

# THE IMPACT OF MILITARY JUSTICE REFORMS ON THE LAW OF ARMED CONFLICT: HOW TO AVOID UNINTENDED CONSEQUENCES

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## ABSTRACT

This article considers efforts to civilianize the military justice systems in Canada, the United Kingdom and other countries and how these reforms potentially impact the role of the military commander with respect to the commander's law of war obligations. One consequence of the "civilianization" of the military justice systems in Canada the United Kingdom and elsewhere potentially impacts the commander's own personal criminal liability. The doctrine of command responsibility holds that a commander may be criminally liable for the law-of-war violations committed by the forces under his command if a commander fails to prevent, suppress, or punish law-of-war violations that he either knew about or was reckless or negligent in failing to notice, he can be punished as if he committed the underlying offenses.

This doctrine is based on the commander's unique position in a military organization. The commander is the focal point of military discipline and order, and it is the commander's responsibility to maintain command and control of his subordinate forces. It is the commander who, by use of all the resources and authority available to him, ensures that his forces do not violate the laws of war. If those forces do, it is in large part attributable to the commander's failings.

If, as a result of the civilianization of military justice, commanders lose a significant portion of the disciplinary authority they have traditionally held, do they no longer occupy that critical position of responsibility over the forces under their command? If they have lost that authority, to whom does the law now turn to for accountability? Does the commander, who has lost some of his authority, lose the ability to maintain discipline through the military justice system, and does he find himself in a situation where he is given responsibility to maintain discipline and control without having sufficient authority to meet that obligation? This article raises and addresses these important questions and it provides a framework for considering military justice reforms that preserve the commander's critical role in law of war compliance.

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## INTRODUCTION

It is not an overstatement to say that we are in the midst of a military justice revolution. In any examination of military justice with an eye towards reform, there is the notion that the traditional military justice system no longer works well. This notion stems from the belief that this system needs a reformation in order to be in line with society's broader understanding of what constitutes a fair system of justice. Minor modifications or a tweaking of the system is not sufficient. To bring military justice into the modern age, many reformers have called for major overhauls and fundamental structural changes to the military justice system as a

whole. These calls for reform have been particularly prevalent in countries with a common law tradition. In the past several years many countries, including the United Kingdom, Canada, Australia, and New Zealand, have each undertaken significant reforms within their respective military justice systems.

If there is one overarching theme to these reforms, it is a clear trend towards “civilianizing military justice.” By that I mean reforming military justice so that it mirrors the civilian justice system in that particular country to a much greater degree. There are a number of influences driving this reform. The most important of these influences come from the human rights community and from those who believe that a division of authority is essential in order for any judicial system to be considered fair.

The human rights focus on military justice has largely been comparative. Reformers in this camp primarily examine the procedures and protections available in a given military justice system and compare those procedures with their respective civilian systems. To the extent that the procedures in the military differ and seem to provide less protection, human rights advocates contend that these systems should be overhauled. Much of the criticism does not focus on individual cases or specific examples of injustice within the military justice system. Rather, the assumption is that if these processes differ and seem less protective of individual rights than the protections which exist in the civilian system, then military justice is inherently unfair and must be brought in line with the civilian system.

Other reformers gauge the fairness of a particular military justice system by focusing on how authority is divided within the system. For example, are the key decisions on the disposition and adjudication of cases given to a single authority? Those who focus on these questions can be referred to as separation of powers reformers. They are critical of military justice systems that give a single office, typically the military commander, the absolute authority to decide which service members to bring to trial, what offenses to charge, and the final disposition of the case. Like the human rights reformers, separation of power reformers have not focused on proving injustices in specific cases, but instead have argued that a system where so much power rests in one office is inherently unfair and therefore must change.

Over the past several years, influence from the human rights reformers and the separation of powers reformers have converged and both camps have identified several unique aspects of traditional military justice systems for reform. One such aspect is lack of tenure for military judges. In most traditional military justice systems judges have been drawn from the ranks and have been appointed to serve on military courts on an *ad hoc* basis. Military judges traditionally do not enjoy any special tenure protection and can be removed or reassigned at any time. The concern is that in such a system, military judges will conform their decisions to what they believe are

the desires of the commander who both appointed them and convened the military court in order to ensure favorable professional advancement.

Another area of focus for reformers is the selection process of the military members empanelled to sit on courts-martial. In many traditional military justice systems, the military commander personally selects the military officers who will sit in judgment of the accused service member. Because this is the same commander who determines that a service member should face a court-martial, the concern is that the commander will select the members who will reach the outcome that the commander desires, regardless of the facts presented at trial. Additionally, there has been some concern that the commander will assert undue influence over the members of the court-martial.

A third area of criticism is the lack of a robust appellate process. In traditional military justice systems, an appellate process is either non-existent or very limited in scope. Often, the appellate authority is the same commander that convened the court-martial. Appeals outside of the chain of command are either not allowed, or are so limited in scope that the convicted service member has no real redress for errors or injustices that may have occurred in that service member's court-martial.

There has been much written on each of these specific aspects of military justice reform over the past several years. However, one overarching aspect of each of these and most other reform efforts has been the central role of the commander within traditional military justice systems. As the court in *Généreux* noted about the then-existing military justice system in Canada, there must be institutional independence with respect to matters of administration that relate directly to the tribunal's judicial function, such as assignment of judges, sittings of the court, and court lists.<sup>1</sup> In that case, the Judge Advocate General who appointed military judges on an *ad hoc* basis was also an agent of the executive branch, leading the court to conclude that the appointment process lacked sufficient independence from the executive.<sup>2</sup> The *Généreux* court disapproved of a system that allowed the convening authority to determine when a General Court-Martial would take place, to appoint the members who would hear the case, to decide how many members would hear the case, and to appoint the prosecutor who would represent the executive at the court-martial.

The focus of this paper is on the overarching theme – the role of the military commander in the traditional military justice system. The first part of the paper looks at the reforms which have taken place in the United Kingdom, Canada, and Australia. Next, the paper examines the role of the commander in the United States military justice system and why the United States gives the commander such a central role in military justice. This section also highlights some of the calls for reforming the U.S. system. The

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1. R. v. *Généreux*, [1992] 1 S.C.R. 259, 286 (Can.).

2. *Id.* at 302.

next section discusses the obligations and responsibilities that a commander has under the law of armed conflict (LOAC) to ensure that their forces comply with the laws of war. The paper next asks whether the reforms which significantly reduce the role of the commander with respect to military justice have adequately considered the commander's obligations under the LOAC. In the last section, the paper identifies those features of military justice where the commander's continued involvement is essential if the commander is to meet his LOAC obligations. This section also identifies those areas where reforms can and should be made without diminishing the commander's essential functions within the military institution itself.

#### I. RECENT EFFORTS AT REFORMING THE ROLE OF THE MILITARY COMMANDER

Reformers have accomplished significant structural changes to many military justice systems, particularly in countries with a shared common law tradition. Nowhere have these changes been more significant than in Canada and the United Kingdom. There are also ongoing efforts for reform in Australia, as well as continued calls for reform in the United States. While these are certainly not the only countries undergoing military justice reforms, they provide useful examples for this discussion. Some of the reform efforts have gone beyond changing the role of the military commander, but the commander's role in military justice remains at the heart of most reforms and it will be the focus of this section.

##### A. Canada

The changes in the Canadian military justice system came as a result of the Supreme Court of Canada's opinion in the case of Michel Généreux.<sup>3</sup> Généreux was tried by a military court-martial where he was convicted of one count of possessing illegal drugs, two counts of possession for the purpose of trafficking, and one count of being absent without leave.<sup>4</sup> He was sentenced to fifteen months imprisonment and given a dishonorable discharge from the Army.<sup>5</sup>

Généreux first appealed his conviction through the military appeals system and then through the Canadian federal courts. The case reached the Supreme Court of Canada on the following issues relevant to this discussion:

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3. *See id.* at 259.

4. *Id.* at 272.

5. *Id.*

1. Do sections 166 to 170 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, and the Queen's Regulations and Orders, inasmuch as they allow an accused to be tried by General Court Martial, restrict the accused's right to a fair and public hearing by an independent and impartial tribunal guaranteed by sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*?
2. If the answer to question 1 is yes, are they reasonable limits in a free and democratic society and therefore justified under section 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?
3. Does section 130 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, restrict the right to equality protected by section 15 of the *Canadian Charter of Rights and Freedoms* in that it confers jurisdiction over a person subject to the *National Defence Act* for offences pursuant to the *Narcotic Control Act*, R.S.C., 1985, c. N-1, as amended, thereby depriving the accused of the procedure normally applicable to such offences?
4. If the answer to question 3 is yes, is it a reasonable limit in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?<sup>6</sup>

In taking up these issues, the court first noted that the Canadian military justice system has a purpose beyond just maintaining discipline and integrity in the armed forces.<sup>7</sup> The Canadian National Defence Act also makes any act or omission punishable under the Canadian Criminal Code or Act of Parliament an offense under the Code of Service Discipline.<sup>8</sup> Thus, the Canadian military justice system also serves one of the purposes of ordinary criminal courts—to punish wrongful conduct which threatens public order and welfare.<sup>9</sup> Because the military justice system shares a

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6. *Id.* at 279–80. Section 1 of the Charter provides: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.), available at <http://laws.justice.gc.ca/en/charter/>. Section 7 of the Charter provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” *Id.* at § 7. Section 11(d) of the Charter provides: “Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” *Id.*

7. *Généreux*, 1 S.C.R. at 281.

8. *Id.*

9. *Id.*

purpose with its civilian counterparts, the court held that constitutional principles are applicable to the military court system.<sup>10</sup>

In Généreux's appeal no evidence was proffered, and the court did not consider any evidence suggesting that the court-martial hearing his case was actually biased.<sup>11</sup> Instead, the court sought to determine whether a reasonable person would have been satisfied that the court-martial system existing at the time was independent.<sup>12</sup> According to the court, in order to be independent, "[t]he status of the tribunal . . . must guarantee . . . freedom from interference by the executive and legislative branches" as well as other external forces.<sup>13</sup>

The court set out three specific criteria to evaluate the independence of the military court-martial system. The first criterion that the court examined was "security of tenure."<sup>14</sup> According to the court, "[w]hat is essential is that the decision-maker be removable only for cause."<sup>15</sup> Second, the "decision-maker [must] have a basic degree of financial security" so that their salary and pension are not subject to arbitrary interference in a manner that could affect judicial independence.<sup>16</sup> Finally, there must be "institutional independence with respect to matters of administration that relate directly to the . . . tribunal's judicial function . . . [such as] assignment of judges, sittings of the court and court lists."<sup>17</sup>

The court examined the structure of the court-martial system in light of these standards. In doing so, the court identified the responsibility placed on the commander for matters of discipline. The court also considered the role of the judge advocate in a general court-martial. The judge advocate is a legally trained officer with several years of experience and is appointed from a pool of military judges to preside over the court and function as a trial judge.<sup>18</sup> In Canada, the judge advocate, by historical practice, is a member of the Canadian military and serves on an *ad hoc* basis. The judge advocate is appointed to the general court-martial by the Judge Advocate General upon the recommendation of the Chief Judge Advocate.<sup>19</sup>

According to the Généreux court, it was this system of appointing military judges to general courts-martial which violated Section 11(d) of the Canadian Charter of Rights and Freedoms.<sup>20</sup> The Judge Advocate General who appointed the military judges on an *ad hoc* basis was an agent of the

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10. *See id.* at 281-82.

11. *See id.* at 284.

12. *Id.* at 287.

13. *Généreux*, 1 S.C.R. at 283-84.

14. *Id.* at 285.

15. *Id.*

16. *Id.*

17. *Id.* at 286.

18. *Id.* at 299-301.

19. *Généreux*, 1 S.C.R. at 301-02.

20. *Id.* at 302.

executive, and the appointment process lacked sufficient independence from the executive.<sup>21</sup> In addition, because the appointment was done on a case by case basis, there was no objective guarantee that a military judge's career would not be affected by his or her past decisions.<sup>22</sup>

The court next looked at the financial security of the members participating in courts-martial. At the time of Généreux's trial, "[t]here were no . . . prohibitions . . . against evaluating an officer on the basis of his or her performance at a [g]eneral [c]ourt-[m]artial."<sup>23</sup> Likewise, there was no prohibition on evaluating a judge advocate based on his or her performance at a general court-martial.<sup>24</sup> According to the court, a commander could reward or punish members who served on a court-martial by either commenting favorably or unfavorably on their performance.<sup>25</sup> Because those performance evaluations had a significant impact on future promotions and assignments, the court held that a reasonable person could conclude that members of a court-martial lacked sufficient financial security and independence from the commander.<sup>26</sup>

Lastly, the *Généreux* court examined the broader characteristics of the general court-martial system and determined that there was insufficient institutional independence to satisfy the requirements of Section 11(d) of the Canadian Charter.<sup>27</sup> The court disapproved of a system that allowed the convening authority to determine when a general court-martial would take place,<sup>28</sup> appoint the members who would hear the case,<sup>29</sup> decide how many members would hear the case,<sup>30</sup> and appoint the prosecutor who would represent the executive at the court-martial.<sup>31</sup>

After noting these deficiencies, the court then analyzed whether any exception to the requirements of Section 11(d) of the charter was justified under Section 1. Here, it provided an analysis that relied on a balancing test previously set out in *Regina v. Oakes*.<sup>32</sup> Under this test, limitations on constitutional rights must be justified by important and overriding governmental concerns.<sup>33</sup> Next, the means chosen to restrict the rights must be reasonable.<sup>34</sup> Applying this test, the court recognized again that one of the primary purposes of the separate military justice system was to maintain

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21. *Id.* at 303-04.

22. *Id.* at 304-05.

23. *Id.* at 306.

24. *Id.*

25. *Généreux*, 1 S.C.R. at 306-07.

26. *Id.* at 307.

27. *Id.* at 309-10.

28. *Id.* at 309.

29. *Id.*

30. *Id.*

31. *Généreux*, 1 S.C.R. at 309.

32. *Id.* at 312-13; *see also* *R. v. Oakes*, [1986] 1 S.C.R. 103, 105-06 (Can.).

33. *Oakes*, 1 S.C.R. at 105-06.

34. *Id.* at 106.

a high level of discipline, an important interest.<sup>35</sup> However, without further analysis, the court held that a military tribunal that does not comply with the requirements of Section 11(d) of the Charter would only satisfy the second prong of the *Oakes* test in the most extraordinary circumstances, such as a period of war or insurrection.<sup>36</sup>

The *Généreux* holding invalidated many of the provisions of the Canadian military justice system relating to the commander's role. In response, Canada rewrote much of its military code.<sup>37</sup> In fact, revisions to the military code began while the *Généreux* case was making its way through the appellate process. Changes that had already occurred by the time *Généreux* reached the Canadian Supreme Court included limited tenure for military judges, allowing them to remain in that position for two to four years.<sup>38</sup> Further, military judges are no longer appointed to a specific case by the Judge Advocate General; instead, they are appointed by the Chief Military Trial Judge.<sup>39</sup> In addition, an officer's performance as a member of a general court-martial can no longer be used to determine his qualification for promotion or rate of pay.<sup>40</sup> In dicta, the court in *Généreux* commented favorably on these changes.<sup>41</sup>

However, the most significant aspects of the role of the convening authority were unchanged when *Généreux* was decided.<sup>42</sup> Changes following *Généreux* altered the traditional role of the military commander so that commanders could no longer conduct a summary action on a case which they have personally investigated.<sup>43</sup> While a commander still has the authority to bring charges, the military police also has independent authority to investigate serious and sensitive cases, and it too can bring charges independent of the military commander.<sup>44</sup> The accused now has the right to elect trial by court-martial in all but very minor cases.<sup>45</sup> Summary court jurisdiction has also been limited to minor offenses.<sup>46</sup> The authority to appoint prosecutors to individual cases has been given to the newly created Director of Military Prosecutions (DMP).<sup>47</sup> The DMP, not the commander, is now "responsible for . . . referring . . . all charges to be tried by court-

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35. *Généreux*, 1 S.C.R. at 313.

36. *Id.* at 313.

37. See Jerry S.T. Pitzul & John C. Maguire, *A Perspective on Canada's Code of Service Discipline*, 52 A.F.L. REV. 1, 9 (2002).

38. *Généreux*, 1 S.C.R. at 305.

39. *Id.*

40. *Id.* at 307.

41. *Id.*

42. Pitzul & Maguire, *supra* note 37, at 10.

43. See National Defense Act, R.S.C. 1985, c.N-5 (Can.).

44. See *id.*

45. *Id.* § 162.1.

46. *Id.* § 164(1).

47. *Id.* § 165.11.

martial.”<sup>48</sup> The DMP determines the type of court-martial that will hear the charges.<sup>49</sup> Court members are now selected by a Court-Martial Administrator at the request of the DMP.<sup>50</sup> In most cases, the military commander is required to refer the case to the DMP along with a recommended disposition.<sup>51</sup> Commanders still have the authority not to proceed with a case, but they no longer have the jurisdiction to dismiss a case.<sup>52</sup> In cases where the commander has decided not to proceed with a charge, military police can refer a charge to the referral authority independent of the military commander.<sup>53</sup>

These changes to the traditional role of the military commander reflect a convergence of Canada’s military and civilian criminal justice processes. The net effect of this convergence is that the military commander now has much less control and involvement in the court-martial process. Much of the decision-making has been turned over to lawyers, judges, and other officials with legal training but who do not hold the mantle of command.

#### B. The United Kingdom

The 1990s also saw a revolution in the military justice system of the United Kingdom which, like Canada, made major changes in response to judicial opinions.<sup>54</sup> In the case of the United Kingdom, however, the judicial opinions came from the European Court of Human Rights (ECHR).<sup>55</sup> Individuals can bring an action against a State in this court if they believe the State has violated rights guaranteed to them under the European Convention or its protocols.<sup>56</sup> If the individual succeeds, he or she is entitled to monetary compensation.<sup>57</sup> More importantly, if the court determines that the State has violated the European Convention or its protocols, the State must modify its law or practice according to the decision.<sup>58</sup> In addition, other signatories to the European Convention will often modify their domestic laws and practices to avoid similar cases being brought against them.<sup>59</sup>

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48. *Id.*

49. *Id.* § 165.14.

50. *Id.* § 165.19.

51. *Id.* § 164.2(1).

52. *Id.* §§ 163.1(2), 164.1(2).

53. *Id.* § 164.1(3).

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

55. *Id.* at 19.

56. See Peter Rowe, *A New Court To Protect Human Rights in the Armed Forces of the UK: The Summary Appeal Court*, 8 J. CONFLICT & SEC. L. 201, 203 (2003).

57. *Id.*

58. *Id.* at 202.

59. *Id.* at 215.

This was the context in which the case of *Findlay v. United Kingdom*<sup>60</sup> came to the ECHR. Alexander Findlay, a British citizen, was a member of the Scots Guard.<sup>61</sup> In July 1990, Findlay held members of his own unit at gun point and threatened to kill himself and some of his colleagues.<sup>62</sup> Findlay was tried by a general court-martial and pled guilty to assault, conduct prejudice to good order and military discipline, and threatening to kill another person.<sup>63</sup> He was sentenced to two years' imprisonment, a reduction in rank, and dismissal from the army.<sup>64</sup> He unsuccessfully petitioned for a reduction in his sentence through both the military and civilian courts.<sup>65</sup>

Ultimately, Findlay brought his case before the ECHR. He claimed that the court-martial system under which he was tried violated Article 6 of the European Convention because, among other things, it did not provide him with an independent and impartial tribunal established by law.<sup>66</sup> The court examined the Army Act of 1955 and applicable rules of procedure to determine if those procedures complied with the European Convention.<sup>67</sup>

At the time of Findlay's case, a soldier could be tried by a district, field, or general court-martial.<sup>68</sup> A general court-martial consisted of a President and at least four other army officers, including a judge advocate.<sup>69</sup> Military commanders at certain levels of command were also convening officers. The convening officer decided the nature and the detail of the charges to be

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

61. *Id.* at 224.

62. *Id.* at 224-25.

63. *Id.* at 227.

64. *Id.*

65. *Id.* at 228.

66. *Findlay*, 24 Eur. Ct. H.R. at 233. Article 6, paragraph 1 of the European Convention states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221.

67. *Findlay*, 24 Eur. Ct. H.R. at 229-32. As the case was pending, the United Kingdom had already begun significant revisions to its justice system with regard to the role of the military commander. While the court did not rule on these changes, it did comment favorably on many of them.

68. *Id.* at 229.

69. *Id.*

brought and the type of court-martial required.<sup>70</sup> The convening authority was also responsible for convening the court.<sup>71</sup> The convening officer would specify the place and time of the trial.<sup>72</sup> He appointed the President and other members of the court and ensured that the judge advocate appointed the prosecutors and the defense counsel.<sup>73</sup> The convening authority also provided the prosecutor with an abstract of the evidence in the case.<sup>74</sup> He ensured that the accused had proper representation and sufficient time to prepare for trial.<sup>75</sup> The convening officer could dissolve the court-martial either before or during the trial and could also comment on the proceeding of the court-martial to the members of the court.<sup>76</sup> The convening officer also ensured the availability of all witnesses at trial.<sup>77</sup> No trial was final until it was confirmed by a confirming officer.<sup>78</sup> In most cases, this confirming officer was the same commander who served as the convening officer.<sup>79</sup> After final action, the accused could petition reviewing officials within the military chain of command for review.<sup>80</sup> The reviewing officials received legal advice from the Judge Advocate General's office; however, that advice was not made public, and the reviewing officials were not required to give any reasons for their decision.<sup>81</sup> A Court-Martial Appeal Court consisting of civilian judges heard appeals of convictions, but no such appeal was available for an accused who pled guilty.<sup>82</sup>

The ECHR found that this system violated the requirements under Article 6 for an independent and impartial tribunal in several regards. All officers of the court-martial were appointed by and directly subordinate to the convening officer, who also performed the role of prosecuting authority.<sup>83</sup> Additionally, because that same officer served as the confirming officer and no case was final until confirmed by him, this system raised serious doubts as to the independence of the tribunal from the prosecuting authority.<sup>84</sup> The court also stated that any involvement by the judge advocate and any oath requirements were not sufficient to dispel the doubts as to the tribunal's independence and impartiality.<sup>85</sup> The court reasoned that

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70. *Id.* at 230.

71. *Id.*

72. *Id.*

73. *Findlay*, 24 Eur. Ct. H.R. at 230.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 231–32.

79. *Findlay*, 24 Eur. H.R. at 231–32.

80. *Id.* at 232.

81. *Id.*

82. *Id.*

83. *Id.* at 240.

84. *Id.*

85. *Findlay*, 24 Eur. H.R. at 239.

in order for the tribunal to be impartial it “must be subjectively free [from] personal prejudice [and] bias . . . [and] must also be impartial from an objective viewpoint.”<sup>86</sup> In essence, the ECHR held that because of “the central role played by the convening officer” in the court-martial structure, the system violated Article 6 of the Charter.<sup>87</sup>

Even before Findlay’s case was decided by the ECHR, the United Kingdom had begun to restructure its court-martial system. In this restructuring process, the United Kingdom adopted a system similar to the Canadian model. These changes had the collective effect of significantly reducing the role of the commander in their particular system of military justice. Changes in the United Kingdom began with the Armed Forces Act of 1996. Under that Act, the role of the convening officer was abolished. In its place, those functions were divided into three separate bodies: the higher authority, the prosecuting authority, and the court administration.<sup>88</sup> “The higher authority [is] a senior officer [who] decide[s] whether . . . case[s] referred to him by the accused’s commanding officer should be dealt with summarily, referred to the new prosecuting authority, or dropped.”<sup>89</sup> “Once the higher authority has [made that] decision, he or she has no further involvement in the case.”<sup>90</sup> If the case is referred to the prosecuting authority, that authority has absolute discretion to decide whether to prosecute the case, which charges to be brought, and what level of court-martial will hear the case.<sup>91</sup> The prosecuting authority will often consider the views of the higher authority and the accused’s commander when making this determination.<sup>92</sup> The prosecuting authority also “conduct[s]” the “prosecution.”<sup>93</sup>

If the case is referred to a court-martial, the court administrator is responsible for arranging the trial.<sup>94</sup> This includes selecting members, ensuring the availability of witnesses, and selecting the time and venue for the case.<sup>95</sup> “Officers under the command of the higher authority will not be selected as members of the court martial.”<sup>96</sup> After trial, a reviewing authority conducts a single review of each case, and the reviewing authority must publish the reasons for his decisions.<sup>97</sup> “The reviewing authority has the power to quash a finding” and related sentence.<sup>98</sup> He also has the power

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86. *Id.* at 244–45.

87. *Id.* at 246.

88. *Id.* at 232.

89. *Id.*

90. *Id.*

91. *Findlay*, 24 Eur. Ct. H.R. at 232.

92. Rowlinson, *supra* note 54, at 33.

93. *Findlay*, 24 Eur. Ct. H.R. at 232.

94. *Id.* at 232–33.

95. *Id.*

96. *Id.*

97. *Id.* at 233.

98. Rowlinson, *supra* note 54, at 40.

to substitute a finding of guilt on a lesser offense and substitute a sentence less severe than the original sentence.<sup>99</sup> The reviewing authority may also authorize a retrial.<sup>100</sup> During the review process, the reviewing authority will receive advice from the judge advocate.<sup>101</sup> The role of confirming officer was abolished.<sup>102</sup>

In addition to these changes under the Armed Forces Discipline Act of 2000, the Summary Appeal Court was created to review cases of which the commander disposed by summary action. This “court is composed of a judge advocate and two Army officers.” “The appeal is by way of rehearing in open court,” and the court must provide the reasons for the finding and sentence.<sup>103</sup> There have been additional changes and reforms to the United Kingdom’s system since that time, but the structural changes made following the *Findlay* case remain in place.

### C. Australia

Unlike the United Kingdom and Canada, the modernization of military justice in Australia resulted primarily from legislative initiatives rather than from judicial opinions. In 1982, Australia enacted the Defense Force Discipline Act (DFDA). Much like the reforms that took place in the United States immediately after World War II, the DFDA established “a uniform system of military justice, which applied to all three military branches.”<sup>104</sup> Among other things, the DFDA set out the role of the convening authority. The convening authority is an officer appointed by either the Chief of the Defense Force or a service chief.<sup>105</sup> Relevant to this discussion, the convening authority had several responsibilities. These responsibilities included convening *ad hoc* courts-martial to hear particular charges, appointing the court-martial legal officer, and appointing the members who sit in judgment of the accused service member.<sup>106</sup> In many ways the role of the convening authority under the DFDA looked very similar to the traditional role of the convening authority in other countries with a common law tradition.

Beginning in the late 1990s a number of studies and committees formed to examine military justice under the DFDA.<sup>107</sup> In 2001, what came to be known as the Burchett Report recommended replacing the role of the

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99. *Id.*

100. *Id.* at 41.

101. *Id.*

102. *Findlay*, 24 Eur. Ct. H.R. at 232.

103. *See Rowe*, *supra* note 56, at 204.

104. Alison Duxbury, *The Curious Case of the Australian Military Court*, 10 OXFORD U. COMMONWEALTH L.J. 155, 157 (2010).

105. *Id.* at 158.

106. *Id.*

107. *Id.* at 159 n.26.

convening authority with a Director of Military Prosecutions (DMP) and the Registrar of Military Justice (RMJ). The DMP would be responsible for charging and prosecution and the RMJ would be responsible for the administration of trials.<sup>108</sup> These recommended changes became portions of the 2005 amendments to the DFDA.<sup>109</sup> The underlying rationale for these reforms was to reduce the influence of the chain of command on the decision to prosecute and increase the level of expertise in the trial process.<sup>110</sup> The removal of the convening authority and dividing those responsibilities among other offices within the military structure is very similar to the changes that took place in the United Kingdom and Canada following the *Findlay* and *Genereux* cases.

Many of the reforms in Australia, however, were short lived. In 2009, the High Court of Australia invalidated one of the key centerpieces of the 2005 reforms by striking down the Australian Military Court (AMC). The Court's decision in *Lane v. Morrison* held that the creation and powers granted to the AMC violated Chapter III of the Australian Constitution.<sup>111</sup> The *Lane* decision has thrown many of the reforms in Australia in flux, and as of yet no legislative fix has been implemented. It is beyond the scope of this article to delve into the interesting details of the *Lane* case and the constitutional challenges facing military justice reform in Australia. What is important is to see that Australia, like the United Kingdom, Canada, and other common law countries have, as a key component of their reform efforts, made attempts at significantly reducing or eliminating the traditional role that the military commander plays in the military justice system.

## II. THE UNITED STATES MILITARY JUSTICE SYSTEM AND CALLS FOR REFORM

In many ways, the United States was at the forefront of military justice reform in the 20<sup>th</sup> Century. At the conclusion of World War II, many of the returning service members complained about the arbitrariness, unfairness, and abuse they suffered under the then-existing court-martial system. The U.S. Congress responded by holding several years of hearings and other inquiries. These efforts ultimately led to the creation of the Uniform Code of Military Justice (UCMJ), which was signed into law in 1951. It is interesting to note that the reforms reflected in the new UCMJ did not come in response to specific court cases or other judicial rulings. U.S. federal courts and the Supreme Court have traditionally been highly deferential to the interests of the military and have not been a primary source for reform of the U.S. military justice system. Rather, the impetus for the reforms

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108. *Id.* at 159.

109. *Id.* at 158-59.

110. Duxbury, *supra* note 104, at 159.

111. *Lane v Morrison* [2009] 239 HCA 230, ¶¶ 9-10 (Austl.).

found in the UCMJ came from service members through their elected representatives in Congress.

The UCMJ was a compromise between proponents of individual rights and those who wanted to retain the commander as a source of virtually unlimited control over military justice.<sup>112</sup> Since the enactment of the code in 1951, there have been two significant amendments to the code, one in 1968<sup>113</sup> and another in 1983.<sup>114</sup>

The UCMJ placed several limits on the influence that a commander could assert over the court-martial process while also providing individual soldiers with greater rights and protections than they had traditionally enjoyed prior to the enactment of the UCMJ. Some of the significant systemic changes included the establishment of the Military Service Courts of Review,<sup>115</sup> the creation of a civilian Court of Appeals,<sup>116</sup> and the possibility of review of military cases by the Supreme Court.<sup>117</sup> Other significant systemic reforms included the creation of the position of the military trial judge and the creation of the trial judiciary to appoint judges to individual courts-martial.<sup>118</sup> Article 37 of the UCMJ prevents those participating in the court-martial, including the military judge, attorneys, and members, from suffering adverse personnel actions based on their participation in the court-martial.<sup>119</sup> A number of other protections were put into place to prevent the risk of the commander attempting to unlawfully influence the court-martial process.<sup>120</sup>

While these reforms were designed to limit a commander's ability to unlawfully influence a case, there are several areas where the commander

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112. 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, 637 (1994).

113. See Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (codified as amended at 42 U.S.C. § 801 *et seq.*).

114. See Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

115. 10 U.S.C. § 866 (2000) (establishing a review by this court is automatic for any sentence that includes a punitive discharge or a sentence to confinement of one year or more).

116. 10 U.S.C. § 867 (2000).

117. *Id.* § 867(a).

118. 10 U.S.C. § 826 (1956).

119. 10 U.S.C. § 837 (1956).

120. 10 U.S.C. § 834 (1983) (requiring the convening authority to obtain advice from a staff judge advocate (legal advisor to the commander) before any charge is referred to a general court-martial); see also MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(A) (2008) [hereinafter MCM] (requiring that each commander exercise his or her own independent judgment as to the proper disposition of the case without influence from a superior authority). In spite of these protections, unlawful command influence continues to plague the military justice system. Many of the reported cases by the Court of Appeals for the Armed Forces and its predecessor, the Court of Military Appeals, have dealt with this issue. It is beyond the scope of this Article to explore these issues in detail. Suffice it to say that as the appellate courts have recognized, unlawful influence is the "mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

still has the legal authority to assert command and control over the process. Under the current version of the UCMJ, the commander still has extensive power in investigating and charging soldiers, in conducting summary disciplinary actions, and in managing the court-martial process.

Before trial, the commander has the authority to order investigations into misconduct.<sup>121</sup> Each service has an established regulatory process that allows the commander to appoint individuals and boards to conduct investigations.<sup>122</sup> In addition, each service has investigative agencies that have the authority to conduct investigations on matters from minor infractions to the most serious offenses.<sup>123</sup> None of these agencies, however, has the independent authority or ability to dispose of a criminal charge against a service member under the UCMJ. Only a commander of that service member has the authority to dispose of the case. This disposition can be achieved by dismissing the charges, adjudicating the charges within the commander's level of authority, or forwarding the charges to a superior commander.<sup>124</sup> Commanders are assisted by their legal advisors throughout this process, but it is the commander alone who decides the disposition of the case.

In addition, the UCMJ gives commanders significant authority to conduct non-judicial punishment<sup>125</sup> and summary courts-martial rather than referring the case to a general or special court-martial. Briefly, non-judicial punishment under Article 15 of the UCMJ allows the commander to be the sole adjudicator of charges brought by the commander against the service member. In this proceeding, the commander serves as the finder of fact, deciding first the guilt or innocence of the accused; if the accused is found guilty, it imposes any punishment within that commander's level of authority. Depending on the rank of the service member involved and the rank of the commander imposing punishment, such punishment can include reductions in rank, restriction on the accused's liberty for up to forty-five days, imposition of extra duty for up to forty-five days, correctional custody for up to thirty consecutive days, and forfeitures of pay.<sup>126</sup> Although in most cases the service member has the right to refuse adjudication under Article

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121. See MCM, *supra* note 120, R.C.M. 303.

122. See generally U.S. Dep't of Army, Reg. 15-6, Procedures for Investigating Officers and Boards of Officers (2006), available at [http://www.apd.army.mil/pdffiles/r15\\_6.pdf](http://www.apd.army.mil/pdffiles/r15_6.pdf).

123. Examples of these agencies include each service's Inspector General Office, the Army's Criminal Investigation Division, the Navy and Marine Corps' Naval Criminal Investigative Service, and the Air Force's Office of Special Investigations.

124. See MCM, *supra* note 120, R.C.M. 306(c), 401(c).

125. See 10 U.S.C. § 815 (2000).

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

15<sup>127</sup> and demand trial by court-martial, a significant number of cases within the military are disposed of under this process.<sup>128</sup> Under Article 15, a service member has only a limited appeal to the next superior commander within the chain of command.<sup>129</sup> Punishments under Article 15 are administrative in nature and are not considered to be criminal convictions.<sup>130</sup>

In addition to non-judicial punishment power, commanders also have the authority to convene summary courts-martial.<sup>131</sup> In a summary court, the commander appoints an officer within the command to serve as the summary court officer. At a summary court, the court officer is the finder of fact. If the accused is found guilty, the summary court officer will impose a sentence that could include up to one month confinement, reduction in rank, and forfeiture of pay.<sup>132</sup> As with non-judicial punishment, the service member can refuse to have his case adjudicated by a summary court and can instead demand trial by court-martial.<sup>133</sup> Summary court convictions are not considered to be criminal convictions.<sup>134</sup>

In cases of general and special courts-martial, the commander also has considerable authority to assert command control over the court-martial process.<sup>135</sup> The commander ultimately decides which cases are tried at a special or general court-martial. Not only does the commander decide if the service member will be tried by a special or a general court-martial, but if

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127. See *id.* Also, in the Navy and Marine Corps, if the service member is aboard a ship that is underway, he or she does not have the right to demand trial by court-martial.

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

129. See, e.g., U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE PARA. 3-33 (2005) [hereinafter AR 27-10], available at [http://www.apd.army.mil/pdf/AR27\\_10.pdf](http://www.apd.army.mil/pdf/AR27_10.pdf).

130. Captain Denise K. Vowell, *To Determine An Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87, 146 (1986).

131. 10 U.S.C. § 824 (1983).

132. 10 U.S.C. § 820 (1950).

133. *Id.*

134. *Middendorf v. Henry*, 425 U.S. 25, 34 (1976).

135. In referring to the court-martial process here, this Article refers to the two levels of court-martial beyond a summary court. Under the UCMJ these two levels of court-martial are referred to as special courts-martial and general courts-martial. Both levels of courts-martial are authorized to hear any case arising from a violation of the punitive articles of the code. However, special courts-martial have jurisdictional limits placed on the sentences they can impose. See 10 U.S.C. § 819 (2001). In addition, the minimum number of members necessary to adjudicate a special court is three. General courts-martial, on the other hand, have no such jurisdictional limits on sentences and can impose any sentence authorized by the code for the specific offense, including death. The minimum number of members needed to hear a general court-martial case is five, and in the case where the death penalty is sought, the minimum number is twelve. See 10 U.S.C. § 818 (1968); MCM, *supra* note 120, R.C.M. 501, available at <http://www.jag.navy.mil/documents/mcm2008.pdf>.

the accused elects to be tried by a military panel rather than a military judge, the commander selects the members who will hear the case. Under Article 25 of the UCMJ, the commander is charged with personally selecting those members who in his opinion are “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”<sup>136</sup>

Beyond the selection of the members, the commander/convening authority<sup>137</sup> has several significant functions during the course of the trial. The convening authority can order depositions to be taken in a pending case.<sup>138</sup> The convening authority approves and authorizes funding for witness travel<sup>139</sup> as well as the employment and funding of expert witnesses requested by either the prosecution or the defense.<sup>140</sup> The convening authority is authorized to grant both transactional and testimonial immunity for any witness subject to the UCMJ.<sup>141</sup> If the accused service-member desires to enter a guilty plea, any pretrial agreement is negotiated between the service member and the convening authority directly and is binding on the court.<sup>142</sup> The convening authority can also order an inquiry into the mental capacity or mental responsibility of the accused service member.<sup>143</sup>

At the conclusion of the trial, if the service member is found guilty of any offense, the convening authority continues to have significant involvement in the case. Before the case becomes final, the convening authority must approve both the findings and the sentence of the court-martial.<sup>144</sup> “At that time, the convening authority may dismiss any charge or specification by setting aside findings of guilt,”<sup>145</sup> change the findings of guilt to a “lesser included offense,”<sup>146</sup> modify the sentence to any lesser

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136. See 10 U.S.C. § 825(d)(2) (2000).

137. A “commander” is a commissioned officer who is in command of a military unit. A “convening authority” is a commander who has the authority to convene a military court-martial. While all court-martial convening authorities are commanders, not all commanders are court-martial convening authorities. As used in this Article, the terms “commander” and “convening authority” are used interchangeably and both terms refer to a commander who has court-martial convening authority.

138. See MCM, *supra* note 120, R.C.M. 702(b).

139. *Id.* R.C.M. 703(e).

140. *Id.* R.C.M. 703(d). In some regards, the convening authority’s power to fund and authorize witness employment and travel is limited by the military judge’s ability to abate the proceedings if the convening authority refuses to fund a witness that the military judge has deemed essential to the case. Nevertheless, obtaining the convening authority’s authorization for witness funding is not a mere formality, and the convening authority’s use of the power of the purse can certainly have an impact on the trial.

141. *Id.* R.C.M. 704.

142. *Id.* R.C.M. 705.

143. *Id.* R.C.M. 706.

144. 10 U.S.C. § 860(c)(1)-(2) (2000).

145. See *id.* § 860(c)(3)(A).

146. See *id.* § 860(c)(3)(B).

sentence, or “order a proceeding in revision or rehearing.”<sup>147</sup> No proceeding in revision can reconsider a finding of not guilty.<sup>148</sup> The commander’s authority to modify the findings and sentence in this manner is viewed as “a matter of command prerogative involving the sole discretion of the convening authority.”<sup>149</sup>

In light of the significant role that the commander continues to play under the UCMJ structure, many today see the U.S. lagging behind the wave of reform that has taken place in Canada, the United Kingdom, and elsewhere. One of the most influential voices for reform is from what has been referred to as the Cox Commission. This commission was sponsored by the National Institute of Military Justice and chaired by Walter T. Cox III, a former judge on the United States Court of Military Appeals, now named the Court of Appeals for the Armed Forces.<sup>150</sup> The work of the commission coincided with the fiftieth anniversary of the UCMJ and was intended to be a “bottom up” review of military justice and to examine a system that, in the opinion of the commission, had failed to keep pace with the changes within the U.S. military and with the changes taking place in other countries’ military justice systems.<sup>151</sup>

After conducting numerous hearings and reviewing testimony from a wide range of perspectives, the Cox Commission recommended several changes to the current UCMJ related to the role of the military commander.<sup>152</sup> First, the Cox Commission recommended modifying the pretrial role of the military commander.<sup>153</sup> Specifically, the commission recommended removing the commander from the panel selection process and randomizing the selection of court members.<sup>154</sup> This recommendation was certainly not something new and has remained one of the most hotly debated aspects of the UCMJ since its inception in 1951.<sup>155</sup>

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147. *See id.* § 860(e)(1).

148. *Id.* § 860(e)(2)(A).

149. *See id.* § 860(c)(1).

150. *See* WALTER T. COX III ET AL., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001), available at [http://www.zoominfo.com/CachedPage/?archive\\_id=0&page\\_id=461731867&page\\_url=/www.badc.org/html/militarylaw\\_cox.html&page\\_last\\_updated=2008-08-28T12:18:06&first Name=alter&lastName=Cox](http://www.zoominfo.com/CachedPage/?archive_id=0&page_id=461731867&page_url=/www.badc.org/html/militarylaw_cox.html&page_last_updated=2008-08-28T12:18:06&first Name=alter&lastName=Cox) [hereinafter COX COMMISSION].

151. *Id.* at 2-4.

152. *Id.* at 4-6.

153. *Id.* at 5.

154. *Id.* at 6-8.

155. *Id.* at 7-8; *see also* Matthew J. McCormack, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice*, 7 GEO. MASON L. REV. 1013, 1049-51 (1999) (arguing that the military should remove the convening authority’s power to handpick court-martial panel members); Lindsay Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT’L L. 169, 190-92 (2006) (suggesting random selection method for choosing panel member that is tailored to meet needs of U.S. military).

The Cox Commission also recommended removing the commander from other pretrial processes such as the approval of witness travel for pretrial hearings, the approval of funding for expert witnesses and expert assistance, and the approval of funding for pretrial investigative assistance.<sup>156</sup> The Cox Commission asserted that under the current system the convening authority is too involved in these decisions, and there is a risk the commander could “withhold or grant approval [of these requests] based on personal preference rather than a legal standard.”<sup>157</sup> Though the report does not cite a significant number of instances where convening authorities actually made these decisions on a basis other than a legal standard, the commission was nonetheless concerned that such a risk existed.<sup>158</sup>

To replace some of the functions currently performed by the convening authority, the Cox Commission and others have called for a greater role for lawyers and military judges.<sup>159</sup> Because courts-martial are convened on an *ad hoc* basis,<sup>160</sup> there are no standing trial courts a service member can petition prior to the formal convening of a court-martial.<sup>161</sup> The Cox Commission recommended the establishment of standing judges to replace the convening authority in deciding pretrial petitions such as witness funding, employment of experts, and the provision of pretrial investigative assistance.<sup>162</sup>

In addition to these suggestions there have also been calls for increasing the independence of military judges by giving these judges some form of tenure.<sup>163</sup> The calls for tenure have come from both within and outside of the military and have increased since the Supreme Court’s decision in *United States v. Weiss*.<sup>164</sup> The rationale for some form of judicial tenure is to enhance the independence of the trial judiciary.<sup>165</sup> According to some critics, there is at least the perception that commanders can influence the Judge Advocate General to remove or reassign a military judge for an unpopular or unfavorable decision.<sup>166</sup>

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156. COX COMMISSION, *supra* note 150, at 7-8.

157. *Id.* at 7.

158. *Id.* at 7-8.

159. *Id.* at 8-9; *see also* John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 18-25 (1998); Andrew M. Ferris, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 487-91 (1994).

160. COX COMMISSION, *supra* note 150, at 9.

161. *Id.*

162. *Id.* at 8-9.

163. Cooke, *supra* note 159, at 19; Ferris, *supra* note 159, at 488-92.

164. *Weiss v. United States*, 510 U.S. 163 (1994) (holding, *inter alia*, as long as the officer is functioning in a position germane to his duties as an officer, the Appointments Clause in Article II of the Constitution does not require the President to specifically appoint military judges); *see also* Cooke, *supra* note 159, at 18-19; Ferris, *supra* note 159, at 488-92; Lederer & Hundley, *supra* note 112, at 672-78.

165. Cooke, *supra* note 159, at 19.

166. *See id.*, at 18-19.

Another reform affecting the authority of the military commander is the call to abolish summary courts-martial.<sup>167</sup> Currently, summary courts are a tool of the military commander to quickly adjudicate and impose swift punishment for relatively minor offenses.<sup>168</sup> Calls for the abolition of these courts is based on the belief that these courts are overly vulnerable to command influence and do not provide sufficient procedural protections for service members facing a summary court.<sup>169</sup>

In spite of the pressures for reform, the U.S. Congress has not engaged in any sweeping reforms as of yet. While modifications and amendments to the UCMJ and the rules for court-martial occur on a regular basis, these amendments have not significantly changed the role that the commander plays in the justice system. Much of the resistance for systemic change comes from within the military itself. Like any institution, the U.S. military is slow to change or embrace sweeping reform. Those who favor the current system and the role that the military commander plays often articulate their preference for the current system in non-specific general terms. These individuals frequently claim that removing or significantly limiting the commander's role in military justice would undermine good order and discipline within the military.<sup>170</sup> Unfortunately, these sweeping claims do little to articulate specifically why it is essential for the commander to maintain broad control over the system and why limiting the commander's functions would undermine good order and discipline. Those who wish to preserve the status quo often seem to argue that since this is the way that military justice has always been administered in the past, it therefore should be maintained as such in the future.

### III. THE ROLE OF THE MILITARY COMMANDER AND THE LAW OF ARMED CONFLICT

In order to better assess whether resistance to the kind of reforms that have taken place in Canada, the United Kingdom, and elsewhere has any merit, relying solely on broad claims that these reforms will harm good order and discipline is simply not enough. Instead, it is important to consider more fully and carefully why it is that the commander has had such a key role in military justice matters. Certainly some rationale for placing the commander at the head of military justice system derives from the fact that the commander needs to control all aspects of military operations if he is to be effective. But if this is the only reason for the commander to remain at the apex of military justice, then perhaps the kinds of reforms that have

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167. *See id.* at 23.

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

169. Cooke, *supra* note 159, at 23.

170. *See, e.g.*, Major Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 196 (2003).

taken place in many countries are justified because there are other offices and processes that most certainly can preform criminal justice functions as effectively as the military commander and in a way that provides greater protections for the accused service member.

However, a critical aspect that often goes unrecognized in most reform efforts is an examination of the military commander's responsibilities under the law of armed conflict. Efforts to reform military justice, to better align it with comparable civilian systems is only part of the equation. To be viable, any reforms must also carefully consider the commander's role in law of war compliance.

The law of armed conflict is a unique legal regime. It seeks to inject humanitarian regulation into the brutal endeavor of warfare. A person who has not experienced war can never truly understand the demands placed on warriors and the officers and non-commissioned officers responsible for their leadership. Military training involves developing a genuine killer instinct—a willingness to take life on order and without hesitation. However, professional warriors must be able to essentially suspend that instinct at a moment's notice in order to exercise humanitarian constraint and preserve the critically important line between legitimate and illegitimate violence, the ultimate objective of the LOAC.

The brutality, intensity, and sheer terror of warfare therefore stress the ability of military leaders to ensure that their subordinates respect LOAC obligations. Commanders, staff officers, and their legal advisors are expected and required to understand these obligations and to correctly apply the law in the context of ongoing military operations. This is not easy. Beyond the commander's responsibility to know the law and harmonize operational decisions to the dictates of the LOAC, commanders also bear the additional and critical responsibility to prepare their subordinates to respect these obligations and to establish a command culture that prioritizes fidelity to the law.

The individual responsible for molding a group of individuals into an efficient and effective military unit is the commander. The commander holds a unique position in a military organization. Primarily through the use of positive leadership and example, the commander sets the tone for the unit. He ensures that the soldiers under his command are well trained and prepared to conduct military operations and achieve the unit's objectives. The commander is the focal point of military discipline and order within the unit. He is responsible for maintaining command and control over his subordinate forces. The commander stands on the line that separates a disciplined military unit from a lawless mob. Through the use of all available resources, to include moral authority, law, and collective purpose, the military commander makes sure his forces effectively execute military operations—which often involve the decisive application of deadly combat power—in a manner that fully complies with the LOAC. When military

units fail to do so, it is in large measure attributable to the commander's failings.

A commander can fail in this most vital responsibility in any number of ways. There are situations when the commander's actions are directly responsible for the LOAC violations committed by his forces. For example, if a commander participates with his forces in the unlawful targeting and killing of civilians, he is directly and criminally liable under the LOAC for the resulting harm. Likewise, a commander who orders his forces to attack a protected place is, as a result of ordering unlawful conduct, responsible for the subsequent LOAC violation as if he had executed the attack himself. Similarly, a commander who encourages his forces to kill or otherwise mistreat prisoners of war, or a commander who assists his subordinates in covering up evidence of a past war crime, is criminally liable for those LOAC violations. In these examples, the commander's complicity with an LOAC violation is direct and punishable through the application of accomplice liability theory. However, even if the commander's involvement is not direct, it is easy to see how his encouragement and assistance can contribute to LOAC violations, rendering him equally culpable.

There are numerous possible scenarios where a commander's action or inaction can have a close and direct nexus to the war crimes committed by subordinates. Even if a commander did not directly order forces under his command to engage in conduct in violation of the LOAC, he may have permitted or acquiesced in those violations. This can include situations where the commander has firsthand knowledge of the offenses and allows those offenses to occur or to continue to occur over time. In this situation, the nexus between commander inaction and a subordinate's war crime exists because soldiers frequently and unquestionably interpret the commander's inaction and acquiescence as approval and permission.

One of the most important components of the LOAC, therefore, is the mechanism that evolved to hold commanders accountable in those instances where the commander's direct participation, encouragement, incitement, involvement, knowledge and/or acquiescence in LOAC violations is either direct, or where the nexus between the commander's actions and the crime is clear. Even if the commander's involvement was less direct, such as ordering his forces to commit unlawful killings but not directly participating in those killings, the doctrine of accomplice liability would provide a solid basis for criminal accountability. If a commander ordered, encouraged, or otherwise supported his forces in committing war crimes, and shared in the criminal purpose or design of the perpetrators and his action or failure to act aids, abets, counsels, or commands the perpetrator to commit the offense, then the commander could be guilty as a principal.<sup>171</sup>

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171. Uniform Code of Military Justice, 10 U.S.C. § 877, art. 77 (1956).

#### A. The Command Responsibility Doctrine

None of this is in any way remarkable. It is merely an application of traditional accomplice liability principles to the war crimes context, whether the offense is charged as a war crime or a violation of the U.S. military code. Because the LOAC implicitly relies so heavily on commanders executing their responsibilities, it should be apparent why legal mechanisms have been put into place to hold commanders accountable when evidence establishes the commander is either directly involved in LOAC violations or that he acceded as an accomplice or an accessory. Without such legal mechanisms, LOAC principles would be largely ineffective and unenforceable. These mechanisms also provide powerful incentives for the commander to fulfill his responsibilities to ensure compliance with LOAC obligations.

This legal structure would be incomplete, however, if these were the only mechanisms available to establish command responsibility for LOAC violations. Direct liability, accomplice liability, and the liability of an accessory only address situations of commander complicity; where the evidence establishes the commander has some independent or shared intent to commit war crimes or prevent their detection. Punishing commanders in these situations will certainly deter such complicity, but will not necessarily incentivize the creation of a command culture that emphasizes LOAC compliance and condemns violations.

How does the law address situations where a commander's dereliction of duty contributes to subordinate LOAC violations? What about a commander who remains willfully ignorant of battlefield reports indicating LOAC violations, or who upon receiving such reports, fails to take appropriate remedial action? In these instances, it is the lack of action that contributes to subordinate violations, often without any intent to violate the LOAC by the commander himself. And yet, in such instances, the commander's failings may set the conditions for the commission of war crimes by the forces under his command. As the individual in the critical position directly responsible for ensuring LOAC compliance within a military unit, should commanders bear responsibility when the risk becomes reality?

The answer comes from the doctrine of command responsibility, developed in customary international law. Its purpose was to align the scope of a commander's criminal accountability for war crimes committed by subordinates with the full extent of the commander's obligation to ensure subordinate compliance with the law. Accordingly, the doctrine accounts for two situations: first, where a commander's responsibility for war crimes is established by traditional complicity principles; second, where the commander may not have been complicit in the war crimes in the traditional sense, but rather was derelict in his duties to ensure respect for the law by the forces under his command. If evidence establishes the commander's dereliction under this second prong of the doctrine, criminal responsibility

may be imputed to the commander for the war crimes committed by his soldiers; in other words, the commander is punished *as if he* had committed those crimes, not merely for his dereliction of duty as a commanding officer. Extending a commander's legal responsibility for subordinate misconduct beyond situations of traditional complicity ultimately provides a necessary incentive to train, monitor, supervise, and correct subordinates, and in so doing, to establish a command culture of commitment to compliance with the law of armed conflict.

Command responsibility was firmly established as a legal doctrine in the war crimes tribunals following World War II. However, the idea of holding a commander responsible for his subordinates' criminal and law of war violations had much earlier origins in foreign, domestic, and international law. Military codes on occasion included provisions imposing what was in effect command responsibility. One of the most frequently cited examples is the Ordinance of Orleans, issued in 1439 by Charles VII of France.<sup>172</sup> The Lieber Code developed in the American Civil War is yet another example. Article 71 of the Lieber Code established that:

Whosoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.<sup>173</sup>

The Fourth Hague Convention of 1907 respecting the laws and customs of war on land was the first modern treaty to impose a form of command responsibility as a matter of express international legal obligation. Article 3 states, "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its

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172. The ordinance provided:

The King orders that each captain or lieutenant be held responsible for the abuses, ills, and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been.

Evan Wallach & Maxine Marcus, *Command Responsibility*, in 3 *International Criminal Law: International Enforcement* 459, 459 n. 1 (3d ed. 2008) (quoting Louis Guillaume de Vilevault & Louis G.O.F. de Bréquigny, *Ordonnances des Rois de France de la Troisième Race* 306 (1782)).

173. RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 58 (1983).

armed forces.”<sup>174</sup> The underlying premise of the modern command responsibility doctrine is also reflected in Chapter 1, Article 1, which established what is recognized as a key characteristic of an army or other organized militia: The military organization is “commanded by a person responsible for his subordinates.”<sup>175</sup>

There are a number of commonalities among these historical antecedents to the contemporary command responsibility doctrine. First, they all recognize the unique position a commander holds in a military organization. Second, they all reflect the axiom that command authority includes both the legal authority and the legal obligation to control subordinate conduct in order to achieve military objectives while respecting the then existing humanitarian limits on the conduct of hostilities. Third, all of these antecedents implicitly recognize that imposing responsibility on the commander for the conduct of subordinates enhances the probability of such respect. These antecedents also recognize that a commander can be held accountable for his subordinates’ law of war violations if he was directly involved, or even in some cases where the commander’s involvement was less direct or obvious. From this foundation, the modern doctrine of command responsibility emerged at the end of World War II.

The most well-known case involving the command responsibility doctrine was the trial of General Yamashita. At the end of World War II, General Yamashita was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. The Japanese government placed General Yamashita in command of these forces just ten days before the American forces landed in the Philippines. General Yamashita was in command during a desperate time for the Japanese forces fighting a delaying action all across the Philippines. In Manila, Japanese army and naval forces turned the city into a battlefield, and were responsible for the death of an estimated 100,000 Filipino civilians. These forces also committed other atrocities including thousands of rapes and other serious war crimes.

The prosecution theory was that these violations were so flagrant and enormous that they must have been known to General Yamashita if he had made any effort to fulfill his responsibilities as a commander.<sup>176</sup> If General Yamashita did know of these offenses, he was complicit in them for his failure to stop them; if he did not know of these acts, it was because he “took affirmative action not to know.” In either case, he bore individual criminal responsibility for them.

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174. Hague Convention No. IV Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277.

175. Annex to the Hague Convention No. IV Respecting the Laws and Customs of War on Land ch. 1, art. 1, Oct. 18, 1907, 36 Stat. 2259.

176. 4 UNITED NATIONS WAR CRIMES COMMISSION, *Case 21: The Trial of General Tomoyuki Yamashita*, in *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 17 (1948).

The military commission that tried General Yamashita rejected the assertion that he took no part in the crimes committed by his troops, and that he did not know what was occurring under his command. According to the commission, the evidence showed the “crimes were so extensive and widespread, both as to time and area, that they must either have been willfully permitted by [Yamashita], or secretly ordered by [him].”<sup>177</sup> With respect to General Yamashita’s dereliction of duty, the President of the commission stated:

[W]here murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.<sup>178</sup>

The key elements of the command responsibility doctrine emerged from this case. A commander’s responsibility and liability is predicated on (1) a command relationship between the superior and subordinate; (2) information or knowledge that triggers the commander’s duty to act; (3) if the duty to act is triggered, the commander must take some action regarding the ongoing or anticipated law of war violations by subordinates; and (4) a causal relationship between the commander’s omission and the war crimes committed by the subordinates.

In 1977 Additional Protocol I to the 1949 Geneva Convention (AP I), was promulgated and it included the first express treaty provision establishing individual criminal command responsibility.<sup>179</sup> The doctrine of command responsibility is central to AP I’s accountability framework. Articles 86 and 87 made significant contributions to the command responsibility doctrine via the articulation of the specific duties for a commander to ensure law of war compliance. Under Article 86, paragraph 2, the commander has the duty to prevent and repress breaches of AP I and the Conventions.<sup>180</sup> Article 87, paragraph 1, imposes a duty on commanders to prevent, suppress, and report breaches to the Convention. Article 87, paragraph 3, requires a commander to prevent violations; otherwise, he should take penal or disciplinary actions in response to past violations if he is aware that his forces are going to commit or have committed a breach.<sup>181</sup>

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177. *Id.* at 34.

178. *Id.* at 35.

179. Diplomatic Conference on Reaffirmation of International Humanitarian Law Applicable in Armed Conflicts, Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, reprinted in 72 AM. J. INT’L L. 497 (1978).

180. *Id.* at 496.

181. *Id.* at 496-97.

Collectively, the commander's duties are to (1) prevent future war crimes, (2) suppress or stop ongoing crimes, and (3) report and punish past crimes.

The proceedings of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) initiated the contemporary evolution of the command responsibility doctrine. The command responsibility provision in the statutes for each tribunal, promulgated in 1993 and 1994 respectively, are virtually identical. Article 7(3) of the ICTY states:

The fact that any of the acts referred to in articles 2 and 5 of the present Statute [Grave Breaches of the Geneva Conventions of 1949 and Crimes Against Humanity] was committed by a subordinate does not relieve his superior of criminal liability if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>182</sup>

Article 6(3) of the ICTR states:

The fact that any of the acts referred to in articles 2 and 4 of the present Statute [Genocide and Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II] was committed by a subordinate does not relieve his or her superior of criminal liability if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>183</sup>

The most recent international codification of command responsibility doctrine is the Rome Statute for the International Criminal Court (ICC). The Rome Statute sets forth ICC's authority, vesting the Court with jurisdiction for cases involving genocide, crimes against humanity, war crimes, and the crime of aggression. Article 28 of the Rome Statute is entitled "Responsibility of Commanders and Other Superiors" and provides:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

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182. S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

183. S.C. Res. 955, at 6, U.N. Doc. S/RES/955 (Nov. 8, 1994).

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>184</sup>

The Rome Statute explicitly provides that a culpable commander “shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control . . . .” This is merely a reflection of the traditional scope of command responsibility, holding the commander accountable not merely for a dereliction, but for the offenses caused by that dereliction. Since Yamashita, this concept has been a key component of the doctrine; however, the Rome Statute is the first specific codification of this imputed liability theory under international law.

#### B. Command Responsibility and the Role of the Commander in Military Justice

The doctrine of command responsibility reflected in both customary law and various international treaties and statutes, has important implications on the role of the commander with respect to military justice. Commanders are expected to control the forces under their command. They are expected to

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184. *Rome Statute of the International Criminal Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY – MATERIALS 3, 3 (Antonio Cassese, Paola Gaeta, & John R.W.D. Jones eds., 2002).

train their forces to comply with the laws of war. They are expected to assert positive leadership over their forces and to be fully engaged in combat operations. Most importantly commanders must prevent, suppress, and punish the forces under their command for law of war violations. If the commander fails in any of these duties, either due to negligence or willful blindness, the commander may be held personally liable for the crimes committed by his subordinate forces.

If reforms and efforts to civilianize military justice systems reduce the commander's role in the system, then what are the consequences to his liability and responsibility under the doctrine of command responsibility? If commanders lose a significant portion of the disciplinary authority they have traditionally held, do they no longer occupy that critical position of responsibility over the forces under their command? The efforts over the past several years to reform military justice based on human rights and separation of power principles have not focused on how these reforms could impact the commander's obligations with respect to the law of armed conflict and the doctrine of command responsibility.

#### IV. REFORM EFFORTS AND THE ESSENCE OF COMMAND

As noted above, the reforms in the United Kingdom and Canada came as result of court cases. The court opinions, which triggered the changes to military justice focused almost exclusively on how the military justice systems compared to their respective civilian systems. The courts in these instances found that because the military systems departed in significant ways from the civilian systems without any clear justification, they were fundamentally unfair. Likewise, the reform efforts in Australia and the calls for reform in the United States have focused on the comparative differences between the civilian and military systems.

This civilian focus can be seen most clearly in the reforms themselves. In Canada and the United Kingdom for example, the commander has been essentially removed from the charging and convening process. These functions are now performed by offices that are independent from the commander.

Similarly, calls for reform in the United States and efforts at reform in Australia seek to give military judges more authority and independence; the kind of authority and independence that judges in civilian courts enjoy. In addition, reformers in the United States want to abolish summary courts because of the control and influence the commander has over the process. These and other reforms noted above all have in common a desire to remove the commander from the military justice process because of concerns about command influence and the potential unfairness that can result, especially when compared with the counterpart civilian systems.

There is little indication, however, that courts and reformers gave much if any consideration to how changes and reforms might impact the

commander's responsibilities under the law of armed conflict. None of the opinions in the European Court of Human Rights or in the Canadian Supreme Court make any mention of the doctrine of command responsibility or what the commander's obligations are under that doctrine. Nor do the opinions consider how the military justice system and the commander's involvement in that system can aid the commander in meeting these obligations.

Failure to consider these impacts does not necessarily invalidate all or most of the reforms to military justice. However, disregarding or ignoring the relationship between military justice and the commander's obligations under the law of armed conflict can undermine reform efforts and create unintended consequences. Some questions raised by these reforms relating to command responsibility include: Can the office of the Director of Military Prosecutions or the Chief Military Judge be held criminally liable if he either fails to prosecute or fails to convene a court-martial to try service members for law of war violations? Must these or similarly situated officials be consulted and involved in the training of service members and in the planning of military operations because they now have the responsibility for prosecuting and convening courts for war violations? Does the commander, who has lost some of his authority by losing the ability to maintain discipline through the military justice system find himself in a situation where he is given responsibility to maintain discipline and control without having sufficient authority to meet that obligation? Is the commander still likely to be held criminally liable for failings that are now beyond his control? Are the military forces less likely to respect and abide by the directions and commands of an officer who they know has little ability to punish them for their misconduct? What are the essential roles that a commander must perform in military justice? Under the law of armed conflict what are the functions of the commander that cannot be derogated to others? These questions have not been the focus of reform efforts up to this point.

If the commander is accountable for taking all reasonable and necessary measures to prevent, suppress and punish war crimes committed by subordinate forces, and if the commander has an affirmative duty to know what subordinate forces are doing during military operations, then there are certain obligations that are non-delegable. These non-delegable obligations include disciplining subordinates and understanding both the context of misconduct and its impact on order and discipline within the unit, establishing and modeling respect for the rule of law, specifically the obligations of the law of armed conflict, training subordinates on law of war compliance, and ensuring that operations are conducted in compliance with the law of armed conflict. There certainly may be other important command functions, but these represent the core functions of command as it relates to compliance with the law of armed conflict. We will look at each of these functions separately.

#### A. The Commander as the Source of Discipline

It is axiomatic that if the commander is potentially responsible for the war crimes committed by subordinate forces, then the commander must have the ability to discipline those subordinates in order to prevent, suppress and punish law of war violations. Without this ability, any demands imposed by the commander to abide by the law will ring hollow. If subordinates are not accountable to the commander, then they will have little incentive to comply with the commander's orders to conduct military operations in accordance with the law. Even in the best of times, it can be challenging for the commander to get his subordinates to comply with all legal requirements through the tenants of positive leadership alone. For at least some members of the military unit, only the possibility of criminal and other disciplinary sanctions will incentivize them to obey. During military operations, these challenges are exacerbated, and it is essential that the commander has disciplinary authority so that the subordinates know the commander has the authority to enforce compliance.

In conjunction with the authority to discipline, the commander is often in the best position to understand the context in which alleged misconduct took place. There is certainly the real risk that a commander may seek to cover-up misconduct out of fear that it will bring disrepute to the unit or subject the unit to additional investigations. Examples abound where commanders have attempted to cover-up war crimes committed by subordinates. That does not mean that commanders lack the ability and responsibility for putting potential misconduct in its proper context or applying the disciplinary tools that will best ensure good order and discipline.

At times for example, the commander may appropriately employ seemingly severe disciplinary tools because the commander understands that unless the misconduct is dealt with strongly, there is a danger that others in the unit will engage in similar misconduct. At other times, the commander may realize that a severe response is unwarranted due to mitigating factors that arise in combat. And the command responsibility doctrine already takes into account those instances where the commander attempts to cover-up misconduct. The commander can be held liable for failing to punish the misconduct.

The ability to assess how a service member's alleged misconduct will impact unit cohesion is an essential part of what it means to be a commander. This responsibility cannot be delegated to another office or officer for the simple reason that the commander is in the unique position of ensuring good order and discipline within the ranks of his subordinate forces. The primary reason for the command responsibility doctrine is to identify the commander as the one person in the military unit who can best assure law of war compliance. If the disciplinary tools are taken away from the commander and he is no longer able to exercise this important authority, then we have in essence given the commander all of the responsibility for

ensuring law of war compliance without giving him the necessary authority to carry out those obligations.

#### B. Establishing and Modeling Respect for the Rule of Law

In addition to disciplinary authority, commanders can best ensure law of war compliance through positive leadership, modeling appropriate respect for the rule of law in the commander's own conduct. This modeling occurs in a number of ways. The most obvious is in training and preparing forces to comply with the laws of war in the context of military operations. Perhaps the least effective way to accomplish this is to simply ask the unit's legal advisor to brief members of the command on the requirements of the law of war. A commander who opts for this approach may meet the minimal requirements but has done little to help the unit understand how the law applies in context. Such an approach also sends a message to the unit that the commander views these rules as obligations that the military is forced to comply with. Worse still is the commander who denigrates these obligations to his subordinates. Telford Taylor, the United States chief prosecutor at the Nuremberg tribunals said of this kind of training, "of what use is an hour or two of lectures on the Geneva Conventions if the soldier sent into combat sees them flouted on every side?"<sup>185</sup>

On the other hand, commanders who understand both the legal obligations and the rationale behind these obligations, will seek to provide robust, contextualized and realistic training to subordinates. The commander will look for opportunities to raise law of war compliance issues throughout the full spectrum of military operations and demonstrate the priority he places on following the law.

Regardless of the approach a particular commander takes, the point is simply that the commander holds a unique position within the unit. He can do more than any other single official to either create an environment where compliance with the law of war is a fundamental aspect of every military operation, or he can create an environment where compliance with the law of war is an external obligation that gets in the way of mission accomplishment. The responsibility for setting the tone on this issue cannot be delegated to others. The command responsibility doctrine recognizes that essential aspect of command, and if the military justice system does not support the commander's ability to set the appropriate tone for law of war compliance, there is a risk that subordinates will disregard their legal obligations.

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185. Telford Taylor, *Nuremberg in Son My*, N.Y. TIMES, Nov. 21, 1970, at 30.

### C. Ensuring that Operations are Conducted in Compliance with the Law of Armed Conflict

In addition to establishing and modeling respect for the rule of law, the commander is ultimately responsible to ensure that all military operations comply with the laws of war. Beginning in the 20th Century in particular, the development of the law of war and the need for commanders to ensure their forces comply with the law has increasingly become a significant demand on a commander's time and resources.

It will never be easy for a commander operating in a combat environment to place a high priority on law of war compliance, but that is exactly what is expected of the commander. Among all of the competing demands placed on a commander, law of war compliance must be a top priority. That is the rationale behind the command responsibility doctrine. By holding the commander responsible and accountable for preventing, suppressing, and punishing law of war violations, the doctrine incentivizes the commander to make compliance with the law of war a key component of any military operation. It is critical that any military justice reforms do not unintentionally take that incentive away from the commander or dilute the applicability of the command responsibility doctrine. There is simply no one else in the military unit who can be delegated the primary responsibility of ensuring law of war compliance. If law of war compliance is not a top priority for the commander, it will not be a top priority for the military unit.

## V. ESSENTIAL AREAS OF INVOLVEMENT

In light of the critical role that the commander must play to ensure law of war compliance and the responsibilities that cannot be delegated to someone other than the commander, the critical question, and the one that has not yet been fully explored by most reformists is; in what ways can a military justice system be reformed while preserving these essential aspects of command? This final section explores this question and it does so by focusing on a number of reforms that have been proposed to the military justice system in the United States. As noted above, some of these reforms have already been adopted by other countries. In those instances the question is whether some of these reforms should be reconsidered.

We will look at five areas that have been the focus of advocates for reform in the United States. These areas are; the commander's investigating authority, the commander's role in convening courts-martial and exercising clemency, summary courts and the commander's ability to impose summary punishment, the role for military judges in the pre-referral phase of a court-martial, and tenure for military judges. There are certainly other possible reforms and this is not an exhaustive list. However, these reforms look at those functions where the commander has the greatest involvement in the process and these specific areas are at the intersection of military justice reform and the commander's obligations under the law of armed conflict.

### A. The Commander's Investigating Authority

In many traditional military justice systems the commander has the authority to initiate and conduct investigations into misconduct within the unit. In the United States commanders typically appoint an investigating officer within the unit to investigate allegations of misconduct. Serious allegations of misconduct are most often investigated by military professionals trained in criminal investigations. These criminal investigations do not require the unit commander's approval before they are initiated. In either case, once the investigations are completed, reports are prepared and provided to the commander.

A system that relies so heavily on the commander's authorization before investigations into misconduct can be initiated are certainly subject to manipulation and potential cover-up by the initiating commander. There are modern examples from the My Lai massacre in Vietnam to the killing of Iraqi civilians in Haditha during the Iraq war where allegations of command cover-up and inaction surfaced. These and other examples of cover-ups and inaction have led to calls for removing the commander from the investigative process. Under these proposed reforms the commander of the unit involved in the alleged misconduct would not be the one responsible for initiating or conducting investigations. This investigative responsibility would be passed to some other office outside of the unit's command structure, such as a centralized office of military prosecutions.

This type of reform has the advantage of removing those who might have the most at stake personally and professionally from initiating and conducting investigations. This might lead to greater independence and reduce the risk that allegations of misconduct will go unreported and uninvestigated.

However, completely removing the commander from the investigative process can conflict with the commander's command responsibility obligations to prevent, suppress and punish law of war violations. Having the authority to investigate allegations is a critical part of suppressing and punishing these violations. Because the commander can be held criminally liable for the offenses if he fails to suppress and punish them, he arguably has a greater incentive to ensure that credible allegations are investigated. A responsible commander is likely to be even keener than an office that has no command responsibility to initiate investigations and discover the relevant facts. Completely removing the commander from the investigative process violates a fundamental principle of the command responsibility doctrine and dis-incentivizes the commander from meeting his obligations under the law of armed conflict.

This is not to suggest that the commander must be the sole authority to initiate and conduct investigations. The risk of command cover-ups always exists, even if the commander could ultimately be held liable for the crimes because of the cover-up. The best approach is a system that gives the

commander the authority and responsibility to conduct investigations, but also vests investigative authority to independent offices outside the chain of command. This hybrid approach addresses the risk of command cover-up while still incentivizing the commander to take personal responsibility to investigate allegations of misconduct. The sharing of investigative responsibilities could be divided up in any number of ways or it could even allow for investigations to be conducted simultaneously.<sup>186</sup>

## B. The Commander's Role as the Convening Authority

### 1. *The Charging Decision*

Closely related to removing the commander from the investigative process are reforms that remove the commander from having any role in the charging process or from convening courts-martial to try the accused service member. These charging and convening authorities are taken from the commander and given to other offices outside of the chain of command. The rationale for these reforms is to provide the accused service member with a more independent tribunal free from undue influences of the military commander. These were at the heart of the reforms in both Canada and the United Kingdom and are high on the agenda for reform advocates in the United States.

Part III set out the significant responsibilities that a commander/convening authority has under the United States' military code. Of these, the most significant is the convening authority's ultimate responsibility for deciding the disposition of a case. It is the convening authority alone who decides if a service member should be tried and if so, what level of court-martial should be convened to try the alleged service member. Although the convening authority is required to make this decision only after consulting with his legal advisor, the ultimate decision rests with the commander and it cannot be delegated to others within the chain of command.

If the commander is to maintain his role as the source of discipline within the unit, the authority to convene courts-martial should not be given to some other office or authority. Reforms that remove the commander from this essential function risk undermining the commander's authority and violate the principles of command responsibility. It is critical for the commander to have final responsibility for imposing discipline within the unit. In order for the commander to do this effectively, he must be the one officer in the chain of command who convenes courts-martial.

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186. Simultaneous investigations often occur in the United States military, particularly in very serious cases. In the Abu Ghraib abuse cases for example, multiple investigations took place at the same time.

Simply having input into the convening determination or having the ability to refer cases to some other office is not enough. A commander's authority is undermined if he cannot address serious disciplinary issues with action. Imagine a situation where the commander believes alleged misconduct within the unit warrants a court-martial but the office in charge of convening a court-martial disagrees and elects to take no action. Such a scenario would seriously undermine the commander's authority within the unit. In the future, members of the unit might question or doubt that the commander has the ability to punish them or initiate disciplinary proceedings against them. How can a commander prevent, suppress, and punish law of war violations as required under the command responsibility doctrine, if members of the unit harbor doubts about his disciplinary authority? The authority to convene courts-martial is such a fundamental aspect of discipline and command authority that it cannot be taken away from the commander without undermining the command responsibility doctrine under the law of armed conflict.

While it is essential that the commander has the authority to convene courts-martial, many of the convening authority's other functions can and should be given to other offices outside of the chain of command. In the United States' system the convening authority has several other responsibilities beyond deciding who should face a court-martial. Some of the most important additional responsibilities include personally selecting the court members who will sit in judgment of the accused service member, deciding witness funding and availability issues, the authority to approve court-martial findings imposing sentences and exercising clemency on behalf of a service member. Each of these additional responsibilities will be discussed in turn.

## 2. Court Member Selection

The first, and by far the most controversial power that a convening authority has under the United States military code is selecting the individuals who will serve as the court members that sit in judgment of the accused service member. This particular provision was contentious when it was codified in the UCMJ and the contention and criticism has continued over time.<sup>187</sup> It is not surprising that reformers have focused their efforts on

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187. See Lederer & Hundley, *supra* note 112, at 645; see also Major Guy P. Glazier, *He Called for His Pipe, And He Called for His Bowl, And He Called for His Members Three – Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 2-3 (1998); Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 SW. U. L. REV. 481, 534-41 (1999) (proposing virtual abolition of the military justice system except in time of war or other overseas deployments); Matthew J. McCormack, Comment, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice*, 7 GEO. MASON L. REV. 1013, 1049-51 (1999) (arguing that the military should remove the convening authority's power to handpick

this issue. It is not hard to imagine a convening authority that has a mind to manipulate or unduly influence the outcome of a court-martial using this authority to hand pick those members who will be inclined to see the case as he does rather than deciding the case on its merits. While there are few reported cases of commander's overtly manipulating the process, the risk does exist when the convening authority has such power.

In spite of the fact that this provision of the UCMJ has been a target for reformers for many years, the military has been resistant to change. The military's arguments focus primarily on the logistical challenges of abandoning the current system for a system of random selection. There are undoubtedly some significant logistical and other challenges that would come with any reform. However, the question we are addressing here is whether the commander's personal selection of the court members should be considered such an essential aspect of command that taking this authority away from him would undermine his responsibilities as a commander. It is difficult to see how hand picking the court members facilitates his responsibilities to prevent, suppress, and punish members of his command for law of war violations. There does not seem to be any nexus between this power and the responsibilities of command. Taking this power away from the commander and placing it in the hands of an independent office seems justified.

### 3. *Witness Funding*

Another significant power enjoyed by convening authorities in the United States is to decide all witness funding and availability issues for both lay and expert witnesses. Before a service member's charges are referred to a court-martial the convening authority's decisions are not subject to review or appeal. Once the case is referred to trial, if the military judge determines that the convening authority's denial of witness funding is not justified, the military judge can abate the proceedings until the funds are made available. As with selecting court members, decisions regarding witness funding are ministerial in nature. There is nothing in the nature of command that gives the commander any special insight into funding issues. These are not decisions that go to the essence of command, and there is at least the risk that a commander could manipulate witness funding in order to inappropriately influence the trial. Reforms that give this authority to an office other than the commander do not prevent the commander from meeting his responsibility to prevent, suppress, and punish war crimes.

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court-martial panel members); Lindsay Nicole Alleman, Note, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169, 190-92 (2006) (suggesting a random selection method for choosing panel members that is tailored to meet the needs of the U.S. military).

#### 4. *Approval Authority and Clemency*

After the conclusion of a court-martial, no conviction or punishment is final until the findings and sentence are approved by the convening authority. Before the convening authority takes final action on a case, he must first review the record of trial and obtain advice from a legal advisor on the factual and legal correctness of the findings and sentence. As noted above, the convening authority may dismiss any charge or specification by setting aside findings of guilt, change the findings of guilt to a lesser included offense, modify the sentence to any lesser sentence, or order a proceeding in revision or rehearing. No proceeding in revision can reconsider a finding of not guilty. In addition, the convening authority can grant clemency to the service member and he has broad discretion on the forms such clemency can take.

Reform efforts that remove the commander from the charging and referral process also would take away the commander's authority to approve the court-martial findings or to exercise clemency on behalf of a convicted service member. This authority is more than a ministerial function and like the charging decision, goes to the essence of command. Commanders are in a position to place misconduct in the broader context of order and discipline within the unit. A commander is better suited than any other office or official to understand how exercising clemency in a particular case will impact both the service member and the unit. The commander can also best appreciate the overall tenor within the unit and is best able to determine when clemency may not be appropriate.

Clemency decisions can have a direct relationship to how the commander will prevent, suppress, and punish law of war violations. A commander who abuses this authority and fails to meaningfully punish violations can create an atmosphere of indiscipline within the unit and therefore increase the risk that subordinates will not take their obligations seriously enough to abide by the laws and customs of war. Similarly, a commander who is overly harsh can create resentment within the unit and a belief among subordinates that the commander acts arbitrarily and unfairly. This too can lead to indiscipline.

Passing these important decisions to someone other than the commander means that these decisions will be made by an official who does not have any of the key insights possessed by the commander. It also undermines the commander's ability to exercise appropriate control over his subordinates. Reforms that take away the commander's ability to exercise appropriate control are inconsistent with the principles of command responsibility and should be rejected.

#### 5. *Summary Courts*

A number of military systems contain some type of summary court-martial or other summarized proceeding, which arguably allows the

commander to take swift disciplinary action. In the U. S., commanders at medium and high levels of command have the authority to convene summary courts. These courts are quite limited in the types of punishment that can be imposed. Critics of the summary court system point to the minimal procedural protections and the risk of undue command influence and claim that the system should be abolished.

In some sense these summary courts do seem like an anachronistic holdover from a bygone era. However, there is a limited role for these summary proceedings and they can assist the commander in meeting his responsibilities to maintain discipline. There are certainly occasions and incidents that warrant swift action. A combat environment is one situation where the commander may need to quickly address misconduct to prevent the spread of indiscipline within the unit. The time and resources may simply not be available to provide for a more robust proceeding. In those instances, summary courts can be an effective tool for the commander to maintain discipline and send a message to potential offenders that he will not tolerate misconduct. This tool can support and enhance the commander's ability to prevent, suppress, and punish war crimes.

There should be appropriate limits on this authority to prevent the commander from abusing his power. Most importantly, summary courts should only be used for relatively minor offenses and the punishment that a commander can impose must be quite limited. This will ensure that summary courts strike the right balance between supporting the commander's responsibilities while also protecting service members from unfair or arbitrary action. Reforms that completely remove the commander's authority to convene summary courts would go too far.

### C. The Role for Military Judges in the Pre-Referral Phase

Courts-martial are *ad hoc* tribunals in virtually every military system around the world. This means that unlike in the civilian system where there are permanent courts and sitting judges to whom an accused can petition throughout the pre-trial and trial phase of a case, in the military system, there is no court or judge with authority to decide or even consider issues until a court is actually convened. In the United States, before a case is referred to a court-martial the convening authority has the ultimate authority to decide and rule on all issues and his decisions are virtually absolute until the case is referred to trial and the issues can be brought before a military judge. This is particularly true with respect to witness availability and pre-trial resource issues. This system can be problematic and unfair to the service member.

For example, in the United States, before the case is referred to trial if a service member wants to obtain the services of an independent investigator to assist with analyzing and understanding complex evidence, or developing investigatory leads and interview potential witnesses, the service member

must request these resources from the convening authority. In order to demonstrate the necessity for this assistance, the defense will often be required to reveal case strategy and other case-sensitive information to the convening authority and to his legal advisor. The convening authority has the sole responsibility of deciding these questions and he typically does so after obtaining advice from his legal advisor, the same officer who supervises the prosecution of the case. Under this system, it can be difficult for the defense to get a fair consideration of the issues and waiting until the case is referred to trial so that the request can be made to the military judge might be too late, particularly when the issues involve investigatory resources.

Given the potential for unfairness, this is an area that is ripe for reform, which does not impact the commander's essential responsibilities to maintain order and discipline over his forces. While reforms could take different paths, it seems that one of the most logical is to expand the role of the military judge and give the judge responsibility for deciding these issues even before the case is actually referred to a court-martial. Allowing a military judge to decide these ministerial issues would ensure that someone with legal training and intimate knowledge of both the rules and the legal precedents is the one making these decisions. This will streamline the process and prevent the issues from being relitigated once the case is referred to a court-martial. It also would ensure that someone who is independent of the chain of command decides these issues helping to facilitate greater overall fairness within the system.

Taking this authority away from the commander and giving them to the military judge does not undermine the commander's responsibility or his authority. The commander is not precluded from exercising his disciplinary responsibilities. He is relieved from the burden of deciding technical legal issues and he is freed-up to focus his attention on the matters of command.

#### D. Tenure for Military Judges

One final reform that has been a feature in the reforms in both Canada and the United Kingdom is to give the military judge a greater degree of independence from the chain of command and the executive. In the United States there have been calls for some type of tenure for military judges. Reforms contend that tenure is needed to give the military judge the independence needed to decide issues and cases without fear of professional retribution by the command or the executive.

It is hard to see how an independent military judiciary would adversely impact the commander's ability to legitimately maintain order and discipline. Military discipline must strike the right balance between maintaining discipline and order and preserving fundamental fairness for the accused service member. If the commander can manipulate the system by sanctioning or adversely affecting a military judge's career because the

commander disagrees with the judge's decision in a particular case, it will have a chilling effect on judicial independence and undermine confidence in the system. If there is widespread distrust of military justice in a unit, that distrust can undermine discipline in the same way as a lax command climate would. Commanders do not lose any of their legitimate authority when military judges are given meaningful independence and are free to decide issues and cases without undue influence from the commander. Reforms that provide protection and independence for military judges do not undermine command responsibility in any appreciable manner.

#### CONCLUSION

Reforming, updating, and modernizing military justice is an important and worthwhile goal for any legitimate system of justice. Over the past 20 years, there has been a virtual revolution in military justice reform and many of the most traditional and respected justice systems have undertaken significant changes. One overarching theme is conforming military justice to the prevailing civilian justice systems to a much greater degree than was the case in the past. While the United States was at the forefront of military justice reform in the years following World War II, today many reformers in the United States look with envy to the civilianization that has taken place elsewhere and are advocating for similar reforms.

In the push to modernize and civilianize military justice caution is warranted. It is important to consider that there are important reasons why military justice is separate from the civilian system. One of the most significant reasons for a separate and different system is because of the obligations the law of armed conflict places on the military commander to ensure order and discipline within the military unit and to prevent, suppress and punish war crimes. It is critical that military justice reforms do not undermine the commander's authority and responsibility to ensure law of war compliance because there is simply no other office or official who can take the place of the commander in meeting these obligations. Rather than reforming military justice with the end goal of making it more like civilian justice systems, any reforms that impact on the commander's traditional role in military justice must be carefully examined. Only those reforms that do not undermine the essence of command should be undertaken. This paper has looked at a number of proposed reforms. Many of these changes have already been implemented in other systems and are at the top of the list for reform advocates in the United States. This paper demonstrates the kind of analysis that should take place in order to determine how these reforms would likely impact the command responsibility doctrine. Courts and legislative bodies called on to address military justice reform must engage in this kind of analysis to ensure that changes do not have unintended consequences. To date, this discussion and analysis has been generally absent in reform efforts and proposals moving forward must embrace the

concept of command responsibility before any changes are made to the current military justice system.