as part of its proposal to have military judges rather than convening authorities decide pre-trial issues, also called for the establishment of permanent or "standing" courts martial.[183] This is a concept which was proposed by General Hodson,[184] as well as many others, including BADC in its submissions to the Cox Commission.[185] Currently there is no military trial judge assigned to a case until the case is "referred" for trial by the CA. One result is that there is a relatively active extraordinary writs practice in the military appellate courts at pre-trial stages for matters which in federal district court would be routinely handled by a sitting federal district judge. Permanent courts also would solve the problem of handling post-trial evidentiary issues, such as when a case is remanded from an appellate court for fact-finding on an issue. Currently such cases typically are remanded for a hearing to be conducted by a military trial judge, a process first used in *United States v. DuBay*.[186] While perhaps not as critical to the appearance or actual fairness of the system as certain other issues, standing courts-martial are the best solution to many aspects of, and problems created by, the current

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182. In addition to the Cox Commission, General Hodson, and Professors Bishop and Schlueter, a variety of other commentators also have urged reform. For example, on the need for more independent military judges, see Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary – A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629 (1994). Professor Lederer and Lieutenant Hundley advanced a far-reaching proposal which would establish a permanent judicial cadre, and would go a long way toward meeting the concerns noted in the Canadian cases, both regarding appointment and reappointment, and salary protection. *See* Lederer & Hundley, *supra*. It would go far beyond mere regulatory tenure, as implemented to date in two services, which is an insufficient and largely cosmetic reform. *See supra* note 180 and accompanying text; *see also* Cooke, *supra* note 33, at 18. "We won the constitutional battle over appointment of and tenure for military judges in *Weiss v. United States.* Now it is time to recognize that tenure for judges, as a matter of policy, is appropriate." *Id.* (citation omitted) Both Judge Cox and Judge Everett also have spoken in favor of tenure. *See, e.g.,* Hudson, *supra* note 115, at 78-79. It is worth noting that both judges also see merit in other reforms, including adopting some scheme for random selection of court members. *See id*. at 84-87. General Cooke, however, would not remove the CA from the role of selecting court members, notwithstanding that "the current system leaves open the potential for and the perception of abuse, more than a 'random' selection process would." Cooke, *supra* note 33, at 25.

183. *See* Cox Commission, *supra* note 4, § II(1).

184. *See supra* note 135 and accompanying text.

185. *See* BADC Recommendations, *supra* note 123, *at* http://www.badc.org/html/militarylaw_art_intro.htm.

186. 17 C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967).

pre-trial role of the CA, and would enhance the efficiency of the system as well as materially improve the fairness of the administration of justice.

C. 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 of whether the modern military needs a death penalty, particularly during peacetime (an issue that the Commission feels deserves further study), but 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.

Among all of the United States criminal jurisdictions that may impose a sentence of death, only at a court-martial does that sentence not require the verdict of a twelve-person jury. A general court may adjudge death with as few as five members, an anomaly that corrupts the legitimacy of both panel selection and the verdict itself. <Fn 9> Because citizens in uniform deserve no less consideration than their civilian peers, the UCMJ should be amended to require twelve members in capital cases. Already the Manual for Courts-Martial requires special procedures for capital courts-martial, and the Court of Appeals for the Armed Forces has recognized the burdens that capital litigation imposes on both accused servicemembers and the resources of military justice. Requiring twelve members to serve on capital courts-martial (and implementing our first recommendation overall, calling for random selection of eligible members) would raise the standard of procedural justice for accused servicemembers to the level already established in civilian capital litigation.

<Fn 9> See the submissions of the Bar Association of the District of Columbia and the American Civil Liberties Union for a full explication of the ramifications of the unfixed, small size of capital courts-martial.

Like requiring twelve-member panels in capital cases, our second recommendation could be implemented without major cost or change in existing procedures. We recommend that military judges instruct panels in capital cases that they may not consider the race of the accused servicemember or the victim(s) in deciding whether to impose death. <Fn 10> The racial disparities of military death row mirror the disparities evident in civilian criminal jurisdictions that impose death. Of the six servicemembers currently on military death row, four are African American, one is a native Pacific Islander, and one is white; all were convicted for killing white victims. An explicit instruction prior to sentencing would remind courts-martial of the importance of ensuring racial justice amid the high stakes and emotions of capital cases.

> <Fn 10> For models of such an instruction, see 21 U.S.C. § 848(o) (1988) and 18 U.S.C. § 3593(f) (1994).
>
> Addressing the Commission's third concern is more difficult, but no less important, than addressing the issues of panel size and racial disparities in the administration of the military death penalty. Inadequate counsel is a serious threat to the fairness and legitimacy of capital courts-martial, made worse at court-martial by the fact that so few military lawyers have experience in defending capital cases. The current system of providing and funding defense counsel shortchanges accused servicemembers who face the ultimate penalty. It has been long recognized by every U.S. jurisdiction with a death penalty that only qualified attorneys may conduct death penalty cases. The paucity of military death penalty referrals, combined with the diversity of experience that is required of a successful military attorney, leaves the military's legal corps unable to develop the skills and experience necessary to represent both sides properly. The Commission believes that Congress should study and consider the feasibility of providing a dedicated source of external funding for experienced defense counsel if military capital litigation continues to be a feature of courts-martial in the 21st century.[187]

Six military members are now on death row, all tried under the "new" capital punishment procedures found constitutional by CAAF in 1991.[188] Every one of those cases had issues of adequacy of counsel at trial. In addition, the "ungoverned revolving door" of appellate defense counsel in capital cases – seven in one case, which was cited as a systemic problem by Judge Wiss in his dissent in that case – has continued to plague this system.[189] The Cox Commission's suggestion that the solution to the counsel problem is to hire outside, civilian counsel is a stark admission that the military defense counsel structure, operating in an environment of very few capital cases, is "unable" to produce counsel qualified to represent accused persons adequately in capital cases. Remedial action is urgently needed; the situation and the Commission's recommendation are clearly worthy of the closest study.[190]

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187. Cox Commission Report, supra note 4, § III.C.

188. *See* Rule for Court-Martial (RCM) 1004, adopted by regulation as part of the promulgation of MCM, 1984. Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 23, 1984). The new procedures were upheld in *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991). The prior procedures had been ruled unconstitutional in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983).

189. United States v. Loving, 41 M.J. 213, 327 (C.A.A.F. 1994) (Wiss, J., dissenting).

190. The suggestion that civilian counsel might represent military persons has met with considerable resistance in the recent past. In 1996, the ABA adopted a recommendation that "military capital prisoners be provided with the same opportunity for the assistance of counsel in seeking federal post-conviction relief as is now provided by federal law for persons sentenced to death in the civilian courts of this country." MIL. JUST. GAZETTE (Nat'l Inst. of Mil. Just.) 41, Sept.-Oct. 1996. The thrust of the recommendation was that these military prisoners should receive the assistance of civilian counsel skilled in handling habeas corpus petitions in federal district court, just as, and to the same degree that, civilian prisoners now have this right. DOD

The problem of the varying size of GCM member panels, juries, in capital cases, which allows for any number of members more than four, has been well developed by the leading commentator.[191] The Cox Commission adopted the recommendations of BADC, as well as of the American Civil Liberties Union, calling for a fixed number of twelve members, and this same concept has since been adopted by the American Bar Association.[192] In making its recommendation, the Cox Commission stated that the variable and small size of a capital jury was an "anomaly that corrupts the legitimacy of both panel selection and the verdict itself."[193] These are strong words. In a civilized world which has largely rejected the death penalty, and in which nations are abolishing the military death penalty,[194] it is indefensible for the United States to continue to stand by a system which "corrupts the legitimacy" of both the process and the verdict in capital cases.

The issue of the size of capital court-martial panels has received attention in the press,[195] and at the time of this writing, legislation has been passed by the Congress as part of the Department of Defense Authorization

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resisted this approach, offering instead to adopt regulations under which the TJAGs would make military attorneys available to these military prisoners for capital *habeas corpus* representation. *See* MIL. JUST. GAZETTE (Nat'l Inst. of Mil. Just.) 43, Dec 1996. The current resistance to civilian counsel representing military members lacks a historical basis. At one time, all judge advocates were civilians, and the practice of the government retaining and paying civilian counsel to represent accused members is hardly novel. *See* Wiener, *supra* note 48, at 207. For example, in 1849, in what is likely the last naval court-martial which led to an execution, a "prominent San Francisco attorney, Hall McAllister, was hired by the commodore [convening authority] to conduct the defense of the accused men at the rate of one hundred dollars per day." VALLE, *supra* note 153, at 106. Indeed, in the United Kingdom even the Judge Advocate General, Judge J.W. Rant, is a civilian, appointed after many years service on the bench. *See* Rant, *supra* note 165, at 3. It is the same in New Zealand, where the Judge Advocate General, court-martial trial judges (judge advocates) and defense counsel all are drawn from the ranks of civilians. *See generally* Hook, *supra* note 33, at 15.

191. *See* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1 (1998).

192. *See* BADC Recommendations, *supra* note 123, *at* http://www.badc.org/html/militarylaw_art_specificfnl.htm. In addition to proposing this idea to the Cox Commission, BADC adopted a formal policy calling for all capital court-martial panels to have twelve members, and along with the National Association of Criminal Defense Lawyers, proposed this to the American Bar Association House of Delegates, which overwhelmingly adopted the recommendation at its Annual Meeting in Chicago in August, 2001. *See* AMERICAN BAR ASSOCIATION, REPORTS WITH RECOMMENDATIONS 10A (Aug. 2001); MIL. JUST. GAZETTE (Nat'l Inst. of Mil. Just.) 96, Aug. 2001.

193. Cox Commission Report, *supra* note 4, at § III.C, text accompanying n.9.

194. *See, e.g.*, Fidell, *supra* note 181, at 204 (noting that Canada abolished its military death penalty in 1998).

195. *See, e.g.*, Raymond Bonner, *Push Is on for Larger Jury in Military Capital Cases,* N.Y. TIMES, Sept. 4, 2001, at A12.

Bill for fiscal year 2002 that would provide for capital court panels of "not less than" twelve members.[196] Thus, this becomes the first of the recommendations of the Cox Commission to be enacted into law, before the remaining recommendations even receive a critical review by Congress or the Department of Defense.[197]

> D. Repeal 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. Replace 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.
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> Of all of the topics that appeared on the Commission's long list of possible areas for consideration, the issue of prosecuting consensual sex offenses attracted the greatest number of responses from both individuals and organizations. The Commission concurs with the majority of these assessments in recommending that consensual sodomy and adultery be eliminated as separate offenses in the UCMJ and the Manual for Courts-Martial. Although popular acceptance of various sexual behaviors has changed dramatically in the fifty years since the UCMJ became effective, the Commission accepts that there remain instances in which consensual sexual activity, including that which is currently prosecuted under Articles 125 and 134, may constitute criminal acts in a military context. Virtually all such acts, however, could be prosecuted without the use of provisions specifically targeting sodomy and adultery. 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.

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196. *See* H.R. CONF. REP. NO. 107-333, § 582 (2001).

197. Congress has not held hearings on or ordered any reviews of the Cox Commission Report. At the SCAFL meeting on August 4, 2001, representatives of DOD advised SCAFL that DOD had not adopted any position on the merits of the twelve member capital court-martial panel issue. Rather, they stated that all the recommendations of the Cox Commission had been referred to the Joint Service Committee, pursuant to the normal DOD practice of staffing all proposed changes to the MCM or the Code through the JSC, and that the JSC would review the recommendation during its regular Annual Review cycle, and would report its recommendations by May 2002. *See* DOD Directive 5500.17 (May 8, 1996). The JSC, with five members with very limited staff, has been acknowledged to be understaffed even to accomplish its routine duties, and suggestions have been considered to expand it. *See* MIL. JUST. GAZETTE (Nat'l Inst. of Mil. Just.) 71, Nov. 1999. In addition, the JSC is also already on record opposing at least one of the Cox Commission's major recommendations, that relating to court member selection. *See* Cox Commission Report, *supra* note 4, § III.A (final paragraph). Despite the JSC being the regular forum for DOD to conduct its Annual Review of the MCM, it is an inadequate and inappropriate body to be the prime reviewer within the Administration of the far reaching Cox Commission recommendations, and it is incapable of conducting the "bottom-up" review the Cox Commission saw as necessary. *See also supra* note 145.

> Because it is crucial that servicemembers are both made aware of and held accountable for sexual activities that interfere with military missions, undermine morale and trust within military units, or exploit the hierarchy of the military rank structure, the Commission recommends that a new statute be drafted to replace the current provisions. Many issues presented in the modern context simply do not fit the current statutes. For example, adultery, indecent exposure, indecent acts, unprotected sexual intercourse by an HIV-positive servicemember, wrongful cohabitation, fraternization, and numerous other offenses are not specified in the Uniform Code of Military Justice but are instead prosecuted under the general article of the Code as "conduct prejudicial to good order and discipline or service discrediting conduct." The same is true of incest, the sexual abuse of minors, pandering or pornography.
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> A comprehensive Criminal Sexual Conduct statute would more realistically reflect the offenses that should be proscribed under military law. The new statute would reconfigure the entire field of "Criminal Sexual Conduct" in the military context, replacing the outdated "rape and carnal knowledge," "sodomy," and general article offenses with a modern statute similar to the laws adopted by many states and in Title 18 of the United States Code. <Fn 11> The Commission urges that the new statute recognize that military rank and organization may produce an atmosphere where sexual conduct, although apparently consensual on its face, should be proscribed as coercive sexual misconduct. There are many models from civilian life that make similar legal distinctions, including laws that govern sexual activity between teachers and students, doctors and patients, probationers and counselors, and corrections officers and prisoners. The Commission believes that this type of statute is appropriate and relevant in a military organization with its attendant subordinate-superior and special trust relationships.
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> <Fn 11> See, e.g., 18 U.S.C.A. §§ 2241 & 2242 (2000); Model Penal Code § 213 (1962). Numerous states have enacted similar statutes.[198]

The Commission makes an excellent recommendation for the adoption of a new statute which would solve a number of problems, not the least of which is the current use of the "general article" to prosecute crimes of a sexual nature, including adultery. Professor Bishop presumably would be pleased with this recommendation.[199] So too should the Pentagon, which in 1997 came under fairly intense criticism as a number of high-visibility court-martial cases focused much attention on the problem of the prosecution of adultery in the military. On July 3, 1997, DOD General Counsel Judith A. Miller wrote a letter to a number of organizations, including SCAFL and NIMJ, seeking comments and suggestions on how the guidance on the offense of adultery contained in the MCM might be improved.[200] Many organizations responded, and after due deliberation, DOD, through the Joint Service Committee,

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198. Cox Commission Report, *supra* note 4, § 111.D.

199. *See supra* note 142 and accompanying text.

200. *See, e.g.*, Letter from Judith A. Miller to Francis S. Moran, Jr., Chair, SCAFL (July 3, 1997) (on file with author).

published proposed amendments to the MCM containing new guidance regarding adultery.[201] The new provisions did not materially change the previous guidance on adultery; they did not solve the underlying concerns which had generated the entire effort a year earlier.[202] A statute such as that recommended by the Commission would go a long way in that direction.

> IV. Discussion of Additional Issues
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> The Commission stands ready to assist in the implementation of the recommendations set forth above. These proposals, however, do not exhaust the need for reform within the military justice system. Additional matters worthy of further consideration include:
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> A. Staff Judge Advocates. The impression that staff judge advocates (SJA's) possess too much authority over the court-martial process is nearly as damaging to perceptions of military justice as the over-involvement of convening authorities at trial. 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. Staff judge advocates, who act as counsel to commanding officers and not as independent authorities, should not exert influence once charges are preferred, should work out plea bargains only upon approval of the convening authority, and deserve a clear picture of what their responsibilities are.
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> It has been recognized since the adoption of the UCMJ that the invidiousness of command influence strikes at the heart of the fairness of the process. Too often, however, critics have focused exclusively on the inappropriate actions of convening authorities in pointing out instances of command influence that violate Article 36 of the UCMJ. In reality, the threat is as likely to come from SJA's and "others subject to the Code," see Article 36 (b), as from convening authorities. 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,

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201. *See* 63 Fed. Reg. 157 at 43687 (Aug. 14, 1998).

202. NIMJ questioned the adequacy of the entire review and MCM rulemaking process followed in reviewing the adultery guidance. NIMJ noted that the Federal Register notice, while indicating that many comments had been received in response to Ms. Miller's letter:

> [F]ails to address the nature of the comments received, by whom they were made, or whether any were meritorious. The proposed changes which are then set forth carry with them neither explanation nor reasoned analysis . . . . The process followed in this case would be wholly inadequate as federal rule making in any other arena [than the MCM].

Letter from Kevin J. Barry, Secretary-Treasurer, NIMJ, to Lt. Col. Thomas C. Jaster, JSC (Oct. 1, 1998). The adequacy of the entire MCM rulemaking process also was raised by the Cox Commission. *See supra* notes 156-58 and accompanying text.

> 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.[203]

The Commission is precisely on the mark in noting that unlawful command influence is not limited to commanders. Indeed, it can occur without the knowledge of commanders, as in *United States v. Hilow*,[204] where the list of prospective court-martial members to be submitted to the CA was prepared by a staff officer who eliminated all potential members other than those he thought would be sufficiently pro-prosecution.[205] Such cases have contributed to the consistent raising of the question: "Can you get a fair trial in the military?"[206] *Hilow* suggests that the answer is: "Yes you can, but you can't ever really be sure whether or not you did." The reason you cannot ever know for sure is because the system is so structured that it allows for the potential for inadvertent error or secret manipulation, but these normally are undisclosed and undiscoverable. The system is so structured, for example, that it would be almost impossible to find out if the Assistant SJA, who may supervise, or even be detailed as, trial counsel, who initially draws up the list of prospective members – an apparent conflict of interest in itself – has unknowingly, or with conscious deliberation similar to what occurred in *Hilow*, applied constitutionally defective criteria in assembling that list.

The entire organizational structure raises a related issue, which is answered differently at different times and in different services: Is the uniformed military attorney a lawyer first or a military officer first? Are the oaths taken as a lawyer entirely consistent with those taken as a military officer? Such slogans as: "Military officer first, lawyer always," which one occasionally hears, do not really answer the question. Organizationally, many military attorneys, including SJAs, not only work for, but also receive their

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203. Cox Commission Report, *supra* note 4, § IV.A.

204. 32 M.J. 439 (C.M.A. 1991).

205. *See* United States v. Hilow, 32 M.J. 439, 440 (C.M.A. 1991).

206. While some may ask this question from other motives, it is neither a cavalier nor idle question, but one asked with serious concern by dedicated, knowledgeable professionals. One indication of the importance of the question came on February 12, 1998, when a seminar cosponsored by the National Institute of Military Justice was held in Washington, D.C., at which a distinguished panel of military law experts, including a former Chief Judge of the Court of Appeals for the Armed Forces, assembled to debate the question: *Can You Get a Fair Trial in the Military?* MIL. JUST. GAZ. (Nat'l Inst. of Mil. Just.) 54, Mar. 1998. This seminar was followed six months later by another seminar with an equally distinguished panel at the Annual Meeting of the American Bar Association in Toronto on August 1, 1998, entitled, *A Retrospective: After Fifty Years Under the UCMJ – Is There Justice in the Military?* No other system of justice in the United States is subject to such a persistent need to attempt to defend its fundamental fairness.

all-important performance evaluations from, their nonlawyer commanders, who also serve as convening authorities. SJAs have the right to communicate freely with more senior command SJAs and with the Judge Advocate General, a right designed to protect the integrity of the lawyer, important enough to be guaranteed in Article 6(b) of the Code.[207] This right, however, may provide little solace when the SJA's usual military responsibility, and the desires of the commander/CA (e.g., staff officers shall support command), conflict with the SJA's legal responsibilities (e.g., to advise the CA that the charges may not legally go forth to a court-martial). Some governmental organizations solve such problems by always having legal advisors reported on and evaluated by more senior attorneys, and never by the non-lawyer "clients." Until these organizational relationships are adequately addressed and resolved, the perceptions regarding the SJA, and unlawful command influence, will continue.

> B. Administrative processes. The Commission's focus is on military criminal justice, but we would be remiss in ignoring the impression of unfairness created by the growing use of administrative discharge action in lieu of court-martial. While the services must be afforded considerable latitude to manage their personnel, there is no denying that administrative action, from non-judicial punishment to administrative withdrawal of qualifications, certifications, and promotion opportunities, can have a devastating effect on an individual's enlistment or career. The misuse, or the perception of misuse, of these administrative processes subverts the fundamental protections of the UCMJ, destroying the notion of fundamental fairness that is so critical to a professional military force. The Commission recognizes that an aggrieved servicemember may seek administrative redress at either the appropriate military administrative appeal board or in federal court, but in most instances these processes cannot make these individuals whole. Rarely can servicemembers be returned to normal career tracks once they have been unfairly administratively sanctioned and fallen behind their career peer groups. Thus, the Commission recommends an overall review of the military disciplinary system [which] should consider, and, where necessary, reform, the administrative disciplinary and sanctioning process.
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> Three aspects of the current system in particular concern the Commission. First, the manner in which discharges are characterized is a relic of the past and should be updated to reflect contemporary realities. The current U.S. military is a volunteer-mercenary force, not a conscripted armed force. It may be sufficient simply to "fire" a servicemember who does not conform to the standards and norms of military service rather than stigmatizing that person with a negative discharge. This shift in the characterization of military discharges would permit servicemembers to receive veterans' entitlements based on criteria such as their length of good service and whether they were medically disabled while on active duty, rather than relying on an arcane hierarchy of discharge categories.

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207. *See* UCMJ § 806(b).

> Second, the current system encourages disparate treatment of servicemembers: One member may be administratively discharged for felonious conduct, such as use of controlled substances, and another subjected to court-martial for the same offense. The member who is tried by a court-martial ends up with a federal criminal felony record, the other none. Such widely varying punishments are inconsistent with the UCMJ's fundamental goal of standardizing and modernizing criminal sanctions in the armed forces and should be corrected.
>
> Finally, the current system does not provide ready access to the federal courts or other appellate review. Consideration should be given to providing for military appellate review of administrative discharges. The military appellate courts are already in place and are capable of reviewing administrative discharges in a manner similar to their current review of court-martial convictions. Likewise, the United States Court of Appeals for the Armed Forces could review the military appellate courts upon petition in the same way that it currently reviews courts-martial convictions.[208]

Once again, the Commission has identified a thorny series of issues, some of which have troubled commentators for years.[209] One aspect raised is the disparate treatment possible where one member is treated administratively, and another receives a court-martial, for virtually identical conduct.

The two recent Annual Reports published by the Judge Advocate General of Canada contain very interesting documents which set forth written standards to be followed by the Director of Military Prosecutions in making prosecutorial decisions.[210] The combination of a single prosecution office, operating under written prosecution guidelines, would seem to allow the Canadians to largely avoid the kinds of disparate treatment issues which the Commission stated the U.S. system not only allows, but encourages.

One rarely mentioned problem is that the U.S. military justice system has an enormous, but indeterminate, number of convening authorities,[211] all of whom exercise prosecutorial discretion, based, it would seem, largely on their own instincts, without the benefit of written guidance for the exercise of that

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208. Cox Commission Report, supra note 4, § IV.B.

209. Senior Judge Everett's oft expressed concerns for abuse of the administrative process go back to his days with Senator Ervin. *See e.g.*, Everett, *supra* note 129, at 31.

210. *See* First Canadian Jag Report, *supra* note 167, at Annex H; *see also* the current Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: A Review from 1 April 2000 to 31 March 2001, Appendix 2, § 6, *available at* http://www.dnd.ca/jag/hl_annualreport_e.html.

211. Many – if not virtually all – commanders or commanding officers exercise some sort of convening authority jurisdiction, almost all without legal training. There are thus literally *thousands* of military officers empowered to make prosecutorial discretion decisions. This is at odds with the professionalism usually associated with the United States Attorney's offices, which, while independent, are limited in number, and are staffed by licensed attorneys, almost always with either prosecution experience, or very experienced staffs, or both.

discretion.[212] One can surmise that there was a day in this system when courts-martial were so numerous, and when the average officer had such consistent involvement with them as counsel or court-member, that a "sense" of the worth of a case in terms of the level of the tribunal, and the appropriate punishment level, was more or less a universal commodity. If that were once true, it is not today, when the number of cases is well below that in past decades, the number of cases tried with members is quite a low percentage of all cases, and officers, other than lawyers, no longer serve as counsel.

In addition, many military lawyers today specialize in areas other than military justice. The result is that military lawyers, after years in other specialties, are assigned into SJA billets, billets often seen as highly desirable, if not required, for one seeking promotion to very senior positions. Many of these lawyers have had too little experience in the justice system to have developed a "sense" for how the system ought to operate, or at what level a particular offense might normally be tried, or what punishment might be appropriate. Thus the nonlawyer convening authorities, whose own instincts may not be very well developed, are forced to rely on the advice of their SJA, whose experience and "military justice judgment" also may be at quite a low level. The necessary result of these factors is a troubling level of "disparate treatment."

The solution might include fewer prosecutors, or moving toward having only professional prosecutors. Both Canada and the United Kingdom have taken such steps. The solution should also include developing centralized, published, prosecution guidance, but this is only part of what needs to be considered. Studies must explore better administrative processes, and ways to ensure better and more ready access to judicial review of those administrative processes. The Cox Commission is absolutely correct in its sense that there is a fundamental need for a thorough study of the administrative discharge process, but that need for study extends to *all* of the other administrative processes affecting military personnel as well. Such studies also must be conducted by diverse and balanced entities, including members from well beyond the armed services themselves, if their findings are to be able to be viewed with credibility. Such in-depth studies should be undertaken with dispatch.[213]

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212. Such guidance is largely unknown in the U.S. military justice system, but does exist in other military justice systems, such as Canada's, see *supra* note 210 and accompanying text, and other criminal justice systems such as the federal civilian system, which contains a plethora of guidance from the Department of Justice to inform the judgment of the U.S. Attorney. *See, e.g.*, Dept. of Justice, United States Attorney's Manual, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html. Chapter 9 of the Manual relates to criminal matters.

213. The need for careful studies by balanced commissions of the entire administrative

> C. Feres Doctrine. The Commission was not chartered with the idea that our study would include matters such as the Feres Doctrine. However, given that it was articulated the same year that the UCMJ was adopted, and that many former servicemembers have been frustrated by its constraints on their ability to pursue apparently legitimate claims against the armed forces, many of which bear little if any relation to the performance of military duties or obedience to orders on their merits, the Commission believes that a study of this doctrine is warranted. An examination of the claims that have been barred by the doctrine, and a comparison of servicemembers' rights to those of other citizens, could reform military legal doctrine in light of present day realities and modern tort practice. Revisiting the Feres Doctrine would also signal to servicemembers that the United States government is committed to promoting fairness and justice in resolving military personnel matters.[214]

In 1950, the Supreme Court decided the case of *Feres v. United States*,[215] and this case and its progeny have wrought untold injustice in the half-century since. The case interpreted the Federal Tort Claims Act (FTCA),[216] under which the United States has waived sovereign immunity, and accepted liability for the tortious conduct of U.S. government employees. The Court determined that a member of the military is barred from collecting damages for injuries

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and judicial structure affecting military personnel is urgent. As one example, the Department of Defense attempted in 2000, and again in 2001, to enact legislation which would substantially modify and restrict the currently existing right of military personnel and veterans to seek judicial review of military administrative cases involving selection board actions. The legislation as proposed would also limit judicial relief to the sole and exclusive remedy of remand to the agency for further administrative action. *See* S. 2549, 106th Cong. § 506 (2000); S. 1416, 107th Cong. § 585 (2001). There is virtually no "legislative history" for the proposed legislation. See, for example, S. REP. NO. 107-62 (2001) where the three paragraphs devoted to the provision do not address the problem the legislation is designed to solve, or the anticipated result of the legislation. Both BADC, and the ABA, with the support of SCAFL, strenuously opposed DOD's attempts to change the law regarding judicial review of military administrative actions in the absence of adequate studies – and congressional hearings – to determine the need for any change, and to ascertain what change would be most appropriate. *See, e.g.*, Letter from James F. McKeown, President, BADC, to Hon. John W. Warner (Sept. 8, 2000); AMERICAN BAR ASSOCIATION, POLICY AND PROCEDURES HANDBOOK 338 (2000-01 ed.). A slightly modified version of the proposed legislation, retaining an administrative exhaustion requirement but restoring broader judicial remedies, was approved by Congress as part of the Department of Defense Authorization Bill. H.R. CONF. REP. NO. 107-333, § 503 (2001). Thus, this provision will become one more in a series of changes to the law affecting military personnel, UCMJ or otherwise, sought by DOD, and enacted by Congress, without studies, congressional hearings, or adequate – or in some cases any – documented legislative history. *See also supra* note 68. By accepting such unexplained legislative proposals and enacting them into law, Congress fails to fulfill its own responsibility as the body charged to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.

214. Cox Commission Report, *supra* note 4, § IV.C.

215. 340 U.S. 135 (1950).

216. 28 U.S.C. §§ 1346(b), 2671-2680 (1994 & Supp. V 1999).

under the FTCA whenever those injuries are "incident to the service."[217] The problem is that virtually *everything* a military member does, unless perhaps she is absent without leave or engaging in substantial misconduct, is incident to military service.

The FTCA itself contains no such limitation. The Act bars only liability on any claim arising out of the combatant activities of the military during time of war.[218] Nonetheless, the Supreme Court, in *Feres*, held that the family of a servicemember who died in a barracks fire which resulted from the government's clear negligence was barred from any recovery under the Act.[219] The ruling has since been applied to virtually all claims for damages by a military member, including injuries that had virtually no relationship to any military duty. For example, military prisoners who suffer cruel and unusual punishment in a confinement facility cannot recover damages, although civilian prisoners under identical circumstances can do so.[220]

The reasons articulated to deny military members damages under circumstances that have little relationship to any military duty include concern that such claims would affect the military senior-subordinate relationship and thus interfere with discipline, that there are adequate statutory compensation schemes for military personnel who are injured or disabled, and that it is inappropriate for military members to be subjected to a multitude of state tort law schemes, which would give different results, depending on the location of the tort. If such arguments ever had strong merit, they clearly seem not to today.

It is hard to fathom why a military member on leave who is injured in family quarters due to the gross negligence of the landlord, the government, in failing to maintain the furnace should not have a remedy in damages. The same is true for a member who, while away from the base in town on a pass, is struck by a government vehicle driven by a negligent civilian employee. Perhaps the most egregious case is the military member who is the victim of medical malpractice by a government doctor performing elective surgery in a military hospital in peacetime.

The courts are unlikely to overturn such a long-standing rule, notwithstanding that it works such a severe injustice on military personnel and their families. It is a matter for the Congress. It hardly seems to need more

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217. Feres v. United States, 340 U.S. 135, 138 (1950).

218. *See* 28 U.S.C. § 2680(j).

219. *See Feres*, 340 U.S. at 146.

220. *See, e.g.*, United States v. Sanchez, 53 M.J. 393, 398 (C.A.A.F. 2000) (citing Marrie v. Nickels, 70 F. Supp. 2d 1252 (D. Kan. 1999)).

study, however. The injustice of the doctrine is patently obvious and very well known. What is needed is legislation to overrule the *Feres* Doctrine.[221]

> D. Sentencing. The Commission believes the sentencing process at court-martial deserves further review. Suggestions for reform have ranged from the use of sentencing guidelines to making military judges responsible for all sentencing. An anomaly of the court-martial sentencing process is that a military accused may request to be sentenced by military judge alone only if he or she elects to be tried without court members. The Commission urges Congress to authorize a military accused to permit the military judge to pass on a sentence even if a trial has proceeded before court members. Further, the Commission recommends that serious consideration and study be given to making military judges responsible for all sentencing in all cases, and to granting military judges the authority to suspend all or part of a court-martial sentence. Such judicial powers are closely related to the Commission's suggestion that the military judges be given enhanced independence and authority to manage pretrial matters.[222]

The various calls for all sentencing to be done by military judges would be a change that goes to the heart of the military justice system, which has always prided itself on its "blue-ribbon panels" which are said to be better than other systems in that they so well reflect the military community's perception of appropriate sentencing. In a system where many accused persons are young (most are first offenders), with fine backgrounds untainted by civilian discipline problems or prior convictions, it would appear that the average sentences are well beyond what would be expected for similar crimes if committed by these same individuals in the civilian community, and tried in that civilian community as civilians. While harsher penalties for military crimes have frequently been argued and might well be justified,[223] such harsher sentences are much harder to justify for an offense which has no "service-connection" whatsoever.[224]

Many defense counsel would not favor a system which denied a military member the right to be sentenced by court-members, because those members might better reflect the cross section of military society, as influenced by civilian values, in their sentence. There is a perceived risk that a professional military judge might reflect to a greater degree an unduly "militaristic" perspective, and this risk is increased if that judge is also operating without tenure, without security of compensation, and without any sentencing guidelines.

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221. Legislation is pending in the House of Representatives which would be a limited repeal of the *Feres* Doctrine for medical malpractice in fixed medical facilities operated by the United States. H.R. 2684, 107th Cong. § 1 (2001).

222. Cox Commission Report, *supra* note 4, § IV.D.

223. *See, e.g.*, GILLIGAN & LEDERER, *supra* note 7, at 4-8 § 1-30.00.

224. *See, e.g.*, the discussion of United States v. Hutchinson, *supra* note 137.

However, there seems no risk in allowing a member to choose sentencing by a judge alone, even while seeking a panel to determine guilt or innocence, as has long been proposed by Judge Everett,[225] and as recommended by the Commission.[226] Allowing the military judge, when sentencing, to suspend whatever portion of the sentence is deemed appropriate, or to otherwise allow for other forms of probation and rehabilitation, is also an idea long discussed and long overdue for implementation. In this vein, punishments alternative to those now authorized in the MCM should be seriously considered.

> E. Instruction on conscientious objection. The armed forces' current management of conscientious objectors is hindered by inadequate trial instructions and administrative shortcomings, both of which the Commission believes should be addressed. Protecting the rights of conscientious objectors is a particular concern at court-martial, where an individual who has professed principled opposition to military service is judged by persons who have embraced that very service. Military judges should issue clear instructions explaining the legal status and responsibilities of a servicemember who has made a claim of conscientious objection but is awaiting a decision on his or her status. The services should also study ways to coordinate better the criminal and administrative processes in these cases, particularly when criminal charges are brought against a servicemember whose discharge for conscientious objection is pending.[227]

The infrequency with which issues regarding conscientious objectors arise in the court-martial process does not detract from their difficulty or importance. The Commission properly focused on the need to review both the administrative processes and the interaction of these processes with the court-martial process. This is another arena in which disparate treatment, a multitude of convening authorities, and the need for better prosecutorial guidance, all are factors.

> F. Jurisdiction of the military appellate courts. 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 <Fn 12>, the Commission believes that further study to clarify the jurisdiction of appellate courts should be undertaken. <Fn 13> However, if the authority of military judges were enhanced as suggested above in III.B., the question of appellate jurisdiction would begin to resolve itself, since military appeals courts clearly possess authority under the UCMJ to review the rulings of military judges at trial.

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225. *See* Hudson, *supra* note 115, at 88.

226. A provision in an early version of the DOD Authorization Bill would have implemented this recommendation. *See* H.R. 2586, 107th Cong. § 572 (2001). That provision was not included in the version of the bill adopted by the Congress. *See* H.R. CONF. REP. NO. 107-333 (2001).

227. Cox Commission Report, supra note 4, § IV.E.

> <Fn 12> See Clinton v. Goldsmith, 526 U.S. 529 (1999) (holding that the United States Court of Appeals for the Armed Forces did not have jurisdiction under the All Writs Act to prevent the Air Force from dropping a convicted servicemember from its rolls).
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> <Fn 13> Challenges to the jurisdiction of the court have proliferated since Clinton v. Goldsmith, creating uncertainty about the legitimacy of the court's much-needed authority over many aspects of military justice. See, e.g., United States v. White, 54 M.J. 469 (2001); United States v. Sanchez, 53 M.J. 393 (2000); United States v. Salahuddin, 54 M.J. 918 (A.F.Ct.Crim.App., 2001); Ponder v. Stone, 54 M.J. 613 (N.M.Ct.Crim.App., 2000); United States v. Kinsch, 54 M.J. 641 (Army Ct.Crim.App., 2000); United States v. Ouimette, 52 M.J. 691 (C.G.Ct.Crim.App., 2000).[228]

Since the decision in *Clinton v. Goldsmith*,[229] cited by the Commission, the government has argued in a number of the other cited cases that the military appellate courts' All Writs Act jurisdiction is limited to cases which fall within the courts' "actual jurisdiction," and that it does not extend to the military appellate courts' "potential," "ancillary," or "supervisory" jurisdiction. This argument has been soundly rejected by CAAF and by all but one of the courts of criminal appeals, and properly so.[230] Nevertheless, an integrated system is needed, which includes not only standing trial courts, but appellate courts with appropriate and adequately defined jurisdiction. Study and action to ensure such an integral system is clearly warranted.

> G. Pre-trial and trial procedures. The Commission received a number of suggestions concerning improvements to the actual trial process. For example, many submissions suggested that the Article 32 officer should be either a military judge or a field grade judge advocate with enhanced powers to issue subpoenas, and to make binding recommendations to dismiss charges where no probable cause was found. Others recommended increasing the number of peremptory challenges for both the government and the defense, permitting lawyer voir dire, granting military judges contempt power over both military personnel and civilians during trial, and allowing witnesses to be sworn by either military judges or clerks. The Commission takes no position regarding these suggestions, but believes that like many of the other issues presented, these comments are worthy of further study and full consideration.[231]

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228. Cox Commission Report, *supra* note 4, § IV.F.

229. 526 U.S. 529 (1999).

230. *See* Kevin J. Barry, Extraordinary Writs After *Goldsmith*, Presentation to the Judicial Conference of the United States Court of Appeals for the Armed Forces 4-14 (June 13, 2001).

231. Cox Commission Report, *supra* note 4, § IV.G.

These are but a few of the many suggestions which were made to the Commission.[232] It is indeed appropriate that further studies be initiated into all these ideas. As noted by the Commission, it is time for a new and thorough "bottom-up" review, similar to that conducted more than fifty years ago by the Morgan Committee.

V. Appendices

A. List of Topics
B. List of Witnesses
C. Submissions
D. Independent Judiciary Report of the Joint Service Committee on Military Justice
E. Bibliography on Reform and Military Law
F. Military Justice Websites[233]

CONCLUSION

The military justice system in the United States has been evolving for more than 225 years, and during the entire period, the tension between the desire of commanders to be able to use the system to ensure "discipline," and the goal of having courts-martial be true courts of justice, has lessened but has never been fully resolved. The UCMJ was a huge advance, marking the U.S. military justice system as a "model" in its day, well ahead not only of other nations' military justice systems, but also of civilian justice systems in the United States in a number of important areas. However, the world has moved forward significantly in the last fifty years, and particularly in the last decade there have been dramatic advances in what other nations view as "fair," and consider to be the minimum requirements of due process and fundamental fairness in military justice systems. Virtually every one of these changes resolves the "discipline versus justice" debate in favor of enhanced due process protections, and limits the potential for, and the appearance of, inappropriate command influence. While these other nations have recognized and have responded aggressively to changed circumstances and perspectives, the Cox Commission found that the United States has not kept pace with these developments.

The National Institute of Military Justice took a giant step forward by sponsoring the Commission on the Fiftieth Anniversary of the UCMJ, and that

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232. BADC alone submitted more than forty pages of suggestions, only a fraction of which were able to be addressed by the Commission. *See* BADC Recommendations, *supra* note 123.

233. Cox Commission Report, *supra* note 4, § V.

Commission, based on limited but diverse input, made dramatic and dynamic proposals, and has recommended substantial procedural and substantive changes to the UCMJ and the MCM. If implemented, the Commission's primary recommendations, standing alone, would help to restore a significantly higher level of systemic fairness to the U.S. military justice system, and help toward achieving again its former status as a model for military justice systems around the world.

The Cox Commission was a broad and comprehensive review, which showed the tip of the iceberg as far as what problems exist. To reach its full potential, however, the Cox Commission will need to be followed by larger studies, for the Cox Commission had neither the resources nor the access to accomplish the extended reviews needed. The breadth of the Cox Commission review now must be fleshed out with the depth which will be provided by a well-staffed and funded "bottom-up" review of the entire system. What is now needed is the kind of attention and effort which followed World War II, and the dedication to systemic review and reform which were evidenced in the appointment and functioning of the Morgan Committee.

Is the United States up to that challenge? One would hope so. But history would suggest that adequate further studies and reports are likely to be forthcoming only if Congress becomes directly involved, abandons the "inattention" it has shown for too long, and mandates studies to be performed by broadly constituted, diverse commissions, including substantial "outside" membership, in addition to full participation by the services and the Department of Defense. The Congress thereafter should hold hearings on the substantive and procedural issues bound to be raised. NIMJ and the Cox Commission have started the process; it now is up to Congress and the Administration to realize the potential of that beginning. American servicemen and women volunteer to put their lives on the line to defend constitutional rights for all others privileged to live in this great nation. It is somehow unseemly to think that, as a consequence, they must give up basic rights which are seen as essential not only for those not in uniform, but also for those who wear similar uniforms in our allies' armed forces.

It is a matter of right, of fairness, and of justice. General Ansell found the military justice system to be "un-American" in 1919,[234] and if he were here today he likely would be similarly offended by today's system. General Hodson opined in 1973 that the system was sufficiently flawed that it either should be changed or the American military should cease to operate a separate

234. *See* Ansell, *supra* note 21, at 1.

system of justice.[235] Almost none of his recommendations have yet been implemented, and the most important have not even been seriously considered. The U.S. military justice system today so far deviates from the norms of fundamental fairness that it is improbable that any UCMJ conviction could be upheld if measured against the minimum standards applicable to *every other* U.S. criminal justice system and virtually all of our allies' *military* justice systems. No system so deficient in fundamental fairness should be tolerated or allowed to continue to operate.

General Ansell and General Hodson, along with many others, are watching. The question is whether we will measure up to the standards they have set. *They* may have been generations ahead of their time, and many agree they were. But Judge Cox and the others on the Fiftieth Anniversary Commission would hardly claim such prescience. The test is for the rest of us to respond to the vision long ago set forth, and now embodied in the findings and recommendations of the Cox Commission. General Hodson's challenge to his generation was "abolish or change."[236] It is our challenge as well. As recommended by so many, most recently by the Cox Commission, we should, we *must*, choose change.

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235. *See* Hodson, *supra* note 30, at 35-40.
236. *See id.*