

Military Historian Comments on Removing Disposition Authority from Commanders

I. Historical Evolution of Commander's Role in U.S. Military Justice

- A. Colonel (Ret.) Fred Borch, Regimental Historian, U.S. Army:** [T]he military's criminal legal system, just as the system that grew up in the Navy, was simply part of an overall effort to give a tool of discipline to commanders to accomplish the mission.

Congress empowered commanders starting with General Washington in The Revolution and they empowered--Congress empowered George Washington to win The Revolution and so, discipline should be seen, at least historically and the need for a separate military justice system, as part of the commander's tool to accomplish mission success.

Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 188-89 (June 27, 2013).

- B. COL Borch:** [T]he military criminal legal system is simply another aspect of the disciplinary effort for which we empower commanders and demand accountability, and so we talk about resource discipline, light and noise discipline, supply discipline, and because the commander is responsible for everything that happens in his or her command, discipline is simply part of achieving that. And so, the court-martial system grows up as a way for commanders to administer discipline in their commands, and that is why the commander is at the root of the system and remains at the root of the system, although what I'm going to talk about now is how the commander's role in the process has changed.

So, from the time that General Washington took command of the Continental Army in June of 1775 until World War I, the system was pretty static, both in the Army and in the Navy. Commanders convened or started courts-martial, they chose the juries or the panels that heard the cases, and then after the results are in, the commander decided what to do. Do I approve this finding? Do I approve the sentence? Or in the old days, commanders even had the power to send the case back to the court-martial because the commander was unhappy with the results. No, you don't seem to understand, I didn't want an acquittal, I wanted a finding of guilty. This is really true.

But the problems were, as you see on my slide, there's an arbitrary action and even capricious actions on the part of commanders because all commanders are different, a lack of uniformity and prosecutions. Some commanders thought this offense was important and struck at the very heart of good order and discipline and other commanders didn't, and there was wide sentence disparity. But in the system prior to World War I, all courts-martial started with the commander who began it and ended with that commander. There was no appellate process, no review process. What really changed the system was the Houston Riots of 1917 and for those of you who know your history, African-American soldiers in the 24th Infantry Regiment were stationed in Houston. They were very much the victims of racial discrimination and mistreatment on the part of the locals, and after they heard one day that a member of their unit had been shot and killed by a white policeman, they rioted.

It wasn't true. In fact, no one had been harmed, but the soldiers didn't know this. They took their weapons, they marched into Houston, and over the next couple of hours, they killed 15 white citizens, policemen, and other bystanders.

The Army sent in some units to establish good order and the soldiers who were involved in the riots were court-martialed at Ft. Sam Houston, Texas, in 1917. Sixty-three of the soldiers were represented by one defense counsel. After a trial that lasted about a week, they were found guilty, and the following day, 13 were hanged. This caused a huge uproar in the country because there had not even been any time for notice of the convictions to get to Washington, DC, much less a chance for there to be any clemency. And as a result of this terrible incident, a split occurred between the two top lawyers in the Army, Samuel Ansell and Enoch Crowder.

Samuel Ansell, a West Point graduate and a graduate of the University of North Carolina's law school said, "We can't have a system like this anymore. We've got to have some sort of appellate process." But Crowder said, "Well, no, we don't need an appellate process. The system works good as it is. And maybe this was not a very good result, but after all, you trust us as commanders to lead troops into battle and you trust us with the lives of your sons and daughters. Trust us. The system as it exists is okay."

Congress, however, did not accept this, and this is the beginning of the judicialization of the process, taking courts-martial, which were very much tools of the commander, and beginning to make them look more like courts.

Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 190-94 (June 27, 2013).

- C. COL Borch:** [I]t's really in 1950 with the enactment of the UCMJ that judicialization comes into force. We create a Uniform Code of Military Justice--for the first time the word justice is in there as opposed to the Articles of War, which is what we called it before that--and for the first time we're saying, all right, the commander's role is important, but we need to improve due process for the accused.

And a lot of this arises out of the late 19th century, early 20th century ideas of Oliver Wendell Holmes and realism, law is what judges say it is, progressivism, reform is good, and so what we have is Article 36 of the Code, for example says, that courts-martial are to mirror to the greatest extent practicable, what's happening in U.S. District Court. And the result of this is that today, if you go into a court-martial, it pretty much looks like a trial before a Federal District Court judge.

Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 194-95 (June 27, 2013).

- D. COL Borch:** [F]rom [a] commander's disciplinary tool in the days of George Washington and General Crowder, to a system today of both discipline and justice, all the changes that have been made have increased due process for the accused. Many of the proposed changes [today] are shifting away from due process or concerns for the accused and instead focusing on victims. What has happened as we've evolved in the system, Your Honor and members of the panel, is that in order to create due process for the accused, we have, in fact, restricted the role of the commander in the process.

We're very careful about unlawful command influence. The commander starts the process and he's involved at the end of the process. He or she does still select the panel members, but the days when the commander could say, well, I'm not happy with this result, go back and do it again, those are over.

The commander ultimately has the real power because only the commander can start the process, courts-martial or not, courts that have vitality before a commander starts the process, and only he or she can start it.

So, the question is, if you look ahead as a historian is, are we going to do future restriction in the process, are we going to remove the commander from the system, are we going to remove the commander for some offenses, these are all questions that are unanswered, but at least looking back through history, would suggest that it would be a radical departure from how the system has grown and developed. And I'm always concerned with changes that may unleash the Law of Unintended Consequences.

Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 201-02 (June 27, 2013).

II. Historical Evolution of Commander's Role in International Military Justice Systems

A. Question from VADM (Ret.) Houck: The second question goes--and last question-- goes to your comment about unintended consequences. Do you have a sense of what those would be? Or do you raise that as just a general proposition? *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 204 (June 27, 2013).*

1. Response from Mr. Borch: I am very concerned about proposals to remove the commander from the system for some offenses for several reasons. If I believe that removing the commander might solve the problem, that would be one thing, but since most of the proposals are to put lawyers in charge of making these decisions, I can tell you as someone who is a lawyer and who practiced for 25 years before I made a career change, that asking a lawyer to make the decisions that we now leave up to the commander is not going to fix the problem, and I don't meant this to sound flip, Admiral, but all you'd be doing is rearranging the chairs on the deck of the Titanic. You're not going to prevent what's coming.

Commanders can best solve this problem in the system as it exists. My only other point would be that sometimes I'm asked as a historian, well, have you looked at what other countries are doing and other nations are doing? And I have, and I've done some study of that, and my Law of Unintended Consequences would be that, albeit anecdotally, where the commander has been taken out of the system for some decision making, he or she quite naturally no longer has much interest in what is going on in that area, and that's quite natural. Commanders are responsible for good order and discipline, for what happens in their command, but if you tell a commander, this is not your responsibility anymore, we've turned it over to lawyers, the commander is then perhaps not so engaged in what's going on in the system.

Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 204-05 (June 27, 2013).

B. Question from Prof Hillman: Do you have an historical example of that happening, either here or in another country? *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 205-06 (June 27, 2013).*

1. Response from Mr. Borch: Yes, Canada. The Judge Advocate General in Canada has said that he's found that his commanders are now quite disengaged from the process because they're no longer involved in the decision-making. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 206 (June 27, 2013).*

C. Question from Prof Hillman: From the process of what exactly? They're disengaged from the criminal part of disciplinary action or disengaged from the morale and sort of good order of their troops? *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 206 (June 27, 2013).*

1. Response from Mr. Borch: They're certainly still responsible as commanders for good order and discipline and morale and the health and welfare of their commands, but because of certain rulings from the highest courts in Canada, commanders have been restricted in actions that they can take in convening courts-martial and in approving those sentences and findings that we don't have in our system. And so the Judge Advocate General in Canada has said that they are, because of their removal, less engaged. But I think that's quite natural. If you're told a lawyer is making these decisions now, then you're probably not going to be as interested. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 206-07 (June 27, 2013).*

D. Question from COL (Ret.) Cook: Based on your research, and I don't know how far you've gone into the removal of command authority from the international arena, from the different commanders, why did they move it? I mean, in the cases that we're looking at now, it appears that part of the impetus is dissatisfaction with how certain categories of cases may be responded to or disposed of. Is that the same reason it was removed command authority in Canada or other countries? Or why did they remove it? *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 217 (June 27, 2013).*

1. Response from Mr. Borch: In the case of our closest allies or some of our closest allies, the British and the Canadians, they were forced to modify their systems because of court cases by their highest courts, and in the case of the British, it's my understanding it's the European Court of Human Rights and some other appellate courts that have overarching authority who instructed, in this case, the British to modify their system because in the case of the British, the European Court said, commanders cannot be part of the system, it's violating the Convention on Human Rights. And so, that's why they've made the changes that they've made. It was externally driven in both cases. . . . It is all accused focused. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 217-18 (June 27, 2013).*

E. Question from COL (Ret.) Cook: so there's a lack of due process or whatever within their system, so they removed it from that. . . . Which doesn't appear to be the same as far as the due process for the accused in the American military justice system. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 218 (June 27, 2013).*

1. **Response from Mr. Borch:** Correct. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 218 (June 27, 2013).*

F. **Question from Ms. Holtzman:** If this is a matter that's been decided by the court under the Human Rights Convention, does that mean all of the military subject to the Human Rights Convention in Europe are--may no longer have commander involvement in the military? In the courts-martial system, in every single military? *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 219 (June 27, 2013).*

1. **Response from Mr. Borch:** Correct. The European Court of Human Rights made that decision. I believe, however, at the time, that the only system that had the commander involvement to the same extent, say, we did, was the British. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 219 (June 27, 2013).*

III. Evolution of Commander Authority & U.S. v. Solorio

A. **COL Borch:** The last case that I want to talk about, because it's a very important one, and actually fits into your work here, Your Honor and members of the panel, and that's the Solorio case. For many years, for almost 200 years, the only thing that was important about the trial of a service member was his or her military status. If you wore a uniform, then we had both in personal and subject matter jurisdiction over you at a court-martial, but in 1969, Justice Douglas delivered a very important decision that turned the military justice world upside down, and that's O'Callahan v. Parker. And Justice Douglas said soldiers and sailors, airmen, Marines, Coastguardsmen, are deprived of their right to an indictment by a grand jury under the Fifth Amendment and deprived of a real jury trial under the Sixth Amendment, and I'm not happy with this, so I'm going to convince the rest of the Court, and the Court ruled that you could not try a service member at a court-martial unless you showed service connection between the offense and military good order and discipline.

And at the time the case was decided, the irony is that only just recently had Congress passed this Military Justice Act of 1968 creating the military judge and taking this last major step towards civilianization, which included more lawyers in the process. But from 1969 until the Solorio case in '87, you had to plead some connection between your offense and the military. So, as a general rule, if it happened off-post, you probably didn't have jurisdiction. . . . [T]he Supreme Court in Solorio overrules O'Callahan v. Parker and replaces the old standard of military status is all you need for jurisdiction.

Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 197-99 (June 27, 2013).

B. **COL Borch:** Solorio is certainly significant for restoring this military status, but it also shows that the Supreme Court, in 1987, was satisfied that enough changes had been made to the military justice system that it could be, in this case, trusted to deliver justice to an accused, and at the same time, the Supreme Court was well aware of the role of the commander in the system at the time, and the decisions made by the commander in getting the Solorio case to trial, because Solorio could have had his offenses disposed of in a state court, now there was overlapping jurisdiction, but Solorio continues to be a very important case and one that seems to, at least in my belief as a historian, endorse the Supreme Court's view that the system is sufficiently mature that it protects the due

process rights of the accused. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 199-200 (June 27, 2013).*

C. Question from Prof Hillman: The last change that you sort of note in the U.S. military justice system is the Solorio case from 1987 and the last sort of legislative change is in 1983. We're a ways removed from that and there have been a lot of changes in the military itself in demographic respects, for instance, since that point in time. You don't see any--the changes that you put out are largely driven by the Judge Advocates who were in the services rather than by the soldiers who were serving, the members of the military themselves, the sort of missions that they were undertaking or the responsibilities they had, so you don't have a sense that the evolution stopped then in the '80s, really, and hasn't--do you see other changes since that we should be sort of grappling with? *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 207 (June 27, 2013).*

1. Response from Mr. Borch: Well, we certainly have continued to make changes, Professor Hillman, every time there's a change, say, when the federal court system on Rules of Evidence, we will update our rules, but your point is well taken.

The past changes have been very much driven internally by the services trying to judicialize and civilianize. I guess my comment would be, I think change is good, I think the system can be improved. I think reforms are necessary and I think history shows that change and reform is coming.

The question--the ultimate question is, are we making changes that in some way, using the Law of Unintended Consequences, will harm the rights of the accused? And our focus, for many years, as lawyers has always been, and certainly as legal historians, on increased due process for the accused. So, my concern would always be, are reforms being driven that even though well intentioned and maybe good, are going to harm the accused? And my other point would be, are the reforms going to somehow, if they take the commander out of the system, then I think you get to the root question is, you don't need a separate system if the commander is not in it.

Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 207-09 (June 27, 2013).

D. Question from Prof Hillman: You just said something really important that you're worried the unintended consequences would be, in fact, to diminish the rights of the accused in the criminal process, and that's something the military justice system has been very protective of. Isn't there a risk now, given all the emphasis on aggressive prosecution of sexual assault, that if we keep the authority to prosecute in command, that the rights of the accused will be undone by the fact that commanders feel obliged to prosecute cases that actually shouldn't be brought to trial? *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 209 (June 27, 2013).*

1. Response from Mr. Borch: I don't know. You're asking me to look into the future and I would only say that possibly, but I think that these are--the commander's role in the system and the importance of the commander's decision making in the system as part of this disciplinary effort, I believe historically, should be retained. But I

agree that change is coming. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 209-10 (June 27, 2013).*

IV. Historian Perspectives on Proposals to Reduce Commander MJ Authority

A. Question from Judge Jones: You know, I think the principle proposal is to take the commander out for certain--I guess it's--let's just say felonies, leaving other lower offenses within the control of the commander, but basically simply swapping out the commander for the JAG lawyers. . . . From what little I've seen, and I certainly haven't seen everything that I will and should, it looks as though the decision making would be very little different if it's left in the control of the JAG lawyers. They're advising every step of the way as it is, and I wonder what you think about that. . . . Would it be vastly different? *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 210 (June 27, 2013).*

1. Response from Mr. Borch: I would say, as a historian, your observation is correct that commanders do not make decisions in a vacuum, in the Navy, in the Army, in any of the services, and their Judge Advocates are involved at every step of the way, and I think that's absolutely true. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 210-11 (June 27, 2013).*

B. Question from Judge Jones: So, I guess what I'm saying is, I would assume the Judge Advocates would continue to protect the accused, because I think they're doing it now, with the commanders, but I suspect they would continue to do it without them. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 211 (June 27, 2013).*

1. Response from Mr. Borch: If past history is any guide, that's absolutely true. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 211 (June 27, 2013).*

C. Question from Mr. Bryant: The Chief of Police or the Sheriff at a jurisdiction is not the one, even though he's running a paramilitary organization, who decides whether or not his officers or his deputies are going to be prosecuted for crimes. It is the district attorney in most cases or some other entity, or to take a less analogous situation, but it's got the same parameters of what you're talking about, the Mayor or the city manager is not the one who decides whether a city employee is going to be prosecuted. It's another entity that's also responsible to, sometimes, the very Mayor, sometimes not, depending on the jurisdiction. But why does that work in the civilian world that we don't let the Chief of Police decide which officers are going to be prosecuted criminally and which aren't, we don't let the Mayor and the city manager decide which of their city employees are going to be prosecuted and which aren't? *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 211-12 (June 27, 2013).*

1. Response from Mr. Borch: Well, I do think that militaries, and particularly the American military, is fundamentally different in the way it's organized and what its mission is than, say, a police department, but I certainly agree with you that we have decided, as a society, that District Attorney is best able to make these decisions. I guess my only answer back would be, it's Congress that has said commanders are empowered under the UCMJ to start these cases, carry them through, and finish them, and I am a big believer in the powers of Congress and in the wisdom of

Congress, as a historian. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 213 (June 27, 2013).*

D. Question from Ms. Holtzman: I'm curious about the Canadian example that you raised because I still don't understand how you--what you mean by the fact that the commander who's taken out of the judicial process does--no longer feels involved. Well, suppose the commander no longer feels involved in the judicial process. Well, let's assume that that is correct. Will that affect his or her ability to lead the troops, to be a commander in every other respect including dealing with crime prevention, support of the troops, development of morale? *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 213-14 (June 27, 2013).*

1. Response from Mr. Borch: Historically, I think it will. Traditionally soldiers look to the commander as being in charge and responsible for health and welfare, good order and discipline, safety in the command, and when decisions are made outside the command structure, historically at least, commanders have felt that they were not empowered. I can tell you, for example, during the Revolution, George Washington complained bitterly that he was unable to begin a court-martial without getting prior approval from Williamsburg and the Assembly sitting in Virginia and he said, this was before he joined the Continental Army, he said, "I don't have time to wait for a decision by the legislative body. I need the power now as a commander to be able to convene courts-martial and carry these situations through." And certainly if you're talking about American soldiers, sailors, airmen, Marine, Coastguardsmen deployed overseas, then the power of the commander becomes even more important. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 214-15 (June 27, 2013).*

E. Question from Ms. Holtzman: What is the difference between having your powers shorn in some respects and having your powers with regard to the military--the court-martial system, removed entirely. How will that affect the extent to which your troops will respect and follow your lead? *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 216 (June 27, 2013).*

1. Response from Mr. Borch: I think that the commander's power over 230 years in the process has been restricted as a natural consequence of giving more due process to the accused, and I expect that overtime, we will continue to make changes that we think are necessary to give more rights to the accused. But I do think, at least historically, the commander is the one who's at the root of the system and he needs or she needs that system as part of a greater disciplinary effort to achieve mission success. *Transcript of Testimony, Response Systems Panel ("RSP") Public Meeting at 216 (June 27, 2013).*