

# THE AIR FORCE LAW REVIEW

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***Editor’s Note***

*We would like to thank the authors for their continued efforts in making this edition a possibility—this in light of their increased work loads following the September 11, 2001 terrorist attack against the United States. Readers will notice a variety of styles, lengths, citation rules, and in some cases, differences in spelling among the pieces. The authors have written formal articles to essays and comments, and the editors were told to preserve as much of each country’s particular style as possible—the only goal is that we understand each other’s military justice systems better after completing this edition. The order for the articles was chosen by lot, with the U.S. articles, as host nation, at the end. Finally, we would like to extend special thanks to Brigadier-General Pitzul and Doctor Tuzmukhamedov as it was their two original submissions that gave rise to the idea of creating an edition comparing various military justice systems.*

## FORWARD

*By Major General Thomas J. Fiscus*

I was privileged recently to speak at the all services Judges Conference held at the Air Force Judge Advocate General School. When I opened the floor for dialogue, the first question asked was about the differences between the U.S. military justice system under the Uniformed Code of Military Justice (UCMJ) and other countries' military justice systems. The judges wanted to know more about how our system compares to those of the countries with which we conduct military operations. Fortunately, I had just read the draft articles for this volume the night before! The judges' questions made the point that we do not understand enough about how each other's military justice systems operate.

This edition of the *Air Force Law Review* helps us to begin to achieve the above goal by providing an excellent survey of the military justice systems used by the United States, United Kingdom, Canada, Australia, Israel, and the Russian Federation. Greater knowledge of the systems of military justice used by these other nations is extremely valuable when we are evaluating the opportunities for improving our own system. Moreover, this knowledge becomes vital when we are working with coalition partners in multinational operations. This point takes on added meaning in carrying out anti-terrorist operations with other countries in the wake of the terrorist attacks of September 11, 2001.

Several of the articles point out that the UCMJ is regularly evaluated in comparison to the American civil system of justice. Having a military justice system that is fair in fact and in perception bolsters our core values by properly addressing misconduct, deterring others from wrong doing, and maintaining the trust of our fellow service members, host nations and the American people. While we provide justice in individual cases, our overall focus is on ensuring good order and discipline in the force.

An understanding of the U.S. military justice system and those of other nations will foster confidence in our allies of our desire to ensure a fair system of justice. For that reason also, it is my hope that this volume will be studied by our allies and friends around the world. This edition of the *Air Force Law Review* may become another step toward greater understanding of and by our allies, especially in this crucial time in the global war on terrorism.

# A PERSPECTIVE ON CANADA'S CODE OF SERVICE DISCIPLINE

BRIGADIER-GENERAL JERRY S.T. PITZUL  
AND  
COMMANDER JOHN C. MAGUIRE\*

## I. THE DEVELOPMENT OF CANADA'S MILITARY JUSTICE SYSTEM TO 1950

It has been suggested that “the procedures for disciplining the military forces of a nation are a direct reflection of the society that the forces were created to defend.”<sup>1</sup> To the extent that this hypothesis may be considered valid, one might expect the study of the evolution of military law not only to explain the rationale for the creation of a *Code of Service Discipline*, and its various provisions, but to also reveal something about the particular society concerned—its origins, traditions, experiences of war and legal history.

There are many factors which served to influence and shape the development of Canadian military law. This article is not an exhaustive analysis of the subject but a general discussion of the major turning points in the evolution of Canada's military justice system, including the passage, in 1950, of the *National Defence Act*,<sup>2</sup> which created one *Code of Service Discipline* applicable to Canada's then existing three armed services and the subsequent evolution of that Code.

The *Code of Service Discipline*, which is currently embodied in Part III of the *National Defence Act*, is the statutory basis for Canada's military justice system and sets out its main components. Further amplification is contained in the *Queen's Regulations and Orders for the Canadian Forces (QR&O)*, which are regulations made by the Governor in Council (the Canadian Cabinet) and the Minister of National Defence, as well as in orders issued by the Chief of the Defence Staff.

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\* Brigadier-General Jerry S.T. Pitzul is the Judge Advocate General of the Canadian Forces. Commander John C. Maguire is a legal officer employed in the Office of the Judge Advocate General. This article was first presented at the American Bar Association's 1998 ABA Annual Meeting, Toronto, Canada on 1 August 1998 and published in the program materials for the ABA General Practice, Solo and Small Firm Section's program entitled “A Retrospective: After Fifty Years Under the UCMJ – Is There Justice in the Military?” It has been reviewed and updated for publication in the *Air Force Law Review*. The views in this article do not necessarily represent the views of the Department of National Defence or the Canadian Forces.

<sup>1</sup> R.A. McDonald, *The Trail of Discipline: The Historical Roots of Canadian Military Law* 1 C.F. JAG J. 1, 1 (1985).

<sup>2</sup> National Defence Act, S.C. 1950, c.43.

Given Canada's historic experiences and status as a former British colony, it may not be surprising to discover that, like so many of Canada's public institutions, the Canadian Forces' *Code of Service Discipline* has clearly defined English roots. Indeed, it has been suggested that the early history of the Canadian military justice system is, in effect, the history of British military law.<sup>3</sup> The proposition is not without some merit given the pre-eminent role played by Britain in the defence of Canada in the period immediately prior to the Confederation of provinces, which, in 1867, gave birth to the modern Canadian nation state.<sup>4</sup>

In fact, until 1868 British forces comprised the only regular armed force in the Dominion of Canada.<sup>5</sup> As a matter of furthering Britain's imperial objectives, the approach was largely politic; Canada provided a ready supply of raw materials for the Empire as well as a secure market for British goods. The protection of these interests mandated a proactive role for British naval and land forces in defence of Canada. It is true that each of the British North American colonies was responsible for raising a volunteer militia. In each of the Canadian provinces, however, the militia was largely unarmed, untrained and unorganized.<sup>6</sup> It remained so until the infant Canadian nation passed its first *Militia Act* in 1868<sup>7</sup> and British regular forces were gradually withdrawn.<sup>8</sup> The 1868 Act, which borrowed heavily from British military law, marked the beginning of a period of development dominated by the legacy of British military and legal doctrine. A meaningful understanding of Canada's early attempts at codifying military law presumes some appreciation of the English experience in formulating a code of discipline to govern its own armed forces.

Until 1661, *Articles of War* were issued under the hand of the Sovereign as part of the Royal Prerogative that permitted the King to place the government of His Majesty's forces under his own command during time of war but which prevented the Sovereign from maintaining a standing army in England in time of peace. While the *Articles of War* prescribed offences, they only governed the conduct and duties of soldiers serving abroad in time of war. The *Mutiny Act* of 1689<sup>9</sup> augmented the *Articles of War* through the establishment of a standing army and made provision for its peacetime discipline under what has been described as the first permanent code of military law.<sup>10</sup> By 1879, the King's Prerogative to issue *Articles of War* had

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<sup>3</sup> K.W. Watkin, *Canadian Military Justice: Summary Proceedings and the Charter*, 35 (1990) (unpublished L.L.M. thesis, Queen's University).

<sup>4</sup> *Constitution Act*, (U.K.), 30 & 31 Vict., c.3 (1867) [hereinafter *Constitution Act, 1867*].

<sup>5</sup> J.B. Fay, *Canadian Military Criminal Law: An Examination of Military Justice* (1974) (unpublished L.L.M. thesis, Dalhousie University).

<sup>6</sup> D. Morton, *A Military History of Canada* (1990), Toronto: McClelland & Stewart Inc.

<sup>7</sup> *An Act Respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868, c.40.

<sup>8</sup> Morton, *supra* note 6, at 86.

<sup>9</sup> *An Act for punishing Officers or Soldiers who shall Mutiny or Desert Their Majesty's Service*, 1 Will & Mar., c.5 (U.K.) (1689).

<sup>10</sup> W.J. Lawson, *Canadian Military Law* 29 Can. Bar Rev. 241, 243 (1951).

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merged with the disciplinary provisions of the *Mutiny Act* in a comprehensive *Army Discipline and Regulation Act*, which would, in turn, be replaced by the *Army Act* of 1881.<sup>11</sup> A succession of *Army Acts*, passed annually by the British government, entrenched the principle of parliamentary oversight over a code of military law applicable during both peace and war—a principle which has survived intact in Canada. The *Army Acts* emphasized the importance of discipline within an armed force and the need for informal procedures under which offenders could be tried swiftly.

Canada's *Militia Act* of 1868 organized the Canadian Army as the country's first military force and essentially adopted the British Army model for a code of discipline. This was a logical step given the presence of British regular forces in Canada during the colonial period and the then prevailing philosophy that the Canadian Army should be trained and organized to support British forces.<sup>12</sup>

The *Militia Act* of 1868 introduced a two-tier system of summary trials and courts martial. Although much has changed, Canada's two-tier tribunal structure dates to this period as does the right to elect trial by court martial—which, at that time, permitted a soldier to elect the more formalized court martial mode of trial in any case where the punishment might have included imprisonment, a fine or a deduction from pay. The commanding officer's power to award imprisonment ended in 1906 when the new punishment of detention was introduced. By 1929, commanding officers were allowed to delegate their powers of punishment and a form of summary proceeding was added to allow general officers to try field officers of the rank of captain and below, and warrant officers, for offences which were not serious but which could "not be overlooked." This was the system which was in use in Britain when the Second World War erupted. By virtue of the successive *Militia Acts* passed by the Parliament of Canada since 1868, it was also the system of justice which the Canadian Army took to war in 1939.<sup>13</sup>

When Britain's Royal Air Force was formed near the end of World War I, the British *Army Act* provisions governing discipline were modified as necessary to account for differences in terminology, but, in most material respects, were merely repeated in what would become Britain's new single service *Air Force Act*.<sup>14</sup> The Order in Council that in 1924 gave birth to the Canadian Air Force specified that discipline would be in accordance with Britain's *Air Force Act*.<sup>15</sup> This should not be particularly surprising given the fact that Canadian airmen had served within British air units during the First

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<sup>11</sup> *Army Discipline and Regulation Act*, 42 & 43 Vict., c.33 (U.K.) (1879); *Army Act*, 44 & 45 Vict., c.58 (U.K.) (1881).

<sup>12</sup> Fay, *supra* note 5, at 3.

<sup>13</sup> These developments are discussed in more detail in Watkin, *supra* note 3, at 37-44.

<sup>14</sup> *Air Force (Constitution) Act*, 7 & 8 Geo. V. c.51 (U.K.) (1917), discussed in McDonald, *supra* note 1, at 19.

<sup>15</sup> Passed under the authority of *The Air Board Act*, S.C. 1919, c.11.

World War where they had been subject to Britain's Army Act provisions. The British *Air Force Act* continued to form the basis for the Canadian Air Force's disciplinary regime until 1950 and the coming into force of the current *National Defence Act*.<sup>16</sup>

As was the case in the army, discipline in the British Royal Navy had initially been governed by *Articles of War*. Trials were originally conducted by the Office of the Lord High Admiral, then by "councils of war."<sup>17</sup> In 1661, a legislative code for the navy was formulated which, for the first time, used the term "courts martial" to refer to naval tribunals and established courts martial jurisdiction having regard to the type of offence, the place of the offence and the status of the offender.<sup>18</sup> Courts martial punishments ranged from death to imprisonment and fines. Corporal punishment—up to forty-eight lashes—could be awarded in lieu of imprisonment and penal servitude followed death in the scale of punishments.<sup>19</sup>

Unlike their army counterparts, naval captains traditionally possessed the power to summarily punish seamen for most "Faults, Misdemeanours and Disorders committed at Sea . . . according to the laws and customs of the sea."<sup>20</sup> While some of the more draconian features of this Code were moderated with the passage of the *Naval Discipline Act* of 1866,<sup>21</sup> ships captains still had great latitude to order the immediate execution of sentences with little supervision from higher authority.<sup>22</sup>

The provisions of Britain's *Naval Discipline Act* of 1866 were incorporated by reference into Canada's *Naval Services Act*<sup>23</sup> when the Royal Canadian Navy was established in 1910. This development can no doubt be explained by the fact that Britain's Royal Navy had always guarded Canada's oceans and for the most part would continue to do so until the end of the First World War.<sup>24</sup> British influences can also be seen in *The Naval Services Act* of 1944.<sup>25</sup> To the extent that it marked the end of the practice of simply incorporating by reference one of the British codes of service discipline, the latter Act, which was the first truly Canadian naval code of discipline, marked a first step in the development of a uniquely Canadian as opposed to British

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<sup>16</sup> McDonald, *supra* note 1, at 19-20.

<sup>17</sup> Watkin, *supra* note 3, at 45-46.

<sup>18</sup> *An Act for the Establishing Articles and Orders for The Regulating and Better Government of His Majesty's Navies Ships of War & Forces by Sea*, 1661, 13 Car.II, c.9 (U.K.).

<sup>19</sup> See McDonald, *supra* note 1, at 7.

<sup>20</sup> *Id.* at 7.

<sup>21</sup> *Naval Discipline Act*, 29 & 30 Vict., c.109 (1866).

<sup>22</sup> Watkin, *supra* note 3, at 47.

<sup>23</sup> *The Naval Services Act*, S.C. 1909-1910, c.43.

<sup>24</sup> Morton, *supra* note 6 at XI.

<sup>25</sup> *Naval Services Act*, S.C. 1944-45, c.23 (1944).

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military justice system.<sup>26</sup> It would in turn serve as the prototype for many sections of what would, in 1950, become the *National Defence Act*.<sup>27</sup>

Canadian historian Desmond Morton has argued that the wars of the twentieth century forced Canadians to “choose between the empire and independence,” that they were “the catalyst for an explosive industrial expansion and for much of Canada’s system of social security” and that they “transformed almost every Canadian institution.”<sup>28</sup> This was clearly the case insofar as Canada’s system of military justice was concerned.

While the Canadian Navy had taken the first step towards a distinct *Code of Service Discipline* in 1944, at war’s end the Canadian Army and Air Force still had what has been described as a “confusion of authorities,” both British and Canadian, which governed discipline.<sup>29</sup> The situation had simply become unmanageable. This factor, coupled with a general “dissatisfaction with the military justice system caused largely by the influx of a large number of civilians into the armed forces during World War II,” led to a comprehensive review of all legislation which applied to servicemen.<sup>30</sup> Of course, Canada was not alone in doing so. The Lewis Commission was undertaking a similar review in the United Kingdom, and Canadian observers followed the work of that commission and similar studies being conducted in the United States—particularly the efforts being made to develop a uniform code of military justice which would ultimately be adopted for use by each of the armed services in that country.<sup>31</sup>

In Canada this process of review culminated in the enactment, in 1950, of a comprehensive *National Defence Act (NDA)* which included, in one Canadian statute, all legislation relating to the Department of National Defence and the Canadian Navy, Army and Air Force, and terminated reliance upon British statute.<sup>32</sup> It also created a single *Code of Service Discipline* applicable to soldiers, sailors and airmen; established a uniform process for administering military justice; and, provided rights of appeal from the findings and sentences of Courts Martial to a Court Martial Appeal Board.<sup>33</sup>

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<sup>26</sup> Fay, *supra* note 5, at 4.

<sup>27</sup> Lawson, *supra* note 10, at 246.

<sup>28</sup> Morton, *supra* note 6, at IX.

<sup>29</sup> McDonald, *supra* note 1, at 20.

<sup>30</sup> Watkin, *supra* note 3, at 49.

<sup>31</sup> Fay, *supra* note 5, at 4.

<sup>32</sup> In fact, as McDonald, *supra* note 1, at 21, observes:

From the time of the First World War, British control over the actual administration of military discipline in the Canadian Forces had been gradually eroded to the point where *de facto* control rested solely with Canadian authorities by the end of the Second World War. The *NDA* strengthened the *de facto* control by adding purely Canadian legislative authority thereby eliminating the final vestiges of British influence in the disciplinary process.

<sup>33</sup> See Watkin, *supra* note 3, at 49, and Fay, *supra* note 5, at 5.



The Code maintained the control which each of the separate Services had over their own forces to the extent that it only permitted an accused to be dealt with and tried by the service in which the member was enrolled.<sup>34</sup> It also adopted the relatively open-ended jurisdiction scheme that had given jurisdiction over an offence to the army and air force, no matter where the offence had been committed. Provision was also made for three forms of summary trial: summary trial by commanding officer, by delegated officer, and by superior commander. It adopted the navy's approach in appointing an officer to assist the accused and allowing the trial of subordinate officers and also incorporated the army's right to elect trial by courts.<sup>35</sup>

In terms of courts martial, the new Code blended the pre-existing court martial structure. While it adopted the army and air force terminology in naming the highest form of court martial a "General Court Martial," it reflected naval practice in the use of the term Disciplinary Court Martial to describe the court martial having the next highest powers. Both courts featured a panel of military officers chosen by a convening authority. Provision was also made for a third form of court martial, the Standing Court Martial, which is currently presided over by a military judge sitting alone.

The process of creating a uniform *Code of Service Discipline* was hardly a straightforward matter, and the finished product reflects a number of compromises. For example, prior to 1950, the summary powers of punishment of naval commanding officers included the ability to award detention of up to three calendar months whereas a twenty-eight day maximum applied in the army and air force. The *Code of Service Discipline* adopted a ninety-day ceiling but required commanding officers to seek approval of any sentence in excess of thirty days. Nevertheless, some differences in the approach taken with respect to minor punishments would continue to be reflected in the applicable single service regulations, thereby perpetuating such venerable punishments as "stoppage of grog" and "confinement to barracks."<sup>36</sup>

## II. SUBSEQUENT DEVELOPMENTS IN CANADIAN MILITARY LAW

The first thirty years in the life of Canada's *Code of Service Discipline* might well be described as a period of reflection, during which public interest in the development of military justice waned.<sup>37</sup> Changes to the Code in this period were largely procedural. However, there were some notable exceptions.

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<sup>34</sup> McDonald, *supra* note 1, at 22.

<sup>35</sup> As Watkin, *supra* note 3, at 51-52, observes, the right was only extended to those accused who were above the rank of private.

<sup>36</sup> For a more thorough discussion of the applicable provisions see McDonald, *supra* note 1, at 23-24.

<sup>37</sup> Fay, *supra* note 5, at 1.

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In 1952, the *National Defence Act* was amended to extend the powers of punishment of delegated officers to allow for the imposition of up to fourteen days detention and add the power to award a severe reprimand.<sup>38</sup> Regulatory changes followed in 1959 which extended the right to elect court martial to any accused charged with a service offence which alleged a breach of the civil criminal law. The election had traditionally been given after the evidence had been heard but before the finding was made. That approach, which is still followed in the British Army, was abandoned in 1959 in favour of a more waiver-like process under which the right to elect trial by court martial was extended, and the accused's answer recorded, prior to the start of the summary trial.<sup>39</sup>

In 1959, the Act was amended once more; this time to specify that any court martial decision which awarded death had to be unanimous. This marked a departure from the majority-vote oriented process for determining findings and sentence which had applied prior to 1959 and which continued to apply in all non-capital cases. The 1959 amendments also marked the establishment of the Court Martial Appeal Court (CMAC) as a civilian superior court of record having jurisdiction to hear and determine appeals from courts martial pertaining to the legality of sentences and findings. This package of reforms did not provide the Crown with a means of initiating appeals; nor did it allow the CMAC to entertain severity of sentence applications. Nevertheless, it did add a further right of appeal to the Supreme Court of Canada which could be exercised by either the accused or the Minister of National Defence, provided certain pre-conditions were satisfied.<sup>40</sup>

Until 1959, Canadian Courts Martial were obliged to apply the rules of evidence then in force in the province in which the trial was being held. In trials conducted abroad, the rules of evidence which were applicable in the accused's home province were to be used. The uncertainty and confusion which such a complicated process created ended when the Military Rules of Evidence (MREs) were passed by Governor in Council in August of that year.<sup>41</sup> The MREs, which are a codification of the normal evidentiary rules followed by Canadian criminal courts, represent a uniquely Canadian approach to the practical problems posed by the portability requirements of a military justice system.

In 1965, the government of the day integrated the Canadian Navy, Army and Air Force under a functional command structure. Unification, which would follow in 1968, led to the creation of a single service—the Canadian Armed Forces or Canadian Forces as it became known in regulations. The new service was comprised of full-time regular force and part-time reserve force components. To the extent that a unified *Code of*

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<sup>38</sup> *The Canadian Forces Act*, S.C. 1952, c.6 (1952).

<sup>39</sup> Watkin, *supra* note 3, at 52.

<sup>40</sup> *An Act to amend the National Defence Act*, S.C. 1959, s 191-196.

<sup>41</sup> Fay, *supra* note 5, at 186-87.

*Service Discipline* was already in place, the fact of unification had very little impact on the military justice system, except to the extent that it led to the creation of a single set of *Queen's Regulations and Orders for the Canadian Forces* and the standardization of minor punishments.<sup>42</sup> A fourth type of court martial, the Special General Court Martial, was added in 1969. It was given the exclusive jurisdiction to try civilians who were subject to the *Code of Service Discipline*. No further significant changes to Canada's military justice system occurred until 1982 and the coming into force of the *Canadian Charter of Rights and Freedoms*.<sup>43</sup>

What followed was a relatively intense process of review, both internal and judicial, during which the Canadian Forces was called upon to reconcile its military justice provisions and processes with the constitutional protections embodied in the *Charter*. That process, which is still ongoing, resulted in an unprecedented series of amendments to the *Code of Service Discipline* and subordinate regulations and orders as well as what has been appropriately characterized as the "rapid convergence between military and civilian criminal justice processes."<sup>44</sup> Some of the more significant changes implemented between 1982 and 1992 include:

- establishing a process under which an accused who had been found guilty at court martial and sentenced to a term of incarceration, could apply for judicial interim release;
- developing a Charter compliant scheme for dealing with mentally disordered accused;
- creating a truly comprehensive civilian appellate review process in both courts martial findings and sentences accessible by both the Crown and the accused; and
- enhancing the independence of courts martial by
  - separating the functions of convening courts martial and appointing judges and panel members;
  - adopting a random methodology for selecting courts martial panel members; and
  - implementing reforms to ensure the security of tenure, financial security and institutional independence of military judges, including appointing judges for fixed terms, adopting the civilian "cause-based" removal standard and discontinuing the use of career evaluations as a measure of judicial performance.

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<sup>42</sup> McDonald, *supra* note 1, at 25.

<sup>43</sup> *Constitution Act, (1982)* Part I [hereinafter referred to as the *Charter*].

<sup>44</sup> A.F. Fenske, "Evolution of the Code of Service Discipline into the twenty-first Century: A Canadian Perspective" (Address to the Canadian Bar Association, Commonwealth Association of Armed Forces Lawyers, 28 August 1996) [unpublished] at 11.

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The latter reforms were the direct result of court challenges in which it was argued that the manner in which the Standing and General Courts Martial were constituted undermined the courts' independence within the meaning of section 11(d) of the *Charter*.<sup>45</sup> Of these cases, the 1992 Supreme Court of Canada decision in *Généreux* is particularly noteworthy.<sup>46</sup> In ruling that the legal construct for General Courts Martial, as it had existed at the time of trial, violated the paragraph 11(d) guarantee of independence, the Court in *Généreux* concluded that it was unacceptable for anyone in the chain of command to be in a position to interfere in matters which are directly and immediately relevant to the adjudicative function. In this respect, the Supreme Court determined that an actual lack of independence need not be established; rather, the test was whether an informed and reasonable person would "perceive" the tribunal as independent, based on its objective status; which is to say, the legal framework governing the status of the tribunal as opposed to the actual good faith of the adjudicator. In examining the *Généreux* decision, it is important to note that many of the reforms in this area had already been implemented prior to the actual appeal hearing. The Supreme Court of Canada commented favourably on these changes.

*Généreux* is also of significance in that the Court, in that case, acknowledged and upheld the requirement for a distinct but parallel system of military tribunals staffed by members of the military who are aware of and sensitive to military concerns. In this respect, the Chief Justice stated that the purpose of such a system is "to deal with matters that pertain directly to the discipline, efficiency and morale of the military" and that "[t]o maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently." Mr. Justice Lamer went on to note the critical role played by the *Code of Service Discipline* in allowing the military to meet its "particular disciplinary needs."<sup>47</sup>

During the latter half of the 1990's, the military justice system was the subject of a level of scrutiny that was unprecedented in Canadian history. The continuing requirement to ensure *Charter* compliance provides an explanation for the process of self-examination which led to the creation of the Summary Trial Working Group. Its comprehensive report on the summary trial system was issued in 1994.<sup>48</sup> That and subsequent studies, such as the reports of

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<sup>45</sup> See *R. v. Ingebrightson*, 61 CCC (3d) 541 (C.M.A.C.) (1990); *R. v. Généreux* 1 S.C.R. 259; 70 CCC (3d) 1 (S.C.C.) (1992) [hereinafter *Généreux* cited to CCC].

<sup>46</sup> *Généreux*, *supra* note 45.

<sup>47</sup> *Id.* at 33.

<sup>48</sup> Canada, Summary Trial Working Group, *Report of the Summary Trial Working Group* (Ottawa, 2 March 1994). This report contained 59 recommendations which were approved by Armed Forces' Council in May of 1994.

*Special Advisory Group on Military Police and Investigation Services*<sup>49</sup> chaired by the Right Honourable Brian Dickson, a retired Chief Justice of the Supreme Court of Canada, resulted in the implementation of a comprehensive set of regulatory changes to the summary trial system. The changes took effect on 30 November 1997.

While units retain the primary responsibility regarding the investigation of minor offences, the regulatory amendments preclude commanding officers from trying any case which they have personally investigated. Unit authorities also continue to have the authority to lay charges.<sup>50</sup> That jurisdiction, however, is shared inasmuch as military police assigned to a newly created National Investigation Service (NIS)<sup>51</sup> now have the mandate to investigate serious and sensitive offences as well as the power to lay charges. Furthermore, in all but a few minor cases, advice must now be obtained from a military legal officer before a charge is laid or when deciding how charges should be disposed of.

The 1997 regulatory changes also enhance the right to elect trial by court martial. That right must now be extended to the accused in cases involving all but the most minor disciplinary offences. Moreover, for the first time, delegated officers have the power to offer the election to accused persons appearing before them. Steps have also been taken to ensure that each accused is fully informed of the implications and consequences of electing summary trial or courts martial, including providing accused persons with access to legal counsel in order to assist them in making a fully-informed election.

The amendments also reduce the offence jurisdiction of commanding officers and delegated officers to those offences that are more minor in nature and over which offence jurisdiction is demonstrably necessary for the maintenance of unit discipline. At the same time, the severity of the punishments that may be awarded at summary trial has been reduced and the scheme of punishments restructured in keeping with the summary trial's disciplinary, as opposed to penal character. For example, while commanding officers are still able to award detention, the maximum amount of detention, which may be awarded, has been reduced from ninety to thirty days.

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<sup>49</sup> Canada, Special Advisory Group on Military Justice and Military Police Investigation Services, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa: Public Works and Government Services Canada – Publishing, March 1997); Canada, Special Advisory Group on Military Justice and Military Police Investigation Services, *Report on Quasi-Judicial Role of the Minister of National Defence* (Ottawa: Public Works and Government Services Canada–Publishing, July 1997) [hereinafter Special Advisory Group Reports].

<sup>50</sup> For the purposes of proceedings under the *Code of Service Discipline*, a "charge" is a formal accusation that a person subject to the Code has committed a service offence. A charge is laid when it is reduced to writing in Part 1 (Charge Report) of the Record of Disciplinary Proceedings and signed by a person authorized to lay charges.

<sup>51</sup> The NIS is responsible to a Provost Marshal who reports outside the operational chain of command to the Vice Chief of the Defence Staff.

## **10-The Air Force Law Review**

Until November of 1997, the decision of a summary trial could only be challenged by way of a grievance submitted through the military chain of command. The regulations now provide a mechanism, separate and apart from the redress of grievance process, by which an accused found guilty at summary trial is able to request that the findings and sentence be reviewed.

The heightened public and media interest alluded to earlier would seem to be the direct result of a small number of high profile cases involving particularly egregious acts of misconduct committed by members of the Canadian Forces involved in peacekeeping operations in Somalia, and to a much lesser extent, Bosnia. Without commenting in any detail on the broader implications and significance of these regrettable acts, their impact on public opinion in Canada has led to comparisons with the American experience in the Vietnam War era. The Canadian government responded to these events, and the public concern they provoked, by convening a public *Commission of Inquiry into the Deployment of Canadian Forces to Somalia*<sup>52</sup> and by commissioning the Special Advisory Group studies referred to earlier. The Somalia Commission Report and the reports of the Special Advisory Group were released in 1997.

The government reacted quickly to the various recommendations contained in these reports by sponsoring Bill C-25,<sup>53</sup> an *Act to Amend the National Defence Act*.<sup>54</sup> Bill C-25 adopted the recommendations of the Special Advisory Group and responded to the recommendations of the Somalia Commission. The vast majority of the provisions contained in Bill C-25 and the implementing regulations came into force on 1 September 1999.<sup>55</sup>

### III. THE FUTURE: CANADIAN MILITARY JUSTICE IN THE 21<sup>ST</sup> CENTURY

The comprehensive package of amendments to the *National Defence Act* contained in Bill C-25 and the supporting regulations were designed to promote greater accountability and transparency in the military justice system and strengthen the Canadian Forces as a national institution in which Canadians may continue to repose their trust and confidence. The changes

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<sup>52</sup> Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Public Works and Government Services Canada – Publishing, June 1997) available at <http://www.dnd.ca/somalia/somaliae.htm> [hereinafter Somalia Commission Report].

<sup>53</sup> Bill C-25, *An Act to Amend the National Defence Act* and to make consequential amendments to other Acts, S.C. 1998, C-35, introduced in Canada's House of Commons on 30 November 1997. Bill C-25 completed third reading in the Senate on 1 December 1998 and received Royal Assent on 10 December 1998.

<sup>54</sup> *National Defence Act*, R.S.C.1985, c.N-5, as amended.

<sup>55</sup> P.C. 1999-1304, July 8, 1999.

resulted in a structure that is more consistent with civilian criminal procedure while still taking into account the military requirements that underscore the rationale for a distinct military justice system, including the requirement to maintain portable service tribunals capable, with prompt but fair processes, of operating in time of conflict or peace, in Canada or abroad.

One of the most important changes concerned the steps being taken to clarify the roles and responsibilities of the various actors in the military justice system. With the implementation of the reforms, the Minister of National Defence no longer has the responsibility to make decisions pertaining to individual disciplinary cases such as convening courts martial, approving punishments of dismissal from Her Majesty's service, or acting as a review authority in respect of summary trial and court martial findings and sentences. By devolving such responsibilities to other authorities, the potential conflict of interest between such matters and the Minister's duties in respect of the overall management of the Department and Canadian Forces has been reduced; as has any perception of interference by the Minister in the routine administration of individual cases.

The requirement for specialized military legal advice is of utmost importance to the Department of National Defence and the Canadian Forces. Since 1911, the Judge Advocate General has acted as legal advisor to the Governor General, the Minister of National Defence, the Department and the Canadian Forces. For the first time however, the Judge Advocate General's duties have been clearly set out in the *National Defence Act* together with the requirement to superintend the administration of military justice across the Canadian Forces by conducting regular reviews and assessments and reporting annually to the Minister.

As representatives of the Judge Advocate General, Canadian Forces legal officers have traditionally given advice pertaining to the investigation of service offences and charge laying, have been appointed by convening authorities to serve as prosecutors, and, have acted as defence counsel at courts martial. These services continue to be performed by legal officers. However, under the amended *Code of Service Discipline*, the prosecution function has been assigned exclusively to the Director of Military Prosecutions (DMP). The person appointed by the Minister to occupy the position of DMP is directly responsible for the preferring of all charges to be tried by court martial, for determining the type of court martial to hear those charges, and, through the assignment of individual uniformed prosecutors, responsible for the conduct of court martial proceedings. The DMP also acts as counsel for the Minister in respect of appeals. The DMP acts under the general supervision of the Judge Advocate General who may issue specific, written instructions or guidelines in respect of particular prosecutions. Where such instructions or guidelines are issued the DMP must ensure that those instructions or guidelines are made publicly available.

## **12-The Air Force Law Review**

Similarly, the defence function has been assigned exclusively to the Director of Defence Counsel Services, who is responsible for the supervision of prescribed legal services to persons subject to the *Code of Service Discipline*. The Director of Defence Counsel Services also acts under the general supervision of the Judge Advocate General and may be subject to general instructions and guidelines that must be made available to the public. However, to avoid any perception of interference, the Act does not allow the Judge Advocate General to issue instructions or guidelines pertaining to the conduct of any particular defence. Enhancing the separation between military defence counsel and other actors in the military justice system was intended to provide greater assurance that persons subject to the Code receive independent legal advice.

Changes were also made to the *National Defence Act* to reflect the regulatory changes pertaining to the institutional independence of military judges referred to earlier. It is important to note that military judges are not responsible to the chain of command. Indeed, the Office of the Chief Military Judge has now been established as a separate unit of the Canadian Forces.

Bill C-25 also made provision for the establishment of a Court Martial Administrator to convene courts martial on the request of the Director of Military Prosecutions and appoint members to sit as General and Disciplinary Courts Martial panel members. The Court Martial Administrator performs these important administrative functions under the general supervision of the Chief Military Judge.

Under the new scheme for referring matters to courts martial, a commanding officer or superior commander who lacks jurisdiction to proceed, or considers that it would not be appropriate to refer the charges to another officer having summary trial jurisdiction, is required to refer the charges to a referral authority—typically an officer commanding a command.<sup>56</sup> In most cases the referral authority will be required to refer the application on to the Director of Military Prosecutions together with any recommendations which may be considered appropriate. The involvement of the referral authority ensures the valuable and essential participation of the chain of command in the decision to prefer charges to courts martial.

I have already discussed some recent changes to the investigation and charging process. The recent statutory reforms continue the process of making the military justice system more efficient and transparent. For example, while commanding officers and superior commanders are able to decide not to proceed with a matter, they no longer have the jurisdiction to dismiss charges.

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<sup>56</sup> The term "referral authority" will be defined to include the Chief of the Defence Staff and any officer commanding a command. By virtue of this definition the environmental Chiefs (the Chief of the Maritime Staff, Chief of the Land Staff and Chief of the Air Staff), subordinate commanders of commands and any officer who is able to exercise the powers of a "commander of a command" by virtue of a special Ministerial order would be able to act as referral authorities.



Moreover, members of the recently created National Investigation Service are able to refer a charge which was laid by a member of that service directly to a referral authority, for further transmission to the Director of Military Prosecutions, in any case where a commanding officer or superior commander has decided not to proceed with a charge. Other legislative amendments have enhanced the independence of the military police through the establishment of an independent, external Military Police Complaints Commission which reports annually to Parliament, as well as through the creation of a Military Police Professional Code of Conduct establishing standards for military police in the conduct of their policing duties.

A new procedure has also been implemented for reviewing cases of pre-trial custody. While the initial review of custody is still conducted by the commanding officer or a designate, all subsequent reviews must be conducted by a military judge. As was the case in release pending appeal applications, the direction to release a member from pre-trial custody is now capable of being made the subject of a conditions order. Such directions are reviewable on application to the Court Martial Appeal Court.

The reforms also complete the process of modernizing the summary trial system. In particular, the largely procedural distinctions between trial by superior commander and other forms of summary proceedings have been eliminated, and the nature of certain forms of punishment have also been changed. For example, a presiding officer's power to impose a punishment of reduction in rank has been limited to one substantive rank and reduction in rank is no longer deemed an included punishment where a non-commissioned member has been sentenced to detention.

Changes to the courts martial system include:

- providing for non-commissioned members at or above the rank of warrant officer to sit as members of General and Disciplinary Court Martial panels when the accused is a non-commissioned member;
- formally requiring the military judge presiding at a General or Disciplinary Court Martial to make all decisions of a legal nature and determine sentence;
- reducing the period of detention that may be awarded at courts martial from two years to ninety days in keeping with the rehabilitative objectives of detention and to enhance the distinction between that punishment and the more penal punishment of imprisonment;
- removing the monetary limits on the fines that may be imposed; and
- eliminating the death penalty from the scale of punishments in the *Code of Service Discipline* on the basis that it was no longer

required as a punishment for service offences and its removal was consistent with other federal law. For the most serious offences, imprisonment for life with no eligibility for parole for twenty-five years has been substituted.

Some jurisdictional changes were also incorporated into the Bill C-25 reforms. For example, the three-year limitation period on the prosecution of service offences was repealed. That limitation period was considered to pose an unreasonable limitation on disciplinary action in particularly complex investigations and in those cases where offences were not reported or disclosed within the relevant period. A one-year limitation, however, is considered to be an appropriate period within which to deal with offences at summary trial given the nature of the proceeding and its objectives.

Another jurisdictional change involves sexual assault offences committed in Canada by persons subject to the *Code of Service Discipline*. Prior to 1 September 1999 such offences had to be tried by civilian court rather than by a service tribunal. To the extent that sexual assault offences have the potential to undermine morale and unit discipline, lessen mutual trust and respect, and ultimately impair military efficiency, the Canadian Forces' inability to deal promptly with such offences was considered problematic. Bill C-25 therefore removed this limitation on jurisdiction.

Other oversight and review measures which have not been discussed, but which nonetheless deserve mention, include: the appointment of an ombudsmen, the creation of a monitoring committee and the requirement that the Minister of National Defence review the statute and report to Parliament within five years of its coming into force.

While this paper does not address all of the changes made to the *Code of Service Discipline*, I trust it has provided some appreciation of the wide-ranging scope and nature of the recent reforms to the Canadian system. While it is still early in the reform process, the changes will result in a modern but in many ways different *Code of Service Discipline* as the Canadian Forces enters the 21<sup>st</sup> century.

# THE BRITISH SYSTEM OF MILITARY JUSTICE

WING COMMANDER SIMON P. ROWLINSON\*

## I. INTRODUCTION

This article will examine the present system of military justice used within the United Kingdom Royal Air Force (RAF). It will briefly discuss the historical development of the military system of justice to the present form. It shall then review the existing system and finally look at the challenges to that system. The system employed by the Army is virtually identical in all respects to that of the Royal Air Force. The Royal Navy system differs in some details to that of the other two Services. For example, there is only one type of Naval Court-Martial, but following recent reforms, it is similar in most respects.

## II. HISTORICAL DEVELOPMENT

From the time of the first organised armies, some form of military law has existed to govern the behaviour of the soldiers. Rules would be needed to enforce discipline in the ranks essential to the success of the army in battle and to ensure the orderly running of the army— both on the march and when in camp. Examples of the existence of such rules can be seen in Herodotus' account of the Persian Wars when he describes the order of march of the Spartan army and the provisions made by the Persians for the guarding of their camp. The English Court-Martial system appears as early as 1296 in the role of a military court attached to the army in Scotland.<sup>1</sup>

Over the centuries the English system developed from feudal beginnings into a recognisable court. By the latter part of the eighteenth century most of the elements of a modern court were in place, with one notable exception—the Judge Advocate acted traditionally as both the legal adviser to the court and as the prosecutor. As the nineteenth century progressed there was increasing disquiet about this dual and apparently mutually inconsistent role of the Judge Advocate and the effect it had on the fairness of the

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<sup>1</sup> James Stuart-Smith, Deputy Judge Advocate, *Without Partiality, Favour or Affection*, THE MILITARY LAW AND LAW OF WAR REVIEW II-2, 1963, Brussels.

proceedings. A description of the courts–martial of this time can be found in the work of Alexander Fraser Tytler, a Judge Advocate of the period.<sup>2</sup>

A well used quote of English lawyers, and indeed lawyers of the Common Law tradition, is that of Lord Chief Justice Hewart who stated that “it is not merely of some importance, but it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.”<sup>3</sup> Thus, in 1860 the Articles of War were amended so that the Judge Advocate became the legal adviser to the court and no longer the prosecutor. When the Royal Air Force was formed on 1 April 1918, the Army system was adapted for its use. This system survived until 1946 and the publication of the Lewis Committee report.<sup>4</sup> The final system was introduced by the Air Force Act 1955 and the Army Act 1955. This legislation remains in force today albeit in a substantially amended form due to the changes made prior to and following the decision of the European Court of Human Rights in the case of *Findlay v. United Kingdom*.<sup>5</sup>

The Royal Navy developed a very similar system of justice to that used by the Army. Arguably, the first record of a system of naval justice is an ordinance of 1190 issued by King Richard 1 for discipline in the fleet during the Great Crusade. By the reign of Queen Elizabeth 1, discipline was exercised in a similar manner to English criminal courts by the Admiral, usually assisted, informally, by Captains of the ships in the fleet. A Commonwealth ordinance of 1645 formalised this system which evolved through the 18<sup>th</sup> and 19<sup>th</sup> centuries so that Captains were given increasingly wide powers to discipline their crews as ships spent longer periods away from the Admiral or other ships. In 1866 the Naval Discipline Act brought the system of naval justice more closely in line with the rest of English law and the military system though Royal Navy Captains still enjoyed wider powers of punishment than their Army counterparts.

The present system of naval justice derives from the Naval Discipline Act 1957, which, like the Army Act 1955 and the Air Force Act 1955, has undergone substantial revision in recent years.

### **III. RECENT REFORMS**

As mentioned above, the three systems of military justice operated by British forces existed largely unchanged for 42 years. In the mid nineteen nineties several challenges were made to the system. These culminated in the

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<sup>2</sup> “An Essay on Military Law and the Practise of Courts – Martial” by Alexander Fraser Tytler. Tytler was Judge Advocate of Northern Britain at the turn of the eighteenth and nineteenth centuries. His writings are regarded as authoritative by many authors in the field of military legal history.

<sup>3</sup> Re: Sussex Justices (1924) 1 KB at page 256.

<sup>4</sup> Report of the Army and Air Force Courts-Martial Committee 1946 Cmnd. 7608.

<sup>5</sup> (1997) 24 E.H.R.R. 221; *see infra* Part III.

case of *Findlay v. United Kingdom*.<sup>6</sup> A brief examination of the system challenged by this case is necessary in order to understand the full implications of the recent reforms and to put into perspective the current system.

The court-martial which tried Lance Sergeant Findlay was convened under Section 86 of the Army Act 1955 by the convening officer, who would be a General Officer in command of the formation to which the accused's unit was attached. Usually this officer would be without legal qualifications. Under Section 87 of the Army Act 1955, the President of the court-martial and the other members of the board were appointed by the convening officer. Furthermore, under Rule 22 of the Rules of Procedure (Army) 1972, the duties of the convening officer included the issuing of the convening order to bring the court-martial into existence and determining upon which charges the accused would be tried. The appointment of the board of officers to hear the case, the Judge Advocate, and the prosecutor were also undertaken by the convening officer as well as were other administrative functions connected to the trial such as securing the attendance of witnesses. In the event of a conviction, the convening officer also had a duty under Section 111 of the Army Act 1955 to confirm the finding and the sentence of the court-martial.

Although it seems that the convening officer had a great deal of power vested in him it should be pointed out that certain of his functions were delegated to his subordinates or carried out with the benefit of professional advice. For example, the charges which would be heard were determined by a legal officer who would then "advise" that the accused should be tried on those charges. Invariably such advice was followed. Similarly, when the finding and sentence of the court-martial was confirmed by the convening officer it was done so on advice from the Judge Advocate General.

The European Court of Human Rights found that the role of the convening officer was such as to deprive Lance Sergeant Findlay of a fair trial by "an independent and impartial tribunal."<sup>7</sup> It stated that the convening officer played a central role in the prosecution of the case and that all the members of the court-martial board were subordinate in rank to him and under his command. Also, the findings of the court-martial had no effect until confirmed by him. Due to the nature and extent of the convening officer's role

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<sup>6</sup> Findley, *supra* note 5.

<sup>7</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) Article 6(1):

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. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private lives 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.

in the court-martial process, fears about the independence and impartiality of the court-martial could be objectively justified. The court decided that, in order to maintain confidence in the independence and impartiality of the court-martial, appearances were important—thus reiterating, in the context of the European Convention on Human Rights, the maxim of Lord Chief Justice Hewart.

In order to pre-empt the final decision of the European Court of Human Rights, the British Government had, prior to the case being heard, passed the Armed Forces Act 1996. The purpose of this Act was to amend the three service Acts, the Naval Discipline Act 1957, the Army Act 1955 and the Air Force Act 1955, so that the functions of the convening officer were separated and divided between ostensibly independent agencies within the armed forces. It was hoped that the Act would ensure that the court-martial system would comply more fully with the European Convention on Human Rights and thus survive any similar challenges in the future. Unfortunately this was not to be, and opportunities for new challenges to the system of military justice came from a surprising source—Government legislation. It had been a stated policy of the Labour Party, while in Opposition, to introduce European human rights law directly into English law. Following the 1997 General Election, the new Labour Government introduced the Human Rights Act 1998. Though the Act did not come into force until 2 October 2000,<sup>8</sup> it was immediately recognised by the lawyers of all three services and the Ministry of Defence that many of the procedures under the service discipline acts would need to be examined and where necessary changed to ensure compliance with the Human Rights Act 1998.

This was a massive undertaking involving scrutiny of all aspects of the disciplinary system, from internal unit level to that of the Court-Martial Appeal Court. It is a credit to those legal officers of all three services who were involved in this review that the subsequent changes made to the system have worked so well. The reforms were introduced in the Armed Forces Discipline Act 2000 which came into force on 2 October 2000, the same day as the substantial part of the Human Rights Act 1998. The most fundamental change introduced by the new Act was the establishment of the Summary Appeal Court. Thus the present system of military justice which will now be examined was established.

#### **IV. THE PRESENT SYSTEM**

##### *A. Arrest*

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<sup>8</sup> Section 22 of the Human Rights Act 1998 provided for the coming into force on the passing of the Act (9 November 1998) of Sections 18, 20, 21(5) and 22. The remainder of the Act, including the substantive provisions did not come into force until 2 October 2000 by virtue of the Human Rights Act (Commencement No.2) Order 2000 (Statutory Instrument No.1851).

Section 74 of the Air Force Act 1955 confers powers of arrest on officers, warrant officers and non-commissioned officers to arrest those persons subject to Air Force law who commit, or are reasonably suspected of having committed, an offence under the Air Force Act 1955. In the main, such powers are usually exercised by officers of the Provost Branch and warrant officers and non-commissioned officers of the Royal Air Force Police who exercise their authority on behalf of the provost officer. The power of arrest, and more particularly the power to retain a person in arrest is not an unfettered power. Indeed, one of the main areas of reform following the introduction of the Human Rights Act 1998 has been that of custody.

The Armed Forces Discipline Act 2000 brought into force a regime designed to ensure that the powers of arrest and custody within all three services complied with Article 5 of the European Convention on Human Rights.<sup>9</sup> The regime is set out in Sections 75 to 75M of the Air Force Act 1955. In broad terms custody is divided into pre-charge custody and post-charge custody. It is presumed by the legislation that a person will not be kept in custody unless certain conditions are satisfied. In the case of pre-charge custody, continued arrest will only be authorised when it is necessary to secure or preserve evidence relating to the offence for which he is under arrest or to obtain such evidence by questioning him.<sup>10</sup> The custody of the suspect in these cases will be authorised by his commanding officer, who must be satisfied that one or both of the two reasons set out above exist to justify the custody of the suspect and also that those tasked with investigating the matter are acting diligently and expeditiously.<sup>11</sup>

In normal circumstances custody can be authorised for up to 48 hours in total from the time of the initial arrest either by a service policeman or in certain circumstances by a civilian police constable.<sup>12</sup> This is a cumulative total which will be reached in 12-hour long stages. After each 12-hour period

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<sup>9</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Cmd. 8969) Article 5 (1) states:

Everyone has the right to liberty and security if the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; . . . .

<sup>10</sup> Section 75A(2) Air Force Act 1955 (as amended).

<sup>11</sup> Section 75A(4) Air Force Act 1955 (as amended).

<sup>12</sup> Section 75A(5) Air Force Act 1955 (as amended) sets out the time limits which run from the "relevant time" as defined in Section 75D of the Act.

of custody a review will be necessary in order to extend the period. This procedure is intended to ensure that the period of custody is no longer than absolutely necessary to further the investigation. The custody review can, in limited circumstances, be delayed but this would be exceptional.<sup>13</sup> Should it be necessary to extend custody beyond the normal maximum period of 48 hours, the suspect's commanding officer must apply to a judicial officer, usually a judge advocate or an experienced lawyer appointed by the Judge Advocate General. The judicial officer can authorise continued custody up to 96 hours from the time of the initial arrest.<sup>14</sup>

Once a suspect has been charged with an offence his custody can only be authorised by a judicial officer. The criteria for retaining the person in custody are that there are substantial grounds for believing that if he were released he would fail to attend any hearing in the proceedings against him, he may commit an offence or he may interfere with witnesses or otherwise obstruct the course of justice. Additionally, custody can be authorised for the protection of the person so held, or if he is under 17 years of age, for his own welfare. If the judicial officer is satisfied that it has not been practicable to have obtained the information required for the hearing he may authorise continued detention. The final reason for authorising detention is where the person has already been released from custody, having been charged, and has absented himself without leave or deserted.<sup>15</sup>

Post-charge custody is authorised at a hearing before the judicial officer, and the person held in custody may have legal representation. Evidence must be called to prove the grounds for continued custody, and representations will be made by both the detainee and the prosecutor, following which the judicial officer must announce his decision and the reasons for it. Custody for up to eight days at a time may be authorised in this way, after which review hearings will be conducted to determine whether custody ought to continue. At the review hearing, provided the person is represented and he consents, the judicial officer may authorise custody for up to 28 days.<sup>16</sup>

There are no other grounds than those set out above for the custody of service personnel by the service authorities. It was hoped when the new regime of custody was introduced that the incidence of servicemen being held in custody without charge or those detained following charge would reduce, and so it has proved, at least for the Royal Air Force. In general the requirements of the legislation have ensured that only those service personnel who ought to be detained are kept in custody. As a result there has been a shift

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<sup>13</sup> Section 75B Air Force Act 1955 (as amended) allows postponement of the review were it is not practicable to carry out the review. Though the term "not practicable" is not defined in the Act, review hearings are invariably carried out except in the most unusual of circumstances.

<sup>14</sup> Section 75C Air Force Act 1955 (as amended).

<sup>15</sup> Section 75F Air Force Act 1955 (as amended).

<sup>16</sup> Section 75G Air Force Act 1955 (as amended).



towards a more careful approach by the service police to the concept of custody and many more investigations now take place without the suspect ever being placed in arrest.

### *B. The Present System: Investigation*

Under Section 76 of the Air Force Act 1955 it is the responsibility of the commanding officer of a Royal Air Force unit to investigate offences alleged to have been committed on his unit. The Royal Air Force Police are tasked by the commanding officer with the gathering of evidence to facilitate this investigative process. The Royal Air Force Police (and the Service Police of the other two Services) conduct investigations in accordance with the Police and Criminal Evidence Act 1984 as modified by order of the Secretary of State for Defence.<sup>17</sup> In addition, the codes of practice, which broadly mirror the codes of practice of the civilian police for the treatment and questioning of suspects, identification of suspects, and tape recording of Service police interviews with suspects.<sup>18</sup>

In 1994 Parliament passed the Criminal Justice and Public Order Act 1994 which placed certain limitations on the right of the suspect to remain silent without having an adverse inference drawn against them at trial. The Secretary of State was empowered under Section 39(1) of the Criminal Justice and Public Order Act 1994 to apply certain parts of that Act to the Armed Forces. As a result, the Service Police Caution changed as from 1 February 1997 in order to come into line with the civilian caution which had been modified by the Criminal Justice and Public Order Act 1994.<sup>19</sup>

The Royal Air Force Police are divided into two main sections when investigating suspected disciplinary or criminal offences. Each station will have an RAF Police Flight with RAF Police Special Investigators who are tasked by the Station Commander with investigation of routine disciplinary and criminal charges such as drunkenness or common assault. The more serious offences such as serious assaults, fraud and sexual offences are investigated by Provost and Security Services investigators who are experienced detectives based at Provost and Security Service Regional

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<sup>17</sup> Section 113(1) The Police and Criminal Act 1984 gives the Secretary of State the power to make orders applying the provisions of the Police and Criminal Evidence Act 1984 to the Service Police. The Police and Criminal Evidence Act 1984 (Application to the Armed Forces) Order 1997 is the order applying certain provisions of the Police and Criminal Evidence Act 1984 to the Service Police and modifying certain provisions of that Act as required by the special circumstances of the Armed Forces.

<sup>18</sup> The Codes of Practice are contained within Joint Service Publication 397 The Service Police Procedures and are made in accordance with the Police and Criminal Evidence Act 1984 (Code of Practice) (Armed Forces) Order 1997 by the Secretary of State in accordance with his powers under Section 113(3) of the Police and Criminal Evidence Act 1984.

<sup>19</sup> The Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 1997.

Headquarters. The Service police investigators also have access to the assistance of Government forensic laboratories, their own forensic experts, and scenes of crimes officers. The other two Services have similar arrangements for investigation of discipline and criminal offences. Though the mechanics of a Service police investigation and the techniques used by the investigators are both fascinating and worthy of study, they lie outside the scope of this article.

Under the powers conferred upon them by the Air Force Act 1955,<sup>20</sup> the Defence Council has made regulations which set out the practice and procedure for the investigation of charges by commanding officers. These rules are contained within the Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000 (PCCSDRs). These regulations reflect the responsibilities of the commanding officer under Section 76 of the Air Force Act 1955 and task him to cause such enquiries or, where a matter has already been reported, such further enquiries to be made as appear to him to be necessary. The most usual method of conducting such an investigation is as mentioned above—an investigation by the Service police. Once a police report has been compiled, the commanding officer must consider the witness statements and any exhibits relevant to the charge. If, during the course of his investigations, the commanding officer considers it appropriate to do so he may amend the charge reported to him or substitute another charge for it.<sup>21</sup>

Following his investigation of the charge, the commanding officer has several options available to him. Firstly, he may dismiss the charge. If he does so then this is the end of the matter as far as the accused person is concerned as he may not be charged again with the same offence. Secondly, the commanding officer may refer the charge to higher authority. Such action is normally taken where the charge is one which will be dealt with by way of court-martial rather than by the commanding officer himself. Finally, the commanding officer may deal with the charge summarily in orderly room proceedings. There are, however, restrictions on the commanding officer's ability to deal with charges in this way. Firstly the commanding officer may not deal summarily with a charge if the accused person is an officer or warrant officer, and secondly, he may not deal with the charge if it is incapable of summary disposal.<sup>22</sup>

### *C. The Present System: Summary Disposal*

Sections 24 to 69 of the Air Force Act 1955 set out the various offences which may be committed by those subject to Air Force law in relation to their Service in the Royal Air Force. Such offences are commonly termed "Service offences." It should be noted, however, that though every Service offence may be dealt with by way of court-martial, certain offences are deemed appropriate

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<sup>20</sup> Section 75E, 82, 83 and 209 of the Air Force Act 1955.

<sup>21</sup> Section 76(3) Air Force Act 1955.

<sup>22</sup> Section 76(6) Air Force Act 1955.

for summary disposal, and a list of these offences is set out at Regulation 5 of the PCCSDRs.<sup>23</sup> The Air Force Act 1955 and the Army Act 1955 contain a provision in Section 70 of each Act to allow Service courts, Commanding Officers, or Appropriate Superior Authorities to deal with “civil offences”—in other words criminal offences under the civilian law. Section 42 of the Naval Discipline Act 1957 confers a similar jurisdiction on Naval courts-martial and Commanding Officers. In relation to civil offences, Section 70 of the Air Force Act 1955 lists the offences which may be dealt with summarily. They are set out in the first schedule to the PCCSDRs. Essentially, the types of civil offences which may be dealt with summarily are minor assaults, theft (subject to certain restrictions contained within the Queen’s Regulations) and minor incidents of criminal damage where the damage to property does not exceed £1000.

The method of summary disposal of offences within the Royal Air Force is by way of the Orderly Room procedure for enlisted ranks and non-commissioned officers. It is conducted either by the commanding officer of the unit or an officer to whom he has delegated powers to deal with disciplinary matters.<sup>24</sup> The Orderly Room procedure follows broadly the order of trial at an ordinary crown court/court-martial, but there are significant and potentially challengeable differences.

In an Orderly Room proceeding, the accused person will be marched before the commanding officer, who will satisfy himself that the accused person has been afforded his rights in relation to election for trial by court-martial and has had sufficient time to prepare for the hearing. The accused person is not entitled to representation during the Orderly Room procedure by a qualified lawyer; however, he may seek the assistance of a qualified lawyer

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<sup>23</sup> Offences under Sections 29, 29A, 30(c), 33, 34, 34A, 35, 36, 38, 39, 41(1)(a) & (d), 43, 43A, 44, 44A(1)(c),(d) & (e), 44B(2), 45, 46, 50, 54(2), 55, 56, 60, 61, 62(1)(a), (b) & (c), 63, 68 (This section is concerned with an attempt to commit an offence against Sections 24 to 69 of the Air Force Act 1955 and may only be dealt with summarily where the full offence is one listed in Regulation 5 of the Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000), 69 & 70 (Section 70 is concerned with the civil offences and in order to be dealt with summarily the offence must be one which is specified in the first schedule to the Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000. Finally, an offence contrary to Section 75J(3) of the Air Force Act 1955 may also be dealt with summarily. This is a new offence created by the Armed Forces Discipline Act 2000 where a person has been released from Air Force custody after charge or during proceedings and is required to attend proceedings and fails without reasonable cause to do so.

<sup>24</sup> Regulation 4 of the Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulation 2000 enables a commanding officer, subject to certain restrictions, to delegate to an officer in command of a unit or part of the unit responsible to him in disciplinary matters the power to investigate and deal summarily with charges against personnel under his command which he could himself have dealt with. These officers termed “subordinate commanders” have more limited powers of punishment than the station commander. The extent of the powers of punishment of the subordinate commander depends upon the rank of the subordinate commander. Subordinate commanders of the rank of squadron leader (sqn ldr) or above have far wider powers than those of the rank of flight lieutenant (flt lt) or below.

prior to the hearing in order to enable him to decide whether to elect for trial by court-martial or to be dealt with by his commanding officer at the Orderly Room. He may however have the assistance of an officer termed the "Accused's friend" during the Orderly Room.

Provided the accused person does not wish to elect for trial by court-martial, the Orderly Room will continue, with the prosecution evidence being presented first. Prosecution witnesses will give their evidence, on oath, to the commanding officer, and the accused person may cross-examine the prosecution witnesses; however, such questions are to be put to the witnesses through the commanding officer. At the end of the prosecution evidence, the commanding officer is to decide whether there is a case to answer. If he decides there is not a case to answer he will dismiss the charge. If he decides there is a case to answer then the accused person will be asked if he wishes to say anything in answer to the charge by giving evidence on oath, or he may elect to stay silent. It should be pointed out however, that the commanding officer may not cross examine the accused person when he gives his evidence but can ask questions for the purpose of clarification. The accused person is also entitled to call witnesses in his own defence, and the commanding officer is to ensure, so far as he is able to do so, the attendance of these witnesses at the Orderly Room. If the commanding officer finds the charge proved he will announce the same and invite the accused to address him with regard to his character or in mitigation in any punishment which he may be awarded. The commanding officer is then to adjourn and to deliberate on the sentence which he considers appropriate.

If at this stage the commanding officer does not consider that his powers of punishment<sup>25</sup> are sufficient to deal with the case then he may refer

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<sup>25</sup> Section 76C The Air Force Act 1955 sets out the powers of punishment of a commanding officer as follows:

Where the offender is an airman detention for a period not exceeding 60 days, a fine (the fine may not exceed 28 days pay except where the offence is one against Section 70 of the Air Force Act 1955 in which case the fine shall not exceed either 28 days pay or the maximum amount of the fine which could be imposed by civil court on summary conviction in indictment), severe reprimand, reprimand, where the offence has occasioned any loss of expense, loss or damage he may award stoppages by way of compensation, finally he may award any minor punishment for the time being authorised by the defence council such as restrictions.

Under regulation 6 of the PCCSDRs however a commanding officer may not make an award of detention to an airman below the rank of cpl for a period exceeding 28 days unless he has applied in accordance with Regulation 17 for permission to award extended detention for a period not exceeding 60 days.

Where the offender is a non-commissioned officer a commanding officer may award a severe reprimand or a reprimand or if the offence has occasioned any expense, loss or damage stoppages by way of compensation or any minor punishment authorised for the time being authorised by the defence council. Where the offender is an acting warrant officer or non-commissioned the commanding officer may if he awards no other punishment or no punishment

the matter up through the chain of command. Accordingly, a junior subordinate commander (in the rank of flight lieutenant or below) may refer the case to the senior subordinate commander (rank of squadron leader or above) and a senior subordinate commander may refer the matter to the station commander. If the charge is to be referred up the chain of command in this manner, the charge will be reheard in its entirety by the next commanding officer in the chain who will make his decisions based on the evidence which he has heard and not on the basis of the previous record of proceedings. If the officer hearing the charge decides that his powers of punishment are sufficient he must then give reasons for the sentence which he imposes upon the accused person. He will then also inform the accused person of his right to appeal to the Summary Appeal Court against either the finding of guilt or the sentence awarded. In accordance with the provisions of the Armed Forces Discipline Act 2000, if the sentence awarded is one of detention the accused will be informed that the sentence will be suspended for a period of 14 days (the period of time during which he must consider whether he will appeal against the sentence). At the conclusion of the hearing, the accused person will be marched out of the Orderly Room, and the record of summary dealing will be completed by the officer who heard the charge recording the offence for which the accused was found guilty, punishment awarded and the reasons for that punishment. In addition, the record of proceedings will contain a record that the accused person was informed of his right to appeal against the finding or punishment to the Summary Appeal Court, and that if he should chose to do so

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except stoppages order the offender to refer to his permanent rank or to assume an acting rank lower than that held by him but higher than his permanent rank.

Regulation 8 of the PCCSDRs sets out the powers of a subordinate commander as follows: if the subordinate commander is of the rank of sqn ldr or above and the offender is a non-commissioned officer other than an acting warrant officer he may award a severe reprimand, reprimand, stoppages where the offence has occasioned a loss, expense or damage not exceeding the amount of 7 days pay or an admonition. If the offender is an aircraftman a fine not exceeding 7 days pay, stoppages where the offence has occasioned expense, loss or damage not exceeding 7 days pay, restrictions not exceeding 14 days, extra guards or pickets not exceeding 3 in number provided that these shall only be awarded in respect of minor offences or irregularities when on or parading those duties, admonition.

If the subordinate commander is of the rank of flt lt or below he may only deal with a non-commissioned officer of the rank of cpl to whom he may award a reprimand or admonition or to aircraftman or aircraftwoman he may award a fine not exceeding 3 days pay provided that the subordinate commander is of the rank of flt lt and has specifically authorised by the commanding officer to award such a punishment, stoppages not exceeding 3 days pay provided that the subordinate commander is of the rank of flt lt and had specifically authorised to award such a punishment, restrictions not exceeding 7 days, extra guards or pickets not exceeding 3 in number (subject to the same restrictions as for senior subordinate commanders), admonition.

he has the right to be legally represented before the Summary Appeal Court and that he may apply for legal aid in relation to his appeal.<sup>26</sup>

So far, the summary disposal system which has been described is that which applies to non-commissioned officers and enlisted ranks. In the case of a commissioned officer the rank of wing commander or below or a warrant officer, summary disposal is carried out by the appropriate superior authority.<sup>27</sup> Section 82(2) the Air Force Act 1995 defines an appropriate superior authority as a person who is an air officer, flag officer, general officer or brigadier or, where the defence so directs, group captain or naval officer of corresponding rank. The procedure carried out by the appropriate superior authority mirrors that of the Orderly Room; however, the powers of punishment are more limited. By virtue of Section 76C(3) the Air Force Act 1955, the appropriate superior authority may only award the following punishments: forfeiture of seniority for a specific term or otherwise (except in the case of warrant officer), a fine, severe reprimand, reprimand or, where the offence has occasioned any expense, loss or damage stoppages. It should be noted that Section 76C(5) specifically states that the appropriate superior authority may not award a fine for an offence which he awards a forfeiture of seniority. There is a further restriction placed on the power of the appropriate superior authority to award punishment in Regulation 10 of PCCSDRs, namely that the appropriate superior authority is not able to award punishment of forfeiture of seniority to a member of Her Majesty's Naval or Military Forces who is subject to Air Force law and further, that the appropriate superior authority may not award a forfeiture of seniority in excess of 12 months to an officer subject to Air Force law. Summary discipline in the Royal Navy is governed by the Naval Discipline Act 1957 and the Naval Summary Discipline Regulation 2000. Although the procedures used are similar to those described above for the Army and the Royal Air Force. The main difference is that a Naval commanding officer has far wider powers of punishment than an Army or Royal Air Force commanding officer—including dismissal from Her Majesty's service,<sup>28</sup> disrating or reduction in rank<sup>29</sup> and deprivation of good conduct badges, good services badges and the Long Service and Good Conduct Medals.<sup>30</sup> The Royal Navy has two forms of punishment, minor punishments such as admonition or extra duties as well as warrant punishments.

These punishments are defined in Regulation 41 of the Naval Summary Discipline Regulations and the procedure for using them is set out in

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<sup>26</sup> Orderly Room procedure is set out in AP 3392, Volume 4, Chapter 3, Leaflet 304.

<sup>27</sup> As from 28 Feb 02, The Armed Forces Act 2001 now allows Summary disposal of minor charges against officers below the rank of Group Captain. This provision also applies to the Royal Navy. Previously an officer in the Royal Navy could not be dealt with summarily and thus all charges however minor were dealt with by court martial.

<sup>28</sup> Naval Summary Discipline Regulations 2000 – Regulation 41b.

<sup>29</sup> Naval Summary Discipline Regulations 2000 – Regulation 41d.

<sup>30</sup> Naval Summary Discipline Regulations 2000 – Regulation 41i.

Regulations 42–54. The warrants are issued in the prescribed format and the commanding officer forwards the warrant for approval to a senior officer, setting out in a covering letter the fact of the case, a precise of the evidence heard in support of the charges, the case for the defence, and an explanation as to why the proposed punishment is requested. If the punishment warrant is approved then it will be read to the accused and the sentence will be carried out. The other main difference between summary disposal of cases in the Royal Navy compared to the other two Services is the extent of the jurisdiction of the commanding officer. The jurisdiction in the Army and Royal Air Force is limited to minor civil offences and most of the disciplinary offences contained within the Army Act and Air Force Act 1955 (except where court-martial is specifically required<sup>31</sup>). In the Royal Navy an offender may be tried summarily for any offence under the Naval Discipline Act 1957 including civil offences apart from murder. The offence of murder is specifically excluded from summary trial; however, the limits placed upon the commanding officer's powers of summary punishment by virtue of the Naval Discipline Act Section 52D(8) mean that the commanding officer's powers of punishment are limited to a maximum of three months detention. This, therefore, imposes a limit on his competence to deal adequately with more serious offences. Additionally, the requirement to offer the accused the ability elect trial by court-martial in certain circumstances places further restrictions on the sort of offences that may be dealt with summarily.<sup>32</sup>

#### *D. The Present System: Summary Appeal*

As mentioned during Part III, discussing recent reforms on 2 Oct 2000, the Armed Forces Discipline Act 2000 established a summary appeal court. One of the perceived areas of challenge under the Human Rights Act was that of the summary disposal system. As can be seen above, the commanding officer has extensive powers of punishment, including the deprivation of liberty of an offender for up to 60 days. However, the offender does not have the right to legal representation during the Orderly Room procedure. It was felt during the introduction of the Human Rights legislation in the United Kingdom that this aspect of the summary disposal system would provide a fertile ground for challenge, not only to the summary disposal system itself but also to the entire system of military justice. As the reader will no doubt recall, Article 5 of the European Convention with the Protection of Human Rights and Fundamental Freedom (1950) provides that nobody shall be deprived of his liberty except in accordance with a procedure prescribed by law after conviction by a competent court.<sup>33</sup> Furthermore, Article 6 of the convention guarantees the right to a fair trial by an independent and impartial tribunal

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<sup>31</sup> See *supra* note 22.

<sup>32</sup> See Rules 55 to 58 of the Naval Discipline Regulations 2000.

<sup>33</sup> See *supra* note 5.

established by law.<sup>34</sup> The perception was that the commanding officer dealing with charges (and also the appropriate superior authority) would not be viewed as an independent and impartial court by the European Court of Human Rights, and further that the deprivation of liberty which could be awarded by the commanding officer would, in these circumstances, give an opportunity for challenge both in domestic legislation under the Human Rights Act 1998 and in the European courts.

Section 83ZA of the Air Force Act 1955 established a court, to be known as the Summary Appeal Court, for the purpose of hearing appeals against findings recorded and punishments awarded by commanding officers and appropriate superior authorities on dealing summarily with the charges. The court consists of a judge advocate and two officers.<sup>35</sup> Any person in respect of whom a charge has been dealt with summarily and a finding that the charge has been proved has been recorded may appeal to the Summary Appeal Court against the finding or against any punishment awarded or both. Any appeal must be brought within a period of 14 days, beginning on the date on which the punishment was awarded or, if not brought within such a time period, within a longer period as the court may allow.<sup>36</sup> An appeal against a finding shall be by way of a rehearing of the charge in its entirety, and an appeal relating only to the punishment awarded shall be by way of a rehearing in relation to the award of a punishment.<sup>37</sup> On an appeal against a finding that a charge has been proved, the Summary Appeal Court has the power to confirm or quash the finding, or, in the case where a commanding officer or appropriate superior authority could have recorded a finding that another charge had been proved, the Summary Appeal Court may substitute for the finding a finding that the other charge has been proved. If the court quashes a finding then it must also quash any punishment which relates to that finding, and it may vary any punishment which relates both to the finding that has been quashed and any other finding so as to award a punishment which would have been within the powers of the commanding officer or appropriate superior authority to award and in the opinion of the court is no more severe than the original punishment awarded. Where, on appeal against finding the charge has been proved, the court confirms the finding or substitutes for a finding that another charge has been proved, the court may also vary the punishment awarded by the commanding officer or appropriate superior authority. However, if the court chooses to do so, it may only award a punishment which was within the powers of the commanding officer or appropriate superior authority to award and is no more severe than that originally awarded.<sup>38</sup>

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<sup>34</sup> See *supra* note 7.

<sup>35</sup> Section 83ZD(1) of the Air Force Act 1955.

<sup>36</sup> Section 83ZE of the Air Force Act 1955.

<sup>37</sup> Section 83ZF of the Air Force Act 1955.

<sup>38</sup> The powers of the Summary Appeal Court are set out in Section 83ZG of the Air Force Act 1955.



On appeal against punishment alone, the court may confirm the punishment awarded or substitute any other punishment that would have been within the powers of the commanding officer or appropriate superior authority to award as long as it is no more severe than that originally awarded. Any punishment awarded by the Summary Appeal Court shall have effect as if awarded on the day on which the original punishment was awarded when the charge was dealt with summarily.<sup>39</sup>

The Secretary of State may make rules for the purpose of regulating the practice and procedure of the Summary Appeal Court by virtue of Section 83ZJ of the Air Force Act 1955.<sup>40</sup> The order of trial in a Summary Appeal Court follows very closely that of the Court-martial/Crown Court. The essential characteristic of the Summary Appeal Court is that the powers of punishment available are limited by the level at which the charge which is being heard was originally dealt with summarily. Thus, if the charge was originally heard by a junior subordinate commander of the rank of flight lieutenant, the court's powers are limited to the powers of punishment of a flight lieutenant.

When the Summary Appeal Court was established on 2 Oct 2000, it was expected that the number of summary appeals would add to the caseload of the three Services' Prosecuting Authorities. However, although the caseload has increased due to Summary Appeal Court cases, the increase was not as great as expected—with the majority of those dealt with by accepting the findings and the punishments of the commanding officers. It should also be noted that since its inception, the Summary Appeal Court has not yet been directly challenged by civilian practitioners under the Human Rights legislation. The reason for a lack of such challenge is not clear. In the opinion of this author, it may be explained by the fact that, firstly, the Summary Appeal Court is in effect “friendly” to the appellant, and secondly, that its powers of punishment have limits placed upon them in line with the powers of punishment of the original officer who heard the charge. An appellant is therefore able to have his case heard by a court presided over by a judge advocate, to be legally represented, and to be advised by his legal representative that the punishment he will receive by the court can be no more severe than which has already been awarded. Having said this however, the challenge to the Summary Appeal Court may only be a matter of time given the hostility sometimes displayed by certain sections of the legal profession to any military court.

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<sup>39</sup> Section 83ZG of the Air Force Act 1955.

<sup>40</sup> Statutory Instrument 2000 No 2372 The Summary Appeal Court (Air Force) Rules 2000 and Statutory Instrument 2000 No 2373 The Administration of Oaths (Summary Appeal Court) (Air Force) Order 2000 are the rules made by the Secretary of State in exercise of the powers conferred upon him by Sections 83ZA(6), 83Z(C)(2), 83ZF(3), 83ZJ and 83ZK and 223(3) of the Air Force Act 1955 (as amended).

### *E. The Present System: Court-martial*

The earliest set of recent reforms to the criminal justice system of the British Military were applied to the court-martial system following the case of Lance Sergeant Findlay in the European Court.<sup>41</sup> As a result, the Armed Forces Act 1996 sought to rectify many of the perceived faults exposed by that case. The reforms have taken place on two levels: firstly, structural changes to the way in which a court-martial is brought into being and administered; and secondly, changes in the procedure to be followed at the court-martial and subsequent to it. As can be seen above, once it has been determined a charge is to be tried by court-martial (because it is incapable of summary disposal, or because the accused has elected for trial by court-martial<sup>42</sup> or because it is decided that a court-martial is the appropriate form of disposal) the accused's commanding officer will refer the charge up through his chain of command with a request for trial by court-martial.

The fundamental structural changes made to the court-martial system involve the dividing up of the responsibilities of the convening officer to three separate and extensively independent bodies. The first of these is termed the Higher Authority. It is to the Higher Authority that the accused's commanding officer will make a referral of the charge and a request for trial by court-martial.<sup>43</sup> On receipt of the referral from the accused's commanding officer, Higher Authority shall refer the case to the Prosecuting Authority unless it is decided to refer the charge back to the commanding officer with a direction to

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<sup>41</sup> See *supra* Part III.

<sup>42</sup> Section 76AA of the Air Force Act 1955 affords the accused the opportunity of electing a trial by court martial in relation to any charge before his commanding officer. If the accused elects for trial by court martial then the charge will automatically be referred to the RAF Prosecuting Authority, and unless the accused withdraws his election (in which the case the charge will be referred back to either his commanding officer or appropriate superior authority depending on the rank of the accused) then the RAF Prosecuting Authority shall institute court martial proceedings in accordance with the powers set out in Section 83B Air Force Act 1955. It should be noted however, that under Section 83B(9A) the RAF Prosecuting Authority may not alter the charge upon which the accused has elected or amend, substitute, or add charges unless the accused gives his consent in writing to such a change. However, under Section 83BB Air Force Act 1955 the Prosecuting Authority may, if it appears that the charge ought to be changed or additional charges should be preferred, refer the case back to the commanding officer with the correct charges so that the entire process may begin again. Where an election has taken place Section 85A Air Force Act 1955 the court, if it convicts the accused, may not impose upon him a sentence greater than that which could have been awarded by the commanding officer or appropriate superior authority who would have dealt summarily with the charge at the election not been made.

<sup>43</sup> Section 76A Air Force Act 1955 sets out the powers of Higher Authority. The definition of Higher Authority, as contained in Regulation 2 of the Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000, is the officer to whom the accused's commanding officer is next responsible in the disciplinary chain of command or any officer to him in that chain of command.

dismiss it or to stay all proceedings in relation to the charge.<sup>44</sup> The second part of the structural reforms is the replacement of the convening officer's role as the prosecutor with that of the prosecuting authority. All three Services' prosecuting authorities were established at the same time under the Armed Forces Act 1996, and the powers of each of the Services' prosecuting authorities are identical.

In the case of the Royal Air Force, the Prosecuting Authority is located at Headquarters Personnel and Training Command. Once a case has been referred to the RAF Prosecuting Authority, the decision must be taken as to whether the charge should be tried by court-martial. The RAF Prosecuting Authority is an officer appointed by Royal Warrant to act as such and who must have held a legal qualification for a minimum of 10 years.<sup>45</sup> The Prosecuting Authority may, however, delegate his functions to officers appointed by him as prosecuting officers—each such officer will be legally qualified.<sup>46</sup>

The officers of the RAF Prosecuting Authority, on receipt of the charge and supporting evidence, must decide firstly whether any charges are disclosed—this as the RAF Prosecuting Authority has the power to amend or substitute charges as it sees fit based on the evidence available.<sup>47</sup> In determining the appropriate charge, the RAF Prosecuting Authority must decide whether a realistic prospect of conviction exists. This simply means that on the admissible evidence available that a court-martial, properly directed in law, will more likely than not to convict. Provided this evidential sufficiency test is satisfied, the RAF Prosecuting Authority must then determine whether it is in the Service's interest to prosecute the accused.<sup>48</sup> The Prosecuting Authority, although it acts independently of the command chain, will often bear in mind the views of both the station commander of the accused and Higher Authority when considering the Service interest test. However, the final decision with regard to prosecution rests entirely with the Prosecuting Authority. This independence is jealousy guarded by the RAF and other Service prosecuting authorities—such independence being seen as a key feature of the reformed court-martial system and a further guarantee that decisions to prosecute offenders are made in an impartial manner.

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<sup>44</sup> Section 76A(2) Air Force Act 1955.

<sup>45</sup> Section 83A Air Force Act 1955.

<sup>46</sup> Section 83C Air Force Act 1955.

<sup>47</sup> Section 83B(4) & Section 83B(8) Air Force Act 1955.

<sup>48</sup> AP3392, Volume 4, Leaflet 707 set out some of the factors to be taken into account in determining where the Service interest lies. For example, the factors which may point towards a prosecution are that a conviction is likely to result in a significant sentence, the offence was premeditated, the offence was against a superior officer or the offence the collective discipline of the Unit. Factors which may point away from prosecution include that the prosecution may have detrimental effect on the victims or physical health (bearing in mind the seriousness of the offence) or the loss or harm caused may be described as minor and as result of a misjudgement.

Once the decision has been made that a court-martial should be convened, the Prosecuting Authority will request that the Court-martial Administration Officer will convene the court-martial. This is the third of the structural reforms relating to the duties of the convening officer. The Court Administration Officer is an officer appointed by the defence council to convene court-martials and also to perform other administrative functions in relation to the court-martial. For example, the Court-martial Administration Officer will, in consultation with the Judge Advocate General's Office, fix a trial date and inform those officers selected to sit on the Board that they are members of the Court-martial Board. The selection of officers to sit on a Court-martial Board is carried out by a random process so that there is no danger of officers volunteering to sit on a court-martial on a regular basis and thus becoming "hardened" to the administration of justice and the types of cases which come before the courts. Also, the officers appointed to act as board members must not come from the higher authority's chain of command. These two factors are seen as a further guarantee that the court-martial system remains as independent and impartial as possible from the command chain.<sup>49</sup>

A court-martial may sit as either a district court-martial or general court-martial. The district court-martial consists of three officers, one sitting as president and two as members of the board of the court-martial together with a judge advocate. A general court-martial will consist of five officers, one sitting as the president and four other Air Force officers together with a judge advocate.<sup>50</sup>

In the Royal Navy the composition of the court-martial is slightly different. Firstly, there is only a single type of court-martial equivalent to that of a general court-martial in the Army and the Royal Air Force. The court-martial will consist of a president and not less than four and not more than eight other Naval officers as members of the court-martial board.<sup>51</sup> Additionally, a judge advocate will be appointed to preside at the court-martial.<sup>52</sup> As with Army and Royal Air Force courts-martial, the rulings and directions on questions of law, including questions of procedure and practice, are given by the Naval Judge Advocate. Any such directions are binding upon the members of the court-martial board. Another difference between the Royal Navy court-martial system and the court-martial system used by the Army and the Royal Air Force is that the judge advocate at a Navy court-martial sits separately from the members of the court-martial board. In this way the Naval

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<sup>49</sup> Section 84A Air Force Act 1955. Sets out the definition of Court Administration Officer. The functions of the Court Administration Officer are set out within both the Air Force Act 1995 Sections 84C, 84D and 95. Further functions are set out within the Courts Martial (Royal Air Force) Rules 1997, SI 1997 and No 171 made by the Secretary of State in accordance with his powers under Section 103 of the Air Force Act 1955.

<sup>50</sup> Section 84D Air Force Act 1955.

<sup>51</sup> Section 54 of the Naval Discipline Act 1957.

<sup>52</sup> In the Royal Navy the judge advocate is a serving Naval officer holding a 5-year general qualification as a barrister. Section 53(B) Naval Discipline Act 1957.

court-martial more closely mirrors a trial in the Crown Court of England and Wales, where members of the jury sit separately from the judge. At Army and Royal Air Force courts-martial the civilian judge advocate will sit on the same bench as the president and other members of the court-martial board.

Until relatively recently, the Army and the Royal Air Force used a Permanent President of Courts-martial for certain cases. This officer was of the rank of Lieutenant Colonel/Wing Commander and in his last posting before retirement. His only duties were to sit as the president of a court-martial board, and he was not reported on in this capacity. Additionally, such an officer would work from home and have minimal contact with the rest of the Service. The main difference between the two types of courts-martial relates to their sentencing powers. A general court-martial has the power to impose any sentence provided by law for a civil offence up to and including life imprisonment, whereas the district court-martial cannot impose a period of imprisonment longer than two years.<sup>53</sup>

Provision still exists within Section 103A of the Air Force Act 1955 for a field general court-martial to be held where a body of the regular Air Force is on active service and where it is not possible, without serious detriment to the public service, for a charge against a member of that body of the Regular Air Force to be tried by an ordinary general or district court-martial. In the modern age of jet airliners, short take off and landing military aircraft, the internet and other communications, the likelihood that a field general court-martial would be convened is very slight. It is probable that a field general court-martial would only be justifiable in the most exceptional circumstances as the ultimate effect of the rules contained within Sections 103A to 103C allow the court to be convened with simply two Air Force officers, not below the rank of flight lieutenant, acting as the board of the court-martial, and they may do so without the benefit of either a judge advocate or legal advice.

The order of trial at a court-martial follows the normal order of trial in any English/common law jurisdiction. The prosecution will present the evidence of their witnesses who will be cross-examined by defence council. Prosecution evidence may also be presented as written statements within the provisions of Section 9 of the Criminal Justice Act 1967 and as admitted fact under Section 10. At the end of the prosecution case it is open to the defence to submit that the prosecution failed to establish a prima facie case. Such a submission will be made to the judge advocate sitting alone and, if successful, will end the trial at that point. This is one of the procedural changes to the

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<sup>53</sup> Section 71 Air Force Act 1955 sets out the full range of punishments available to a court martial together with the restrictions relating to fines and certain sentences passed by the court depending on the type of offence of which the accused is convicted and the rank of the accused. For example, an officer tried by general court martial and sentenced to be incarcerated may only be sent to a civilian prison and cannot be sent to a Service detention centre. Section 120 of the Air Force Act 1955 allows sentences of imprisonment or detention to be suspended in certain circumstances.

system. Prior to 1997 the “no case” submission could be heard by the board of officers and the judge advocate. Should the trial proceed beyond a submission of no case, or where no such submission is made, the accused will give his evidence, followed by witnesses for the defence. The accused and his witnesses will be subject to cross-examination by the prosecution. At the end of the evidence the prosecutor will address the court in closing as will counsel for the defence.

Following closing speeches by both advocates, the judge advocate presiding at the trial will sum up the case to the members of the board and direct them on matters of law. The judge advocate’s ruling on matters of law are binding on the court. The members of the board will then retire, without the judge advocate, in order to deliberate on their finding. In the event that the accused is acquitted, this will be announced in an open court and the judge advocate will dissolve the court-martial. If, however, the accused is convicted, then the court will hear evidence regarding the accused’s Service record, pay and pension entitlement and any decorations or awards. This evidence will be presented by the prosecution. Counsel for the defence or the accused himself (or both) may then address the court in mitigation of sentence and call character witnesses. The members of the board together with the judge advocate will then retire to deliberate on sentence. Once a decision has been reached, the sentence will be announced in an open court together with reasons for the sentence which are given by the judge advocate<sup>54</sup>—another of the procedural changes introduced in 1997.

#### *F. The Present System: Sentencing*

As previously indicated, the main distinction between the two types of courts-martial lies in the sentencing powers of each court. However, the range of sentences available to both types of courts-martial are quite extensive<sup>55</sup> and include sentences specifically designed to cater for those civilians to whom the court-martial system applies.<sup>56</sup>

Until 2 October 2000, a general court-martial had a power, in certain circumstances, to impose a death penalty. However, the Human Rights Act 1998 abolished the death penalty, and therefore the maximum sentence which may be imposed at a general court-martial is life imprisonment. A general court-martial or field general court-martial may impose a sentence of imprisonment up to the maximum provided by a statute or common law for the offence concerned. A district court-martial is limited to a maximum of two years imprisonment. However, an accused under the age of 21 may not be

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<sup>54</sup> The rules pertaining to the conduct at trial at court martial are contained within the Court Martial (Royal Air Force) Rules 1997, SI 1997 No 171.

<sup>55</sup> The sentencing powers of the court martial are contained in Sections 71, 71A, 71A and 71B of the Air Force Act 1955 (as amended).

<sup>56</sup> See Appendix.

sentenced to imprisonment by virtue of Section 71A(1) of the Air Force Act 1955. If a sentence of imprisonment is imposed, then the accused will automatically be dismissed from Her Majesty's Service. Under Section 120 of the Air Force Act 1955, a sentence of imprisonment could be suspended for up to one year. In practice, sentences of imprisonment by court-martial are hardly ever suspended as the sentence carries with it dismissal whether or not the sentence is suspended. Once a serviceman has been dismissed from the Service, were he to be dealt with by civilian court for a further offence, there would be no power to order the suspended sentence of the court-martial into effect.

As recruits as young as 17½ are allowed to enlist in the British Armed Forces, rules exist to sentence young offenders. The court-martial may impose a sentence of custody for life in detention during Her Majesty's pleasure by virtue of Section 71A(1B) where the accused is aged between 18 and 21 and is convicted of an offence for which a person over the age of 21 would be liable for life imprisonment. By virtue of Section 71AA of the Air Force Act 1955 a court-martial may impose a custodial order on an accused aged between 17 and 21. If such a sentence is awarded, it will be served at a young offender institution in the United Kingdom. The minimum period that can be imposed is a sentence of 21 days if the accused is over 18, or two months if the accused is aged between 17 and 18. The court-martial would be limited to the statutory maximum for the offence unless the offender is under the age of 17, in which the case the maximum sentence available would be 12 months.

An accused who is a serviceman may be dismissed from Her Majesty's service by a court-martial. Such a dismissal may be with or without disgrace. However, dismissal with disgrace is usually reserved for those accused who have behaved in way which is, in the opinion of the court, truly disgraceful. The effect of a sentence of dismissal on the accused's pension rights, particularly where the accused has given long service, is likely to be enormous. Accordingly, it has been held in the Court-martial Appeal Court<sup>57</sup> that careful consideration must be given to the effect of sentence of dismissal on the accused's pension and that accurate and detailed evidence about his pension entitlement must be available to the court prior to sentencing.

A court-martial may impose a sentence of military detention on an accused who is not a commissioned officer or a civilian. However, if the sentence is imposed on a non-commissioned or warrant officer there will be an automatic reduction to the ranks. Military detention is quite distinct from imprisonment and consists of a highly structured rehabilitative regime at the Military Correction Training Centre at Colchester. The accused will undergo a form of basic training whilst at Colchester, and therefore, the sentence is not usually regarded as a suitable sentence for senior non-commissioned officers or warrant officers, although the sentence is one which is very often applied to

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<sup>57</sup> R v. Love (1997) The Times, December 3.

junior non-commissioned officers. The maximum amount of detention which may be imposed by a court-martial is two years; however, it is rare for the sentence to be much more than twelve months as the sentence is not really intended for those who have been convicted of serious criminal offences and as the regime at Colchester is geared for shorter periods of detention. If dismissal has also been imposed along with detention then part of the regime at Colchester will involve retraining for a civilian career, and there will normally be an opportunity for the accused to attend resettlement courses and training prior to his release from Colchester.

Although detention is rehabilitative, there are also punitive elements attached to it—namely the loss of liberty and income for those undergoing detention. A sentence of detention may also be suspended under the provisions of Section 120 of the Air Force Act 1955. Unlike a suspended prison sentence, a suspended detention sentence has a practical effect since the sentence would be suspended only where the accused were to be allowed to continue to remain in the Service. Then, should he commit a subsequent offence which brought him before a court-martial, the court-martial would have the power to activate the suspended sentence.

A court-martial also has the power to award sentences which affect the accused's rank and promotion prospects. Firstly, in relation to officers, the court may order seniority to be forfeited; however, such a sentence is rarely imposed due to the severe financial effects it may have on the officer concerned and the impact it may have on his eligibility for promotion. An officer receives an increment of pay for each year he has served in a particular rank, to a maximum for that rank. In addition, the amount of seniority in a particular rank will also effect the amount of pension payable to the officer on retirement. Thus, the sentence can cause severe financial hardship for officers who have forfeited large amounts of seniority and are close to retirement. Additionally, even if the officer is not near to retirement, the amount of seniority he holds will affect his promotion prospects. Thus, any forfeiture of that seniority will either hold up any promotion or may in certain circumstances guarantee that the officer will not be promoted at all. In view of these severe implications for officers, the sentence is rarely used.

In the case of other ranks, a court-martial may impose the sentence of reduction in rank. This reduction in rank may be by one rank—for example, from flight sergeant to sergeant, or it may be a reduction to the ranks—for example, from flight sergeant to senior aircraftman. This sentence carries with it most of the financial and career implications which forfeiture of seniority carries for officers. However, there are certain other implications in the sentence for certain accused. For example, all RAF policemen are at least of the rank of acting corporal. Should an RAF policeman find himself before a court-martial and be sentenced to reduction to the ranks, then he will be unable to hold his warrant card as an RAF policeman and must remuster to another trade group. Clearly this can have a significant impact on the future career of



the RAF policeman who is awarded this sentence. Additionally, in the present climate of drawdown and reduction of forces, there may not be a suitable position in another trade group for an RAF policeman who is reduced to the ranks, and he may be administratively discharged from the service. Thus, the sentence of reduction to the ranks for an RAF policeman is in effect a dismissal from Her Majesty's service.

Fines are also available to the court-martial—up to maximum of 28 days gross pay in the case of a Service offence. In the case of civil offences the accused can be fined up to the maximum of provided by statute. Other financial penalties are available to the court-martial as well, such as stoppages of pay under the Air Force Act 1955, where the offence for which the accused has been convicted has occasioned loss, damage or injury. However, the limit on an order for stoppages to compensate a victim of violence is £5000, and this amount will be deducted from any amount awarded to the victim under the Criminal Injuries Compensation Scheme. The other type of financial penalty which may be available to the court-martial is an order for restitution out of cash or property found on the accused and is provided for by Section 138 of the Air Force Act 1955. This is essentially where the allegation is one of unlawfully obtaining any property, whether by stealing it, handling it or otherwise and property is found in the possession of the accused. Another instance is where money, which can be attributed to the sale or coining of stolen property, is found in the possession of the accused, then a court may order that money to be paid to the owner of the property.

A reprimand or severe reprimand may also be awarded by a court-martial. These sentences are designed to indicate the court's disapproval of the accused's conduct and will have an adverse affect on the accused's promotion prospects and general career prospects within the Service. The result of reprimands or severe reprimands is not, however, as severe as reduction in rank or forfeiture of seniority and therefore very often are combined with a financial penalty. Finally, the court-martial may impose such minor punishments as are authorised by the defence counsel. This will generally involve the awarding of restrictions to an accused. This essentially involves the accused having to attend parades at the guardroom with a high standard of turnout, to do fatigues for up to three hours per day, and to undergo extra instruction for up to one hour per day. The accused will also be confined to the unit during the period of his restrictions. Such punishments are usually awarded only for very minor offences of a Service nature and usually during summary disposal proceedings. The award of a minor punishment by a court-martial will not generally be appropriate except in very limited circumstances.<sup>58</sup>

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<sup>58</sup> Under 116 of the Air Force Act 1955, rules exist where a finding of insanity is returned either by a person unfit to plead or where, after hearing the evidence, the court is satisfied the accused was guilty of the offence but was insane at the time the offences were committed, in which case rather than a verdict of guilty being returned, a verdict of not guilty by reason of

### *G. The Present System: Review and Appeal*

Where a court-martial has found the accused guilty of an offence, the accused may, within 28 days following the day on which the sentence is announced, present a petition to the defence counsel against the finding of guilt, of the sentence passed, or both.<sup>59</sup> The reviewing authority shall review any finding of guilt made and any sentence passed by a court-martial as soon as practicable after the petition has been presented or at the end of the period within which the petition could have been presented. Thus, the effect is that the reviewing authority will review all findings and sentences of court-martial whether or not a petition has been presented. However, should an accused wish to raise particular issues with the reviewing authority, he would normally present a petition drawing the reviewing authority's attention to the points which he wishes to emphasise.

If the accused has also made an application for leave to appeal to the Court-martial Appeal Court, then the reviewing authority shall complete the review of the finding and sentence as soon as possible. However, if leave to appeal is granted before the review is completed then the reviewing authority must cease the review. The reviewing authority is normally to be the defence counsel or an officer to whom the defence counsellor's reviewing authority has delegated powers. In the case of the Royal Air Force, this would normally be the Director of Personnel Management Agency (Airmen) or the Director of Personnel Management Agency (Officers and Airmen Aircrew).

On a review under the Air Force Act 1955, the reviewing authority has the power to quash the finding, and if the sentence relates only to a particular finding, to quash the sentence passed in consequence of that finding. The reviewing authority may also substitute a finding of guilt which could have been validly made by the court-martial on the charge before or where there was an alternative charge on which the court made no finding. Then the reviewing authority may enter a finding of guilt on the alternative charge and quash the finding of guilt on the original charge.

As far as the sentence is concerned, the reviewing authority may quash it or substitute a sentence which was open to the court-martial to impose. However, the reviewing authority may not impose a sentence more severe than the original sentence. If it appears to the reviewing authority that the court-martial, in sentencing the accused, exceeded or erroneously exercised its powers (for example to take other offences into consideration) then the reviewing authority shall annul the taking into consideration of the other

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insanity will be returned. In these circumstances, the court martial powers are the same as those of the crown court in England and Wales and the accused will be detained under the provisions of the Mental Health Act 1983 or the Mental Health (Scotland) Act 1984.

<sup>59</sup> Section 113 Air Force Act 1955 and Court Martial (Royal Air Force) Rules 1997, Statutory Instrument 1997 No 171 Rule 82.

offence or offences in question and any dependent thereon. Where the reviewing authority takes this course of action, the offence or offences shall be treated for all purposes as not having been taken into consideration. Any substituted finding or sentence shall be treated for all purposes as having been made or passed by the court and shall be promulgated and have effect as from the date of promulgation.<sup>60</sup>

The reviewing authority also has power to authorise a retrial in the same manner as the Court-martial Appeal Court by virtue of Section 113A of the Air Force Act 1955. Finally, the reviewing authority may also review summary findings and awards in the same manner as the findings and awards of a court-martial.<sup>61</sup>

Apart from the review procedure, which takes place as a paper exercise by the reviewing authority who will receive legal advice from the office of the Judge Advocate General, it is open to a person convicted at court-martial to appeal to the Court-martial Appeal Court under the provisions of the Court-martial (Appeals) Act 1968. As part of the post *Findlay* reforms, the Act amended the Court-martial (Appeals) Act 1968 to enable the appellant to appeal not only against a finding of guilt, but also a sentence imposed upon him by the court-martial. Prior to 1 April 1997, it was not possible to appeal against a sentence alone. The change brought about by the Armed Forces Act 1996 brought the court-martial system more fully in line with the civilian system for appeals.

The Court-martial Appeal Court is constituted in the same manner as the Court of Appeal (Criminal Division) and is properly constituted if it consists of an uneven number of judges not less than three. The judges themselves will be judges of the Court of Appeal and such other judges as the High Court as the Lord Chief Justice may from time to time nominate for the purpose. Additionally, Lords Commissioners of Justiciary, and judges of Her Majesty's Supreme Court of Judicature of Northern Ireland may also sit in the Court-martial Appeal Court. Finally, the Lord Chancellor may appoint other persons of legal experience to be judges of the Appeal Court.<sup>62</sup>

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<sup>60</sup> Section 104 Air Force Act 1955 provides as any findings and determination or other thing required by this Act to be promulgated shall be promulgated either by being communicated to the accused or in such other manner as may be specified by Queen's Regulations or as the reviewing authority may direct. The matters which require promulgation under this Section are actions taken on review under Section 113A(7) Air Force Act 1955 and any direction that part or all of the sentence of imprisonment or detention shall be served outside the United Kingdom under Section 127(6) Air Force Act 1955. The suspension of a sentence under Section 120 of the Air Force 1955 is not required to be promulgated, but the accused must nevertheless be informed.

<sup>61</sup> Section 115 Air Force Act 1955.

<sup>62</sup> Section 2 of the Court Martial (Appeal) Act 1968 sets out the qualification for judges in the Court Martial Appeal Court and Section 5 of the Court Martial (Appeal) Act 1968 sets out the constitution of the court.

A person convicted by a court-martial may, with the leave of the appeal court, appeal to the court against his conviction and any sentence, provided the application for leave is brought within the time period specified.<sup>63</sup> The Court-martial Appeal Court shall allow an appeal against conviction by a court-martial if the conviction is unsafe, but in any other case, the appeal will be dismissed. If the appeal is allowed, the conviction will be quashed.<sup>64</sup>

Where the appellant was convicted of more than one charge and the Court-martial Appeal Court set aside one of the convictions, then the power exists to amend the sentence. Alternatively, the Court-martial Appeal Court may substitute a finding of guilty of another offence than that of which the appellant was convicted—provided it is an offence which the court-martial by which he was tried could have lawfully found him guilty. Again, if the substituted finding requires a modification in the sentence imposed, then Court-martial Appeal Court has the power to impose a different sentence.<sup>65</sup>

Where the Court-martial Appeal Court quashes a conviction, it has the power to order that the appellant should be retried by a court-martial. However, it will only order a retrial where it appears that, in the interests of justice, there ought to be a retrial. Apart from the circumstances where a conviction has been quashed by the Court-martial Appeal Court, the appellant shall not be liable to be retried again for that offence by a court-martial or any other court.<sup>66</sup> There is provision for the reference of cases to the Court-martial Appeal Court on a point of law of exceptional importance which should be determined by the Appeal Court—either by the Judge Advocate of Her Majesty's Fleet or Judge Advocate General of the Forces. Additionally, the Secretary of State may, upon consideration of the matters appearing to him not to have been brought to the notice of the court-martial at the trial, request that the matter should be referred to the Court-martial Appeal Court.<sup>67</sup>

Following appeal to the Court-martial Appeal Court, a further appeal is possible to the House of Lords, but only where leave is given by the Court-martial Appeal Court. Such leave shall not be given unless it is certified by the Court-martial Appeal Court that a point of law of general public importance is involved in the decision and it appears to either the Court-martial Appeal Court or to the House of Lords that the point is one which ought to be considered by the House of Lords. Application for leave to appeal to the House of Lords

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<sup>63</sup> Rule 6 of the Court Martial Appeal Rules 1968 sets out the time for presenting petitions. Usually this must be done within 28 days following the day on which the sentence was passed or where a petition has been presented to the reviewing authority and the petition is not granted then 40 days next following the day on which the person convicted presented his petition provided the court martial was held in the United Kingdom or if the court martial was held outside the United Kingdom 60 days. However Rule 7 allows a notice of application to the court for an extension of time in which to apply for leave.

<sup>64</sup> Section 12 Court Martial (Appeals) Act 1968.

<sup>65</sup> Section 14 & 15 Court Martial (Appeals) Act 1968.

<sup>66</sup> Sections 18 & 19 Court Martial (Appeals) Act 1968.

<sup>67</sup> Section 34 Court Martial (Appeals) Act 1968.

shall be made within 14 days from the date of the decision of the Court-martial Appeal Court.<sup>68</sup>

## V. MOST RECENT CHALLENGES

Although the British system of military justice was reformed in 1997 following challenges made in the European Court of Human Rights, there have, nevertheless, been a number of more recent challenges. Indeed, it is accurate to say that the number of challenges to the reformed system have been greater in number than those to the system which existed prior to the reforms. Indeed, at the time of writing, several cases were pending in the European Court of Human Rights where appeals had been refused either in the Court-martial Appeal Court or later in the House of Lords. The main area of challenge at present is in respect of the structural reforms to the court-martial system. It is alleged by certain advocates that the structural changes brought about by the Armed Forces Act 1996, which led to the division of the functions of the convening officer to different agencies, were cosmetic in their effect only and did not address the root cause of any perceived bias and unfairness in the court-martial system.

The first series of cases to reach the Court-martial Appeal Court which challenged the fundamental arrangements for the court-martial system were the cases of *Regina v. Spear and Hastie* and *Regina v. Boyd*.<sup>69</sup> In each of these two cases, the appeal was based on the ground that the board by which they had been tried included a permanent president of courts-martial and secondly that, in violation of Article 6(1) of The Convention for the Protection of Human Rights and Fundamental Freedoms, they had not been afforded a fair and public hearing by an independent and impartial tribunal established by law. Additionally, Boyd raised an appeal on a separate point, namely that the appointment of part-time judge advocate affected the independence and impartiality of his court-martial. The Court of Appeal, consisting of Lord Justice Laws and Judges Holman and Goldring, delivered judgement in the case. The appeals were dismissed on the basis that the objective guarantees or safeguards required to exclude a legitimate doubt about the impartiality of a tribunal did not have to be enshrined in formal rules as Article 6 of the convention set out flexible principles rather than inflexible rules. In determining whether the guarantees were sufficient, a court must consider whether a reasonable man, apprised of all the relevant facts about a particular case and the general practice of the court, would conclude that there existed a real doubt as to the court's impartiality or independence.

With regard to the position of the permanent president of courts-martial, the court held that the appointment in this post was for no less than

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<sup>68</sup> Section 39 & 40 Courts Martial (Appeals) Act 1968.

<sup>69</sup> Reported at [2001] EWCA Crim 3 on 15 Jan 2001.

four years and was the last posting of the particular officer concerned. It offered no prospect of promotion or preferment thereafter, and the officer who sat as a permanent president of court-martial operated outside the chain of military command; he was not subject to reports on his decision making functions and could only be removed from office in highly exceptional circumstances. Accordingly, the court decided that the conditions upon which the permanent president of court-martial had been appointed and held his office offered objective guarantees which were sufficient for the purposes of Article 6(1) to ensure his independence and impartiality. On a question of a part-time judge advocate being employed at a court-martial, the court decided, as the part-time judge advocate was appointed by the Judge Advocate General who was himself wholly independent of the executive, and since any question of termination of his appointment or the appointment to a full time position was entirely in the Judge Advocates Generals hands, that the part-time judge advocate's lack of security of tenure did not undermine his impartiality or independence for the purposes of Article 6(1) of the convention.

These cases required the Court-martial Appeal Court to examine the procedures that had been put in place following the *Findlay* case of 1997.<sup>70</sup> In deciding the case, the court also had regard to Strasbourg jurisprudence with regard to court-martial and independent and impartial tribunals. The court founded its judgement on the reasoning set out by the European Court of Human Rights in the case.

In the light of recent decisions, part of the judgement of *Spear, Hastie and Boyd* is important. One submission made on behalf of *Spear and Hastie* was that a permanent president of court-martial who held the rank of Lieutenant Colonel/Wing Commander was an officer of "medium rank" and would therefore be likely to be subject to "general Army influence." The court explained that if this argument were right it would mean that Article 6(1) required that the members of a court-martial board should all be officers of the same rank. The court felt that this could not be the law and argued that were it reasonable to fear that between joint decision makers of a different rank that there was a systematic likelihood that more junior officers would be unduly influenced by the views of the more senior that this would be an unlooked for and unwelcome side effect of the convention regime. The court considered that it was reasonable to suppose that junior officers would regard it as their duty to come to their own conclusions and voice those conclusions and that the modern culture of the Service would indeed promote that point of view. The court did not believe it would be reasonable for an accused soldier to entertain any different perception.

With regard to the argument about "general Army influence," the court felt that this argument could be disposed in a like manner. Furthermore, the court went on to explain that such an assertion by the appellants amounted to

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<sup>70</sup> Findley, *supra* note 5.

an accusation of actual bias, whether conscious or not. In other words, the court stated it was a way of saying that officers were prone to take a prosecution line when sitting as board members on a court-martial board. This, the court felt, was quite a serious allegation, and it could not find any supporting evidence for it. The court stated “in our view it is simply patronising to suggest that an officer of the rank of Lieutenant Colonel, or his equivalent in the Royal Air Force, will have his judgement on concrete facts of a particular case effected by anything so morphose as “general Army influence.”<sup>71</sup>

Following the decision, ten further appellants received judgements in their appeals to the Court-martial Appeal Court. The common ground of appeal was to the effect that the process of criminal justice constituted by court-martial in the Army and the Royal Air Force was, in principle, incompatible with Article 6 of the European Convention on Human Rights. Essentially, the argument advanced was that the European Convention on Human Rights does not allow a parallel system of criminal justice at all. Ultimately the appellants sought a declaration of incompatibility under Section 4 of the Human Rights Act 1998 in relation to the court-martial system. If such a declaration was granted by the Court-martial Appeal Court it would in effect mean that the British Government would have to introduce legislation as quickly as possible to remedy the incompatibility of the court-martial system or replace the system with a compatible system. In its judgement, the Court-martial Appeal Court referred to the earlier judgement in *Regina v. Spear and Hastie* and *Regina v. Boyd*. However, the court also looked at European case law and existing English case law.

On the test of independence and impartiality required by Article 6, the court relied on the case of *In Re Medicaments*.<sup>72</sup> In that case the Court of Appeal approved the speech of Lord Gough of Chievely in the case of *Regina v. Gough*<sup>73</sup> in which he stated, “bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may be unconsciously effected by bias.” In *Re Medicaments*, the court went on to consider the case *Hausschildt v. Denmark*<sup>74</sup> in which the European Court said “in considering whether in a given case there is a legitimate reason fear that a particular judge lacks impartiality, the stand point of the accused is important but not decisive . . . . What is decisive is whether this fear can be held objectively justified.” The Court of Appeal in *Re Medicaments* was of the opinion that the Strasbourg jurisprudence was no different to that test applied in Commonwealth countries and in Scotland: the court must first ascertain all the circumstances which have a bearing on the suggestion that a court is not independent and impartial and ask whether in those circumstances would a fair

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<sup>71</sup> Paragraph 28 of the Judgement of *Regina v. Spear and Hastie* [2001] EWCA Crim 3.

<sup>72</sup> Reported at [2001] 1 Weekly Law Reports Page 700.

<sup>73</sup> Reported at [1993] Appeal Cases Page 646.

<sup>74</sup> Reported at [1989] 12 EHRR 266.

mindful and informed observer conclude that there was a real possibility or real danger that the court was not independent and impartial.

On behalf of the appellant it was submitted that, in dealing with criminal offences as opposed to disciplinary offences, the court-martial was not in principle an independent and impartial court—being a military tribunal trying military personnel. The Court-martial Appeal Court did not find in favour of this submission looking at the case of *Hakansson*<sup>75</sup> in which the European Court of Human Rights stated “in proceedings originating in an application lodged under Article 25 of the Convention the court has to confine itself, as far as possible, to examination of a concrete case before it. It is accordingly not called upon to review the system . . . in abstracto, but to determine whether the manner in which this system was applied or affected the applicants gave rise to any violations of the Convention.” The court agreed with this approach in relation to the European Convention on Human Rights, namely, that each case should be judged on its own facts rather than judged in a general, broad-brush manner.

The court accepted the arguments for the Crown that Article 6 assumed a divide between the bringing of a charge and its trial in court. The court concluded the prosecutor and the trial court should be wholly independent of one another, saying that whatever the reach of any charge brought by a prosecuting authority, Article 6 existed to guarantee that it was fairly tried. However, Article 6 did not embrace the prosecuting authority within the same discipline. The court explained that this did not mean that prosecuting authority standards of decision making are unimportant; however, there was a distinction between the values demanded of a prosecutor and those demanded of a trial court, which merely recognises that ideals of fairness and independence and impartiality as opposed to, for example, Service interest, may become problematic if they are sought to be applied to a decision to prosecute. The court stated, “(fairness, independence and impartiality) . . . are the values needed for civilised trial of issues arising between man and man or citizen or state.” The decision to prosecute needs to be girt with other values, not lesser, but different; whether the evidence will support the case, and what the public/Service requires.”

The court went on to say that circumstances in which a charge is brought could of course become the concern of a court whose duty it is to uphold convention rights—for example, where prosecuting amounts to an abuse of process. However, safeguards exist within UK domestic law such as the abuse of process doctrine, contempt of court, or charges relating to the interference with justice to cater for the circumstances. Second, the court emphasised that different considerations would arise where a prosecutor and the trial court are not strictly independent from one another. Any influence of the prosecutor over the court risks the court’s independence and impartiality

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<sup>75</sup> Reported at [1990] 13 EHRR 1.



being undermined. In the case of British military justice, however, the court concluded that the prosecuting authority was certainly independent of the court-martial and therefore the requirements of Article 6 were satisfied.

They examined the requirements for a parallel system of military justice and concluded that there was ample case law from the European Court of Human Rights in Strasbourg as well as the United Kingdom, the United States, and other common law jurisdictions to show that such a system was not only permissible but a legitimate dimension of the criminal justice systems of the various jurisdictions involved. As to whether the existence of a court-martial system within the military would give rise to undue influences on the members of the court-martial board or, as the court put it, as “giving fair wind to the prosecutions cases over and above the evidence,” the court concluded that such factors are a manifestation of the institutional loyalty or *esprit de corps* which exists within the military and which will require that the court-martial process should be seen to be fair and impartial and so far as possible achieve accurate results. Otherwise military personnel and the public would lose confidence in it. Such a situation would undermine good order and discipline within the military and be injurious to the public. The court concluded, “Service considerations far from being anti-pathetic to the ideals of independence and impartiality enshrined in Article 6, actually demand that they be fulfilled.”

Following the decisions of the Court-martial Appeal Court in the *Crown v. Spear and Hastie*, the *Crown v. Boyd* and the *Crown v. Williams and Others*, an earlier case, that of *Morris*, was ruled upon by the European Court of Human Rights in Strasbourg.<sup>76</sup> The case was brought by Trooper Morris, who had been charged with the offence of absence without leave whilst serving with the Life Guards Regiment Household Cavalry. It should be noted here that Morris’ case was based on a disciplinary offence rather than a criminal offence as in the cases of *Spear*, *Hastie*, *Boyd*, *Williams and Others*. He complained of a number of structural defects in the court-martial system following the amendments introduced in the 1996 Act. He argued that the Higher Authority, Court-martial Administration Officer, Army Criminal Legal Aid Authority, the Army Prosecuting Authority, and the officers that sat on the board of the court-martial itself were all controlled wholly or in part by the Adjutant General who was himself directly subordinate to the Defence Counsel. Accordingly, the court-martial system could not be an independent and impartial tribunal as required by Article 6 of the European Convention of Human Rights as it was not independent of the Army as an institution and, in particular, of senior Army commands. He also raised the issue of a permanent president of court-martial sitting on the board who he claimed underlined the lack of independent and impartiality of the court-martial system.

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<sup>76</sup> Reported at *Morris v. United Kingdom* (Application Number 38784/97 dated 26 February 2002).

In reaching their decision, the European Court reviewed the cases of *Regina v. Spear and Hastie* and *Regina v. Boyd*. Significantly, however, the court stated at paragraph 59 of the judgement, that in its own case law military officers can, in principle, constitute an independent and impartial tribunal for the purposes of Article 6(1) and that there was nothing objectionable to a parallel system of military justice in states which are signatory to the European Convention on Human Rights. The court stated, however, that the Convention would only tolerate such court as long as sufficient safeguards were in place to guarantee their independence and impartiality.

The European Court of Human Rights then reviewed the changes introduced in the 1996 Armed Forces Act and came to the conclusion that these changes had gone a long way to meeting the concerns that the court had expressed in the *Findlay* case. The court concluded that the Higher Authority, the Prosecuting Authority, and the Court-martial Administration Officer had split the functions of a convening officer, which had been the primary objection of the court to the court-martial system in the *Findlay* case. The European Court concluded that this separation between the prosecutory and adjudicatory functions of a court-martial, as well as other reforms such as the role of the Judge Advocate at trial, ensured that court-martial proceedings did not give rise to any violation of Article 6 or the European Convention on Human Rights.

The court went on to look at the individual facts of the *Morris* case and concluded that the applicant's concerns regarding the selection of officers who sat on the court-martial board were not justified. The Court-martial Administration Officer was appointed by the Defence Council, but this did not of itself give reason to doubt the independence of the court-martial because the Court-martial Administration Officer was adequately separated from the Prosecuting Authority and the members of the Court-martial Board. The court concluded there was no evidence in the *Morris* case to suggest an interference with the Court-martial Administration Officer which could give rise to a perception of any lack of independence under the terms of Article 6 of the European Convention of Human Rights. The court also approved the use of a permanent president of court-martial in the *Morris* case, citing the Court-martial Appeals Court decision in the *Crown v. Spear and Hastie* and the *Crown v. Boyd*. The *Morris* case ruled that the Reviewing Authority's role was incompatible with Article 6. For a non-judicial body to interfere with the decision of a lawfully constituted and compliant court flew in the face of both the letter and opinion of Article 6. As a result, steps have been taken to remove the powers of the Reviewing Authority in relation to courts-martial.

The *Morris* case has, however, introduced other difficulties for the British system of military justice with comments made by the court at paragraph 72 of the judgement. The court concluded that the presence of certain safeguards, such as the permanent president of court-martial and the enhanced role of the Judge Advocate, could not exclude the risk of outside

pressure being brought to bear on the two junior members of the court-martial board. It noted that these officers had no legal training and remained subject to Army discipline and reports. There was no strategy or other bar to their being subject to external Army influence when sitting on the case. The court was concerned that in such a case as *Morris*, where the offence charged directly involved a breach of military discipline, the members of the Court-martial Board could be open to the risk of outside pressure.

## VI. CONCLUSIONS

As can be seen from the decision of the European Court in *Morris*, the reasoning of the court with regard to outside influence being brought to bear on members of the court-martial does not sit easily with the decision of the Court-martial Appeal Court applying Strasbourg jurisprudence to the same issue. It is perhaps significant that *Morris* and his lawyers did not argue the specific point of undue influence on junior members of the court-martial board in his application, nor did the European Court of Human Rights give a fully reasoned judgement why they considered that safeguards were either insufficient or non-existent.

It seems clear from both the common law and case law in the Court-martial Appeal Court that the United Kingdom's system of military justice contains safeguards against undue influence upon court-martial board members in the form of criminal sanctions for interference with jurors, perverting the course of justice, contempt of court, or military offences such as conduct to the prejudice of good order and Air Force discipline contrary to Section 69 of the Air Force Act 1955. None of these safeguards is mentioned in the judgement of the European Court of Human Rights in the case of *Morris v. the United Kingdom*.

The cases of *Regina v. Williams and Others* and *Regina v. Spear, Hastie and Boyd* have now gone to the House of Lords. A hearing is expected in June 2002 with a reserve judgement some weeks later. The case of *Morris v. the United Kingdom* arose from a case of absence without leave, a discipline offence under the Naval Discipline Act 1957, the Army Act 1955 and the Air Force Act 1955. The cases, which are now to proceed to the House of Lords, namely *Regina v. Williams and Others* and *Regina v. Spear, Hastie and Boyd* arise out of the criminal jurisdiction of courts-martial (under Sections 70 of the Army Act 1955, Section 70 of the Air Force Act 1955 and Section 42 of the Naval Discipline Act 1957). In the case of *Regina v. Hastie, Spear and Boyd*, the certified question for the House of Lords is whether the presence of a permanent president at court-martial (PPCM) was compatible with the requirement of Article 6(1) of European Convention on Fundamental Human Rights and Freedom for a fair trial before an independent and impartial tribunal. In the case of *Regina v. Boyd* alone, the further issue arises as to

whether the use of a part-time deputy Judge Advocate rendered the trial incompatible with Article 6(1) of the European Convention.

In the case of *Regina v. Williams and Others*, the certified question of general public importance for the House of Lords is whether trial by court-martial in the United Kingdom of a civilian criminal offence, that is to say an offence falling under Section 70 of the Army Act 1955 or Section 70 of the Air Force Act 1955 is compatible with Article 6(1) of the European Convention on Human Rights (a) generally, or (b) at least in regard to cases where the offence in question is said to have been committed in the United Kingdom.

Although these certified questions are to be addressed by their Lordships, the appellants have also raised many of the issues from the judgment of European Court of Human Rights in *Morris v. the United Kingdom*. It seems possible that the House of Lords may now give a full analysis of the Court-martial Appeal Court decisions and how such decisions can be reconciled with the concerns of the European Court of Human Rights as expressed in the *Morris* case.

Such an issue was examined in the case of *Skuse v. Regina*,<sup>77</sup> an appeal arising from the Naval Court Martial System which, as noted above, uses uniformed judge advocates. The court concluded that the Judge Advocate was at the end of his career and due to retire so that there could be no possibility of promotion as a result of his duties. Thus, a fair minded observer possessed of all the objectively ascertainable facts would conclude that there were sufficient guarantees of independence to exclude any real possibility or charges of bias. The safeguards the court relied upon were the judicial oath taken by the Judge Advocate, his separation from the board members,<sup>78</sup> and his appointment by the Judge Advocate of the Fleet.<sup>79</sup> Furthermore, the court pointed out that everything the Judge Advocate did at trial was in public and thus open to scrutiny—unlike the board members whose deliberations were in private.

In the short term, however, the decision in the *Morris* case has necessitated the introduction of new Queen's Regulations to specifically prohibit interference with officers who form members of the court-martial board by the chain of command and also to prohibit reporting upon them by the chain of command when carrying out their functions on a court-martial. Further plans have been put in place to further separate the Court-martial Administration Officer from the chain of command and to underline the independence of the Royal Air Force and Army Prosecuting Authorities from the chain of command. It remains to be seen whether such measures will be sufficient to reform the system in order that the shortcomings perceived by the European Court in the case of *Morris* can be overcome.

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<sup>77</sup> Unreported CMAC Friday 3 May 2002.

<sup>78</sup> Royal Navy Courts Martial the Judge Advocate sits separately from the board of officers.

<sup>79</sup> The Judge Advocate of the Fleet is a civilian judge appointed to oversee the appointment of uniformed Judge Advocates.

In the long term, it is possible that further reforms to the court-martial system may be necessary. For example, it would seem from the European Court judgement in *Morris* that the idea of uniformed judge advocates is not necessarily objectionable within the Strasbourg jurisprudence. It is hardly likely that this is the result which was sought by those representing Morris, Williams and other appellants whose cases will undoubtedly be referred to the European Court of Human Rights in due course. However, as the European judges are happier with idea of professional lawyers as finders of fact they may have no objection to the idea of uniformed military judges.<sup>80</sup>

Ultimately, the future for the court-martial system seems to be certain in so far as Strasbourg jurisprudence recognises and accepts the need for a parallel system of military justice. The Government of the United Kingdom is committed to maintaining the high professional standards of the British military, the bedrock of which is a workable system of military justice which is both fair and effective. Until the cases of *Regina v. Williams and Others*, *Regina v. Spear, Hastie and Boyd* are decided in the House of Lords it is not possible to give any clear indications of the future shape of the court-martial system. An addendum to this article will therefore be required once the judgement is available.

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<sup>80</sup> *Incal v. Turkey*. Reported on 9 June 1998, Reports 1998-IV, 67.

## APPENDIX

### APPLICATION OF THE AIR FORCE ACT 1955 TO CIVILIANS

Section 209 of the Air Force Act 1955 applies part 2 of the Act, namely, the disciplinary provisions, to any person who is employed with any body of the regular Air Force on active Service or accompanies a body of the Air Force as is not otherwise subject to Air Force law. Within part 2 of the Act only Sections 29, 35, 36, 55, 56 and 57 apply to civilians.<sup>81</sup> Also, Section 68 of the 1955 Act will apply to civilians in so far as the Sections above apply to them.<sup>82</sup>

At trial by court-martial the court may award only the sentences of imprisonment or a fine against a civilian.<sup>83</sup>

In addition, a court, called the Standing Civilian Court, is established by the Armed Forces Act 1976 to try civilians subject to Air Force law. The rules governing the operation of the Standing Civilian Court closely mirror the Magistrates Court Rules in the civilian system of military justice and are set out in a Statutory Instrument.<sup>84</sup> The prosecution of civilians is conducted by the Royal Air Force Prosecuting Authority in front of the Standing Civilian Court, which will consist of a Judge Advocate sitting as a magistrate and in certain cases with two lay assessors to assist him in his decision. The maximum sentence which can be awarded by a Standing Civilian Court is six months imprisonment.<sup>85</sup> A right to appeal to exists from the Standing Civilian Court to a court-martial against sentence in the case of a guilty plea or against conviction and or sentence where a not guilty plea was entered.<sup>86</sup> The Standing Civilian Court is, however, territorial in nature and may sit in only The Federal Republic of Germany, The Kingdom of Belgium, The Kingdom of the Netherlands, The Republic of Cyprus and the southern based areas of Akrotiri and Dekhalia.<sup>87</sup>

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<sup>81</sup> Section 29 relates to use of force against a member of Her Majesty's Forces who is on guard duty. Section 35 applies to obstruction of Service policemen. Section 36 relates to disobedience to standing orders. Section 55 makes it an offence to resist arrest by Service police. Section 56 makes it an offence to escape from Air Force custody. Section 57 makes it an offence to commit contempt of court in the face of a court martial.

<sup>82</sup> Section 68 makes it an offence to attempt to commit an offence contrary to the Air Force Act 1955.

<sup>83</sup> Section 209(3) Air Force Act 1955. In addition by virtue of Section 209(3)(a)(i), Section 71(5)(a) which sets out the maximum number of days pay which may be imposed as a fine does not apply to civilians.

<sup>84</sup> Standing Civilian Courts Order 1997 Statutory Instrument 1997 No 172.

<sup>85</sup> The Powers of the court are set out in Schedule 5A to the Air Force Act 1955 and Section 8 of the Armed Forces Act 1976.

<sup>86</sup> Paragraph 18 to Schedule 3 to the Armed Forces Act 1976.

<sup>87</sup> Standing Civilian Court (Areas) Order 1977 as modified by the Standing Civilian Court (Areas amendment) Order 1991 Statutory Instrument 1991 No 2788.



# **INSTITUTIONS OF MILITARY JUSTICE OF THE ARMED FORCES OF THE RUSSIAN FEDERATION**

GENERAL-LIEUTENANT GENNADY ZOLOTUKHIN (RET.)\*

Russia is experiencing radical changes.

It is impossible to create a democratic state without a strong legal foundation based on commonly recognized principles and standards of international law. Additionally, the legal foundation must have a coordinated and effective system of state institutions to administer the law. A system of military courts, the Office of Military Prosecutor, and the Legal Service of AFRF carry out the legal responsibilities of the Armed Forces of the Russian Federation (AFRF).

## **I. RUSSIAN FEDERATION MILITARY COURTS: ORGANIZATION, AUTHORITY, PROCEDURE**

As with many other countries, power in the Russian Federation is divided between three branches of government: legislative, executive, and judicial. Dividing the power between the three branches strengthens the Constitution and, in turn, the credibility of the government itself. As to the judicial branch, Russian Federation judicial power is based on 10 of the Constitution and Federal Constitutional Law “On the Judicial System of the Russian Federation,” collectively the RF Judicial System. The Judicial System is independent and acts separately from executive and legislative powers. Power within the RF Judicial System is executed by civil, constitutional, administrative and criminal trials.

In executing this power, trials in the RF must be conducted according to provisions established by the Constitution and by law; “emergency” and other unconstitutional courts are prohibited. In these trials, participating parties meet as equal adversaries, with a competitive spirit, to execute justice. These principles carry over to our military courts, where issues or cases must be presented in front of a judge, jury, or people’s arbitration assessors. No other bodies are authorized to conduct trials.

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## II. MILITARY COURTS

Military Courts are included in the system of Federal Courts of General Jurisdiction along with federal and regional courts and courts of specialized jurisdiction. The courts are established where military units are located, and they are open to the public. The corresponding federal constitutional laws determine the particularities of their organization and activity during mobilization and wartime.

Military courts conduct trials independently, subordinate only to the Constitution, constitutional laws and statutes. The judges in military courts are independent in dispensing justice; the Constitution, federal constitutional law and statute guarantee the judges' independence. It cannot be abrogated or diminished, and any interference with their activities is unacceptable and punishable by law.

### A. Jurisdiction

Military courts administer justice in accordance with civil, administrative and criminal procedures. In hearing these cases, it is the responsibility and duty of military courts to ensure and protect: Individual rights and freedoms protected by law; Local government's rights and interests protected by law; Russian Federation rights and interests protected by the law, as well as interests of the RF constituents, federal jurisdictions and the constituents' public authorities. In protecting these rights, the following matters are justiciable at Military courts:

**1. Civil and administrative cases** involving the protection of violated rights or freedoms, and AFRF servicemen's interests, protected by the law, from the action or forbearance of command or military authorities and their decisions. In these cases, Retired officers and civilians, who have undergone reserve military training, also have a right to appeal to a military court when their rights or freedoms have been violated. They can appeal the action or forbearance of the command or military authorities, and the decisions made while they were in service.

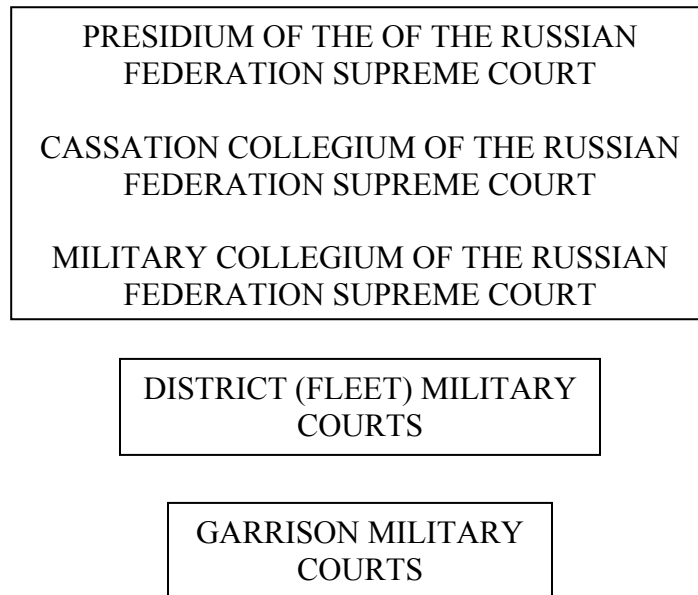
**2. Criminal cases** in which servicemen, as well as retired officers, committed crimes during their term of service. Federal procedural laws set jurisdiction over criminal and administrative cases, committed by servicemen and retired officers. Crimes committed before active servicemen or reservists on military training enlisted are not within the military court's jurisdiction.

**3. Administrative cases** in which servicemen violated the law. The military courts try appeals against the investigators and prosecutors who secured servicemen or prorogued their custodial terms as well as against the activities (inactivity) of prosecutors. Military courts also try cases and review matters concerned with the circumscriptions of privacy of correspondence, telephoning and residential security.

The military courts located outside the RF have jurisdiction over all civil, administrative, and criminal cases which are to be pleaded by Federal Courts of general jurisdiction unless provided otherwise by an international treaty. Federal constitutional law determines trial procedure and cases within military courts' jurisdiction, during mobilization and in wartime.

### **B. Military Courts Structure and Authorities**

Military courts are structured as follows:



\*Military courts can be established collaterally with the ARRF units and organizations located outside of Russian Federation territory.

Presidium of the Russian Federation Supreme Court considers cases concerning verdicts, determinations and rulings of the Military Collegium of the RF Supreme Court and of military courts. The Cassation Collegium of the RF Supreme Court considers cases concerning complaints and protests over decisions, sentences, definitions and rules that were adopted by the Military Collegium in the first instance but are not yet in force.

## **C. The Military Collegium**

### *1. Jurisdiction*

The Military Collegium works as part of the RF Supreme Court. District (fleet) military courts are inferior to the Military Collegium. The Military Collegium hears cases under its jurisdiction in the following procedure:

1. First instance civil and administrative cases are investigated by an individual judge or by a board of three judges, and criminal cases are investigated by a board of three judges, by a judge with a board of jurors, or by a judge with assessors.
2. Cases concerning complaints and protests over decisions, a board of three judges reviews sentences, definitions and rulings that were adopted by the Military Collegium in the first instance but failed to come into force.
3. Cases concerning complaints and protests over decisions, sentences, definitions and rulings that came into force are investigated by a board of three judges.

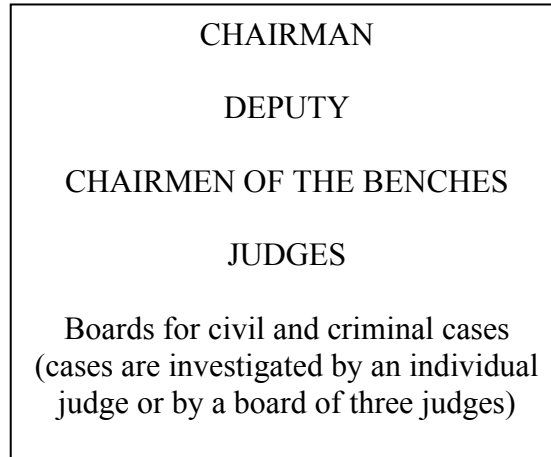
Besides hearing cases, the Military Collegium publishes an information bulletin for the military courts containing decisions of military courts on both civil and criminal cases, judicial case reviews, analytical data and military court statistics, and other materials.

The Military Collegium considers in the first instance (1) cases disputing non-normative acts of the RF President, the RF Government, the Ministry of Defense, and acts of other federal bodies of executive power where military service is provided by law concerning rights and freedoms, protected by legislation, of military members and reservists undergoing military training and (2) criminal cases where military judges are accused, if the judge brings necessary petition, and cases of extra complexity or social meaning, if petition of the accused is available.

The Military Collegium also hears complaints and protests over decisions, sentences, definitions and rules of District (fleet) military courts adopted in the first instance but are not yet in force; protests over decisions, sentences, definitions and rules of military courts that came into force; and new evidence concerning decisions and sentences of the Military Collegium, that came into force.

## 2. Composition

The members of the Military Collegium are a chairman, his deputy, chairmen of the benches, other judges of the RF Supreme Court, and Boards:



The Chairman of the Military Collegium is the Vice-Chairman of RF Supreme Court. He is appointed by the Council of Federation of Federal Assembly of the RF, after nomination by the President of RF. The presidential nomination is based on the recommendation of the Chairman of the RF Supreme Court and the Judges of the Supreme Court high qualifying board. Duties of the Chairman of the Military Collegium, Deputy Chairman of the Military Collegium, and Chairman of the Board follow:

### *a. Chairman of the Military Collegium*

1. Brings protests of the Military Collegium to the RF Supreme Court concerning decisions, sentences, definitions and rules that came into force;
2. Brings protests of military courts to the Military Collegium and District (fleet) military courts concerning decisions, sentences, definitions and rules that came into force;
3. Considers cases before the Military Collegium and presides over court sessions;
4. Organizes Military Collegium activities;
5. Decides whether cases should pass to another bench;
6. Appoints, dismisses and controls the work of the Military Collegium staff, which is a part of the staff of the RF Supreme Court;
7. Executes other powers provided by Federal Law and any responsibilities delegated by the Chairman of the RF Supreme Court.

*b. Deputy of the Chairman of the Military Collegium*

1. Considers cases before the Military Collegium and can preside over court sessions;
2. Executes duties of the Chairman of the Military Collegium in his absence, except bringing protests;
3. Executes other powers and the duties he is assigned by the Chairman of the RF Supreme Court and the Chairman of the Military Collegium;

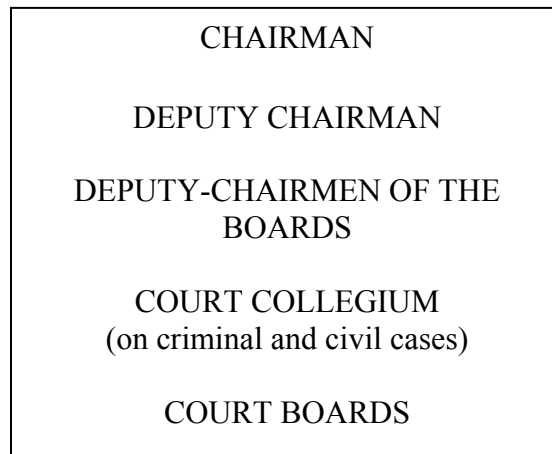
*c. Chairman of the Board*

1. Organizes Board activities;
2. Considers cases before the Board and presides over Board court sessions;
3. Controls the work of the Board staff.
4. Executes duties assigned by the Chairman of the Military Collegium.

**D. District (Fleet) Military Court**

*1. Jurisdiction*

District (fleet) military court acts over the territory of one or several constituent entities of the RF where military units, formations or other forces of the AFRF are located. It consists of the chairman, his deputies, and other judges and may have a post of the first deputy of the chairman. District (fleet) military courts, create presidiums, but they may also create court collegiums and/or boards.



District (fleet) military courts consider in the first instance civil cases connected with state secrets and cases on crimes that may be punished by over 15 years of imprisonment, life imprisonment or capital punishment. District (fleet) courts also hear complaints and protests over decisions, sentences, definitions and rules adopted by garrison military courts in the first instance, but that are not yet in force; protests over decisions, sentences, definitions and rules of garrison military courts that came into force, and definitions and rulings adopted by District (fleet) military court in the second instance; and new Evidence concerning decisions, sentences, definitions and rules of District (fleet) military court that came into force. District (fleet) military courts also hear cases on complaints and protests against decisions, sentences, orders and resolutions garrison military courts passed concerning: cases in the first instance and are not yet in force; arrest; detention; the limitation of the right to privacy of correspondence, telephone and other communications; inviolability of the home; and activity (inactivity) of an inquirer, investigator, prosecutor and their decisions.

District (fleet) military courts investigate in the first instance cases within their jurisdiction. Civil and administrative cases are investigated personally by a judge or by a board of three judges. Criminal cases are tried by a board of three judges, or by a judge with a board of jurors, or by a board consisting of a judge and assessors.

## *2. Presidium of the District (Fleet) Military Courts*

The presidium of the District (fleet) military courts consists of the chairman, his vice-chairmen, and vice-chairmen—chairmen of collegium and boards. Session is held at least once a month on the of the initiative of the court president. It is a legally qualified session if more than half of its members present. The resolutions of the presidium of the District (fleet) military courts are adopted by the majority of the members votes who participate the session. The Presidium of the District (fleet) Military Courts:

1. Tries civil, administrative and criminal cases concerning protests against the decisions, sentences, determinations and resolutions of the garrison military courts which entered into force, as well as the determinations and resolutions of the District (fleet) military courts of second instance;
2. Considers the work organization and co-ordinates the activities of collegium and boards;
3. Commissions chairmen of collegium and boards on the basis of the chairman's presentation;
4. Determines the number of collegium and boards on the basis of the chairman's presentation;

5. Considers the judicial staff activity organization, approves the structure and the judicial staff's list of members of staff on the basis of the chairman's presentation, the number of its employees and judicial staff regulations.

### *3. Collegium and Boards of the District (fleet) Military Courts*

Collegium and Boards of the District (fleet) Military Courts try:

1. Cases which were attributed to the judicial jurisdiction of the District (fleet) military courts by the Federal constitutional law, in the first instance;
2. Cases concerning appeals and protests against the decisions, sentences, determinations and resolutions of the garrison military courts, which were taken by a court of first instance but are not yet in entered into force;
3. Cases of new evidence concerning decisions, sentences, determinations and resolutions of the corresponding collegium and boards that came into force.

### *4. Chairman of the District (fleet) Military Courts*

The RF President appoints the Chairman of the District (fleet) military courts. The Chief Justice of the RF Supreme Court nominates a person for the position, on the recommendation of the High Qualifying Board of the judges of the RF. The Chairman of the District (fleet) military courts:

1. Brings protests against the decisions, sentences, determinations and resolutions of the garrison military courts and District (fleet) military courts which entered into force;
2. Participates in the investigation of cases before the District (fleet) military courts and presides over the judicial sessions;
3. Organizes court activities;
4. Calls the presidium into session and introduces cases for consideration and presides over the presidium session;
5. Distributes the duties among the deputy chief judges;
6. If necessary, settles questions concerning transferring cases from one collegium or board to another; and whether judges of one collegium or board can participate on a case for consideration in another collegium or board;
7. Controls the activities of the administrator and judicial staff, appoints and dismisses the court staffers who are not in the active military service;

8. Represents the court in the government bodies, non-governmental organizations and local self-government;
9. Exercises other authority provided by Federal law.

#### *5. Deputy Chairman of the District (fleet) Military Courts*

The Deputy Chairman of the District (fleet) military courts is appointed by the RF President. The Chairman of the RF Supreme Court nominates a person for the position, on the recommendation of the High Qualifying Board of the judges of the RF. He exercises the authority of the Chairman in his absence, with the exception of bringing protests. Deputy Chairman of the District (fleet) military courts, deputy chairman of a collegium or a board of District (fleet) military courts:

1. Participates in cases assigned to a particular collegium or board and presides over the judicial sitting;
2. Organizes the activities of a collegium or board;
3. Controls the activities of the staff of a collegium or board;
4. Exercises other authority provided by the Federal law and duties assigned to him by the Chairman.

#### *6. Chairman of the Board of the District (fleet) Military Courts*

1. May participate in investigation of hearings of cases by the Board and preside over hearings;
2. Organizes the activities of the Board;
3. Controls the activities of the Board staff;
4. Exercises other authority provided by Federal law and exercises duties assigned to him by the Chairman of the Court and (or) by a chairman of a respective Board.

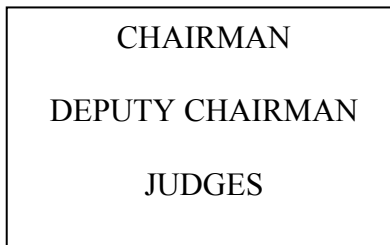
### **E. GARRISON MILITARY COURTS**

Garrison military courts act within the territory where one or several military garrisons are located and are comprised of the Chairman, his deputy and other judges. Garrison military courts try in the first instance civil, administrative and criminal cases, which were not attributed to the jurisdiction of the District (fleet) military courts. They also try cases of newly discovered evidence regarding their own decisions, sentences, definitions and resolutions that came into force.

Garrison military courts take decisions concerning arrests; custodial placement; holding in custody; limitation of rights for privacy of correspondence, telephone and other conversations, postal, telegraphic and other communications; for inviolability of the home; for activity (inactivity) of



an inquirer, investigator, prosecutor and their decisions in cases and in the order provided by federal criminal procedural law. The structure of garrison military courts while exercising justice follows:



Civil and administrative cases and criminal cases are tried by an individual judge or by a judge and assessors. The judge of garrison military courts personally makes the decisions concerning arrests, custodial placement, holding in custody, limitation of rights for privacy of correspondence, telephone and other conversations, postal, telegraphic and other communications, for inviolability of the home, for activity (inactivity) of an inquirer, investigator, prosecutor and their decisions in cases and in the order provided the federal criminal procedural law.

The RF President appoints the Chairman of a garrison military court after his being nominated by the Chairman of the RF Supreme Court. The Chairman of garrison military court:

1. Participates in and presides over cases tried in garrison military court;
2. Organizes court activities;
3. Allocates duties between judges;
4. Supervises the court administrator and staff, appoints and releases employees who are not in military service, and approves regulations about court's staff;
5. Represents the court in government bodies, non-governmental organizations and local government.

The Deputy Chairman of garrison military court is appointed by the RF President on the nomination of the Chairman of the RF Supreme Court, on the recommendation of the High Qualifying Board of the judges of the RF. He discharges his duties, substitutes for the Chairman in his absence and discharges other duties assigned to him by the Chairman.

### **III. FINANCING AND PROVIDING ACTIVITY OF MILITARY COURTS AND BOARDS**

The Judicial Department is the federal body in charge of organizational support for the military justice system. Organizational support includes staff, financial, material and technical and other activities that are necessary to create a full and independent military judiciary. It is established by the Federal Law “On the Judicial Department of the Supreme Court of the RF.” The Judicial Department is to assist in the administration of the court system, but is not to usurp a judge’s independence nor interfere in the execution of justice.

Financing of the Military Collegium and military courts is provided by the Federal Budget. Providing military courts, Military Collegium, and corresponding units of Judicial department with transport, communication means, firearms, offices, their servicing, exploitation, protection and also keeping archives is done by applicable bodies of the Russian Armed Forces, other troops, military units and bodies. Those services are paid for by the Judicial Department and Supreme Court of the RF.

The Military Collegium’s activities are supported by the staff of the RF Supreme Court and of military courts and by the Judicial Department (Federal constitutional laws determine financing for military courts in wartime, and in the state of emergency). The Chairman of the Supreme Court and chairman of the Military Collegium control the activity of the staff, respectively, of military courts and of the Military Collegium.

Employees of staff of the military courts and Military Collegium are Federal State employees, and servicemen can be attached to the staff of the military courts and Military Collegium. The staff supports the administration of justice by military courts and Military Collegium, reviews judicial practice, provides for the analysis of judicial statistics and systematization of current legislation and execution of other court’s functions.

The Administrator of military courts also plays a vital role. He acts within his commission under the control of the chairman of the court and under the supervision of an appropriate division of the Judicial Department. He is appointed and dismissed by the head of an appropriate division of the Judicial Department, on the recommendation of the chairman of a respective military court. The administrator of military courts:

1. Takes measures concerning the organizational provision of court activity;
2. Interacts with state bodies, non-governmental organizations, local self-government, their officials and other employees concerning providing the court activities;
3. Takes measures on providing adequate material and living conditions for judges and employees of military courts and its staff and also their medical care and sanatorium treatment;

4. Provides judges and employees of military courts and their staff with legal literature, handbooks, and reference books;
5. Organizes judicial statistics, including record management and archives;
6. Organizes security for buildings, work places and other military courts property, and also organizes administrative activity including communications and transportation;
7. Organizes building, repairing and technical maintenance;
8. Establishes a budget for military courts approved by the Chairman;
9. Exercises other measures on providing activities of military courts;
10. Carries out orders and instructions of the Chairman related to providing activities of military courts.

Positions of judges of military courts and of the Military Collegium, as well as staff posts in the military courts, the Military Collegium and the Judicial Department are filled by servicemen who are attached to, respectively, the Supreme Court of the RF and the Judicial Department. The attachment of servicemen is executed by the nomination of the Chairman of the Supreme Court. The judges and employees of military courts, Military Collegium, and Judicial Department serve in accordance with the Federal law “On the Military Duty and the Military Service.”

Judges of military courts and of the military Collegium are promoted to general/flag officer ranks as provided for under the Federal law “On Military the Duty and the Military Service” on the nomination of the Chairman of the Supreme Court. Promotion to other ranks is performed on the nomination of the Chairman of a District (fleet) military court.

Military ranks of employees of military courts staff, Military Collegium and Judicial Department are provided by the Federal law “On the Military Duty and the Military Service” on nomination of the chairman of the Military Collegium for employees of Military Collegium staff; the chairman of the District (fleet) military court for employees of District (fleet) military courts and garrison military courts staff; and the general director of the Judicial Department for employees of Judicial Department. The heads of the corresponding units of the Judicial Department conduct appointments, discharges and moving to other posts of employees of military courts.

Judges of military courts are provided with premises meeting health and other standards for conducting justice. Buildings and movable properties, used by military court are federal property and are to be used exclusively for military justice activities. The federal property cannot be withdrawn. Additionally, Military courts are exempted from rent, other tenantry payments, municipal and other payments, for land utilized by military courts.

**Judge Posts in Military Courts and Military Collegium of The Supreme Court and Corresponding Ranks to these Posts<sup>1</sup>**

<b>Post</b>	<b>Military rank</b>
The chairman of the Military Collegium.	Colonel-General of Justice
Deputy chairman of the Military Collegium, the chairman of a judicial staff of the Military Collegium, the chairman of Moscow circuit military court.	Lieutenant-General of Justice
The judge of the Military Collegium, the chairman of District (fleet) military courts and the chairman of Moscow garrison military courts.	Major-General of Justice
Deputy chairman and the judge of District (fleet) military courts; the chairman of garrison military courts.	Colonel of Justice
Deputy chairman and the judge of garrison military courts.	Lieutenant-Colonel of Justice

Military units or garrison commandants' offices are responsible for the transportation and safekeeping of prisoners who are in disciplinary units and guardhouses. A body of the federal executive power is responsible for the transportation and safekeeping of prisoners in prisons, convict colonies and other places. They are also responsible for transportation to and from the place of trial.

**IV. OFFICE OF THE RF PROSECUTOR**

**A. Role**

The Office of RF Prosecutor plays a special role in ensuring the compliance with law in the AFRF.<sup>2</sup> It is made of a unified, centralized network of federal agencies overseeing compliance with the Constitution of the RF and execution of laws currently in effect on its territory. The Prosecutor also has other functions as defined by federal law. In order to ensure the

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<sup>1</sup> Federal constitutional law of June 23, 1999 No 1-Federal law "About Military courts Of The RF" Officially published in digest "Collected Legislations" of June' 28, 1999 No 26 Art 3170; Federal constitutional law of Dec. 31, 1996 No 1-Federal law "About The Judicial System Of The RF". Officially published in digest "Collected Legislations" of January'6 1997 No 1 Art.1.

<sup>2</sup> The legal basis of the Office of Prosecutor's activities is Art. 129 of the Constitution of the RF as well as the Federal Law of Jan. 17, 1992, # 2201-1 (edition of Dec. 29, 2001, with amendments of Dec. 30, 2001).

supremacy of law, integrity and enforcement of legality, safeguarding of human rights and liberties, as well as public and national interests upheld by law, the Prosecutor is in charge of the following activities:

1. Supervision of the execution of laws by federal ministries, state committees, services and other federal executive agencies, representative (legislative) and executive agencies in the RF constituent entities, local authorities, defense command and control agencies, supervising agencies, officials thereof, control boards and chief executive officers of commercial and non-profit organizations, as well as the conformity to law of legal acts issued by them;
2. Oversight of observance of human rights and liberties by: federal agencies, state committees, services and other federal executive agencies, representative (legislative) and executive agencies in the RF constituent entities, local authorities, defense command and control agencies, supervising agencies, officials thereof, control boards and chief executive officers of commercial and non-profit organizations;
3. Supervision of compliance with laws by investigative, inquiry and prosecuting agencies;
4. Supervision of compliance with laws by bailiffs;
5. Oversight of execution of laws by: administration of agencies and establishments enforcing punishments and court-ruled punitive enforcement measures; administration of detention and pre-trial facilities;
6. Criminal prosecution in compliance with authority in the RF Criminal Procedural Code;
7. Co-ordinate crime fighting by law enforcement agencies.

The offices of the Prosecutor operate on the basis of subordination of prosecutors to superior prosecutors and ultimately to the RF Prosecutor General (PG). In addition to the listed activities, the offices of the prosecutor also have the following responsibilities:

1. Execute their authority independently from federal authorities, public authorities of the constituent entities of the RF, provincial governments, public associations, and in full compliance with the laws of RF;
2. Act publicly unless it runs counter to requirements of the legislation of the RF on the protection of civil rights and freedoms, as well as the legislation of the RF relating to state or any other specifically protected secret;

3. Keep federal authorities, public authorities of the constituent entities of the RF, local authorities, as well as the public, informed of the state of legality;
4. Prosecutors or prosecuting agencies' investigative officers may not be members of elective, or any other, bodies set up by federal authorities or local authorities;
5. Prosecution officers may not be members of public associations pursuing political goals, or take part in such activities. Public associations pursuing political aims and their branches in prosecutors' offices and establishments shall not be allowed. Prosecutors and investigators are not bound in their service by decisions taken by public associations;
6. Prosecution officers may not engage alternately in any other paid or gratuitous activities concurrently with their duties, except for teaching, research, or arts.

The Constitution emphasizes that prosecutors' supervision shall not be interfered with. Exerting any influence upon a prosecutor or investigator by federal authorities, RF constituent entities, local authorities, public associations, mass media, and representatives thereof, as well as officials, with the intent of impacting decision-making—or hampering their activities in any form, warrants legally-mandated reprisals. Additionally, a prosecutor or investigator is not to make announcements on merits of cases or materials under examination, or to submit them to any person whatsoever for review, other than in cases or in a manner prescribed by federal legislation.

Additionally, no one may publicly disclose findings involved in check-ups and preliminary investigations carried out by prosecutors' agencies, pending their completion without prior permission from a prosecutor. Orders issued by the prosecutor, ensuing from his authority, are subject to strict execution within the set timeframe.

Prosecutors and investigators also have powers for collecting information. Statistics, or any other data, certificates, documents or copies thereof, indispensable for discharging functions incumbent upon prosecutors' offices, shall be submitted at a prosecutor's or investigator's demand free of charge. Defaults on orders and evasion of attendance when subpoenaed are also forbidden.

The system of the Office of Prosecutor is constituted by the Office of the Prosecutor General, constituent entities', military and other specialized prosecutors' offices equivalent to them, research and educational institutions, publications editorial boards (that hold a status of legal entities), as well as city and regional prosecutors' offices, and other specialized prosecutors' offices—territorial, military, etc. The Prosecutor General's Office, prosecutors' offices of the constituent entities of the RF, equivalent

prosecutors' offices, and research and educational institutions, operate public amenities and administrative facilities.

The Prosecutor General's Office is appointed and dismissed by the Federal Assembly of the RF at the proposal of President of the RF, and his tenure is confined to a five-year term. The Prosecutor General annually submits a progress report on the state of legality and public order and the work made to improve it to the Chambers of the RF Federal Assembly and the RF President.

The prosecutors of constituent entities of the RF are appointed by the Prosecutor General with acquiescence of the constituent entities' authorities. The regional and city prosecutors, as well as specialized prosecutors are also appointed and dismissed by the Prosecutor General. Additionally, they are subordinate and accountable to superior prosecutors and the Prosecutor General of the RF. The Prosecutor General's Office forms a council board including the Prosecutor General (Chair), his First Deputy and assistants (ex officio), and other prosecutors appointed by Prosecutor General.

The structure of the Prosecutor General's Office includes main directorates, directorates and departments (equal in rights to directorates, as part of directorates). Chiefs of main directorates, senior assistants, and their deputies and chiefs of departments (forming part of directorates) are assistants to the Prosecutor General. The main directorates, directorates and departments have assigned positions of prosecutors and senior prosecutors, prosecutor-criminologists and senior prosecutor-criminologists, as well as detectives and senior detectives for especially important cases, and their assistants.

In the prosecutors' offices of the constituent entities of the RF, and in the equal military and other special prosecutors' offices, the council boards are formed. They consist of a prosecutor of a constituent entity of the RF (chairman), his first deputy and deputies (ex officio) and other prosecutor's officials, appointed by the prosecutor of the constituent entity. They establish directorates and departments (equal in rights to directorates, as part of directorates). Chiefs of main directorates, directorates and departments equal to directorates, are senior assistants. Their deputies and chiefs of departments forming part of directorates are assistants to the prosecutors of the legal entities of the RF.

In the prosecutors' offices the following positions are established: assistants and senior assistants of the prosecutor, prosecutors and senior prosecutors of the departments and sections, prosecutor-criminologists and senior prosecutor-criminologists, as well as investigators for especially important cases and senior investigators and their assistants. The prosecutors of the constituent entities of the RF and equivalent prosecutors can have aids for specific appointments that enjoy the status of the deputy department chiefs.

Service in the structures and establishments of the prosecutors' offices is regarded as federal state service. The qualifications for prosecutors and investigators include RF citizenship, juridical education (received in state-

certified institution of higher education), proper professional and moral qualities, and being physically fit for the job. Prosecutor office employees who have class grades or occupy graded positions must pass qualifying tests to determine fitness for their positions. The procedure and terms of qualification tests are determined by the RF Prosecutor General. Employees working in prosecutor offices also sign a service contract for an indefinite period or a period not exceeding five years. Finally, newly appointed persons to a position of prosecutor or investigator shall take the Prosecutor (Investigator) Oath. The procedure for taking the oath is determined by the Prosecutor General.

## **B. Compensation, Recognition and Discipline**

The salary of prosecutor's office employees includes non-taxable basic pay; class grade incentive pay, long-service incentive pay, special service conditions incentive pay (50% of the basic pay), incentive pay for complexity of duty and intensity of work, outstanding achievements pay (up to 50% of the basic pay), incentive pay for a scientific degree or title in the professional area associated with the official duties, honored title of "Merited Lawyer of the RF;" quarterly or year bonus (premium), and an allowance for subsistence (if rations are not received in kind).

Prosecutors and investigators, research, and pedagogic employees have a paid annual leave of thirty calendar days without regard for the time of travel to the vacation place and back and with paid travel expenses within the limits of the RF. Those Prosecutors and investigators working in areas with heavy or adverse climatic conditions have annual paid leave according to the rules, established by the Government of the RF, with a duration of no less than 45 calendar days. An additional annual paid leave for long service as a prosecutor or investigator, scientific or pedagogic employee is be scaled up as follows:

- after 10 years of service – additional 5 calendar days;
- after 15 years of service – additional 10 calendar days;
- after 20 years of service – additional 15 calendar days;

Additionally, for excellent performance, for long and irreproachable service in the prosecutor's office bodies and institutions, and for accomplishing tasks of special importance and complexity an employee may be awarded a notice of commendation, a certificate of merit, or his photograph may be placed a photo on the Board of Merit or his name entered in the Book of Merit. They may also be granted a bonus, a present, a valuable present, or an inscribed weapon. Further, they may be advanced in assignment or class, awarded a pin "For irreproachable service in prosecutor's office of the RF," or awarded a pin "Honored employee of the prosecutor's office of the RF" together with a diploma of the Prosecutor General of the RF. Especially distinguished employees may be nominated for the honorable title "Merited lawyer of the



RF” and awarded state medals. The Prosecutor General is also entitled to establish other types of encouragement.

For failure to perform or for improper performance and for misdemeanors or defaming officials, the heads of prosecutors’ office branches and establishments can impose disciplinary penalties including admonitions, reprimands, severe reprimands, demotions in class, deprivation of the breastplate “For irreproachable service in prosecutor’s office of the RF” or for “Honored employee of the prosecutor’s office of the RF,” a warning of incomplete fitness for the job, and dismissal from the bodies prosecutor’s offices. Service in the bodies and establishments of the prosecutor’s office terminates with the dismissal of the employee.

To ensure physical protection of its employees, the Prosecutor’s Office has its own security service. Prosecutors and investigators, being official representatives of state power, enjoy special protection of the state. Their relatives, and in some exclusive cases other persons whose lives, health and property are encroached upon in order to obstruct the performance of legitimate duties of prosecutors and investigators, also enjoy such protection. The order and terms of providing the state protection to prosecutors and investigators are determined by the Federal Law “On State Protection of Judges and Officials of the Law-Enforcement and Supervising Bodies,” and also by other norms and enactments of the RF.

### **C. Retirement**

Along with the grounds stipulated by RF labor legislation, prosecutor’s office employees can retire in connection with retirement age, the maximum age being sixty years (except for the scientific and educational employees). The head of the prosecutor’s office body and establishment may extend this age—with one time extensions not exceeding one year. Employees may also retire or at the initiative of the head of the organ or establishment of the prosecutor’s office in the following cases:

1. Reaching the age limit for the service in the prosecutor’s office;
2. Termination of the citizenship of the RF;
3. Violation of the prosecutor’s (investigator’s) oath as well as conducting misdemeanors, defaming the honor of an employee of prosecutor’s office;
4. Non-compliance with the limitations, connected with the service as well as the occurrence of situations stipulated by the Article 11 and Paragraph 3 of Article 21 respectively of the Federal Law “On the fundamentals of state service in the RF;”
5. Disclosure of information constituting a state secret or any other secret protected by law.

The pension allowance of prosecutors and investigators, research and education employees or their family members is paid in conformity with the regulations, provisions and the order, established by legislation with regard to retired officers who served in the Ministry of Internal Affairs and their family members. Prosecutors and investigators, research and education employees entitled to pension allowance stipulated by this Clause, and having no less than twenty cumulative years of service and not receiving any pension, are paid a monthly bonus to their basic pay amounting to 50% of the pension they could have otherwise received. They are paid according to the following scale:

- Less than 10 calendar years – 5 monthly basic salaries with the additional payment for their class rank;
- From 10 to 15 calendar years – 10 monthly basic salaries with the additional payment for their class rank;
- From 15 to 20 calendar years – 15 monthly basic salaries with the additional payment for their class rank;
- 20 calendar years and above – 20 monthly basic salaries with the additional payment for their class rank.

#### **D. Chief Military Prosecutor's Office**

The Military Prosecutor's Office consists of the Chief Military Prosecutor's Office, military prosecutors' offices in military districts, fleets, Strategic Missile Forces, Federal Border Troops, the Moscow military prosecutor's office, other military prosecutor's offices equaled to the prosecutor's offices of the agencies of the RF, and military prosecutor's offices of units and large formations, garrisons and other military prosecutor's offices, equaled to the prosecutor's offices of cities and districts.

In the military prosecutors' offices equaled to the prosecutors' offices of cities and districts, prosecutor-investigation and investigation sub-offices can be set up by the decision of the Chief Military Prosecutor.

In areas, where the other bodies of the prosecutor's office of the RF do not work due to exceptional circumstances, as well as in territories outside the RF, where the RF troops are stationed in accordance with international agreements, the functions of the prosecutor's office can be entrusted by the Prosecutor General of the RF to the bodies of military prosecutor's office. These bodies are headed by the deputy to the Prosecutor General of the RF—the Chief military prosecutor, who co-ordinates the activities of the bodies of the military prosecutor's office, provides for selection, placing and education of personnel, attests military prosecutors and investigators, and issues orders and directives binding for all military prosecutors. Military prosecutors' offices carry out their duties in the Armed Forces of the RF, other

troops, military units and bodies, which are created in accordance with the federal laws and other documents.

The office of the Chief Military Prosecutor consists of directorates, departments (both independent and integral to directorates), offices, and reception chambers. The heads of directorates and independent departments are senior assistants. Their deputies are heads of the departments in the directorates offices and reception chambers and are assistants to the Chief Military Prosecutor. The Chief Military Prosecutor adopts the guidelines on the structure of his office.

Positions of the prosecutors and senior prosecutors, prosecutor-criminologists and senior prosecutor-criminologists, special investigators and senior special investigators are established in the directorates and departments. The Board is created in Chief Military Prosecutor's Office. This Board includes Chief Military Prosecutor (chairman), his first deputy and deputies and other prosecutor's employees, who are assigned by the Chief Military Prosecutor. The Board's membership is affirmed by the Prosecutor General of the RF upon presentation by the Chief Military Prosecutor.

The General Prosecutor of the RF supervises the execution of laws in the Armed Forces of RF through the Chief Military Prosecutor. Subordinate to the Chief Military Prosecutor are prosecutors vested with powers within the limits of their competence, determined by Federal Legislation. They exercise this power independently of the military command in accordance with the legislation. Military prosecutors are vested with the following authority:

1. To participate in sessions of boards, military councils, meetings of military command;
2. To launch non-departmental inspections and checks, the expenditures for which are reimbursed according the prosecutor's decision by the bodies of military command, superior to the checked military units;
3. On showing of the ID service card, free access to the territory and premises of military units, enterprises, institutions, organizations and headquarters irrespective of the regimen, established in them, as well as access to their documents and materials;
4. To check legality of the confinement of convicted, arrested and detained servicemen in guard-houses, in disciplinary units and other places of their confinement, and to immediately release illegally incarcerated persons;
5. To demand provision of security, custody and escort of the persons confined in army and garrison guard-houses, in other places of the confinement, detained and incarcerated, respectively by military units, military commandants, escorts detailed by the Internal Troops of RF, bodies and institutions of internal affairs of the RF.

Military Prosecutors can respond to infringement of law as follows:

1. Instituting criminal proceedings and taking disciplinary, administrative or liability actions against guilty persons;
2. Protesting on acts, contradicting the law, to a command body or military official, which have issued this act;
3. Filing the prosecutor's statement on elimination of infringement of law.

To serve as a military prosecutor or inspector, one must be a citizen of the RF, be physically fit for military service, be on active duty, have an officer rank, as well as have higher legal education from a state certified institution of higher learning. One must also possess appropriate expertise and moral qualities. Additionally, by the order of the RF Prosecutor General, or upon his approval, civilian persons may be assigned to military prosecutor or investigator posts. The servicemen of the military prosecutor's offices are entitled to legal and social guarantees, pensions, medical care and other social benefits granted to servicemen by the laws of RF.

Officers of the Military Prosecutor's office enjoy the status of servicemen, who serve in the AFRF, Federal Border Troops of the RF, other branches, and military units and other bodies according to the Federal law "On Military Duty and Military Service" and enjoy the rights and privileges guaranteed by the Federal laws "On the Status of Servicemen" and "On the Prosecutor's Office of the RF."<sup>3</sup> Their appointment to serve in the Military Prosecutor's offices and their discharge in reserve (retirement) is executed on the initiative of Prosecutor General of the RF or Chief Military Prosecutor (however, the discharge (retirement) of general officers is executed by President of the RF at the suggestion of the Prosecutor General of the RF). Officer grades in the bodies of Military Prosecutor's office correspond to the class ranks of the prosecutor employees of the territorial prosecutor's offices. Further, as part of the AFRF, their positions and grades are included in the list of military positions.

Proficiency tests of military prosecutors and investigators are performed in accordance with procedures established by the Prosecutor General. Giving due regard to the specificity of their military service, and considering their expertise and qualification, they can be endowed with qualification grades. Promotion of military prosecutors and investigators is exercised on the motion of the corresponding military prosecutor in accordance with the procedure established for servicemen. The conferment of general

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<sup>3</sup> Federal Law of January 17, 1992 No. 2202-1 "On Prosecutor's Office of RF" was officially published in the "Collected laws of RF" of November 20, 1995, Volume 47, page 4472.

grades is exercised by President of the RF in accordance with the motion of the Prosecutor General of the RF.

Military prosecutors' and investigators' salary includes basic pay; military grade pay, long-service incentive pay, special service conditions incentive pay (50% of the basic pay), complexity of duty incentive pay (up to 50% of the basic pay), academic degree allowance, an allowance linked with the title of "Merited lawyer of the RF," as well as other bonuses and types of allowance provided to servicemen. The salary is paid by the Ministry of Defense of the RF, or the Federal Border Troops Command, or by commands of other troops, military formations and agencies. The head of the military prosecutor's office, considering the volume and the results of work of each military prosecutor or investigator, may establish incentives to recognize complexity, intensity and any special regimen of duties.

Military prosecutors and investigators can be rewarded or punished in accordance with the Federal Law "On the Prosecutor's Office of the RF" and the Disciplinary Regulations of Armed Forces of the RF. Both the right to encourage and the right to impose discipline belong exclusively to senior military prosecutors and the RF Prosecutor General.

Upon retirement from the active service and joining the service in the territorial or specialized prosecutor's offices, officers of the military prosecutor's office (colonels included) are instated in class ranks equal to their military grades. Once enrolled to the active military service, public prosecutors and investigators (senior legal counselor included) receive army grades correspondent to their class. Additionally, military prosecutors and investigators entitled to a pension for long service, receive a monthly allowance to the basic pay amounting to 50% of the pension they could have otherwise received.

The legal status and endowment of civilian employees of the military prosecutor's offices are determined in accordance with the procedures envisaged for the employees of territorial prosecutor's offices.

## **V. LEGAL SERVICE OF THE ARMED FORCES OF THE RF**

The legal service of the AFRF is designed to provide legal support to elements of military command, large formations, military units, and organizations of the AFRF. They contribute to these units with legal means, allowing them to operate at their best performance. The sub-units (separate positions) of the legal service function in the command structures, large formations, military units and organizations of the AFRF. The system of the legal service is made according to the following structure:

- The Administrative Directorate of the RF Defense Ministry;
- Legal branches with the Services of the AFRF, chiefs of the main and central directorates (departments) of the AFRF, military districts, fleets, arms of the AFRF;
- Senior legal counselors of armies (flotillas), legal assistants of corps and squadrons, divisional commanders and commanders of units which are equal to them, military school commandants, legal assistants of the AFRF—senior instructors, legal assistants at military commissariats;
- The legal assistants of brigade, regimental, 1st rank ship commanders, legal advisers of establishments, enterprises and organizations of AFRF.

At present, specific decisions of the Chief of the General Staff of the AFRF, as the first deputy defense minister of the RF, have introduced into some institutions of military command positions of the commanding officer's assistants on legal issues—chiefs of legal service.

#### **A. Administrative Directorate**

According to Order of the RF Defense Minister of 1998, No. 100, overall supervision of the legal service in the AFRF is vested in the Administrative Directorate. Thus, the First Deputy Head of the Administrative Directorate of the Defense Ministry in the RF is the Chief of the Legal Service of AFRF. He is to supervise the performance of the legal service on special issues and is the main legal expert in the AFRF.

The Administrative Directorate organizes a methodical guidance of legal work in the AFRF and also analyzes its condition through regular checks and final annual reports of the legal service divisions. It also prepares proposals on its improvement.

The Administrative Directorate provides methodical guidance on professional training and retraining of the legal service officers with the purpose of increasing the efficiency and the work quality of subdivisions and legal service officials. Personnel preparation is accomplished during the training period as well as through independent study following the recommendations developed by the Administrative Directorate.

The Administrative Directorate also participates in legal service staff selection and assignment. The assignment to the legal service and the reassignment of the personnel is made by established procedure, following the recommendation of the senior of the legal service. The appointment of legal counselors to divisional commanders and above is coordinated with the Chief of the Legal Service of AFRF.

Structural subdivisions of the Administrative Directorate occupy a special place in the system of the legal service. They are: legal examination

and enactments; legal support of the international military cooperation and draft legislation work; and supervision department of the legal service sub-units in the AFRF.

In order to update the entire body of norms and directives, the Administrative Directorate prepares draft orders and directives for the RF Defense Minister on repealing earlier orders and directives, which lost their practical importance. The legality is further strengthened by the submission by the Administrative Directorate of orders and directives of the RF Defense Minister for state registration at the RF Ministry of Justice.

The Legal Service of the Armed Forces participates in educating the personnel of central military command of the Armed Forces on current RF legislation and norms of the international humanitarian law. On the basis of order #333 (1999) of the Defense Minister, the Administrative Directorate, commanding and moral and development personnel of military districts (fleets), together with subdivisions of the legal service and in cooperation with bodies of military prosecutor's office and military courts, see to the elaboration on guidance recommendations on legal training of servicemen of the Armed Forces.

Besides training, the judicial service of the Armed Forces participates in preparing and carrying out activities directed to ensure the effective use of legal means in strengthening military and work discipline.

Legal services of the arms of Armed Forces of the RF, chiefs of the main and central bodies of the Armed Forces of the RF, military districts, fleet, and arms of the Armed Forces are intended for execution of legal work in the specified military control elements.

Legal services execute the following tasks:

- Carry out legal examination and control the conformity with legislation, of orders and instructions of the RF Defense Minister and previously published orders of the commander-in-chief (commander), and draft orders and instructions submitted for his signature;
- Check the conformity of drafted (or received by military control bodies) bills, drafts of the international treaties and other documents on military issues with current legislation;
- Participate in preparation and execution of measures directed at increasing efficacy of legal means to strengthen military and work discipline;
- Carry out the methodical guidance of the legal service subdivisions on special issues and arrange advanced training and experience exchange among the legal service officers and civilian personnel;
- Participate in training and retraining of the legal service officials, select candidates for training at the military law faculty of the Military University to get qualification in "legal counseling," provide them the reference;

- Coordinate (with personnel offices) the manning of legal service subdivisions with qualified specialists;
- Periodically check the state of legal work in military control bodies; organize inspections of military units; analyze the status of work of the legal service based on results of inspections and final reports of subdivisions; and develop suggestions and make arrangements on improvement of this work;
- Prepare the annual status report of legal work in the appropriate military control institution and submit it to the higher legal service command upon the consideration of a respective commander;
- Organize reference work on the laws, bylaws of public authority, orders and instructions of RF Defense Minister and his deputies, systematize the orders and instructions of the commander-in-chief (commander), keep their master copies, publish the index of the enactments and instructions;
- By the order of the commander-in-chief (commander), protect rights and legitimate interests of military control institutions, servicemen and civilian personnel; keep account of the complaints against actions and decisions of the military control elements officials, considered by courts, analyze them periodically and prepare the offers on lacks elimination and reasons of rights and freedom infringement of the servicemen and civil personnel; and carry out legal support of contractual and claim work executed by the military control elements;
- Check legality and validity of the documentation submitted to the relevant commanding officer's authorization to write off useless or lost material or financial assets;
- Counsel and inform on legal issues related to activities of military control bodies; assist in responding to letters, complaints and requests;
- Participate in organization and training on current legislation and norms of international humanitarian law by servicemen.

Senior legal advisers of armies (flotillas), legal assistants of corps, squadron and division commanders and commanders of equal units, legal counselors to commandants of military schools and senior instructors, and legal assistants of the military commissariat; have the primary function of reviewing draft orders and draft enactments of higher military control elements. Besides that, they participate in preparing and carrying out activities directed to the effective use of legal means of strengthening military and work discipline. They also organize and train on current legislation and norms of the international humanitarian law.

This category of legal officers is vested with the function of legal support for working out contracts, handling claims and suits, providing methodical guidance for the legal work in the military unit, analyzing its state



upon inspections, working out suggestions on improvement of this work, preparing the annual reviews of legal work in the military unit and their submission upon approval of the commanding officer, to the higher command of the legal service. By the order of the commanding officer, legal officers protect rights and legitimate interests of military control elements, servicemen, and civilian personnel with regard to their duties.

Another important issue supervised by the legal service activity is the care of military equipment. This function is carried out by legal examination of documents submitted to commanders (chiefs) to write off material and financial assets in accordance with established procedure.

The legal counselors to brigade, regimental, 1 rank ship captains, legal advisers of establishments, enterprises and organizations of the Armed Forces of the RF carry out wide ranging legal work. The content of their work depends on the branch of military control element they are stationed.<sup>4</sup>

Thus, legal counselors of the military unit commanders are vested with the function of checking legality of the draft orders of commanding officers and papers submitted to the commanding officer's authorization to write off material or financial assets in accordance with the established procedure. Besides that, the legal counselor participates in preparing and carrying out activities directed to the effective use of legal means of strengthening military discipline; assists the commanding officer during his appointment hours in counseling servicemen and civilian personnel and their family members on personal affairs; participates in organization and training on current legislation and norms of the international humanitarian law by servicemen; provide legal support in protecting rights and legitimate interests of military unit, servicemen and civil personnel with regard to their duties; takes part in the work of non-profit counseling office of the garrison. The legal assistants are included in the examination boards certifying relevant categories of servicemen in their knowledge on fundamentals of law.

The legal support of contractual and claim work for the unit constitutes another sizeable function, as does the preparation of the annual review on the state of legal work in the unit.

Thus, the subdivisions of the legal service, in aggregate, form a harmonious system of the legal service in the Armed Forces of the RF—being subordinate to the chiefs of those military control elements, in whose staff they are included.

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<sup>4</sup> The peculiarity of their activity is reflected in official duties, developed on the basis of common duties, which are embodied in the legal service Rule of the Armed Forces of the RF (order #100 of RF Defense Minister, 1998).

## **B. On Supporting Military Courts**

Taking into account specificity of legal service subdivisions of the Armed Forces of the RF one of their tasks is the interaction with the bodies of military prosecutor and military courts to promote legality and one-man-command in the Armed Forces by legal means.

The military courts are formed in the RF in accordance with the Federal Constitutional Law No. 1 of December 31, 1996 “On the Judicial System in the RF.” They are established according to the territorial principle in the armies and fleets are located and execute judicial authority over troops, control elements, and formations (where the federal law stipulates a military service). The military courts, within the limits of their jurisdiction, try cases as the court of the primary jurisdiction. They try cases as courts of secondary jurisdiction in oversight cases and lawsuits retried due to newly discovered evidence. According to the Federal constitutional law of June 23, 1999 No.1 “On Military courts of the RF,” the major objectives of military courts are:

- Provision and protection of infringed and/or contested rights, freedom and legally protected interests of the man and citizen, legal entities and their associations;
- Provision and protection of infringed and/or contested rights, freedom and legally protected interests of local government;
- Provision and protection of infringed and/or contested rights, freedom and legally protected interests of the RF, constituent regions of RF, federal authorities and federal authorities of the constituent regions of RF.

Interaction between the legal service, military courts, and offices of military prosecutor are arranged in the following fields:

- Joint meetings of command officers, offices of military prosecutor and military courts on the following issues: the state of preventive work against irregular conduct, conflicts in military collectives and measures to improve that work; the state of legal education of servicemen, work of the military unit command as investigating bodies and measures on their improvement; the preclusion of drug use and drug trafficking among troops, preventive measures against offences related to drunkenness and alcoholism;
- Tasking officers of prosecutor’s offices and military courts to do presentations with the following agendas; training servicemen to use new forms and methods of ensuring safety of state property and preventing acquisitive offences; ensuring legality of commanders’

- activity; the protection of social rights and freedoms of the servicemen and members of their families;
- Establishing joint working groups to examine the state of law and order and to assist command of military units in strengthening military discipline;
  - Analyzing the reasons of servicemen's appeals to courts of various levels giving their assessment of how current legislation is observed by military officials;
  - Appearance of the military lawyers on local TV and radio programs for servicemen and members of their family members with consultations on law of the RF;
  - Arranging training sessions on the in-depth knowledge of Criminal Procedure Code of the RF with investigation officers, together with officers of prosecutor's offices, teaching forms and methods of identifying and investigating crimes, proper execution of paper work on investigation;
  - Probation coordinated with military prosecutors and military judges, of military unit's investigators at offices of military prosecutors and military courts.

# THE ROLE OF THE RUSSIAN CONSTITUTIONAL COURT IN PROTECTING THE RIGHTS OF ACTIVE DUTY AND RETIRED SERVICEMEN

BAKHTIYAR R. TUZMUKHAMEDOV\*

## I. INTRODUCTION

Some time ago this author was approached by a fellow lawyer from the United States who boasted a long and distinguished legal career in academia, government and private practice. My friend was asking on behalf of creators of the CBS “JAG” television show whether a US military lawyer could represent a Russian serviceman in a Russian military court. The hypothetical case was about an officer disobeying a superior’s unlawful orders on the battlefield.<sup>1</sup> Judging from the results of brief research, completed with the assistance of civilian experts in criminal law and procedure, as well as with military colleagues from the Legal Service of the Armed Forces, that would be a very distant possibility at best. The then current Code of Criminal Procedure of 1960,<sup>2</sup> which through a patchwork of amendments, retained little semblance to the original text by the turn of the Millennium,<sup>3</sup> would not allow a lawyer, other than a properly certified member of an accredited collegium of advocates, to be by the side of his or her client and gain access to all the evidence at the pre-trial phase.<sup>4</sup> The court may admit a person chosen by a defendant to represent him or her, but only when the case reaches the courtroom.<sup>5</sup> A presiding judge at the military court may well

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<sup>1</sup> The episode called “Legacy” was first aired in October 2000. I do not know if my advice was taken.

<sup>2</sup> Original version published in: *Vedomosti Verkhovnogo Soveta RSFSR* (The Bulletin of the Supreme Soviet of the Russian Soviet Federated Socialist Republic), 1960, No. 40, Art. 592 [hereinafter *Vedomosti Verkh Soveta RSFSR*].

<sup>3</sup> The number and frequency of amendments made it impossible to publish an official up-dated Code. A consolidated text may be found in *KonsultantPlus*© an electronic commercial database.

<sup>4</sup> Art. 47, fourth paragraph, as amended by Federal Law No. 73-FZ, June 15, 1996. *Sobraniye Zakonodatel'stva Rossiyskoy Federatsii* (Collection of Laws of the Russian Federation), June 17, 1996, No. 25, Art. 2964 [hereinafter *Sobr. Zakonod. RF*].

<sup>5</sup> Art. 47, fifth paragraph.

find a few good reasons to bar an outsider, let alone a foreign military lawyer, from the case.<sup>6</sup>

However, it is not totally impossible to envision a situation where a foreign lawyer could represent a party in the Constitutional Court of the Russian Federation. There is no explicit prohibition in the law, and the Court does not often hear cases which involve sensitive information that judges or parties would be reluctant to share with a foreigner. Current judges, and there are nineteen on the bench, would likely not mind a lawyer speaking with an accent or communicating through an interpreter.

This brief article will first introduce a foreign reader to the Russian Constitutional Court and its powers. Next, it will discuss the categories of cases the Court may decide. It will then discuss several Constitutional Court decisions of relevance to the military.

## II. JURISDICTION OF THE CONSTITUTIONAL COURT

The Constitutional Court of the Russian Federation was first established in 1991 in the wake of the collapse of the Soviet Union (USSR). The sources of its authority were the Constitution of the Russian Federation of 1978, with major amendments introduced immediately prior to and in the aftermath of the break-up of the USSR,<sup>7</sup> and the Law “On the Constitutional Court of the Russian Soviet Socialist Federal Republic” of 1991,<sup>8</sup> as amended. The Court decided its first case in February 1992.<sup>9</sup> It failed to stay clear of the power struggle between

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<sup>6</sup> The most likely scenario would be if a case involved any classified information. Under Art. 21, second paragraph, of the Federal Law “On State Secrets” of 1993, as amended (originally published in *Rossiyskaya Gazeta* [The Russian Gazette] No. 182, September 21, 1993) [hereinafter *On State Secrets*], access of foreign citizens to state secrets shall be governed by the Government of the Russian Federation. In 1998 the Government issued a respective Order (Order No. 1003, August 22, 1998, *Sobr. Zakonod. RF*, *supra* note 4, August 31, 1998, No. 35, Art. 4407). Those regulations are quite restrictive with regard to permitting legitimate access of foreigners to Russian state secrets. Of course, this author is not qualified to discuss the authority under which a US serviceman, that is, a JAG officer, could represent a foreign national in a court of a foreign jurisdiction.

<sup>7</sup> *Konstitutsiya (Osnovnoy Zakon) Rossiyskoy Federatsii-Rossii* [The Constitution (Fundamental Law) of the Russian Federation, Russia]. Moscow, 1993, 127.

<sup>8</sup> *Vedomosti S'yezda Narodnykh Deputatov i Verkhovnogo Soveta RSFSR* [The Bulletin of the Congress of People's Deputies and of the Supreme Soviet of the RSFSR], July 25, 1991, No. 30, Art. 1017 [hereinafter *Congress of People's Deputies*].

<sup>9</sup> The case was quite noteworthy. The Constitutional Court ruled that the Presidential Decree on the merger of the Ministry of Internal Affairs of the USSR, the Ministry of Internal Affairs of Russia, the Inter-Republican Security Service and the Russian Federal Security Agency into the Ministry of Security and Internal Affairs violated the principle of separation of powers and of the delineation of competence between supreme bodies of government. On those grounds the Court found the Decree unconstitutional (*see*: *Congress of People's Deputies, id.*, February 6, 1992, No. 6, Art. 247).

the President and the Parliament that reached its violent climax in the fall of 1993, and it was suspended until March 1995.<sup>10</sup>

Currently the Constitutional Court derives its powers from the Constitution of 1993<sup>11</sup> and the Law “On the Constitutional Court of the Russian Federation” of 1994, as amended.<sup>12</sup> It is part of the three-tiered judicial system,<sup>13</sup> but unlike the Supreme Court and the Higher Court of Arbitration that sit at the apex of their pyramids of general jurisdiction and of arbitration, the Constitutional Court does not have such a foundation.

Article 125 of the Constitution and Article 3 of the Law “On the Constitutional Court” describe categories of cases that may be decided by the Court. The three categories are (1) cases involving legislative acts petitioned by public authority, (2) cases involving jurisdictional disputes between authorities, and (3) cases involving review of a law applied in a particular case—petitioned by either private parties or the courts.

### **A. Legislative Acts Petitioned by Public Authority**

The first category of cases the Court may hear involve legislative acts passed by public authorities, whether federal or regional. In these cases, only public authorities may petition the Court. Additionally, these cases need not arise from any on-going dispute—any party with due authority may request an abstract review of a statute. When confronted with such petitions, the Court rules on the constitutionality of federal laws and normative acts issued by the President or by either chamber of the Federal Assembly, that is, Parliament, or by the Government.

Among possible cases are laws or decrees that regulate military service, defense or other national security matters. In 1995 the Court heard a notable case regarding the constitutionality of the President’s decision to use military force to quell insurgency in the Chechen Republic. The Court was petitioned by deputies of both chambers of the Federal Assembly. In deciding that case, the

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<sup>10</sup> Decree No. 1400 that President Boris Yeltsin promulgated on September 21, 1993 merely suggested that “the Constitutional Court of the Russian Federation does not hold sessions until the convocation of the Federal Assembly of the Russian Federation”. See *Sobraniye Aktov Prezidenta i Pravitelstva Rossiyskoy Federatsii* (Collection of Acts of the President and the Government of the Russian Federation), September 27, 1993, No. 39, Art. 3597. However, under the circumstances that prevailed in Moscow those days the Decree could not have been read other than an unequivocal order.

<sup>11</sup> For the text of the Constitution an English-speaking reader may be referred to the web-site of the Russian Embassy in Washington, D.C., available at <http://www.russianembassy.org> (last visited May 8, 2002).

<sup>12</sup> *Sobr. Zakonod. RF*, *supra* note 4, July 25, 1994, No. 13, Art. 1447. A consolidated text may be found in KonsultantPlus© an electronic commercial data-base.

<sup>13</sup> The powers and jurisdiction of courts are set forth in Chapter 7 “The Judiciary” of the Constitution and the Federal Constitutional Law “On the Judicial System of the Russian Federation” of 1996, as amended. See *id.*, January 6, 1997, No. 1, Art. 1.

Court did not specifically discuss the rights of servicemen.<sup>14</sup> However, it is worth noting that in its decision the Court invoked Protocol II Additional to Geneva Conventions regarding the application of international humanitarian law. The Court directed the legislators to take the Protocol into account while modifying laws regulating the use of armed forces. The Ministry of Defense implemented that decision by directing that legal training in International Humanitarian Law be an integral part of combat training.<sup>15</sup>

The Constitutional Court may also rule on the constitutionality of constitutions, charters and laws of the component entities of the Russian Federation, as well as on treaties concluded by those entities with the Federal authorities and between those entities. One possible scenario for court review would be when a law passed by a constituent entity interferes with matters that, under the Constitution, fall under exclusive Federal jurisdiction. One such provision would be Article 71(*l*) of the Constitution which refers to such matters as “defense and security.” For example, a case falling under this rubric could potentially arise out of a Declaration of the State Council of Tatarstan that was adopted ten days after the upper chamber of the Federal Assembly authorized the deployment of a Russian unit as part of Kosovo Forces. In that Declaration the legislative body of an influential constituent entity of the Russian Federation stated that it would be “inadmissible for Tatarstanians to be part of the military units of the Armed Forces of the Russian Federation that are being deployed in Kosovo”.<sup>16</sup> However, the emerging conflict had been resolved through the political process before the issue came before the Court.

Finally, the Court may decide whether international treaties that have not yet come into force conform with the Constitution. Of relevance to this discussion could be possible cases about the constitutionality of international treaties on collective defense, on deployment of forces abroad, and on their status. The closest the Constitutional Court has ever come to deciding such cases was when it ruled that a petition contesting the constitutionality of the Treaty on Friendship, Cooperation and Partnership between Russia and Ukraine of 1997 was inadmissible. The Treaty contains general commitments in the field of cooperation on defense and security matters.<sup>17</sup> Several legislators filed a petition with the Constitutional Court requesting that the Court consider the issue. However, the ratification process moved so fast that it left no time for the Court to even look into the merits of the petition. Once the Treaty was ratified and instruments of ratification exchanged, thus making it effective, the Court no longer had jurisdiction.<sup>18</sup>

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<sup>14</sup> Vestnik Konstitutsionnogo Suda Rossiyskoy Federatsii [The Bulletin of the Constitutional Court of the Russian Federation], 1995, No. 5.

<sup>15</sup> Directive No. 333, May 29, 1999, of the Minister of Defense of the Russian Federation “On the Legal Training in the Armed Forces of the Russian Federation” (copy on file with author).

<sup>16</sup> Respublika Tatarstan [Republic of Tatarstan], No. 125, July 6, 1999.

<sup>17</sup> Sobr. Zakonod. RF, *supra* note 4, May 17, 1999, No. 20, Art. 2413.

<sup>18</sup> Ruling No. 62-O, April 23, 1999 (copy on file with author).

## **B. Jurisdictional Disputes Between Authorities**

The second category comprises cases about jurisdictional disputes between federal authorities, or between federal and regional authorities, or between regional authorities. The aforementioned Decree of the State Council of Tatarstan would likely result in a case falling under this category.

## **C. Review of Laws Applied in a Particular Case**

The third category consists of cases where the Constitutional Court is petitioned by private persons or by courts requesting a constitutional review of a law that has been applied or ought to be applied in a particular case. Those will be discussed at greater length later in this article.

It is only natural to expect the supreme judicial body of constitutional review to interpret the Constitution. However, unlike the US Supreme Court, the Russian Constitutional Court may also deal with it as an abstract question. In 1995 the upper chamber of the Federal Assembly requested an interpretation of an article of the Constitution which empowered that chamber to decide on the possibility of foreign deployments of the Russian Armed Forces.<sup>19</sup> The Court chose not to consider the petition on its merits. It argued, somewhat arbitrarily, that the issue had already been resolved by subsequent legislation.<sup>20</sup> It should also be mentioned that the Constitutional Court may be requested to deliver an advisory opinion on the observance of a prescribed procedure of impeachment of the President.

## **III. TYPES OF DECISIONS OF THE CONSTITUTIONAL COURT**

At this point a brief note on types of decisions that are passed by the Court would be worthwhile. The Court, when deciding a case on its merits, will issue a “judgement” (*postanovleniye*). When it rules that a petition is inadmissible it will issue a “ruling” (*opredeleniye*). Some of the latter may be rather brief and merely state, for example, that a petitioner does not have standing. Others may carry more substance and express an argumentative position of the Constitutional Court on a matter of law. In the Court’s own unofficial parlance those are called “rulings with positive content.”

The Law on the Constitutional Court explicitly requires it to officially publish its judgements and advisory opinions, but does not require it to publish rulings.<sup>21</sup> Therefore, it is up to the Court itself to decide whether to publish a

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<sup>19</sup> Constitution of the Russian Federation, Art. 102.1(d).

<sup>20</sup> Ruling No. 115-O, December 4, 1995 (copy on file with author).

<sup>21</sup> The Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, Art. 78.



particular ruling. That leaves a considerable number of rulings unpublished. While most unpublished rulings are of importance only to the parties that are directly involved in the matter, there are quite a few others that may be of interest to a more general audience, but of which the general audience remains largely unaware due to a lack of publishing.

The Constitutional Court addresses issues vital to the military mostly in decisions that develop from this third category—those involving private disputes and arising from private or court petitions to review a law. Some may be construed as favoring individuals, others as being beneficial to the Ministry of Defense.

#### **IV. SELECTED CASES WITH MILITARY APPLICATION**

##### **A. Conscientious Objectors**

The current Russian Constitution, unlike its predecessors, recognizes conscientious objectors to service in the armed forces. Article 59(3) states that a person is entitled to alternative civilian service if, by reason of his convictions or religious beliefs, he is opposed to military service, which is compulsory in Russia. The Constitution allows other grounds for such substitution, but those grounds need to be specified in a federal law in order to be effective. In the absence of such law, local draft boards restrictively interpret that provision of the Constitution. They insist that until the law is enacted a conscientious objector can not claim his right to an alternative service.

The Constitutional Court has received several petitions regarding the exercise of the right to alternative civilian service. Those petitions were filed both by draftees and by courts of general jurisdiction that heard cases that were brought both by and against objectors.

In one such instance, a court of general jurisdiction in Kemerovo District in the East of Russia heard a case of a young man who had been charged with draft evasion. The defendant was a member of the Jehovah's Witnesses, a religious organization. Although he refused to don the uniform, he expressed his willingness to perform alternative civilian service. The court questioned the constitutionality of a provision of the then effective Criminal Code of 1960<sup>22</sup> that, in the opinion of the presiding judge, violated the right of a citizen to such alternate service. In a situation when a court has doubts about the constitutionality of an applicable law, it is entitled to suspend proceedings and request the Constitutional Court to review that law.

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<sup>22</sup> Vedomosti Verkh Soveta RSFSR , *supra* note 2, Art. 591. The consolidated text may be found in KonsultantPlus© an electronic commercial data-base. The contested provision was Art. 80 "Evasion from Regular Draft to Active Military Service" that criminalized draft evasion with possible sentences of one to five years in prison.

The Constitutional Court deferred the consideration of the petition on its merits. However, in what became a “ruling with positive content,”<sup>23</sup> it argued that the disputed provision of the Criminal Code applied to draft evaders rather than to conscientious objectors. Thus the article of the Code that made draft evasion a criminal offense did meet the test of constitutionality. Having said that, the Constitutional Court stated that the absence of a law regulating alternative civilian service could not preclude the exercise of a right by a person who was able to prove that he indeed had convictions or religious beliefs that made military service unacceptable. The grounds for the exercise of that right are prescribed by the Constitution and do not require any implementing law.

Without interfering with the legislative powers of the Federal Assembly, the Constitutional Court used the technique that may be described as a “legislative hint”. With its own law-making initiative being limited to matters that explicitly fall within its jurisdiction, the Court highlighted a lacuna that it believed ought to be closed by the appropriate branch of power. At the same time it instructed other departments of the Government as to how to apply the provision of the Constitution that prescribed the right to alternative civilian service.

However, in that decision, as well as in another decision adopted later that same year<sup>24</sup> the Constitutional Court stated that the fact that a draftee had convictions or religious beliefs needed to be proven in a court of general jurisdiction, while other grounds would need to be specified by law. As of the time of this writing, that law had not yet been adopted.

## **B. Drafting Students**

The last decade of the 20<sup>th</sup> Century was a time of expansion of the private sector in the Russian system of education that had for many years been run by the state. A student at a state institution of higher learning would normally get a guaranteed draft deferral for the duration of studies. For some, such deferral made universities a refuge from the draft. The new private institutions were required to go through the process of state accreditation. If they were accredited their students would be also be granted a draft deferral.

A court in Omsk, a major city in Southern Siberia, asked the Constitutional Court to review a provision of the Federal Law “On the Military Duty and the Military Service.” The provision granted draft deferral to students at state, municipal, and private accredited institutions, but did not grant such deferrals to students in private non-accredited institutions. The petitioner argued that the provision violated the right to education, the principal of equality of

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<sup>23</sup> Ruling No. 63-O, May 22, 1996. Unofficial publication in: *Konstitutsioniy Sud Rossiyskoy Federatsii: Postanovleniya. Opredeleniya* (Constitutional Court of the Russian Federation: Judgements. Rulings) 1992-1996. Moscow, 1997, 501-503.

<sup>24</sup> Ruling No. 93-O, September 26, 1996 (copy on file with author).

rights and freedoms and went beyond reasonable restrictions on the exercise of rights and freedoms.

The Constitutional Court passed a Judgement<sup>25</sup> in which it pointed out that a person contemplating studies at an institution of higher learning had a choice of applying to state-owned or private colleges and universities. The reader should be aware that admittance requirements at state institutions could be more stringent than in private institutions. However, the majority of students at the former do not pay any tuition fee. Besides, degrees conferred by traditional, that is, state institutions, often command more respect.

Having not found any violation of the right to education, the Constitutional Court considered the constitutional duty to defend the Motherland by performing the military service. It argued that students at state or private non-accredited institutions alike are under obligation to perform that duty. The difference is that some get deferral while others do not. Those who do not may resume studies upon completion of their military service. On those grounds the Constitutional Court upheld the disputed provision of the Law.

### **C. Uniformed Parents**

A decision of the Constitutional Court resulting from a private dispute is sometimes likely to become a class action that will affect a group of people with some common characteristics, even though that group may be rather small. There are not as many servicewomen in the Russian Armed Forces as in the United States, although their numbers have certainly grown in recent years. There are few mothers in uniform, although the decision that will be discussed below affected both mothers and fathers serving in the military.

Ms. Leukhina had signed a contract with the Ministry of Defense and was serving as an NCO in a unit deployed in Azerbaijan, a former Soviet republic, now an independent state. She was the mother of two young children who lived with her. The officer commanding her unit refused to pay her monthly compensations to support minor dependents. He argued that since the unit was deployed to the territory of a state with which Russia did not have an agreement on mutual support of dependents, she was not entitled to compensations provided for by a respective Russian law.

The reader should be aware that, following the break-up of the USSR in December 1991, Russia adopted into its jurisdiction quite a few units of the former Soviet Armed Forces that were deployed in what became territories of new independent states. Legally, that required a tremendous amount of treaty-making work—both on bi-lateral and multi-lateral levels. A treaty that could have been applicable law under the circumstances in which Ms. Leukhina found herself was the Agreement on the Guarantees to Citizens with Regard to

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<sup>25</sup> Judgement No. 13-P, October 21, 1999. *Sobr. Zakonod. RF, supra* note 4, November 1, 1999, No. 44, Art. 5383.

Payment of Social Benefits, Compensations to Families with Children, and Alimony, that became effective on 12 April 1995.<sup>26</sup> Both Russia and Azerbaijan signed the Agreement. However, the latter, unlike the former, had never ratified it, thus making it ineffective in relations between the two countries.

The military court that heard the servicewoman's case asked the Constitutional Court to review the Federal Law "On Government Compensations to Citizens with Children". The presiding judge argued that the Law, by making the compensation conditional on an international agreement, discriminated against military members serving abroad.

The Constitutional Court stated that it was not the Law, but rather the application of it that had been defective. The obligation of the State to support parents was unconditional. The burden of that support could be shared with another state-party to an international agreement, but in the absence of such an agreement, it was the duty of the Russian Government to pay compensations in full. The Court further stated that "the special legal status of the military stems from the need to perform the duty and the obligation of the citizen of the Russian Federation to defend the Motherland. Hence the military, the location of their duty station notwithstanding, shall be considered residing in the Russian Federation".<sup>27</sup>

## V. IMPLICIT LAWMAKING

When asked to scrutinize a law, the Constitutional Court is guided by a presumption of its constitutionality. However, at the end of the day the disputed provision may be struck off the books. This may be described as a negative result. A possible scenario when the attitude becomes positive is when the Constitutional Court identifies a lacuna in the legislation and gently suggests that lawmakers might wish to fill that void. That implicit lawmaking goes somewhat further than what has already been referred to in this article as a "legislative hint." An example of such a "legislative hint" that had concerned the military follows.

Two military courts requested the Constitutional Court to review the Law "On the Military Duty and the Military Service". They had been hearing cases in which two plaintiffs, both former servicemen, disputed the refusal of their commanders to cite the failure of the Ministry of Defense to fulfill terms and conditions of their contracts as grounds for termination of the contracts. The commanders argued that the Law did not provide for such grounds. The military

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<sup>26</sup> Sodruzhestvo [Commonwealth]. The official Bulletin of the Council of the Heads of State and of the Council of the Heads of Government of the Commonwealth of Independent States, 1994, No. 2 (21), p. 89-93.

<sup>27</sup> *Sobr. Zakonod. RF, supra* note 4, August 14, 2000, No. 33, Art. 3430. Incidentally, this was not a judgement, but rather a "ruling with positive content" that was delivered on June 8, 2000.

courts reasoned that the Law they were to apply violated several constitutional rights and freedoms of plaintiffs.

The Constitutional Court did not find any flaws in the existing text of the Law. It gave its own interpretation of the petitions as implying a lack of an applicable norm rather than unconstitutionality of an existing provision. As noted elsewhere in this article, the Constitutional Court is entitled to legislative initiative, but that power is restricted to the sphere of the Court's jurisdiction. Obviously, the detailed regulation of military service contracts does not come near that area. For that reason the Constitutional Court did not consider the petitions on their merits, but expressed an opinion that the petitioners, in fact, pointed out a lacuna in the Law "On the Military Duty and the Military Service."<sup>28</sup>

The legislature reacted quite promptly to the decision. The new version of the Law under the same title that was adopted on 28 March 1998 included a provision that entitled a serviceperson to initiate an abrogation of contract in case of a "substantial and (or) systematic breaches of terms of contract" by the other party.<sup>29</sup>

Sometimes the Constitutional Court may be less unobtrusive in identifying both deficiencies of existing laws and defective practice of their application. Captain 1<sup>st</sup> Rank Alexander Nikitin, a retired naval officer, signed a contract with the Norwegian environmental group "Bellona" to perform a study of nuclear safety issues in the Russian Northern Fleet. The Federal Security Service (counterintelligence) charged him with high treason, alleging that Mr. Nikitin illegally acquired and disclosed secret information in his analysis. The lawyer he had chosen was barred from the case on grounds that he did not have a security clearance. The Federal Security Service maintained that the then effective Federal Law "On State Secrets" of 1993 required clearance for a lawyer in a case which involved information classified as secret.<sup>30</sup>

The Constitutional Court found that this interpretation of the Law violated the right to legal assistance that was guaranteed by the Constitution.<sup>31</sup> Further, the Court stated that the role of a lawyer as a party in judicial proceedings as well as the nature of the services he provided to his client were sufficient grounds for a waiver of the regular procedures of authorization of access to secret information. Ironically, under the contested Law that authorization was performed by the Federal Security Service itself. That same agency enjoys almost exclusive investigatory powers in criminal cases involving state secrets. A lawyer whose client is charged with high treason would likely be rather ill at ease if he were obliged to request a security clearance from the same Federal Security Service that initially brought charges against his client.

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<sup>28</sup> Ruling No. 94-O, July 11, 1996 (copy on file with author).

<sup>29</sup> Art.51.3(a). *Sobr. Zakonod. RF, supra* note 4, March 30, 1998, No. 13, Art. 1475.

<sup>30</sup> On State Secret, *supra* note 6.

<sup>31</sup> Constitution of the Russian Federation, Art. 48.

The Constitutional Court ruled<sup>32</sup> that the disputed provision of the Law “On State Secrets,” in its literal meaning, met the test of constitutionality, while the meaning attributed to it by the Federal Security Service did not. To avoid any further misinterpretation of that provision, the Court explicitly directed the lawmakers to introduce a clarifying amendment to the Law.

Eighteen months later the Law was amended to include a provision that waived the authorization procedure with respect to lawyers whose clients stand criminal charges involving state secrets, as well as to deputies of both chambers of the Federal Assembly and to judges.<sup>33</sup> Of course that would not relieve them of responsibility for disclosure of state secrets.

## VI. CONCLUDING REMARKS

I conclude this article with a frivolous theory that, nonetheless, quite a few of my colleagues consider deserving of merit.

Russian society has had a long history of lack of confidence and trust in the judiciary. This distrust goes back well before the 1917 October Revolution which brought the Communist Party to power. A common perception was that courts sentenced rather than administered justice. Under the Soviet system a person would try to uphold a right in a regional Communist Party committee rather than in a court of law.

When that system collapsed it left a gap that, in the public perception, has been partially filled by the Constitutional Court. Some would probably rather not notice a short noun “Court” hidden behind the long adjective “Constitutional”. Because of this misperception, the new institution began to receive thousands of petitions on issues that should have been addressed to other courts or even could have been resolved outside the judiciary.

The Constitutional Court, for its own part, often seems to be inclined to take an attitude of protecting the right of the individual, rather than upholding public interests. Even now, in the second decade of its existence, the Court has yet to find a way of consistently maintaining the balance between the two principles.

However, it is in decisions involving the military, both as individuals and as an organization, that the Court seems to be developing a more balanced model. It weighs the rights and freedoms of a uniformed citizen against the duties of a soldier. It puts on one side of the scale the prerogatives of the military as but one of departments of the Government, and on the other side of the scale their special responsibilities as the armed defender of the nation.

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<sup>32</sup> Judgement No. 8-P, March 27, 1996. *Sobr. Zakonod. RF, supra* note 4, April 8, 1996, No. 15, Art. 1768.

<sup>33</sup> That amendment was introduced by Federal Law No. 131-FZ, October 6, 1997. *Sobr. Zakonod. RF, supra* note 4, October 13, 1997, No. 41, Art. 4673.

Several examples from the practice of the Constitutional Court that were cited earlier in this article may serve as evidence to prove that theory.

# THE MILITARY JUSTICE SYSTEM IN AUSTRALIA

WING COMMANDER FRANK B. HEALY\*

When the British Government established a penal colony in Australia in 1788, the sailors and soldiers who accompanied the transported prisoners were governed by the English *Mutiny Act* and the *Articles of War* that were in force at the time. Following the withdrawal of the English naval and military forces in 1870, an Australian military legal system began to evolve. Before federation on 1 January 1901, there were separate State naval and military forces. These forces were governed by State legislation that closely followed the English system. Following federation, the Commonwealth naval and military forces were established. Until 1985 the separate forces were governed by Commonwealth legislation. That legislation incorporated the respective English legislation for each of the forces. Although work had commenced on developing an Australian military justice system before World War II, it was not until 3 July 1985 that such a system came into force. This paper describes the current Australian system.

## I. DEVELOPMENT OF AUSTRALIAN MILITARY LAW

Following the settlement of Australia in 1788, the provisions of the *Mutiny Act* of England that was in force at the time governed the British troops who were in the Colony. It was not until 1870 that the English naval and military forces were withdrawn from Australia.<sup>1</sup> With the formation of the various Colonies of Australia, Colonial Navies and Colonial Armies were raised, and these were governed by the appropriate Colonial legislation.<sup>2</sup> This legislation provided for military offences such as desertion and mutiny.<sup>3</sup>

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<sup>1</sup> Sarah Dawson (ed), *The Penguin Australian Encyclopaedia* (1990) 135; Jeffrey Grey, *A Military History of Australia* (1990) 9; Gerald Walsh, "The Military and the Development of the Australian Colonies, 1788-1888" in Michael McKernan & Margaret Browne (eds), *Australia: Two Centuries of War & Peace* (1988) 44.

<sup>2</sup> Eg, *The Volunteer Force Regulation Act 1867* (NSW); *Defences and Discipline Act 1890* (Vic); *The Defence Acts 1884 to 1896* (Qld); *The Defence Act 1885* (Tas); *The Safety of Defence Act 1892* (WA); and *The Naval Discipline Act 1884* (SA).

<sup>3</sup> Eg, *The Discipline Act 1870* (Vic) ss 10 and 11.



With the federation of the various States into the Commonwealth of Australia in 1901, a statute of the Parliament of Great Britain, namely the *Commonwealth of Australia Constitution Act 1900* (UK),<sup>4</sup> provided Australia with a written Constitution. Section 68 of the Constitution provides, “The Commander-in-Chief of the Naval and Military Forces of the Commonwealth is vested in the Governor-General as the Queen’s representative.” Thus the Governor-General personally has the ultimate executive authority over such of the Australian Defense Forces as exists from time to time.

The Constitution also specifies the powers of the Australian Parliament. Placitum (vi) of section 51 of the Constitution grants Federal Parliament exclusive powers, namely, the “[p]ower to make laws for the peace, order and good government of the Commonwealth with respect to the Naval and military defense of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth. Pursuant to this power, the Federal Parliament enacted the *Defense Act 1903* (Cth), the *Naval Defense Act 1910* (Cth), and the *Air Force Act 1923* (Cth). The *Defense Act 1903* (Cth) provided that the State Acts relating to defense forces ceased to apply.<sup>5</sup> It also authorized the Governor-General to make regulations for securing the discipline and good government of the Defense Force,<sup>6</sup> and, pursuant to this power, the *Australian Military Regulations* were made in 1904,<sup>7</sup> the *Naval Regulations* in 1906,<sup>8</sup> and the *Air Force Regulations* in 1922.<sup>9</sup> The *Air Force Regulations* were made under the *Air Force Act 1923* (Cth) in 1927,<sup>10</sup> and the *Naval Forces Regulations* under the *Naval Defense Act 1910* (Cth) in 1935.<sup>11</sup> The Regulations predominantly dealt with the organization and administration of the respective services.

The *Defense Act 1903* (Cth) governed the raising and maintenance of the Australian Military Forces, and was the source of military law applicable to those forces. However, with time, the separate branches of the Australian Military Forces became subject to the jurisdiction of separate legislation.<sup>12</sup> However, all services eventually became subject to the *Defense Force Discipline Act 1982* (Cth). Even so, a brief history of each service’s past is still worth noting.

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<sup>4</sup> 63 & 64 Vict, c 12.

<sup>5</sup> *Defence Act 1903* (Cth) s 6.

<sup>6</sup> *Id.* s 124.

<sup>7</sup> Statutory Rules 1904 No 71.

<sup>8</sup> Statutory Rules 1906 No 20 - which effectively applied the English law.

<sup>9</sup> Statutory Rules 1922 No 160 - which applied the *Australian Military Regulations* (Statutory Rules 1916 No 66) to the Air Force.

<sup>10</sup> Statutory Rules 1927 No 161.

<sup>11</sup> Statutory Rules 1935 No 133.

<sup>12</sup> The Royal Australian Navy was formed in 1910; the Royal Australian Air Force in 1921.

## A. Navy

Initially, the *Defence Act* 1903 (Cth) applied to the Navy<sup>13</sup> and made applicable the provisions of the *Naval Discipline Act* 1866 (UK).<sup>14</sup> This situation remained unaltered following the passing of the *Naval Defence Act* 1910 (Cth).<sup>15</sup>

However, in 1964, the provisions of the *Naval Discipline Act* 1957 (UK)<sup>16</sup> were made applicable to the Navy,<sup>17</sup> and those provisions continued to apply until repealed in 1985.<sup>18</sup> Since 3 July 1985, discipline in the Navy has been governed by the *Defence Force Discipline Act* 1982 (Cth).

## B. Army

The *Defence Act* 1903 (Cth) applies to the Army.<sup>19</sup> By it, the provisions of the *Army Act* 1881 (UK)<sup>20</sup> were made applicable to the Army while its members were on active service.<sup>21</sup> In 1917 the *Defence Act* 1903 (Cth) was amended, and the law in relation to discipline that applied to the Army depended on whether the Army was on war service or not<sup>22</sup> with the only significant difference between the legislation that was applicable in time of peace and that which was applicable in time of war was that the available punishments were greater in time of war. At that time, the Army was governed by:

1. The *Defence Act* 1903 (Cth);
2. The regulations made pursuant to the *Defence Act* 1903 (Cth); and
3. So much of the *Army Act* 1881 (UK) and Rules of Procedure, not being inconsistent with 1 and 2, as were applied by section 88 of the *Defence Act* 1903 (Cth).

The *Defence Act* 1903 (Cth) gave the Governor-General power to constitute a Board of Administration for the Military Forces, which was called the Military Board, and prescribed the powers and functions with which the Board could be invested.<sup>23</sup> By virtue of the powers given to the Military

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<sup>13</sup> *Defence Act* 1903 (Cth) s 5.

<sup>14</sup> 29 & 30 Vict, c 109; *Defence Act* 1903 (Cth) s 56.

<sup>15</sup> *Naval Defence Act* 1910 (Cth) s 36.

<sup>16</sup> 6 Eliz 2, c 53.

<sup>17</sup> *Naval Defence Act* 1964 (Cth) s 34.

<sup>18</sup> By the *Defence Force (Miscellaneous Provisions) Act* 1982 (Cth) s 83.

<sup>19</sup> *Defence Act* 1903 (Cth) s 5.

<sup>20</sup> 44 & 45 Vict, c 58.

<sup>21</sup> *Defence Act* 1903 (Cth) s 55.

<sup>22</sup> *Id.* s 14.

<sup>23</sup> *Defence Act* 1903 (Cth) s 28.

Board by the *Australian Military Regulations*, the Military Board regulated the administration of the Military Forces by the Australian Military Orders, the Military Board Instructions, and Army Routine Orders. The provisions of the *Army Act 1881 (UK)*<sup>24</sup> continued to apply to the Army until repealed in 1985.<sup>25</sup> Since 3 July 1985, discipline in the Army has been governed by the *Defense Force Discipline Act 1982 (Cth)*.

### C. Air Force

Following the formation of the Australian Air Force on 31 March 1921, it was made subject to the *Defense Act 1903 (Cth)*.<sup>26</sup> It was specifically provided that the *Army Act 1881 (UK)*<sup>27</sup> did not apply to members of the Air Force.<sup>28</sup>

However, in 1939, the provisions of the *Air Force (Constitution) Act 1917 (UK)*,<sup>29</sup> in force on 15 December 1939, were made applicable to the Air Force,<sup>30</sup> and provisions continued to apply until repealed in 1985.<sup>31</sup> Since 3 July 1985, discipline in the Air Force has been governed by the *Defense Force Discipline Act 1982 (Cth)*.

Thus, while each of the three Services was initially subject to the *Defense Act 1903 (Cth)*, the Navy and the Air Force were subsequently granted their own legislation. However, the administration of discipline in all three Services was effectively governed by the respective English legislation, by reference in the Australian law, until 1985. Since 1985 all three arms of the Australian Defense Force have come under the provisions of the *Defense Force Discipline Act 1982 (Cth)*.

## II. THE DEFENCE FORCE DISCIPLINE ACT 1982 (CTH)

The *Defense Force Discipline Act 1982 (Cth)* (the Act) set up a hierarchy of service tribunals and conferred upon them a comprehensive system of discipline law that reflected civilian criminal standards and processes.<sup>32</sup> The service tribunals have the power to try members of the Australian Defence Force on charges of service offences against the Act. Civilians accompanying the Australian Defence Force outside Australia or on operations against the enemy are also subject to the Act in certain

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<sup>24</sup> 44 & 45 Vict, c 58.

<sup>25</sup> By the *Defence Force (Miscellaneous Provisions) Act 1982 (Cth)* s 51.

<sup>26</sup> *Air Force Act 1923 (Cth)* s 3(3).

<sup>27</sup> 44 & 45 Vict, c 58.

<sup>28</sup> *Air Force Act 1923 (Cth)* s 3(5).

<sup>29</sup> 7 & 8 Geo 5, c 51.

<sup>30</sup> *Air Force Act 1939 (Cth)* s 6.

<sup>31</sup> By the *Defence Force (Miscellaneous Provisions) Act 1982 (Cth)* s 9.

<sup>32</sup> *Defence Force Discipline Act 1982 (Cth)* (hereinafter referred to as “DFDA”) s 10.

circumstances.<sup>33</sup> Civilians are not otherwise liable to be tried by service tribunals, nor are any offences created by the Act triable by civil courts.

The Act also provides for related matters such as investigation of offences,<sup>34</sup> suspension from duty,<sup>35</sup> powers of arrest,<sup>36</sup> power to order restitution of stolen property<sup>37</sup> or payment of reparation for damage or loss caused,<sup>38</sup> conviction without punishment,<sup>39</sup> approval of certain punishments by higher authority,<sup>40</sup> suspension and remission of punishments,<sup>41</sup> execution and enforcement of punishments and parole.<sup>42</sup>

### III. AUSTRALIAN SERVICE TRIBUNALS

Having described the general purport of the Act, it is appropriate to detail the tribunals and appointments that are empowered to deal with military offences. The Australian service tribunals that are available under Part VII of the Act, in a descending order in relation to the jurisdiction that is granted to them, are:

1. General Court-Martial;
2. Restricted Court-Martial;
3. Defense Force Magistrate;
4. Superior Summary Authority;
5. Commanding Officer;
6. Subordinate Summary Authority; and
7. Discipline Officer.

Although a discipline officer does not constitute a service tribunal for the purposes of the Act,<sup>43</sup> the provisions relating to them will be dealt with in this section for completeness. Each of these tribunals shall be examined in turn, and the issues of how they are convened or appointed, their composition, their jurisdiction, and the punishments that they may impose shall be addressed. Subordinate Summary Authorities, Commanding Officers, and Superior Summary Authorities, as a group, are classed as Summary Authorities,<sup>44</sup> but each will be dealt with separately.

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<sup>33</sup> *DFDA* s 3(1).

<sup>34</sup> *DFDA* Part VI ss 101–101ZC.

<sup>35</sup> *DFDA* ss 98–100.

<sup>36</sup> *DFDA* Part V ss 88–95.

<sup>37</sup> *DFDA* s 83.

<sup>38</sup> *DFDA* s 84.

<sup>39</sup> *DFDA* s 75.

<sup>40</sup> *DFDA* s 172.

<sup>41</sup> *DFDA* ss 78, 79, 81, 82, and 173.

<sup>42</sup> *DFDA* Part X ss 170–177.

<sup>43</sup> *DFDA* s 169F(4).

<sup>44</sup> *DFDA* s 3(1) and Pt VII, Div 2.

However, before examining these matters, it is important to note that the Act speaks of “dealing with” and “trying” charges.<sup>45</sup> These are distinct and separate processes. In dealing with a charge, a tribunal has to determine whether to try the charge, dismiss it, or direct that it not be proceeded with, or to refer it to a more appropriate tribunal for trial. In any event, a tribunal may not try a charge unless the Act grants it jurisdiction to do so.

### A. General Court Martial

A general court martial is not a standing tribunal, but is appointed, or convened, by a convening authority on an *ad hoc* basis.<sup>46</sup> Where a charge is referred to a convening authority, they may direct that the charge be not proceeded with; refer the charge to a superior summary authority or to a commanding officer for trial (where the charge is within their jurisdiction); refer the charge to a Defense Force magistrate for trial; or convene either a general court martial or a restricted court martial to try the charge.<sup>47</sup>

A general court martial is composed of a president and not less than four other members.<sup>48</sup> In order to be eligible to sit on a general court martial, members of the Australian Defense Force must meet a number of specified requirements. First, they must be officers.<sup>49</sup> Secondly, they must have been officers for a continuous period of not less than three years or for periods amounting in the aggregate to not less than three years.<sup>50</sup> And finally, no member may be of a rank that is lower than that of the accused,<sup>51</sup> and the President must hold a rank of at least the naval rank of captain or the rank of colonel or group captain.<sup>52</sup>

A general court martial may try any charge against any person, except for custodial offences and the offences specified in section 63 of the Act, which offences include treason, murder, manslaughter, bigamy, and certain sexual offences in respect of which proceedings under the Act may not be instituted without first obtaining the consent of the Director of Public Prosecutions.<sup>53</sup> A general court martial may impose, in decreasing order of severity:<sup>54</sup>

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<sup>45</sup> *DFDA* ss 106-111.

<sup>46</sup> *DFDA* s 102. Convening authorities are appointed by chiefs of staff by instrument in writing. *Id.*

<sup>47</sup> *DFDA* s 103.

<sup>48</sup> *DFDA* s 114(2).

<sup>49</sup> *DFDA* s 116(1)(a).

<sup>50</sup> *DFDA* s 116(1)(b).

<sup>51</sup> *DFDA* s 116(1)(c).

<sup>52</sup> *DFDA* s 116(2)(a).

<sup>53</sup> *DFDA* s 115(1).

<sup>54</sup> *DFDA* ss 67(1) and 68(1), and Schedule 2.

1. Imprisonment for life.
2. Imprisonment for a specific period.
3. Dismissal from the Defense Force.
4. Detention for a period not exceeding two years.
5. Reduction in rank.
6. Forfeiture of service for the purpose of promotion.
7. Forfeiture of seniority.
8. A fine not exceeding the amount of the convicted person's pay for 28 days.
9. Severe reprimand.
10. Reprimand.

### **B. Restricted Court Martial**

Like a general court martial, a restricted court martial is not a standing tribunal, but is convened on an *ad hoc* basis to try charges. Additionally, they also are appointed, or convened, by an officer appointed in writing by a chief of staff to be a convening authority.<sup>55</sup>

A restricted court martial is composed of a president and not less than two other members.<sup>56</sup> The eligibility requirements to sit on a restricted court martial are essentially the same as for a general court martial. However, in this case the president must hold a rank of at least commander, lieutenant colonel or wing commander.<sup>57</sup> A restricted court martial has the same jurisdiction as a general court martial, but its powers of punishment are less severe.<sup>58</sup> The punishments are:<sup>59</sup>

1. Imprisonment for a period not exceeding six months.
2. Dismissal from the Defense Force.
3. Detention for a period not exceeding six months.
4. Reduction in rank.
5. Forfeiture of service for the purpose of promotion.
6. Forfeiture of seniority.
7. A fine not exceeding the amount of the convicted person's pay for 28 days.
8. Severe reprimand.
9. Reprimand.

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<sup>55</sup> DFDA s 102.

<sup>56</sup> DFDA s 114(3).

<sup>57</sup> DFDA s 116(2)(b).

<sup>58</sup> DFDA Schedule 2.

<sup>59</sup> DFDA ss 67(1) and 68(1), and Schedule 2.

### C. Defense Force Magistrate

Defense Force magistrates are appointed from the judge advocates' panel by the Judge Advocate General. Upon the nomination of the Judge Advocate General, officers may be appointed as members of the judge advocates' panel by instrument in writing signed by a chief of staff.<sup>60</sup> Following appointment to the panel, officers are required to take an oath or affirmation of office.<sup>61</sup> Officers who are members of the judge advocates' panel may in turn be appointed as Defense Force magistrates by the Judge Advocate General by instrument in writing, and following such appointment, they are again required to take an oath or affirmation of office.<sup>62</sup>

Defense Force magistrates sit alone when hearing charges under the Act that are referred to them for trial by a convening authority.<sup>63</sup> They have the same jurisdiction and powers as a restricted court martial, including the powers of the judge advocate of a restricted court martial.<sup>64</sup> Similarly, the punishments that may be imposed by Defense Force magistrates are the same as for a restricted court martial.<sup>65</sup>

### D. Superior Summary Authority

Superior summary authorities are also appointed by instrument in writing, but by a chief of staff.<sup>66</sup> With the exception of prescribed offences,<sup>67</sup> superior summary authorities have jurisdiction to try a charge against an officer who is two or more ranks junior to them, being an officer of or below the rank of lieutenant commander, major or squadron leader.<sup>68</sup> They may also try a charge against a warrant officer or against a person who is not a member of the Defense Force.<sup>69</sup> However, superior summary authorities may only try charges that are within their jurisdiction and that have been referred to them by a convening authority or by a commanding officer<sup>70</sup>—they do not have

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<sup>60</sup> *DFDA s 196(2)*. In order to be eligible to be nominated to the panel by the Judge Advocate General, an officer must be enrolled as a legal practitioner and have been so enrolled for not less than five years. *DFDA s 196(3)*.

<sup>61</sup> *DFDA s 196(4)*.

<sup>62</sup> *DFDA ss 127 and 128(1)*.

<sup>63</sup> *DFDA s 103(1)(c)*.

<sup>64</sup> *DFDA s 129(1)*.

<sup>65</sup> *DFDA ss 67(1) and 68(1), and Schedule 2*.

<sup>66</sup> *DFDA s 105(1)*.

<sup>67</sup> *DFDA s 63*. These offences include treason, murder, manslaughter, bigamy, and specified sexual assaults.

<sup>68</sup> *DFDA s 106(a)*.

<sup>69</sup> *DFDA ss 106(b) and (c)*.

<sup>70</sup> *DFDA ss 110(1)(b) and (c)*.

jurisdiction to try a charge at first instance. The punishments that may be imposed by superior summary authorities, in decreasing order of severity, are<sup>71</sup>:

1. A fine not exceeding the amount of the convicted person's pay for 14 days.
2. Severe reprimand.
3. Reprimand.

### **E. Commanding Officer**

Commanding officers derive disciplinary powers by virtue of their military appointment as a commanding officer. They have jurisdiction to deal with any charge against any person<sup>72</sup> and may try a charge against a member of the Defense Force who is two or more ranks junior to them, being a member of or below the naval rank of lieutenant, the military rank of captain or the rank of flight lieutenant, in respect of a service offence that is not a prescribed offence.<sup>73</sup> Additionally, they may try a charge against a person who is not a member of the Defense Force in respect of a service offence that is not a prescribed offence.<sup>74</sup> They are also required to try a charge that is within their jurisdiction and that is referred to them for trial by a convening authority or by a subordinate summary authority.<sup>75</sup>

The punishments that may be imposed by commanding officers depend upon the Service to which the convicted person belongs and their rank and also, in respect of elective punishments,<sup>76</sup> upon whether the convicted person elected to be tried or punished by the commanding officer.<sup>77</sup> The range of available punishments, beginning with the maximum is:<sup>78</sup>

1. Detention for a period not exceeding 42 days.
2. Reduction in rank.
3. Forfeiture of seniority.
4. A fine not exceeding the amount of the convicted person's pay for 28 days.
5. Severe reprimand.
6. Restriction of privileges for a period not exceeding 14 days.
7. Stoppage of leave for a period not exceeding 21 days.

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<sup>71</sup> *DFDA* ss 67(2) and 68(1), and Schedule 3, Table A.

<sup>72</sup> *DFDA* s 107(1).

<sup>73</sup> *DFDA* s 107(2)(a).

<sup>74</sup> *DFDA* s 107(2)(b).

<sup>75</sup> *DFDA* ss 103(1)(b) and 111(2)(c).

<sup>76</sup> *DFDA* s 3(1).

<sup>77</sup> *DFDA* s 131.

<sup>78</sup> *DFDA* ss 67(2) and 68(1), and Schedule 3, Table B.



8. Extra duties for a period not exceeding 7 days.
9. Extra drill for not more than two sessions of 30 minutes each per day for a period not exceeding 3 days.
10. Reprimand.

### **F. Subordinate Summary Authority**

A subordinate summary authority is appointed by instrument in writing by a commanding officer.<sup>79</sup> Their jurisdiction is limited to that granted to them by their instrument of appointment. First, they may deal with a charge against a member of the Defense Force who is not an officer in respect of any service offence of a kind that is notified in their instrument of appointment.<sup>80</sup> Secondly, they may deal with a charge against a prescribed officer, namely an officer who is included in a prescribed class of officers and receiving instruction or training, in respect of any service offence of a kind that is notified in their instrument of appointment.<sup>81</sup> Thirdly, they may try a charge against a member of the Defense Force who is of, or below, the rank of leading seaman or corporal in respect of a service offence other than a prescribed offence,<sup>82</sup> of a kind that is notified in their instrument of appointment.<sup>83</sup> Finally, they may try a charge against a prescribed officer in respect of a service offence, again with the exception of a prescribed offence, of a kind that is notified in their instrument of appointment.<sup>84</sup>

As with a commanding officer, the punishment that may be imposed by a subordinate summary authority in a particular case is dependent upon the Service to which the subordinate summary authority belongs, their rank, their official appointment, the Service to which the accused belongs, and the rank of the accused. Beginning with the most severe, the range of available punishments are:<sup>85</sup>

1. A fine not exceeding the amount of the convicted person's pay for 7 days.
2. Severe reprimand.
3. Restriction of privileges for a period not exceeding 14 days.
4. Stoppage of leave for a period not exceeding 21 days.
5. Extra duties for a period not exceeding 7 days.

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<sup>79</sup> *DFDA* s 105(2).

<sup>80</sup> *DFDA* s 108(1).

<sup>81</sup> *DFDA* ss 108(1A) and (4).

<sup>82</sup> As defined in *DFDA* s 104, which includes the offences of treason, murder, manslaughter, bigamy, and specified sexual offences.

<sup>83</sup> *DFDA* s 108(2).

<sup>84</sup> *DFDA* s 108(3).

<sup>85</sup> *DFDA* ss 67(2) and 68(1), and Schedule 3, Table C.

6. Extra drill for not more than two sessions of 30 minutes each per day for a period not exceeding 3 days.
7. Reprimand.

### **G. Discipline Officer**

The provisions relating to a discipline officer were inserted as Part IXA of the Act in 1995.<sup>86</sup> Although a discipline officer does not constitute a tribunal under the provisions of Part VII of the Act and a finding of guilt and the imposition of a penalty does not constitute a conviction under the Act, reference to the discipline officer is included for completeness.

A hearing before a discipline officer does not attract the formalities that apply to hearings before service tribunals. The aim is to achieve the dispensation of punishment for minor disciplinary infringements in an efficient and timely manner.<sup>87</sup> Accordingly, members must elect to be dealt with by a discipline officer to be subject to their decisions. A defense member who elects to be dealt with by a discipline officer must admit the breach and may not be represented at the hearing, but may call witnesses and present evidence in mitigation of punishment.<sup>88</sup>

A discipline officer may deal with defense members in respect of “disciplinary infringements” that are offences against several specified sections of the Act and may impose one of a number of available minor penalties in respect thereof.<sup>89</sup>

A commanding officer may, in writing, appoint any officer or a warrant officer as a discipline officer.<sup>90</sup> A discipline officer has jurisdiction to deal with a defense member who holds a rank below non-commissioned rank in respect of a disciplinary infringement where the member has not been charged with a service offence in respect of the act or omission in question and where the member has elected to be dealt with by a discipline officer.<sup>91</sup> The punishments that may be imposed by discipline officers, in a decreasing order of severity, are:<sup>92</sup>

1. A fine not exceeding the amount of a member’s pay for one day.
2. Restriction of privileges for a period not exceeding two days.

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<sup>86</sup> *Defence Legislation Amendment Act 1995* (Cth) Sch 2 ¶ 30; the new provisions came into effect on 1 November 1995.

<sup>87</sup> *Discipline Law Manual* (Aust) (1996) Vol 1, ¶ 1327.

<sup>88</sup> *DFDA* ss 169G(2) and (3).

<sup>89</sup> *DFDA* ss 169A and F.

<sup>90</sup> *DFDA* s 169B. *DFDA* s 3(1) defines “officer” to mean a person appointed as an officer.

<sup>91</sup> *DFDA* s 169C.

<sup>92</sup> *DFDA* s 169F(1).

3. Stoppage of leave for a period not exceeding three days.
4. Extra duties for a period not exceeding three days.
5. Extra drill for not more than two sessions of 30 minutes each per day for a period not exceeding three days.
6. A reprimand.

#### **IV. STATUTORY APPOINTMENTS**

In addition to the appointment of judge advocates and Defense Force magistrates already mentioned, the Act also provides for the appointment of a Judge Advocate General and Deputy Judge Advocates General. Details of these appointments will now be considered.

##### **A. Judge Advocate General**

The Judge Advocate General is appointed either on a full or part-time basis by the Governor-General and has such functions, powers and duties as are conferred by the Act or any other law.<sup>93</sup> The Judge Advocate General holds office for such period, not exceeding seven years, as is specified in their instrument of appointment, provided that that period does not extend beyond the day on which they attain the age of 65 years.<sup>94</sup> In order to qualify for appointment as Judge Advocate General, a person must be or have been a Justice or Judge of a federal court or of a Supreme Court of a State or Territory.<sup>95</sup> The Governor-General may terminate the appointment of the Judge Advocate General if their appointment as a Justice or Judge of a federal court or of a Supreme Court of a State or Territory is terminated by reason of misbehavior, physical or mental incapacity, or bankruptcy.<sup>96</sup> A Judge Advocate General who is a Justice or Judge of a federal court or of a State Supreme Court or Territory ceases to hold office if they no longer hold office as such a Justice or Judge.<sup>97</sup>

##### **B. Deputy Judge Advocates General**

The Governor-General may also appoint one or more Deputy Judge Advocates General, who also may hold their appointments either on either a full or part-time basis.<sup>98</sup> Their term of appointment<sup>99</sup> and their qualification for appointment are essentially the same as for the Judge Advocate General,

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<sup>93</sup> *DFDA* ss 179(1) and (3).

<sup>94</sup> *DFDA* ss 183(1) and (2).

<sup>95</sup> *DFDA* s 180(1).

<sup>96</sup> *DFDA* ss 186(1) and (2).

<sup>97</sup> *DFDA* s 186(3).

<sup>98</sup> *DFDA* s 179(2).

<sup>99</sup> *DFDA* ss 183(1) and (2).

except that a person need not be a justice or judge—a person who has been enrolled as a legal practitioner for less than five years is eligible.<sup>100</sup> Their appointment may be terminated or terminates on the same grounds as for the Judge Advocate General, with the additional ground that a Deputy Judge Advocate General who is not a Justice or Judge of a federal court or of a Supreme Court of a State or Territory ceases to hold office if they cease to be a legal practitioner.<sup>101</sup>

### **C. Judge Advocate**

In proceedings before a court martial, the judge advocate is required to give any ruling, and exercise any discretion that, in accordance with the law in force in the Jervis Bay Territory of Australia, would be given or exercised by a judge in a trial by jury, and must sit without the members of the court martial where that would be the practice in a trial by jury.<sup>102</sup> A ruling given by the judge advocate is binding on the court martial.<sup>103</sup> In addition to the requirements of the Act, the Regulations, or the Rules, the functions of the judge advocate are:<sup>104</sup>

1. To be present at all sittings of the court martial;
2. To preside over all hearings conducted in the absence of the members of the court martial, and to ensure, at all such hearings, that the proceedings are conducted in accordance with the Act and the Rules and in a manner befitting a court of justice; and
3. To ensure that an accused person who is not represented does not suffer any undue disadvantage as a consequence of that fact; and to ensure that a proper record of the proceedings is made and that the record of proceedings and the exhibits, if any, are properly safeguarded.

### **D. Defense Force Magistrate**

In addition to any functions conferred on them by the Act, the Regulations, or any other rule, the functions of a magistrate at any proceedings before them are to ensure that the proceedings are conducted in accordance with the Act and the Rules and in a manner befitting a court of justice; that an accused person who is not represented does not, in consequence of that fact,

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<sup>100</sup> *DFDA* s 180(2). However, in practice the Deputy Judge Advocates General who have been appointed have been either judges or very senior counsel.

<sup>101</sup> *DFDA* ss 186(1)–(4).

<sup>102</sup> *DFDA* ss 134(1) and (2).

<sup>103</sup> *DFDA* s 134(4).

<sup>104</sup> *DFDR* reg. 32.

suffer any undue disadvantage; and that a proper record of the proceedings is made and that the record of proceedings and the exhibits, if any, are properly safeguarded.<sup>105</sup>

## **V. IMPORTANT APPOINTMENTS**

### **A. President**

The president of a court martial has a duty to ensure that the proceedings are conducted in accordance with the Act and the Rules and in a manner befitting a court of justice; to speak on behalf of the court martial in announcing a finding or sentence or any other decision taken by the court martial; and to speak on behalf of the members of the court martial in conferring with, or requesting advice from, the judge advocate on any question of law or procedure.<sup>106</sup> In proceedings before a court martial, with the exception of matters that are specifically reserved for determination by the judge advocate, the president presides.<sup>107</sup>

### **B. Prosecutor**

The prosecutor is required to provide the accused person with notice and particulars of any evidence that the prosecution intends to adduce at the trial that was not contained in the written statements furnished to the accused person<sup>108</sup> before they initially appeared before a summary authority.<sup>109</sup> Where the prosecutor decides not to call a prosecution witness to give evidence as notified to the accused person, the prosecutor must, if practicable to do so before the trial, inform the accused person accordingly, and that they may call the witness as a witness for the defense, or inform the accused person at the trial that they do not intend to call the witness to give evidence but will tender the witness for cross-examination by the accused person if they so request.<sup>110</sup> A court martial or a Defense Force magistrate may allow the prosecutor to withdraw a charge before the accused person is arraigned on it.<sup>111</sup>

## **VI. MILITARY JUSTICE PROCEDURES**

The procedures applicable to the hearing of charges are similar whether the particular tribunal hearing the charges is a summary authority, a court

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<sup>105</sup> *DFDR* reg. 36.

<sup>106</sup> *DFDR* reg. 31.

<sup>107</sup> *DFDA* s 133(1)(a).

<sup>108</sup> Pursuant to *DFDR* reg. 15.

<sup>109</sup> *DFDR* reg. 16(1).

<sup>110</sup> *DFDR* reg. 16(2).

<sup>111</sup> *DFDR* reg. 13.

martial, or a Defense Force magistrate. The practice and procedure applicable to the Australian military justice system, including the review of proceedings and the right of appeal, is set out in legislation. The principal legislation governing these issues is:

1. The *Defense Force Discipline Act* 1982 (Cth).<sup>112</sup>
2. The *Defense Force Discipline Regulations* (Cth).<sup>113</sup>
3. The *Defense Force Discipline Rules* (Cth).<sup>114</sup>
4. The *Defense Force Discipline Appeals Act* 1955 (Cth).<sup>115</sup>
5. The *Federal Court of Australia Act* 1976 (Cth).<sup>116</sup>

## **A. Rules of Evidence, Rules of Procedure and Regulations**

### *1. Rules of Evidence*

Subject to any regulations made under the Act, the rules of evidence in force in the Jervis Bay Territory<sup>117</sup> apply to proceedings before a service tribunal as if the tribunal was a court exercising jurisdiction in or in relation to that Territory, and the proceedings were criminal proceedings.<sup>118</sup> A document that is certified by a commanding officer as being a copy of a general order is evidence of that order unless the contrary is proved.<sup>119</sup> In addition, a service tribunal must take judicial notice of all matters within the general service knowledge of the tribunal or of its members.<sup>120</sup>

### *2. Rules of Procedure*

The Judge Advocate General is authorized to make rules of procedure, which are not inconsistent with the Act, providing for the practice and procedure to be followed by service tribunals.<sup>121</sup> The rules so made are subject to parliamentary scrutiny.<sup>122</sup> They may cover such matters as:<sup>123</sup>

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<sup>112</sup> Act No. 152 of 1982.

<sup>113</sup> Statutory Instrument No. 125 of 1985.

<sup>114</sup> Statutory Instrument No. 128 of 1985.

<sup>115</sup> Act No. 16 of 1955.

<sup>116</sup> Act No. 156 of 1976.

<sup>117</sup> A territory of the Commonwealth of Australia.

<sup>118</sup> *DFDA* s 146.

<sup>119</sup> *Defence Force Discipline Regulations* (Cth) (hereinafter referred to as “*DFDRegs*”) reg 27.

<sup>120</sup> *DFDA* s 147.

<sup>121</sup> *DFDA* s 149(1).

<sup>122</sup> As per Part XII of the *Acts Interpretation Act* 1901 (Cth) relating to regulations.

<sup>123</sup> *DFDA* ss 149(1)(a)–(h).

1. The attendance of witnesses;
2. The production of documents;
3. The administration of oaths and affirmations;
4. The forms to be used in proceedings;
5. The service of process;
6. Charge sheets;
7. The manner of taking the votes of the members of a court martial;
8. The manner and form of charges; and
9. The recording of proceedings of service tribunals.

### *3. Regulations*

The Governor-General is authorized to make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.<sup>124</sup>

## **B. Conduct of Trial**

### *1. Courts Martial and Trials by Defense Force Magistrates*

The hearing of proceedings before a court martial or a Defense Force magistrate is normally held in public.<sup>125</sup> If, however, the president of the court martial or the Defense Force magistrate considers it necessary in the interests of the security or defense of Australia, the proper administration of justice, or public morals to order that some or all of the members of the public be excluded during the whole or a specified part of the proceedings, they may do so.<sup>126</sup>

### *2. Method of Taking Evidence*

A service tribunal is empowered to take evidence on oath or affirmation, and the proceedings must generally be held in the presence of the accused.<sup>127</sup> Witnesses appearing before service tribunals may be examined, cross-examined, and re-examined.<sup>128</sup>

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<sup>124</sup> *DFDA* s 197(1).

<sup>125</sup> *DFDA* s 140(1).

<sup>126</sup> *DFDA* s 140(2).

<sup>127</sup> *DFDA* ss 138(1)(a) and 139(1).

<sup>128</sup> *DFDR* reg. 18(1).

### 3. Record of Proceedings

The record of proceedings of a hearing before a summary authority must contain the substance of the evidence of the witnesses and such additional matters, if any, as are necessary to enable the merits of the case to be judged.<sup>129</sup> Where the proceedings of a hearing before a summary authority are recorded by means of shorthand or sound recording apparatus, the recorder must prepare, or cause to be prepared, a transcript in writing, which must be authenticated by the person who made the transcript, and be certified as true and correct by the summary authority.<sup>130</sup>

The proceedings before a court martial or a Defense Force magistrate must, if practicable, be recorded *verbatim*.<sup>131</sup> Where the proceedings are not recorded by means of shorthand or sound recording apparatus, they must be recorded in sufficient detail to enable the course of the proceedings to be followed, and the merits of the case to be judged, from the record.<sup>132</sup> Where the proceedings are recorded by means of shorthand or sound recording apparatus, the recorder must prepare, or cause to be prepared, a transcript in writing that must be authenticated by the person who made the transcript.<sup>133</sup> The written record of the proceedings must be certified as true and correct, in writing, by the recorder and the judge advocate or the Defense Force magistrate as soon as practicable after the conclusion of the trial.<sup>134</sup>

### 4. Principles of Law Applicable to Trials

Before 15 December 2001, the principles of the common law with respect to criminal liability applied in relation to service offences.<sup>135</sup> The prosecution bore the onus of proving the case beyond reasonable doubt, while the onus of proving an appropriate defense was on the person charged with the standard of proof being on the balance of probabilities.<sup>136</sup> As from 15 December 2001, the principles of criminal responsibility are as laid down in Chapter 2 of the Criminal Code.<sup>137</sup> Service tribunals may impose punishments ranging in increasing order from a reprimand to imprisonment for life.<sup>138</sup> The

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<sup>129</sup> *DFDR* regs. 55(1)(a) and (b).

<sup>130</sup> *DFDR* regs. 55(2) and (3)(a).

<sup>131</sup> *DFDR* reg. 54(1).

<sup>132</sup> *DFDR* reg. 54(2).

<sup>133</sup> *DFDR* reg. 54(3).

<sup>134</sup> *DFDR* reg. 54(4).

<sup>135</sup> *DFDA* s 10.

<sup>136</sup> *DFDA* ss 12(1) and (2).

<sup>137</sup> The Criminal Code is contained in the Schedule to the *Criminal Code Act 1995* (Cth) – Act No 12 of 1995.

<sup>138</sup> *DFDA* ss 68(1)(a) and (p).



particular types of punishment that may be imposed vary with the nature of the tribunal. They are required to have regard to the sentencing principles as applied by the civil courts, as well as the need to maintain discipline in the Australian Defense Force.<sup>139</sup>

### *5. Amendment of Charge Sheets*

A summary authority may, before dealing with or trying a charge, or at any stage of dealing with or trying a charge, amend the charge as they think necessary, unless the amendment cannot be made without injustice to the accused person.<sup>140</sup> Similar action may also be taken by a convening authority, the judge advocate of a court martial, or a Defense Force magistrate.<sup>141</sup> A mistake in the charge sheet in the name or description of the accused person or a mistake that is attributable to clerical error or omission may be amended at any time during a hearing of proceedings.<sup>142</sup>

### *6. Swearing of Members*

After all objections by the accused to members of the court have been dealt with and before the arraignment of the accused begins, the judge advocate administers an oath or affirmation to the president and each other member of the court in the presence of the accused.<sup>143</sup> The oath or affirmation is that the person will duly administer justice according to law without fear or favor, affection or ill-will, that the person will well and truly try the accused person or persons before the court martial according to the evidence, and that the person will not disclose the vote or opinion of any member of the court martial unless required to do so in due course of law.<sup>144</sup>

### *7. Opening Address by Prosecution*

Before the first prosecution witness is called to give evidence at trial, the prosecutor may, and at a trial by a court martial or a Defense Force magistrate must, make an opening address to the tribunal, stating briefly:

1. The elements of the offence charged that have to be proved before the accused person can be convicted;
2. The alleged facts upon which the prosecutor will rely to support the charge; and

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<sup>139</sup> *DFDA* s 70(1).

<sup>140</sup> *DFDA* s 141A(1)(a).

<sup>141</sup> *DFDA* ss 141A(1)(b)-(d).

<sup>142</sup> *DFDR* reg. 12.

<sup>143</sup> *DFDR* reg. 35(1).

<sup>144</sup> *DFDR* reg. 35(2).

3. The nature of the evidence that the prosecutor proposes to adduce to prove the alleged facts.<sup>145</sup>

#### *8. Tribunal May Direct Substitution of Plea of Not Guilty*

Where at any time during a trial it appears to a service tribunal, or in the case of a court martial, to the judge advocate, that an accused person who has pleaded guilty does not understand the effect of the plea, the tribunal must substitute a plea of not guilty and proceed accordingly.<sup>146</sup>

#### *9. Recalling of Witnesses and Calling of Further Witnesses*

The prosecutor and the accused person may, at any time before the judge advocate begins to sum up at a trial by court martial, or before the service tribunal makes a finding on the charge in any other case, recall a witness by leave of the service tribunal.<sup>147</sup> After the witnesses for the defense have given their evidence, the prosecutor may, by leave of the service tribunal, call a witness to give evidence on any matter raised by the accused person in their defense in respect of which evidence could not properly have been adduced, or which could not reasonably have been foreseen, by the prosecution before the accused person presented their defense.<sup>148</sup> A service tribunal may, at any time before the judge advocate begins to sum up at a trial by court martial, or before the service tribunal makes a finding on the charge in any other case, call a witness or recall a witness if, in the opinion of the service tribunal or, in the case of a court martial, the judge advocate, it is in the interests of justice to do so.<sup>149</sup> When a witness is so called or recalled, the accused person and the prosecutor may put such questions to the witness as seem proper to the service tribunal or, in the case of a court martial, the judge advocate.<sup>150</sup>

#### *10. Right to Argue and Adduce Evidence*

The accused person and the prosecutor may properly argue, and adduce evidence relevant to, any question presented to the service tribunal for decision.<sup>151</sup>

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<sup>145</sup> DFDR reg. 42.

<sup>146</sup> DFDR reg. 43.

<sup>147</sup> DFDR reg. 19(1).

<sup>148</sup> DFDR reg. 19(2).

<sup>149</sup> DFDR reg. 19(3).

<sup>150</sup> DFDR reg. 19(4).

<sup>151</sup> DFDR reg. 40.

### *11. Submission of No Case to Answer*

At the close of the prosecution case, the accused person may make a submission to the tribunal in respect of a charge that the evidence adduced is insufficient to support the charge.<sup>152</sup>

### *12. Opening Address by Defense*

Where the accused person intends to call a witness to give evidence as to the facts of the case, they may, before calling the first such witness, make an opening address to the tribunal stating the nature and general effect of the evidence that they propose to adduce in their defense.<sup>153</sup>

### *13. Closing Addresses*

After all of the evidence has been given, the accused and the prosecutor may each make a closing address to the tribunal.<sup>154</sup> The closing address, if any, of the accused is made after that of the prosecutor.<sup>155</sup> Where two or more persons are charged in the same charge sheet, their closing addresses are made in the order in which their names are listed on the charge sheet, but when they are represented by the same person, that person may only make one closing address.<sup>156</sup>

### *14. Judge Advocate to Sum Up*

After the closing addresses, if any, at a trial by court martial, the judge advocate is required to sum up the evidence and direct the court on the law relating to the case.<sup>157</sup>

### *15. Evidence as to Material Facts after Conviction on Plea of Guilty*

Where, on the trial of a charge, the accused is convicted after pleading guilty, the prosecutor must inform the tribunal of the material facts that show the nature and gravity of the offence.<sup>158</sup> The convicted person may dispute any such facts, and they and the prosecutor may adduce evidence in relation to any fact so disputed.<sup>159</sup>

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<sup>152</sup> DFDR reg. 44.

<sup>153</sup> DFDR reg. 45.

<sup>154</sup> DFDR reg. 47(1).

<sup>155</sup> DFDR reg. 47(2).

<sup>156</sup> DFDR regs. 47(3) and (4).

<sup>157</sup> DFDR reg. 48.

<sup>158</sup> DFDR reg. 49(a).

<sup>159</sup> FDR regs. 49(b) and (c).

## *16. Decisions of Courts Martial*

In proceedings before a court martial, with the exception of matters that are specifically reserved for determination by the judge advocate, the president presides and every question is determined by a majority vote of the members, and in the event of an equality of votes, the president has a casting vote.<sup>160</sup> In the case where the issue being determined is whether the accused person is guilty or not of a service offence, and the votes are equal, the court martial must find the accused person not guilty.<sup>161</sup> Where a court martial is determining whether an accused person is guilty or not guilty of a service offence or determining the appropriate punishment to impose on a convicted person, the members must sit without any other person present.<sup>162</sup> On any question to be determined by the court martial, the members must vote orally, in order of seniority commencing with the junior in rank.<sup>163</sup>

## *17. Plea in Mitigation*

After a person has been convicted by a service tribunal, the prosecutor adduces evidence of the relevant particulars of their service in the Defense Force if they are a defense member or were a defense member at the time of the commission of the offence.<sup>164</sup> They will also produce particulars of any previous convictions for service offences, civil court offences, and overseas offences, and such other matters relevant to the determination of sentence.<sup>165</sup>

The convicted person may then give evidence, call witnesses to give evidence as to their character and in mitigation of punishment, and address the service tribunal in mitigation of punishment.<sup>166</sup> The witnesses, including the convicted person if they give evidence, may be examined, cross-examined, and re-examined as with any witness during the trial.<sup>167</sup>

## **C. RIGHTS OF AN ACCUSED**

### *1. Action Following Arrest*

A person arrested under the provisions of the Act must be delivered, as soon as practicable, into the custody of a commanding officer, who must either

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<sup>160</sup> *DFDA* ss 133(1)-(3).

<sup>161</sup> *DFDA* s 133(4).

<sup>162</sup> *DFDA* s 133(6).

<sup>163</sup> *DFDR* reg. 33.

<sup>164</sup> *DFDR* reg. 50(1)(a).

<sup>165</sup> *DFDR* regs. 50(1)(b) and (c).

<sup>166</sup> *DFDR* regs. 50(2)(a) and (b).

<sup>167</sup> *DFDR* reg. 50(3).

charge them with a service offence or release them from custody within 24 hours after they have been delivered into their custody.<sup>168</sup> Where a person is so charged, proceedings must be commenced as soon as possible, and if not commenced within a period of 48 hours, the commanding officer must make a written report to a convening authority giving reasons for the delay.<sup>169</sup>

If a person remains in the custody of a commanding officer for a period of eight days or more without the charges having been dealt with, the commanding officer must report the reasons for the delay in writing to a convening authority every eight days.<sup>170</sup> Where a person remains in custody for 30 days without the charge having been dealt with, the convening officer must notify the reasons for the delay to a chief of staff, who must order the release of the person from custody, unless satisfied that it is proper that they should continue in custody.<sup>171</sup>

## *2. Limitation Period for Bringing Charges*

Generally speaking, a person must be charged with a service offence within five years of the commission of the offence.<sup>172</sup> Where a person has ceased to be a member of the Defense Force they must be charged within six months of ceasing to be a member, and then only where the maximum punishment for the offence is at least imprisonment for a period of two years.<sup>173</sup> However, a person may be charged with an offence of aiding the enemy, communicating with the enemy, mutiny, or desertion, or with being an accessory to, or with attempting, or inciting any of these offences at any time.<sup>174</sup>

## *3. Investigation of Service Offences*

The Act authorizes a person who is investigating a service offence to ask questions of any person whom they believe may be able to furnish information that may assist with the investigation.<sup>175</sup> There is however, no obligation on the person to answer any questions.<sup>176</sup> Where a person is in custody, an investigating officer may not ask them any question or to do anything in connection with the investigation of a service offence unless the investigating officer has:

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<sup>168</sup> *DFDA* ss 95(1)-(2).

<sup>169</sup> *DFDA* s 95(4).

<sup>170</sup> *DFDA* s 95(5).

<sup>171</sup> *DFDA* ss 95(8)-(9).

<sup>172</sup> *DFDA* s 96(1).

<sup>173</sup> *DFDA* s 96(6).

<sup>174</sup> *DFDA* ss 15, 16, 20, 22 and 96(2).

<sup>175</sup> *DFDA* s 101B(1).

<sup>176</sup> *DFDA* s 101B(2).

1. Told them their name and rank, and
2. Has cautioned them that they do not have to say or do anything, but anything that they do say or do may be used in evidence.<sup>177</sup>

A person must likewise be cautioned before being asked any question or asked to do anything after an investigating officer has either:

1. Decided to charge them with a service offence or
2. Decided to seek the issue of a summons against them for a service offence, or to recommend that they be so charged or that a summons be sought.<sup>178</sup>

A person who is in custody in respect of a service offence is also entitled to communicate with a friend or a relative, and also with a legal practitioner of their choice.<sup>179</sup> They must be treated with humanity and with respect for human dignity while in such custody.<sup>180</sup>

Further protections are added by taping interviews. Where a person, who is being interviewed as a suspect by a police member, makes a confession or an admission, the confession or admission must be tape recorded where possible, and the suspect must be provided with a copy of the video recording or the sound recording, as applicable, free of charge within seven days of the recording being made.<sup>181</sup>

The Act also permits an investigating officer, who is an officer or a warrant officer, to take fingerprints or photographs of a person who is in lawful custody in respect of a service offence, where they deem it necessary for the purpose of establishing the identity of the person.<sup>182</sup> Additionally it permits the identification of a suspect being held in custody by means of photographs where the suspect has refused to take part in an identification parade, or where the holding of an identification parade would be unfair to the suspect or impracticable given all the circumstances.<sup>183</sup> It also authorizes the holding of identification parades, the search of arrested persons, and their medical examination.<sup>184</sup>

Search warrants may be issued authorizing named investigating officers to search:

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<sup>177</sup> *DFDA* ss 101C(1)-(2).

<sup>178</sup> *DFDA* s 101D(1).

<sup>179</sup> *DFDA* s 101E(1).

<sup>180</sup> *DFDA* s 101H(1).

<sup>181</sup> *DFDA* s 101JA.

<sup>182</sup> *DFDA* s 101L(1)(a).

<sup>183</sup> *DFDA* s 101M(1).

<sup>184</sup> *DFDA* ss 101N, P, and Q.

1. Defense members or defense civilians;
2. The clothing being worn by them, and the property under their immediate control; and
3. To seize any thing of the kind specified in the information seeking the warrant found in the course of the search, which they believe, on reasonable grounds, to be connected with the service offence being investigated.<sup>185</sup>

#### *4. Accused Person Must be Given Copies of Statements by Witnesses*

A person who has been charged with a service offence must be given a copy of each statement in writing obtained by the prosecution from material witnesses to the alleged offence before they appear before a summary authority for a purpose relating to the charge.<sup>186</sup>

When a convening authority convenes a court martial for the trial of a charge, the authority must send a copy of the convening order to the president and to each member or reserve member of the court.<sup>187</sup> The judge advocate must be sent the convening order, the charge sheet, the record of evidence taken at proceedings in relation to the charge before a commanding officer, a superior summary authority, or an examining officer, and any other statement taken from a witness to be called for the prosecution.<sup>188</sup> The accused person must be sent copies of:

1. The charge sheet;
2. The record of evidence taken at proceedings in relation to the charge before a commanding officer, a superior summary authority, or an examining officer;
3. Any other statement taken from a witness to be called for the prosecution;
4. A list of the names of witnesses to be called by the prosecution; and
5. A list of exhibits to be given in evidence for the prosecution.<sup>189</sup>

When a convening authority refers a matter to a Defense Force magistrate, the authority must, in the order referring the matter, specify the Defense Force magistrate to whom the matter is referred, and fix the time and

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<sup>185</sup> *DFDA* s 101X.

<sup>186</sup> *DFDR* reg. 15.

<sup>187</sup> *DFDR* reg. 29(1)(a).

<sup>188</sup> *DFDR* reg. 29(1)(b).

<sup>189</sup> *DFDR* reg. 29(1)(c). These documents must also be provided to the accused in a trial by Defence Force magistrate.

place for the hearing of the matter.<sup>190</sup> The Defense Force magistrate must be sent the order referring the matter and the charge sheet.<sup>191</sup>

### 5. *Representation of Accused Persons*

A person may not represent a party before a court martial or a Defense Force magistrate unless they are either a member of the Defense Force or a legal practitioner.<sup>192</sup> Additionally, a convening authority must, subject to the exigencies of the service, afford an accused person awaiting trial by court martial or Defense Force magistrate the opportunity of being represented at the trial by a legal officer.<sup>193</sup>

At a hearing by a summary authority the accused person is entitled to be represented.<sup>194</sup> At the hearing of a proceeding before a summary authority by way of trial, an accused person may also request the services of a specified member of the Defense Force to defend them.<sup>195</sup> Unless the services of the specified member are not reasonably available, or the hearing is before a subordinate summary authority and the person requested is a legal officer, they must be permitted to defend the accused person.<sup>196</sup> Where the services of the specified member are not reasonably available, the summary authority must, with the consent of the accused person, direct a defense member to defend them.<sup>197</sup> If the accused person requests representation by a legal officer at a hearing before a commanding officer or a superior summary authority, the legal officer whose services are requested must be permitted to defend the accused if leave is given by the commanding officer or superior summary authority and the services of the legal officer are reasonably available.<sup>198</sup>

While an accused person may request the services of a specified member of the Defense Force to defend them at a hearing before a summary authority,<sup>199</sup> a member who elects to be dealt with by a discipline officer may not be represented.<sup>200</sup>

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<sup>190</sup> *DFDR* regs. 28(a) and (b).

<sup>191</sup> *DFDR* regs. 29(2)(a)(i) and (ii).

<sup>192</sup> *DFDA* s 136.

<sup>193</sup> *DFDA* s 137. *DFDA* s 3(1) defines a legal officer as a member of the Australian Defence Force who is a duly qualified legal practitioner.

<sup>194</sup> *DFDR* reg. 23(2).

<sup>195</sup> *DFDR* reg. 24(1).

<sup>196</sup> *DFDR* reg. 24(2).

<sup>197</sup> *DFDR* reg. 24(3).

<sup>198</sup> *DFDR* reg. 24(2A).

<sup>199</sup> *DFDR* reg. 24(1).

<sup>200</sup> *DFDA* s 169G(2).



## 6. *Accused to be Present*

Unless, by reason of the disorderly behavior of the accused person, it is impossible to continue the hearing in their presence, a hearing before a service tribunal must be held in the presence of the accused person.<sup>201</sup> Before the members of a court martial are sworn, their names are read to the accused person who must then be asked whether they object to being tried by any of them.<sup>202</sup> The accused person or the prosecutor may, at any time, apply on any reasonable grounds for an adjournment of the proceedings.<sup>203</sup>

## 7. *Record of Evidence*

A person may be appointed to act as a recorder or as an interpreter at proceedings before a service tribunal.<sup>204</sup> An accused person may enter an objection to a recorder or interpreter on the ground of partiality or incompetence or both.<sup>205</sup> Where the service tribunal or, in the case of a court martial, the judge advocate, is satisfied that the accused person has substantiated such an objection, the service tribunal or the judge advocate must allow the objection.<sup>206</sup> Before a person begins to act as a recorder or an interpreter, the service tribunal or the judge advocate administers an oath or affirmation to them.<sup>207</sup> In the case of a recorder, the oath or affirmation is that they will, to the best of their ability, truly record and transcribe the evidence and will deliver a true transcript of it to the service tribunal.<sup>208</sup> In the case of an interpreter, the oath or affirmation is that they will, to the best of their ability, truly interpret and translate as required.<sup>209</sup>

## 8. *Applications and Objections by Accused Persons*

Before an accused person is required to plead at a trial before a service tribunal, they may make an application based on a number of specified grounds, including:

1. Obtaining an adjournment in order to obtain further time in which to properly prepare their defense;

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<sup>201</sup> *DFDA* s 139.

<sup>202</sup> *DFDR* reg. 34.

<sup>203</sup> *DFDR* reg. 39.

<sup>204</sup> *DFDR* reg. 37(1).

<sup>205</sup> *DFDR* reg. 37(2).

<sup>206</sup> *DFDR* reg. 37(3).

<sup>207</sup> *DFDR* reg. 37(4).

<sup>208</sup> *DFDR* reg. 37(5)(a).

<sup>209</sup> *DFDR* reg. 37(5)(b).

2. To choose a representative;
3. To secure the attendance of witnesses; or
4. To make a request for separate trial.<sup>210</sup>

They may also object to the charge on a number of specified grounds, including the grounds that the charge does not disclose a service offence or is otherwise wrong in law, or that the service tribunal does not have jurisdiction.<sup>211</sup> The accused person, or the prosecutor, may, at any time, apply to a service tribunal, on any reasonable grounds, for an adjournment of the proceedings before the tribunal.<sup>212</sup>

### *9. Pleading to Charges and Arraignment*

Before hearing any evidence in support of a charge, the tribunal must call upon the accused to plead to the charge, and if they plead guilty and the tribunal is satisfied that they understand the effect of that plea, the tribunal must convict the accused person.<sup>213</sup> If they plead not guilty or if the tribunal is not satisfied that they, in pleading guilty, understand the effect of that plea, the tribunal must record a plea of not guilty and proceed to hear the evidence on the charge.<sup>214</sup> If, after hearing the evidence on the charge adduced by the prosecution, the tribunal is of the opinion that that evidence is insufficient to support the charge, it must dismiss the charge.<sup>215</sup> On the other hand, if after hearing the evidence on the charge adduced by the prosecution, the tribunal is of the opinion that that evidence is sufficient to support the charge, it must proceed with the trial.<sup>216</sup>

After having proceeded with the trial, if the tribunal finds that the charge is not proved, it must dismiss the charge<sup>217</sup> or acquit the person<sup>218</sup> as appropriate. If it finds the charge proved, it must convict the accused person,<sup>219</sup> and after hearing evidence relevant to the determination of what action should be taken,<sup>220</sup> proceed to impose a punishment upon them.<sup>221</sup>

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<sup>210</sup> *DFDA* s 141(1)(a).

<sup>211</sup> *DFDA* s 141(1)(b).

<sup>212</sup> *DFDR* reg. 39.

<sup>213</sup> *DFDA* s 130(1)(a) (summary authorities); s 135(1)(a) (Defence Force magistrates); and s 132(1)(a) (courts martial).

<sup>214</sup> *DFDA* s 130(1)(b) (summary authorities); s 135(1)(b) (Defence Force magistrates); and s 132(1)(b) (courts martial).

<sup>215</sup> *DFDA* s 130(1)(c) (summary authorities); s 135(1)(c) (Defence Force magistrates); and s 132(1)(c) (courts martial).

<sup>216</sup> *DFDA* s 130(1)(d) (summary authorities); s 135(1)(d) (Defence Force magistrates); and s 132(1)(d) (courts martial).

<sup>217</sup> *DFDA* s 130(1)(e) (summary authorities).

<sup>218</sup> *DFDA* s 135(1)(e) (Defence Force magistrate); and s 132(1)(e) (courts martial).

<sup>219</sup> *DFDA* s 130(1)(f) (summary authorities); s 135(1)(f) (Defence Force magistrates); and s 132(1)(f) (courts martial).

<sup>220</sup> *DFDA* s 130(4) (summary authorities); 135(5) (Defence Force magistrates); and s 132(5)

Where there is more than one charge against an accused person before a service tribunal, the person is required to plead separately to each charge.<sup>222</sup> Where there is more than one charge against an accused person before a court martial or a Defense Force magistrate in more than one charge sheet, the service tribunal must arraign and try the person on the charge or charges in one charge sheet before they are arraigned on a charge in another charge sheet.<sup>223</sup> If a person is convicted by a court martial or a Defense Force magistrate of a charge which is one of two or more charges stated in the charge sheet in the alternative, they must not be convicted by the service tribunal of any charge which is alternative to the charge of which they have been convicted and which is placed after it on the charge sheet.<sup>224</sup>

## **VII. REVIEW OF PROCEEDINGS**

Part IX of the Act provides that a chief of staff may, by instrument in writing, appoint officers as reviewing authorities to review proceedings in accordance with the Act and Regulations.<sup>225</sup>

### **A. Discipline Officers**

As a discipline officer is not taken to be a service tribunal for the purposes of the Act,<sup>226</sup> proceedings before a discipline officer are not subject to review pursuant to the provisions of Part IX of the Act.

### **B. Subordinate Summary Authorities**

Proceedings before a subordinate summary authority must be reviewed by the authority's commanding office, and, for this purpose, the commanding officer is deemed to be a reviewing authority.<sup>227</sup> The commanding officer may, but is not required to, obtain a report from a legal officer before commencing the review, but must forward the record of the proceedings and a report of the results of their review to a legal officer after completing the review of the proceedings.<sup>228</sup> If the legal officer is not satisfied with the

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(courts martial).

<sup>221</sup> *DFDA* s 130(1)(g) (summary authorities); s 135(1)(g) (Defence Force magistrates); and s 132(1)(g) (courts martial).

<sup>222</sup> *DFDR* reg. 41(1).

<sup>223</sup> *DFDR* reg. 41(2).

<sup>224</sup> *DFDR* reg. 41(3).

<sup>225</sup> *DFDA* s 150.

<sup>226</sup> *DFDA* s 169F(4).

<sup>227</sup> *DFDA* ss 151(1) and (2).

<sup>228</sup> *DFDA* ss 151(3) and (4).

review by the commanding officer, they may in turn forward the record and report to a reviewing authority.<sup>229</sup>

### **C. Commanding Officers, Superior Summary Authorities, Defense Force magistrates, Restricted Courts Martial, and General Courts Martial**

All service tribunals, other than subordinate summary authorities, must forward the record of proceedings to a reviewing authority for automatic review upon the conviction of a person for a service offence, whereupon the reviewing authority must promptly review the proceedings.<sup>230</sup> However, before reviewing the proceedings, the reviewing authority, in the case of a conviction by court martial or Defense Force magistrate, must first obtain a report from a legal officer appointed by instrument in writing for the purpose of reviewing charges by a chief of staff on the recommendation of the Judge Advocate General.<sup>231</sup> In the case of a conviction by a commanding officer or a superior summary authority, a report must be obtained from a legal officer.<sup>232</sup>

Although reviewing authorities are bound by any opinion on a question of law set out in a legal officer's report, they may refer the report to the Judge Advocate General, or if the Judge Advocate General so directs, to a Deputy Judge Advocate General, for further opinion.<sup>233</sup> If the Judge Advocate General or the Deputy Judge Advocate General dissents from the opinion on the question of law given in the report of the legal officer, they must furnish to the reviewing authority a written report stating their opinion on the question of law. That opinion is binding on the reviewing authority.<sup>234</sup>

### **D. Review on Petition to a Reviewing Authority**

Where a person has been convicted of a service offence by a service tribunal, they may, within 90 days of the conviction, or within such further period as a reviewing authority allows, lodge with the reviewing authority a petition for a review of the proceedings concerned.<sup>235</sup> Likewise, if a person appeals to the Defense Force Discipline Appeal Tribunal and the appeal is dismissed, they may lodge a petition for a review of the proceedings of the service tribunal which was the subject of that appeal, within 60 days of the dismissal or such further period as a reviewing authority allows.<sup>236</sup> Upon receipt of a petition, a reviewing authority must as soon as possible, and in any

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<sup>229</sup> *DFDA* s 151(5).

<sup>230</sup> *DFDA* ss 152(1) and (2).

<sup>231</sup> *DFDA* s 154(1)(a).

<sup>232</sup> *DFDA* s 154(1)(b).

<sup>233</sup> *DFDA* ss 154(2) and (3).

<sup>234</sup> *DFDA* s 154(4).

<sup>235</sup> *DFDA* s 153(1).

<sup>236</sup> *DFDA* s 153(2).

event within 30 days of its receipt, review the proceedings and notify the petitioner of the result of the review.<sup>237</sup> Once again, the reviewing authority must obtain a report on the proceedings from a legal officer before commencing the review.<sup>238</sup>

### **E. Further Review by a Chief of Staff**

A review by a reviewing authority does not prevent a further review of the proceedings concerned by a chief of staff if it appears to the chief of staff that there are sufficient grounds for a further review.<sup>239</sup> For the purpose of conducting such further review the chief of staff is deemed to be a reviewing authority.<sup>240</sup> However, before commencing the review, the chief of staff must first obtain a report on the proceedings from the Judge Advocate General or, if the Judge Advocate General so directs, from a Deputy Judge Advocate General.<sup>241</sup> The chief of staff is bound by any opinion on a question of law set out in the report.<sup>242</sup>

### **F. Effect on Reviews of Appeals to the Defense Force Discipline Appeal Tribunal**

Where a convicted person lodges an appeal, or an application for leave to appeal, to the Defense Force Discipline Appeal Tribunal, a reviewing authority must not commence or proceed with a review.<sup>243</sup> But where the Defense Force Discipline Appeal Tribunal dismisses the appeal, or the application for leave to appeal, the reviewing authority may proceed with a review.<sup>244</sup>

### **G. Action on Review of Proceedings that have resulted in a Conviction**

Where it appears to a reviewing authority that a conviction is:

1. Unreasonable; or
2. Cannot be supported, having regard to the evidence; or
3. That, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction was wrong in law

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<sup>237</sup> *DFDA* s 153(4).

<sup>238</sup> *DFDA* s 154(1).

<sup>239</sup> *DFDA* s 155(1).

<sup>240</sup> *DFDA* s 155(2).

<sup>241</sup> *DFDA* s 155(3).

<sup>242</sup> *DFDA* s 155(4).

<sup>243</sup> *DFDA* s 156(1).

<sup>244</sup> *DFDA* s 156(2).

and that a substantial miscarriage of justice has occurred;  
or

4. That there was a material irregularity in the course of the proceedings and that a substantial miscarriage of justice has occurred; or
5. That, in all the circumstances of the case, the conviction is unsafe or unsatisfactory;

the reviewing authority must quash the conviction.<sup>245</sup> Where a reviewing authority quashes a conviction and does not order a new trial, the person is deemed to have been acquitted of the offence.<sup>246</sup> Where a reviewing authority quashes a conviction that was recorded within the preceding six months and considers that, in the interests of justice, the person should be tried again for that service offence, they may order a new trial of the person for that offence.<sup>247</sup> The order for the new trial lapses unless the new trial commences within a period of six months commencing on the day on which the order is made.<sup>248</sup>

Alternatively, where a reviewing authority quashes a conviction but considers that the tribunal could have found the person guilty of an alternative offence as prescribed by the Act, or of an offence that was charged in the alternative and in respect of which the tribunal did not record a finding, and that the tribunal, by reason of its finding in respect of the original offence, must have been satisfied beyond reasonable doubt of facts sufficient to prove the other offence, the authority may substitute a conviction of the other offence.<sup>249</sup> Provided that a punishment was imposed for the original offence, the reviewing authority may impose a punishment that would have been available to the tribunal in respect of such conviction that is not more severe than the original punishment.<sup>250</sup>

## **H. Action on Review of Punishment Imposed by a Service Tribunal**

If it appears to a reviewing authority that the punishment imposed by a tribunal is wrong in law or is excessive, they must quash the punishment.<sup>251</sup> And where it appears to a reviewing authority that a summary authority has imposed an elective punishment without having given the accused the right to elect trial by court martial or Defense Force magistrate, they must quash the

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<sup>245</sup> *DFDA* s 158.

<sup>246</sup> *DFDA* s 159.

<sup>247</sup> *DFDA* s 160(1).

<sup>248</sup> *DFDA* s 160(2).

<sup>249</sup> *DFDA* ss 142 and 161(1).

<sup>250</sup> *DFDA* s 161(2).

<sup>251</sup> *DFDA* s 162(1).

punishment.<sup>252</sup> They may then award such a punishment as was available to the tribunal, so long as it is not more severe than that initially awarded.<sup>253</sup>

### **I. Punishments Subject to Approval by a Reviewing Authority**

A number of specified punishments do not take effect unless approved by a reviewing authority,<sup>254</sup> who must also determine when the punishment is to take effect.<sup>255</sup> If the reviewing authority does not approve the punishment, they must quash it, but having done so, they may then impose such a punishment as the tribunal might have imposed, so long as it is not more severe than the punishment originally imposed.<sup>256</sup> With these exceptions, a punishment imposed by a service tribunal, a reviewing authority, or the Defense Force Discipline Appeal Tribunal, takes effect forthwith, and a punishment for a specified period commences on the day on which it is imposed.<sup>257</sup> However, a summary authority who imposes a punishment for a specific period may suspend the commencement date for the punishment by up to 14 days.<sup>258</sup> Punishments may be either concurrent or cumulative.<sup>259</sup> Where a convicted person petitions a reviewing authority with respect to either conviction or punishment, or notifies a reviewing authority that they have appealed to the Defense Force Discipline Appeal Tribunal against the conviction, the reviewing authority may order the stay of execution of punishment pending the determination of the appeal or petition.<sup>260</sup>

## **VIII. APPEAL AGAINST CONVICTION**

A right of appeal against conviction by a court martial or a Defense Force magistrate lies initially to the Defense Force Discipline Appeal Tribunal, and from there, in certain circumstances, to the Federal Court of Australia, and finally to the High Court of Australia. The role of each of these tribunals in the administration of service discipline shall now be examined.

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<sup>252</sup> *DFDA* ss 131 and 162(3).

<sup>253</sup> *DFDA* s 162(5).

<sup>254</sup> *DFDA* s 172. The punishments include imprisonment for life, imprisonment for a specific period, and dismissal from the Defence Force. The punishments of detention, reduction in rank, forfeiture of seniority, and a fine of an amount in excess of 14 days pay are also subject to approval if awarded by a summary authority.

<sup>255</sup> *DFDA* s 168.

<sup>256</sup> *DFDA* ss 169(1) and (2).

<sup>257</sup> *DFDA* s 171(1).

<sup>258</sup> *DFDA* s 171(1A).

<sup>259</sup> *DFDA* s 74.

<sup>260</sup> *DFDA* s 176.

## A. The Defense Force Discipline Appeal Tribunal

### 1. Composition

The Defense Force Discipline Appeal Tribunal was created by the *Defense Force Discipline Appeals Act 1955*, and consists of a President, a Deputy President, and such other persons as are appointed by the Governor-General by commission to be members of the Tribunal.<sup>261</sup> In order to qualify for appointment as President or Deputy President, a person must be a Justice or Judge of a federal court or of the Supreme Court of a State or Territory; and to qualify for appointment as a member, a person must be a Justice or Judge of a federal court or of the Supreme Court of a State or Territory or a Judge of a District Court or County Court of a State. The President, the Deputy President, and the members all cease to hold office if they no longer hold such qualifying appointments.<sup>262</sup>

### 2. Procedure

Except when the Tribunal is dealing with matters of procedure or deliberating, or when the interests of security, the proper administration of justice, or public morality demands otherwise, the proceedings of the Tribunal are conducted in public.<sup>263</sup> The Tribunal is normally comprised of three members, at least one of whom must be the President, the Deputy President or a member who is qualified for appointment as President.<sup>264</sup> However, the powers of the Tribunal may be exercised by a single member with respect to certain specified matters, such as the granting of leave to appeal to the Tribunal against a conviction.<sup>265</sup>

### 3. Right to Appeal

While a convicted person may appeal to the Tribunal against their conviction, an appeal on a ground that is not a question of law may not be brought except by leave of the Tribunal.<sup>266</sup> An appeal or an application for leave to appeal must, without leave of the Tribunal, be brought within 30 days

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<sup>261</sup> *Defence Force Discipline Appeals Act 1955* (Cth) (hereinafter referred to as “DFDAA”) ss 6 and 7 (The Act was formerly known as the *Courts-Martial Appeals Act 1955* (Cth)).

<sup>262</sup> DFDAA s 8.

<sup>263</sup> DFDAA s 18.

<sup>264</sup> DFDAA s 15(1).

<sup>265</sup> DFDAA s 17(1).

<sup>266</sup> DFDAA s 20(1).



of the person's receiving notice of the result of the review of the proceedings<sup>267</sup> or within 60 days of the conviction, whichever is the earlier.<sup>268</sup>

#### 4. *Determination of Appeals*

Where it appears to the Tribunal that the conviction is unreasonable or cannot be supported, having regard to the evidence; or that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction or the prescribed acquittal was wrong in law and that a substantial miscarriage of justice has occurred; or that there was a material irregularity in the course of the proceedings before the court martial or the Defense Force magistrate and that a substantial miscarriage of justice has occurred; or that, in all the circumstances of the case, the conviction is unsafe or unsatisfactory; it must allow the appeal and quash the conviction.<sup>269</sup>

Furthermore, where it appears to the Tribunal that there is evidence that was not reasonably available during the earlier proceedings, which evidence is likely to be credible, and which would have been admissible in the earlier proceedings, the Tribunal must receive and consider that evidence and, if it appears that the conviction cannot be supported having regard to that evidence, it must allow the appeal and quash the conviction.<sup>270</sup>

Where the Tribunal quashes a conviction, it may, if the interests of justice so require, order a new trial.<sup>271</sup> However, for the purposes of the *Defense Force Discipline Act 1982* (Cth), where the Tribunal quashes a conviction and does not order a new trial, the person is deemed to have been acquitted of the offence.<sup>272</sup> On the other hand, if it considers that the court martial or the Defense Force magistrate could have found the accused guilty of an alternative offence,<sup>273</sup> or of an offence charged in the alternative in respect of which the earlier tribunal did not record a finding, on the basis of the facts found by the tribunal, the Tribunal may substitute a conviction of the alternative offence.<sup>274</sup>

#### 5. *Representation of Appellants and Hearing of Appeals*

An appellant is entitled to representation before the Tribunal by a legal practitioner.<sup>275</sup> Although an appellant is entitled to be present at the hearing of

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<sup>267</sup> *DFDA* s 152.

<sup>268</sup> *DFDAA* s 21.

<sup>269</sup> *DFDAA* s 23(1).

<sup>270</sup> *DFDAA* s 23(2).

<sup>271</sup> *DFDAA* s 24.

<sup>272</sup> *DFDAA* s 41.

<sup>273</sup> As specified by *DFDA* s 142.

<sup>274</sup> *DFDAA* s 26.

<sup>275</sup> *DFDAA* s 39(1).

the matter, it may be heard and determined notwithstanding the appellant's absence.<sup>276</sup>

#### 6. *Reference of Questions of Law to Federal Court of Australia*

The Tribunal may, of its own motion or at the request of the appellant or a chief of staff, refer a question of law arising in a proceeding before it, not being a proceeding before a single member exercising the powers of the Tribunal, to the Federal Court of Australia for decision, and the Full Court of the Federal Court of Australia has jurisdiction to hear and determine the question of law referred to it.<sup>277</sup>

### **B. The Federal Court of Australia: Appeals from Decisions of the Tribunal**

An appellant or a chief of staff may appeal to the Federal Court of Australia on a question of law involved in a decision of the Tribunal in respect of an appeal under the *Defense Force Discipline Appeals Act* 1955 (Cth), not being a decision given by a single member exercising the powers of the Tribunal.<sup>278</sup> Unless further time is allowed by the Federal Court of Australia, an appeal must be instituted within 28 days of the delivery of the decision of the Tribunal.<sup>279</sup> The jurisdiction to hear and determine the appeal is exercised by the Federal Court of Australia constituted as a Full Court, which may make such order as it thinks appropriate, including an order affirming or setting aside the decision of the Tribunal; an order remitting the case to be heard and decided again by the Tribunal in accordance with its directions; or an order granting a new trial by a court martial or a Defense Force magistrate.<sup>280</sup>

### **C. Appeals to the High Court of Australia**

The High Court of Australia has jurisdiction to hear and determine appeals from judgments of the Federal Court of Australia, whether in civil or criminal matters, subject to the following exceptions.<sup>281</sup> Except as otherwise provided by another Act, an appeal cannot be brought a judgment of the Federal Court constituted by a single Judge, nor from a judgment of a Full Court of the Court unless the High Court gives special leave to appeal.<sup>282</sup> The jurisdiction of the High Court to hear and determine an appeal in accordance

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<sup>276</sup> *DFDAA* ss 39(2) and (3).

<sup>277</sup> *DFDAA* ss 51(1) and (2).

<sup>278</sup> *DFDAA* s 52(1).

<sup>279</sup> *DFDAA* s 52(2).

<sup>280</sup> *DFDAA* ss 52(3)-(5).

<sup>281</sup> *Federal Court of Australia Act* 1976 (Cth) s 33(1).

<sup>282</sup> *Id.* ss 33(2) and (3).

with these provisions is exercised by a Full Court of the High Court consisting of not less than three Justices.<sup>283</sup>

## **IX. JURISDICTIONAL CHALLENGES TO THE DEFENCE FORCE DISCIPLINE ACT**

Over the years, the High Court of Australia has held that the legislation providing for the trial by court martial of members of the Australian Defense Force is a valid exercise of the powers given to Federal Parliament to make laws in relation to “the naval and military defense of the Commonwealth.”<sup>284</sup>

Since the introduction of the *Defence Force Discipline Act* 1982 (Cth), questions have arisen about the jurisdiction of the Australian Defence Force service tribunals to deal with those matters that are also offences under the ordinary civil law. Between 1989 and 1994 the High Court of Australia considered three challenges to the jurisdiction of a service tribunal to hear charges brought under the *DFDA*. They were *Re Tracey, Ex parte Ryan*; *Re Nolan and Another; Ex parte Young* and *Re Tyler and Others; Ex parte Foley*.<sup>285</sup>

The nature of the challenge to the jurisdiction of service tribunals in each case involved contentions that:

1. The respective charges were not laws appropriate to the discipline of the defense forces;
2. there was an infringement of the applicant defence member’s civil and constitutional rights to a trial in the ordinary courts for an offence against the general law of Australia; and
3. for a service tribunal to hear the charges involved the exercise of the judicial power of the Commonwealth which required the judicial officer to be appointed pursuant to Chapter III of the Constitution.

### **A. Separation of Powers**

The jurisdictional challenges also raised issues of separation of powers. The separation of powers doctrine has two limbs that relate to the exercise of judicial power. The first was established in *Huddart, Parker & Co Pty Ltd v Moorehead*<sup>286</sup> in which Griffith CJ held that the exercise of Commonwealth

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<sup>283</sup> *Id.* 33(6).

<sup>284</sup> *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452; *R v Cox; Ex parte Smith* (1945) 71 CLR 1; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan & Anor; Ex parte Young* (1991) 172 CLR 460; *Re Tyler & Ors; Ex parte Foley* (1994) 181 CLR 18.

<sup>285</sup> Respectively cited (1989) 166 CLR 518; (1991) 172 CLR 460; and (1994) 181 CLR 18.

<sup>286</sup> (1909) 8 CLR 330.

judicial power was limited to Chapter III courts under section 71 of the Constitution. The second limb of this doctrine states that Federal Chapter III courts can only exercise judicial powers and such powers as are ancillary or incidental to the judicial function as was established in *R v Kirby; Ex parte Boilermakers' Society of Australia*.<sup>287</sup> The doctrine is said to be a reflection of the requirement that all people should be subject to the same law administered by the same tribunals.

The first limb of the separation of powers doctrine is relevant to service tribunals established under the *DFDA*. The initial question before the High Court was whether service tribunals exercise the judicial power of the Commonwealth. The classic definition of judicial power was made by Griffith CJ in *Huddart Parker*.<sup>288</sup>

I am of the opinion that the words 'judicial power' as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

*Re Tracey, Ex parte Ryan; Re Nolan, Ex Parte Young* and *Re Tyler and Ors, Ex Parte Foley* generally accepted the view that section 51(vi) of the Constitution permits the establishment of service tribunals to maintain discipline of defence forces. Most Justices agreed that service tribunals exercise judicial power in the traditional sense described above.<sup>289</sup>

[N]o relevant distinction can, in our view, be drawn between the power exercised by a service tribunal and the judicial power exercised by a court. Nor do we think it possible to admit the appearance of judicial power and yet deny its existence by regarding the function of a court-martial as merely administrative or disciplinary.<sup>290</sup>

In addition, most Justices explained that the exercise of judicial power by service tribunals does not, of itself, breach the separation of powers doctrine by distinguishing between "judicial power" *per se* and "judicial power of the Commonwealth."<sup>291</sup>

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<sup>287</sup> (1956) 94 CLR 254.

<sup>288</sup> (1909) 8 CLR 330 at 357.

<sup>289</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 537 (per Mason CJ, Wilson and Dawson JJ), at 574 (per Brennan and Toohey JJ), at 582 (per Deane J) and at 598 (per Gaudron J).

<sup>290</sup> *Id.* at 537 (per Mason CJ, Wilson and Dawson JJ).

<sup>291</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 541, 572-574 and 598; cf 582-583; *Re Nolan & Anor; Ex parte Young* (1991) 172 CLR 460 at 498; *Re Tyler; & Ors* (1994) 181 CLR 18 at 32 (per Brennan and Toohey JJ).

Thus the real question in this case is not whether a court-martial in performing its functions under the [Defence] Act is exercising judicial power. There has never been any real dispute about that. The question is whether it is exercising the judicial power of the Commonwealth under Ch. III of the Constitution.<sup>292</sup>

The various judges put forward different reasons for distinguishing between judicial power exercised by service tribunals and that of the Commonwealth. They all concluded that service tribunals do exercise judicial power within the *Huddart Parker*<sup>293</sup> definition.

Mason CJ, Wilson and Dawson JJ suggested in *Re Tracey*<sup>294</sup> that service tribunals could exercise judicial power without breaching section 71 because that section requires that “unless . . . a contrary intention may be discerned,” judicial jurisdiction must be conferred only on Chapter III courts. Their Honours considered that a contrary intention is evident in respect of the defence power as it is essential for the proper functioning of the defence force that a disciplinary system of a judicial nature exist within the force and standing outside Chapter III.<sup>295</sup>

Dixon and Deane JJ held in *Re Tracey*<sup>296</sup> that service tribunals could validly exercise judicial power because they operate independently of “. . . the judicial system administering the law of the land, which is comprised of Chapter III courts exercising federal jurisdiction.” Deane JJ went on to state that this distinction involves “. . . an essentially pragmatic construction of the reference to the judicial power of the Commonwealth in Chapter III.”

In *Re Tracey*,<sup>297</sup> Brennan and Toohey JJ considered whether military tribunals were exercising “the judicial power of the Commonwealth,” such as would require their compliance with Chapter III of the Constitution. They quote Dixon J in *R v Cox; Ex parte Smith*<sup>298</sup> where his Honour said:

In the case of the armed forces, an apparent exception is admitted and the administration of military justice by courts-martial is considered constitutional: *R v Bevan*.<sup>299</sup> The exception is not real. To ensure that discipline is just, tribunals acting judicially are essential to the organisation of an army or navy or air force. But they do not form part of the judicial system administering the law of the land. It is not uniformly true that the authority of courts-martial is restricted to members of the Royal forces. It may extend to others who fall under the same general military authority, as for instance those who accompany the armed forces in a civilian capacity.

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<sup>292</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 540 (per Mason CJ, Wilson and Dawson JJ).

<sup>293</sup> (1909) 8 CLR 330.

<sup>294</sup> (1989) 166 CLR 518.

<sup>295</sup> *Id.* at 540-541.

<sup>296</sup> (1989) 166 CLR 518.

<sup>297</sup> *Id.* at 565.

<sup>298</sup> (1945) 71 CLR 1 at 23.

<sup>299</sup> (1942) 66 CLR 452 at 467, 468, 481.

Their Honours upheld the validity of military tribunals saying that “the power which is exercised is not the judicial power of the Commonwealth; it is a power sui generis which is supported solely by s. 51(vi) for the purpose of maintaining or enforcing service discipline.”<sup>300</sup>

In *Re Tracey*,<sup>301</sup> Deane JJ also notes the view expressed by Dixon J in *R v Cox; Ex parte Smith*<sup>302</sup> that the administration of military justice by courts martial did not involve a “real” exception to Chapter III of the Constitution.<sup>303</sup> In respect of the “immunity” of those powers from the net cast by Chapter III of the Constitution Deane JJ says, “The legal rationalisation of such immunity can only lie in an essentially pragmatic construction of the reference to “the judicial power of the Commonwealth” in Ch III to exclude those judicial powers of military tribunals which have traditionally been seen as lying outside what Dixon J described as “the judicial system administering the law of the land.”<sup>304</sup>

## **B. Offences Amenable to Jurisdiction of Service Tribunals**

A further question for resolution by the High Court was, assuming that a service tribunal is entitled to exercise judicial power without breaching section 71 of the Constitution, over what *Defence Force Discipline Act* offences may a service tribunal exercise judicial power? There is general recognition that “disciplinary” offences cannot be clearly distinguished from “civil” offences.<sup>305</sup> Unfortunately the High Court has not had a unanimous opinion on this distinction and on the charges that a service tribunal can validly determine.

Mason CJ, Wilson and Dawson JJ in *Re Tracey*<sup>306</sup> held that service tribunals can validly exercise judicial power if the exercise is “sufficiently connected with the regulation of the forces and the good order and discipline of defence members.”<sup>307</sup> When it came to applying this test, they considered that, rather than the courts drawing some arbitrary distinction between military and civil offences, it is up to the Commonwealth Parliament to determine what is required to regulate defence force members. Parliament was entitled to determine, as it did in section 61 of the *Defence Force Discipline Act* 1982

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<sup>300</sup> (1989) 166 CLR 518 at 574.

<sup>301</sup> (1989) 166 CLR 518.

<sup>302</sup> (1945) 71 CLR 1 at 23.

<sup>303</sup> (1989) 166 CLR 518 at 581.

<sup>304</sup> *Id.* at 583.

<sup>305</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 544 (per Mason CJ, Wilson and Dawson JJ) and at 555 (per Brennan and Toohey JJ); *Re Nolan & Anor; Ex parte Young* (1991) 172 CLR 460 at 474 (per Mason CJ and Dawson J); *Re Tyler & Ors; Ex parte Foley* (1994) 181 CLR 18 at 26 (per Mason CJ and Dawson J).

<sup>306</sup> (1989) 166 CLR 518.

<sup>307</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 545.

(Cth), that any civil offence committed by a defence member will disrupt the order and discipline of the forces and will, therefore, amount to a military offence.<sup>308</sup> Mason CJ and Dawson JJ maintained this view in *Re Nolan*<sup>309</sup> and *Re Tyler*.<sup>310</sup>

In *Re Tracey*, *Re Nolan* and *Re Tyler*,<sup>311</sup> Brennan and Toohey JJ considered that proceedings before a service tribunal in relation to a military offence could only be brought if they substantially served the purpose of maintaining or enforcing service discipline. This test seems not unlike the “substantial connection” approach advocated by Mason CJ, Wilson and Dawson JJ. However, Brennan and Toohey JJ did not believe it should be up to Parliament to determine, pursuant to section 61 of the *Defence Force Discipline Act* 1982 (Cth), that proceedings in relation to the commission of civil offences by defence members would always serve the requisite purpose. Instead, their Honours stated that this would depend on the facts of a particular case, including consideration of “whether the jurisdiction of a competent civil court can conveniently and appropriately be invoked to hear and determine a corresponding civil court offence.”<sup>312</sup> This view recognises the practical difficulties associated with hearing civil offences in remote parts of Australia or outside Australia during times of war.

One difficulty with the approach adopted by Brennan and Toohey JJ is the practical task of distinguishing between offences that substantially serve the purpose of maintaining or enforcing service discipline and those that do not. In practice, service tribunals must determine, as a preliminary question, whether proceeding with a particular matter substantially serves the purpose of maintaining or enforcing service discipline.

Gaudron J’s approach in *Re Tracey*, *Re Nolan* and *Re Tyler*<sup>313</sup> was based on the nature of the defence power as a “purposive” power.<sup>314</sup> Her Honour noted that the criterion for assessing the validity of a purported exercise of such a power is “that it is reasonably capable of being regarded as appropriate and adapted to the object which gives the law in question its character as a law with respect to the relevant head of power.”<sup>315</sup> Accordingly, the limits of judicial power exercisable by a service tribunal depend on the extent to which the exercise of the power is “appropriate and adapted” to the object of controlling the defence forces under section 51(vi) of the Constitution. Application of this criterion depends on the circumstances engaging the power and the situations in which the forces are deployed.<sup>316</sup>

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<sup>308</sup> *Id.* at 544-545.

<sup>309</sup> *Re Nolan & Anor; Ex parte Young* (1991) 172 CLR 460 at 474-475.

<sup>310</sup> *Re Tyler & Ors; Ex parte Foley* (1994) 181 CLR 18 at 26.

<sup>311</sup> *Supra* note 285.

<sup>312</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 570.

<sup>313</sup> *Supra* note 285.

<sup>314</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 596.

<sup>315</sup> *Id.* at 597.

<sup>316</sup> *Id.* at 600; *Re Nolan & Anor; Ex parte Young* (1991) 172 CLR 460 at 498; *Re Tyler & Ors*;

Gaudron J considered that where defence members are serving outside Australia, it will often be inappropriate for offences to be heard by the ordinary Australian courts.<sup>317</sup> Her Honour considered that, in these circumstances, military tribunals will be entitled to hear charges which could otherwise be put before the civil courts. These service proceedings would be permitted by section 51(vi) of the Constitution and would not breach Chapter III. By contrast, “the vesting of jurisdiction in service tribunals to hear and determine service offences which are substantially the same as civil court offences cannot reasonably be regarded as appropriate and adapted to the object of control of the forces.”<sup>318</sup> Hence, Gaudron J considered the *Defence Force Discipline Act* 1982 (Cth) to be invalid to the extent that it purported to vest jurisdiction in service tribunals to hear service offences substantially the same as civil offences in times of peace and general civil order.<sup>319</sup>

In *Re Tracey*,<sup>320</sup> Deane JJ emphasised the significance of the separation of powers doctrine to the Constitution as a whole and, in particular, the importance of ensuring that judicial power is exercised only by Chapter III courts. Speaking of the justification of the doctrine of the separation of judicial from executive and legislative powers, his Honour said that “To ignore the significance of the doctrine or to discount the importance of safeguarding the true independence of the judicature upon which the doctrine is predicated is to run the risk of undermining, or even subverting, the Constitution’s only general guarantee of due process.”<sup>321</sup> In the subsequent case *Re Tyler*, his Honour said that he continued to reject what he saw “as an unjustifiable denial of the applicability of the Constitution’s fundamental and overriding guarantee of judicial independence and due process to laws of the Parliament providing for the trial and punishment of members of the armed forces for ordinary (in the sense of not exclusively disciplinary) offences committed within the jurisdiction of the ordinary courts in times of peace and general civil order.”<sup>322</sup> Addressing the traditional confinement of the nature and range of the disciplinary powers of military tribunals in *Re Tracey*,<sup>323</sup> his Honour said:

It avoids the creation of a military class removed from the reach of the ordinary law and courts of the land. . . . It protects the civilian from being subjected to military law and deprived of the benefits and safeguards of the administration of justice by independent courts. It limits the extent to which those subject to military authority are deprived of those benefits and

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*Ex parte Foley* (1994) 181 CLR 18 at 35..

<sup>317</sup> *Re Tracey*; *Ex parte Ryan* (1989) 166 CLR 518 at 601.

<sup>318</sup> *Id.* at 602.

<sup>319</sup> *Id.* at 603.

<sup>320</sup> (1989) 166 CLR 518.

<sup>321</sup> *Id.* at 580.

<sup>322</sup> (1994) 181 CLR 18 at 34.

<sup>323</sup> (1969) 166 CLR 518.



safeguards to what is ‘thought necessary’ for the maintenance and enforcement of military discipline and duty.<sup>324</sup>

His Honour considered that the *Defence Force Discipline Act* 1982 (Cth) cannot validly grant jurisdiction to military tribunals to deal with offences against the *Defence Force Discipline Act* 1982 (Cth) that are also offences under the ordinary State or Commonwealth criminal law, even though they might have a disciplinary aspect. His Honour considered that these provisions could not be saved by reading down or severance.<sup>325</sup> Only the exclusively disciplinary offences under the *Defence Force Discipline Act* 1982 (Cth) were excluded from the application of Chapter III and hence, could be validly dealt with by military tribunals.<sup>326</sup> Deane JJ took the same view in *Re Nolan*<sup>327</sup> and *Re Tyler*.<sup>328</sup>

McHugh J agreed with Deane JJ’s approach in *Re Nolan*.<sup>329</sup> However, in the most recent case of *Re Tyler*,<sup>330</sup> McHugh J acknowledged that no *ratio decidendi* could be discerned from *Re Tracey*<sup>331</sup> or *Re Nolan*,<sup>332</sup> but stated that a court (other than the High Court) must apply the decision of an earlier case lacking a *ratio decidendi* where the circumstances of the new case are not reasonably distinguishable from the earlier case.<sup>333</sup> As the reasoning of the majority of Justices in both *Re Tracey*<sup>334</sup> and *Re Nolan*<sup>335</sup> was different to that of Deane JJ, namely that military tribunals are restricted to dealing with exclusively disciplinary offences, McHugh J felt compelled to give effect to the majority view:

Although I remain convinced that the reasoning of the majority justices in *Re Nolan* and *Re Tracey* is erroneous, I do not regard that as a sufficient reason to refuse to give effect to the decisions in those cases. They are recent decisions of the Court where, after full argument on each occasion, the Court upheld the validity of the Act in circumstances where the facts are not readily distinguishable from the present case.<sup>336</sup>

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<sup>324</sup> *Id.* at 584.

<sup>325</sup> *Id.* at 588.

<sup>326</sup> *Id.* at 591.

<sup>327</sup> (1991) 172 CLR 460 at 489-493.

<sup>328</sup> (1994) 181 CLR 18 at 34.

<sup>329</sup> *Re Nolan & Anor; Ex parte Young* (1991) 172 CLR 460 at 499.

<sup>330</sup> (1994) 181 CLR 18.

<sup>331</sup> (1989) 166 CLR 518.

<sup>332</sup> (1991) 172 CLR 460.

<sup>333</sup> *Re Tyler & Ors; Ex parte Foley* (1994) 181 CLR 18 at 37.

<sup>334</sup> (1989) 166 CLR 518.

<sup>335</sup> (1991) 172 CLR 460.

<sup>336</sup> *Re Tyler & Ors; Ex parte Foley* (1994) 181 CLR 18 at 39.

In summary, the High Court cases have held that:

1. No distinction can be drawn between the power exercised by a service tribunal and the judicial power exercised by a Court.
2. The powers bestowed by section 51 of the Constitution are subject to the Constitution and thus subject to Chapter III of the Constitution.
3. The proper organisation of a defence force requires a system of discipline which is administered judicially, not as part of the judicature established under Chapter III of the Constitution, but as part of the organisation of the force itself. Thus the power to make laws with respect to the defence of the Commonwealth contains within it the power to enact a disciplinary code standing outside Chapter III of the Constitution and to impose upon those administering that code the duty to act judicially.
4. As a matter of history and of contemporary practice, it has commonly been considered appropriate for the proper discipline of a defence force to subject its members to penalties under service law for the commission of offences punishable under civil law even where the only connection between the offences and the defence force is the service membership of the offender. Such legislation is based on the premise that as a matter of discipline, the proper administration of a defence force requires the observance by its members of the standards of behaviour demanded of ordinary citizens the enforcement of those standards by military tribunals, that is, Parliament can take the view that what is good for society is good for the regulation of the defence forces and give effect to that view by creating service offences which are cumulative upon rather than in substitution for civil offences.

## **X. CONCLUSION**

As is the case with the Canadian, New Zealand and United States military justice systems, the Australian system is derived from and based upon the English common law. Each of these systems is the result of a fairly lengthy evolutionary process. While each of the three Services was initially subject to the *Defence Act 1903* (Cth), the Navy and the Air Force were subsequently granted their own legislation. However, the administration of discipline in all three Services was effectively governed by the respective English legislation, by reference in the Australian law, until 1985. Since 1985 they have all come under the provisions of the *Defence Force Discipline Act 1982* (Cth).

A requirement for the maintenance of discipline in the military was recognised at an early stage. Furthermore, judicial opinion was that soldiers should be tried by their officers for all offences committed in a military capacity and civilian courts would not review proceedings of courts martial so long as they acted within their jurisdiction. It was not until 1955 in Australia that appeal was available from the decision of a court martial to any court,

either civil or military. In addition to the right to review by petition within the military system, there is also available a right of appeal against conviction to civilian courts or courts that are constituted by civilian judges which is comparable to that applicable to civilian criminal proceedings.

The advent of the *Defence Force Discipline Act 1982* (Cth) has meant that the service tribunals that are tasked with trying offences, the authorities, the tribunals, and the courts that may entertain petitions and appeals from their decisions, and the practices and procedures that are applicable to proceedings that are conducted before those tribunals and courts closely parallel those applicable in the Australian civilian courts.

Finally, it is abundantly clear that by becoming soldiers, the members of the Australian armed forces do not shed any of the rights and duties of citizens. Where the duties of a soldier and a citizen conflict, the duties of the citizen prevail.

# THE ISRAELI MILITARY LEGAL SYSTEM—OVERVIEW OF THE CURRENT SITUATION AND A GLIMPSE INTO THE FUTURE

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## I. INTRODUCTION

This article is intended as an introduction to the Israeli Military Legal System.<sup>1</sup> Naturally, a description of this system in an article of limited length requires a summary presentation of the issues. This article will not reference all aspects of the legal system employed in the Israel Defense Forces (IDF). The purpose of this paper is to provide a succinct presentation of the structure of the military legal system and of the changes that it is expected to undergo in the near future. The military legal system is of interest in Israel due to its being at the crossroads between the military, national security, and the law. Military service in Israel is compulsory under law<sup>2</sup> and involves a large proportion of the population, either in regular or reserve duty.<sup>3</sup> The military legal system is as old as the State of Israel itself. Immediately upon attaining national independence, both the military justice system and governmental systems were established.

Courts-martial were first established under the Jurisdiction Law, 5708-1948. This was a temporary arrangement set down in the State of Emergency

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<sup>1</sup> In this paper, the term "Military Legal System" refers to the whole gamut of military legal systems—the judge advocate general and the military trial system. The terms "justice" or "military justice system" refer to proceedings in courts-martial.

<sup>2</sup> See the Security Services Law [Consolidated Version] 5746-1986.

<sup>3</sup> The phrase "the entire nation is the military" dates back to the beginnings of the State of Israel and reflects this concept of general obligatory service, which is justified by Israel's many security requirements.

(Jurisdiction Law, 5708) Regulations, 5708-1948, the force of which was extended from time to time.<sup>4</sup> In 1955, the Military Justice Law, 5715-1955 (hereinafter the Military Justice Law or the MJL) was enacted.<sup>5</sup>

Many of the arrangements in place regarding the military legal system stem from the realities of life in Israel and from various social processes that have taken place in it over the fifty-four years of its existence. Below we shall set out the structure of the Military Advocate General (MAG), the MAG's main roles, the court-martial process, and the connection between the military systems and the civil legal system in the State of Israel.

### **A. The Military Advocate General**

The Military Justice Law, which came into force on 1 January 1956, triggered significant changes in the structure of the military legal system. Under the Jurisdiction Law, which preceded the MJL, the supervisory military legal body was the Supreme Military Court. This body was made up of a President, who was not a lawyer, assisted by two deputies, who were lawyers. The Supreme Military Court supervised the legal system of the military, including prosecution and defense attorneys, and had the authority to interpret the Jurisdiction Law, even when such was outside the context of a particular case.

The enactment of the MJL moved the focus away from the Military Tribunal to the office of the MAG. At the same time, the law established a division of powers between the military judicial system and the MAG's office, the latter comprising the military prosecutor and defense attorney's offices.<sup>6</sup>

The MJL was intended to be a comprehensive code that would ground all aspects of the military legal system, including investigation and examination proceedings, establishment of prosecution and defense

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<sup>4</sup> See Oded Mudrik, *Commanders' Liability—Procedural Aspects*, 9 Plilim (5761) 285 [hereinafter Mudrik, *Commanders' Liability*]. At a symposium held in October 1999 at the Israeli Institute for Democracy on the subject of "Military Justice Jubilee," the Emeritus Chief Justice of the Supreme Court Meir Shamgar, who served as the MAG from 1961 to 1968, noted that military justice, which came into being at the same time as the State of Israel, was intended to serve a country that was in a state of war; however, at the same time, it did not adopt the restrictions that other military legal systems had adopted over history aimed at limiting as far as possible the influence of the law on the military. As an example, Chief Justice Shamgar noted that from the very outset, the Jurisdiction Law, 5708-1948, prescribed the existence of an instance of appeal in the Israeli military justice system (which is something that was brought into English military law only in 1951). See Symposium, *Military Justice Jubilee*, 14 Mishpat ve-Tzava 11, 17 (June 2000) [hereinafter *Military Justice Jubilee*].

<sup>5</sup> The Bill for the Military Justice Law of 1949 was drafted by Adv. Aharon Hoter Yishai, the then MAG. See Chief Justice Shamgar, Speech at the *Military Justice Jubilee*, *supra* note 4, at 20 and see also Zvi Inbar, *The Status and Powers of the Military Advocate General*, 37 Hapraklit, Special Volume to commemorate 25 years of the Israel Bar Association (5747) 108, 109.

<sup>6</sup> See Shamgar, *supra* note 5, at 20 and see also Inbar, *supra* note 5, at 109.

mechanisms, and a criminal military justice system. Thus, Israel has both a civilian legal system and a military justice system operating in parallel.<sup>7</sup>

On a number of occasions, the Israeli Supreme Court of the State has referred to the MJL as being a separate and complete code, the need for which arises out of the uniqueness of military service. Thus, it was held in one such case that “The Military Justice Law is intended to serve as a special, comprehensive code which defines who may be subject to military justice, prescribes offenses, establishes and defines the powers of courts and prescribes detailed procedures.”<sup>8</sup> Elsewhere, it was also held that:<sup>9</sup>

The military is a typical hierarchical organization . . . and is generally considered to have special characteristics . . . as distinct from civilian organizations. Discipline and coercion are among the notable characteristics of the military, as are . . . mutual co-dependence and solidarity in the ranks—especially on the battlefield, but not only; obedience of command; telling the truth without reservation and without exception; the relations of trust between commanders and their subordinates and among the soldiers themselves; all of these characteristics are both proper and desirable in day-to-day life, but they are an absolutely essential precondition of the existence of a military worthy of the name, they are truly a matter of “to be or not to be” for an military.

It is no accident that the Military Justice Law was enacted as a special law for the military. The law expresses the special nature of the military and the elements of discipline and coercion that are so much a part of it.

Thus, the Military Justice Law establishes a legal apparatus, at the head of which stands the MAG.

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<sup>7</sup> This article shall deal below with the manner in which these two systems intersect.

<sup>8</sup> HCJ 695/88, Adler v. Military Court of Appeals, 43(2) P.D. 185, 186. In that case, two soldiers who had been arraigned in a court-martial argued that the laws of arrest and detention applicable to the civilian legal system that were more lenient than the laws applicable in courts-martial should also apply to them. This, they claimed, was in light of a general provision of the Criminal Procedure Law (section 2 of the Criminal Procedure Law [Consolidated Version], 5742-1982), which states that, “Criminal procedure shall be in accordance with this Law unless otherwise provide by or under another Law in respect of a specific matter.” The Supreme Court dismissed the soldiers’ petition and held that the Military Justice Law prescribes a different statutory arrangement regarding the arrest of soldiers arraigned in courts-martial and that the permanent exception in the above provision applied. It was also held that the uniqueness of provisions regarding arrest under the military justice system was not extraordinary in terms of the general structure and intention of the MJL.

<sup>9</sup> HCJ 3959/99, Movement for Quality Government in Israel v. the Sentencing Commission, 53(3) P.D. 721, 745. See also HCJ 4723/96, Avivit Atiyah v. Attorney General, 51(3) P.D. 714, 728, where Justice Beinisch held that the Military Justice Law creates a separate judicial system that is “adapted to the needs of the military and encompasses the nature of military service, the conditions under which criminal procedure is executed in the military, the existence of special criminal offenses for those to whom the Military Justice Law applies, and judicial procedures appropriate to its needs.”

The MAG is an appointee of the Minister of Defense at the recommendation of the Chief of Staff.<sup>10</sup> The way in which the MAG is appointed differs from the way in which other senior officers in the military are appointed.<sup>11</sup> This uniqueness bears witness to the special status of the office of the MAG and the independence afforded to its staff.<sup>12</sup>

The MAG is a professional staff officer in the General Staff of the IDF, subordinate, in principle, to the Chief of Staff.<sup>13</sup> At the same time, the MAG and his staff operate completely independently in the areas of their operation. Members of the Military Advocate are not subject to the functional command orders of the command ranks that they serve, and the decisions that they make are in their exclusive discretion.<sup>14</sup> The MAG is not subordinate to the Chief of Staff in respect of the exercise of his powers and is not under any command whatsoever—de jure or de facto.<sup>15</sup>

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<sup>10</sup> Section 177 of the MJL. Under the provisions of this section, the MAG is required to have at least seven years of legal experience.

<sup>11</sup> First, the manner in which other officers are appointed in the military (other than the Chief of Staff and officers who serve in the military judicial system) is not set out in statute. Second, most senior military officers are nominated by the Chief of Staff with the consent of the Minister of Defense. In his book *Justice Under Fire*, Justice Amnon Strashnov, a former MAG, notes that there are two fundamental facets to the appointment of the MAG by the Minister of Defense. One is the grounding of the MAG's independent position within the military in that his appointment is made outside the military hierarchy. Second is a strengthening of the MAG's position outside the military by making him subject to the civilian-political echelons. Amnon Strashnov, *Justice Under Fire*, 17 (Yediot Aharonot Books 1994).

<sup>12</sup> The Attorney General's Directive No. 21.869A (clause 1) notes that the fact that the powers and roles of the MAG are generally defined, unlike those of any other legal counsel in the Israeli government system, demonstrates the MAG's special status. Moreover, the MAG is generally subordinate to military orders but at the same time has a separate, independent obligation to fulfill the roles prescribed by law.

<sup>13</sup> Similarly, the military advocates are staff officers of the commanders of the relevant commands/corps and act as their legal advisors. See section 179 of the MJL.

<sup>14</sup> See the end of section 178 of the MJL, and section 9 of Supreme Command Rule 2.0613—Military Advocate General.

<sup>15</sup> Clearly, the independence of the MAG does not preclude consultation with command ranks. Sometimes this consultation is required by law. For instance, section 539A of the MJL, added in 1998, provides that the powers of the MAG to order the commencement of an investigation by an investigating military police following the findings of a military investigation are conditional upon there having been consultation with a commander whose rank is at least that of Major General. In this context, it is interesting to note that the Attorney General is also required, in certain cases, to consult the political echelons, even though he has ultimate discretion. This issue was discussed by a commission, established in 1962, headed by then Chief Justice of the Supreme Court, Justice Shimon Agranat, in order to examine the powers of the Attorney General. In respect of the consultation obligation imposed upon the Attorney General, the Agranat Commission held that the Attorney General is required to consult with the Minister of Justice from time to time regarding the manner in which he is to act in the area of penal law. This obligation to consult, in some cases with the entire government, is imposed upon the Attorney General in particular with respect to activities that have security, political,

In principle, the responsibilities of the MAG within the military are similar to those of the Attorney General in the civilian sphere.<sup>16</sup> The MAG's functions are set out in statute.<sup>17</sup> Under the provisions of the MJL, the MAG supervises the rule of law in the military, acts as legal advisor to the Chief of Staff and to other military authorities in respect of law and justice, provides legal supervision of disciplinary law in the military, and fulfills any other role imposed upon him by law or military edict.<sup>18</sup> The MAG's opinion determines the existing legal situation in terms of the military authorities.<sup>19</sup> In fulfilling these roles, the MAG is assisted by military advocates, the chief military prosecutor, the chief military defense counsel, and other military lawyers.

The role of the MAG is characterized by duality—on the one hand, he acts as legal counsel to the military authorities; on the other hand, he enforces penal laws and represents the rule of law and the public interest. In appropriate cases, he exercises his authority in order to institute legal steps against persons serving in the military. This duality of the MAG's functions reflects that of the

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or public significance. At the same time, the Agranat Commission emphasized that whenever there are disputes between the Attorney General and the Minister of Justice, or the government as a whole, the Attorney General's ruling shall be final. The Supreme Court had ruled similarly in HCJ 935/89, *Ganor v. Attorney General*, 44(2) P.D. 485, 512.

<sup>16</sup> See HCJ 4723/96, *Avivit Atiyah v. Attorney General*, 51(3) P.D. 714, 725-727. See also *supra* note 9 and the citations set out therein. It is interesting to note that in HCJ 425/89, *Zofan v. the MAG*, 43(4) P.D. 718, 725, Justice Beisky noted that even though there is a great deal of similarity between the MAG and the Attorney General regarding their independence as to arraignment, due to the special nature of the military system, the MAG is subordinate, in terms of command, to the Chief of Staff, and although the Chief of Staff does not have the authority to instruct the MAG regarding arraignments, one cannot ignore the military hierarchical structure in which the MAG operates.

<sup>17</sup> See section 178 of the MJL, and *supra* note 12.

<sup>18</sup> In addition, the MAG makes recommendations to the Chief of Staff regarding the appointment of military advocates. Section 177(c) of the MJL. Other powers of the MAG are set out in military edicts. For instance, the MAG is authorized to give an opinion as to whether there are grounds to bring a career soldier before the Discharge Committee, which is authorized to recommend the release of a career soldier from continued service in the military, even when this negates the soldier's own position. See Supreme Command Rule Note 3.0501.

<sup>19</sup> See clause 4 of the Attorney General's Directive No. 21.869A, and clause 13 of Supreme Command Rule No. 2.0613. The MAG's status in respect of military authorities is parallel to that of the Attorney General, who is the person authorized to interpret the law in respect of the executive wing of government and whose opinion binds the authorities of the State and reflects the legal position of it. See HCJ 4267.93, *Amitai—Citizens for Proper Administration and Integrity v. the Prime Minister*, 47(5) P.D. 441, 473-4. It should be noted that while the Attorney General is responsible for representing the government and the State authorities in all legal instances, the MAG is responsible for representation before courts-martial and before the Supreme Court sitting on the appeal of a judgment handed down by the Military Court of Appeals. Representatives of the Attorney General, however, present the position of the IDF when the decisions of military authorities are challenged in the High Court of Justice (hearing petitions submitted against acts of the State). It is possible that this practice should be reexamined, at least in some instances.



role of the Attorney General.<sup>20</sup> Below we shall expand on these two layers of the MAG's role - law enforcement on the one hand and legal advice on the other.

The Military Advocate is responsible for law enforcement in the military. A military advocate is authorized to order the filing of a charge sheet, arraignment under disciplinary charges, or the closure of an investigation file.<sup>21</sup> The MAG has the power to order a preliminary investigation by an investigating judge whenever he is of the opinion that an offense has been committed that a court-martial is competent to hear.<sup>22</sup> The MAG may also decide to appoint an investigating judge to investigate the death of a soldier in the instances set out in the MJL.<sup>23</sup>

A military advocate is authorized to order the filing of charge sheets for military crimes prescribed in the MJL (such as absence without leave, disobeying orders, violence against officers, etc.); however, the military advocate's power to arraign is much broader. The military advocate is permitted to arraign a soldier on any offense under the penal laws of the State of Israel, even when the offense is not a military offense,<sup>24</sup> and also, in principle, even when there is no link between the offense and military service.

Indeed, if the Attorney General is of the opinion that an offense was not committed within the military or due to a connection of the accused with the military, the Attorney General may instruct that the soldier's case be heard in a

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<sup>20</sup> For more on the question of the duality of the role of the Attorney General, see *The Report of the Public Committee into the Methods of Appointment of the Attorney General and Matters Relating his Tenure* at 48-49, 52-56 (1998). The Committee, which was headed by the previous Chief Justice of the Supreme Court, Justice Meir Shamgar, dealt at length with the question of whether the Attorney General's position as general prosecutor ought to be separated from his role as advisor to government authorities. The committee's conclusion was that the blending of these roles was preferable and that the benefits exceeded the detriments. The main reason for this conclusion was that a single line passes through these two positions connecting the power to activate criminal law in order to promote the rule of law with detailed advice given to government authorities. In other words, the Committee reached a general conclusion that the weight of the Attorney General's position and advice stems to a very great extent from the combination and concentration of his powers. On the other hand, if the role were divided up, this would generate a separation which, in the long run, would weaken each of the divided parts because it would reduce the status of the Attorney General. In our opinion, the importance of this blend between the area of advice and the power to enforce the law receives additional force with respect to the MAG because he acts in a hierarchical environment where it is harder to maintain the independence of his decisions.

<sup>21</sup> Sections 280-282B of the MJL.

<sup>22</sup> Section 178(4) of the MJL.

<sup>23</sup> Section 298A(a) of the MJL.

<sup>24</sup> See the beginning of section 14 of the MJL. In this context, the Israel Police Force reports to the office of the MAG any incident in which a soldier is involved in an offense, and if the military is interested in such, the file is transferred to the military authorities—the military police and the office of the MAG.

civilian court.<sup>25</sup> However, in practice, the Attorney General seldom exercises this power and the MAG tends, in certain offenses, to arraign soldiers in courts martial even for acts perpetrated while on leave, outside of their units. For instance, soldiers are arraigned for use of dangerous drugs even when such use occurs in civilian circumstances (such as during weekend leave). The rationale behind this policy is that drug use by a soldier, even while on leave, cannot be reconciled with military service because it is just a small step between such use and use in the context of military service. Moreover, a soldier who uses drugs in a civilian context might be called to duty or might return to his post at the end of his leave still under the influence of the drug. This also gives rise to the special interest that the military has in fighting drug use, which includes arraigning soldiers in courts-martial. This policy has received the approval of the Supreme Court.<sup>26</sup>

### *1. Legal Supervision of Disciplinary Hearings*

One of the roles of the MAG is to supervise disciplinary proceedings in the military. Disciplinary proceedings are legal proceedings held before a commander. The commander acts as a disciplinary officer and is authorized to decide guilt or innocence. Where the accused is found guilty, the commander is authorized to impose a sentence in accordance with the powers accorded him in the MJL.<sup>27</sup>

Disciplinary hearings are part of the day-to-day life of the military. Everyday, hundreds of such hearings take place.<sup>28</sup> Every disciplinary hearing is documented by the disciplinary officer on a military form, a copy of which is sent to the office of the MAG. The office of the MAG is responsible for examining the proceedings. If an illegality or deviation from authority is discovered, it is brought to the attention of the MAG, who is authorized to

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<sup>25</sup> See section 14 of the MJL. For those who are not soldiers and who are not subject to the MJL by virtue of being a civilian military employee or an employee on a mission on behalf of the military under section 8(2), (3) of the MJL, the Attorney General may rule at any time until a verdict is given that such person's case be heard in a civilian court. See section 15 of the MJL.

<sup>26</sup> HCJ 5000/95, Pvt. Bertalle v. Military Advocate General, 49(5) P.D. 64. In approving the military policy regarding arraignments for drug offenses, which is stricter than that used in civilian law, the Supreme Court noted that the establishment of the military justice system was intended, first and foremost, to serve the needs of the military and that the military has a particular interest in deterring soldiers from using dangerous substances (per Justice Kedmi, *Id.* at 74).

<sup>27</sup> See Part C, sections 136-176 of the MJL. The sentencing powers accorded to disciplinary officers includes the power to impose a sentence of detention up to thirty-five days, confinement, fine, reprimand, warning, or reduction in rank. See sections 152-153 of the MJL.

<sup>28</sup> Inbar, *supra* note 5, at 116-117. For instance, some 200,000 disciplinary proceedings were held in the various military units in 2000.

amend the judgment, quash it, or return it to the disciplinary officer.<sup>29</sup> The MAG is authorized to quash a judgment handed down in disciplinary hearing where he is of the opinion that the disciplinary officer was not authorized to hear the matter or to judge the accused,<sup>30</sup> where he finds that the act or omission for which the accused was tried did not constitute an offense,<sup>31</sup> or where the disciplinary hearing took place in a manner inconsistent with the legal procedure.<sup>32</sup>

The MAG also has broad powers to intervene in the sentences imposed by disciplinary officers in cases where the officers deviate from their powers or err in imposing, activating, or failing to activate detention sentences and, in particular, conditional sentences. Not only may the MAG quash an unlawful sentence imposed, he may also convert such a sentence to a sentence that the disciplinary officer was authorized to impose.<sup>33</sup>

The MAG's powers regarding supervision of disciplinary processes in the IDF is unique because of his ability to intervene in the judicial activity of a disciplinary officer. The justification behind this stems from the fact that an overwhelming majority of disciplinary officers are not lawyers. This power also has consequences for the relationship between the MAG and commanders.

## 2. *The Legal Powers of Commanders in the IDF*

The above shows that legal powers in the IDF are granted to the Military Advocate General, which is a professional body made up of lawyers who operate independently and free from external influences. At the same

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<sup>29</sup> See section 168 of the MJL. Apart from this supervision, the MAG also deals with complaints from persons accused of committing disciplinary offenses regarding the proceedings in their matters.

<sup>30</sup> See section 168(c) of the MJL. A typical case would be where the accused is charged under disciplinary proceedings for an offense that can only be heard in a court-martial and not in a disciplinary proceeding, which, as a rule, is intended for hearing military offenses.

<sup>31</sup> See section 168(a) of the MJL.

<sup>32</sup> See section 168(b) of the MJL. This power of the MAG was construed by the Supreme Court in HCJ 118/80, Greenstein v. the MAG, 35(1) P.D. 239, and more recently in HCJ 106/01, Second Lieutenant Dana Moed v. General Shay Avital (unreported). In this case it was held that if the disciplinary hearing took place in a manner inconsistent with the legal procedure, the MAG's authority to quash a disciplinary ruling becomes a duty when, objectively, there is a real suspicion that the failure to observe hearing procedures might cause a miscarriage of justice against the accused. In *Moed*, Justice Naor noted that she is willing to assume, for that matter, that this was true not only where a miscarriage of justice was caused to the accused. Justice Naor opined that the issue ought also be judged from the point of view of the public or from the point of view of the complainant. See para. 12 of Her Honor's judgment.

<sup>33</sup> Section 168(d) of the MJL. For a comprehensive analysis of the powers of the MAG to intervene in sentences imposed under disciplinary proceedings, see HCJ 243/80, Madjinsky v. Military Court of Appeals, 35(1) P.D. 67.

time, under the current law, certain powers regarding legal proceedings are also granted to commanders of the IDF. We shall discuss these powers below.

The military legal system is divided into jurisdictional districts, which parallel the divisions of command and corps in the IDF. The jurisdictional districts include the Northern Command, the Central Command, the Southern Command and Field Corps HQ, the Home Front Command, the Air Force, the Navy, and the General Staff. Each jurisdictional district is headed by a "District Chief" who is the commanding officer of the relevant command or corps. In each jurisdictional district there is a military advocate.

The Military Justice Law confers a large number of powers on each District Chief, which allows them to intervene and influence legal processes in the military. The District Chief is authorized to order the Chief Military Prosecutor to file an appeal against a judgment handed down by a court-martial in the first instance,<sup>34</sup> to order, with the consent of a military advocate, the quashing of a charge sheet,<sup>35</sup> and, as a confirming authority, to consent to any final judgment handed down by a court-martial.<sup>36</sup> Regarding the last power, the confirming authority has the power to confirm or mitigate the sentence imposed.<sup>37</sup>

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<sup>34</sup> See section 424(b) of the MJL.

<sup>35</sup> See section 308(a) of the MJL. This section grants a similar power to the MAG to quash a charge.

<sup>36</sup> The confirming authorities are: the Minister of Defense in the case of a sentence imposing the death penalty; the Chief of Staff in the case of a sentence of the Military Court of Appeals or of a special court-martial (which is competent to try officers of the rank of Lieutenant Colonel or higher, and officers who are charged with offenses for which the death penalty may be imposed); and the relevant District Chief in the case of any other court-martial at first instance. See section 441(b) and (c) of the MJL.

<sup>37</sup> See section 442 of the MJL. Thus, the confirming authority may replace a sentence of arrest or detention, in whole or in part, with a conditional sentence and may quash or reduce an obligation to pay compensation. Before the confirming authority makes its decision, the opinion of the MAG or of a military advocate is submitted to the authority. See General Staff Order 33.0314. Where the confirming authority makes a decision that contradicts the opinion of the military advocates, he or she must give written reasons for this decision. See section 442(c) of the MJL. Additional powers conferred upon the District Chiefs include the power to rule that a complaint transferred by a senior disciplinary officer for hearing by a court-martial, be heard in disciplinary proceedings if he decides, after reading the opinion of a military advocate, that it ought to be heard in disciplinary proceedings. See section 151(a) of the MJL. Section 171(b) of the MJL provides that a person shall not be brought before a court-martial for an act that he was tried for in disciplinary proceedings other than by order of the District Chief, which order shall only be made after receipt of the opinion of a military advocate. The power to convene sessions of a court-martial is also granted to the Chief of Staff and to the District Chiefs (defined as a "convening authority"). See section 204 of the MJL. In addition, the convening authority may decide that a particular case be heard *in camera* so as to prevent harm to the security of the State. See section 324(b) of the MJL. It should be noted that in the civilian system, this power is granted to the court alone. See section 68 of the Courts Law [Consolidated Version] 5742-1982). Section 325 of the MJL states that there shall be no

The conferring of these many significant powers regarding legal proceedings upon command ranks can give rise to difficulties in terms of the relationship between the powers of the District Chief and the powers of the military's legal authorities. It would appear that the powers granted to commanders to intervene in judicial and legal proceedings are ostensibly harmful to the principle of separation of powers and the independence of military judicial and legal bodies.<sup>38</sup>

A certain struggle for powers between the command ranks and legal personnel took place not long ago in the case known as the *Duvdevan* case. In that matter, the MAG decided to file a charge sheet against four commanders for negligently causing the death of a civilian at a surprise checkpoint. The MAG dismissed an application made by the accuseds to quash the charge under the powers vested in the MAG. Thereafter, the accuseds made a similar application to the District Chief (O.C. Central Command), who also had the authority to quash the charges, as stated above, with the consent of a military attorney. The O.C. Central Command responded that since the MAG had dismissed the application, the authority of the District Chief to quash the charge had expired. He went on to note that even if he were authorized to hear the application, he would not be able to accede to it. The reason for this was that the (command) military advocate had not consented to acceding to the application to quash the information. Some time later, the O.C. Central Command stated that had he had the authority, he would have acceded to the quashing application. The accuseds petitioned the Supreme Court and challenged the decisions of the MAG and the O.C. Central Command not to quash the charge filed against them.<sup>39</sup>

Due to these difficulties, the Supreme Court and the courts-martial have tended to give a narrow interpretation to the scope and substance of the powers vested in District Chiefs.<sup>40</sup> Recently, a memorandum of a law was published

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publication of any hearing that takes place *in camera* in a court-martial, nor issue of the protocols of such hearing, without the consent of the convening authority or of the court.

<sup>38</sup> See Mudrik, *Commanders' Liability*, *supra* note 4, at 308, where the author calls for the cancellation of these powers.

<sup>39</sup> Note that the Supreme Court dismissed this petition, holding that there were no grounds for intervening in the discretion of the MAG. HCJ 2702/97, *Anon. v. the Minister of Defense*, 53(4) P.D. 97. On grounds for the intervention of the High Court of Justice in the decisions of the MAG, see below.

<sup>40</sup> In the *Duvdevan* case, the Supreme Court spoke of the powers of the District Chief to quash a charge. This power is granted, as stated above, in parallel to both the MAG and to the District Chief. However, the quashing of a charge by the District Chief requires the consent of a military advocate. Regarding the power of the District Chief, the Supreme Court held, per Chief Justice Barak, that “*prima facie* we ought not presume that a military advocate may make a decision that contradicts that of the Military Advocate General. Thus, we ought not presume that the power of the district chief is reserved to make a decision that contradicts that of the MAG, since it is clear—in light of our presumption—that such a decision could not be so refined as to quash an information without the consent of a military advocate.” The court

in the civilian legal system proposing an amendment to the Military Justice Law which would cancel most of the powers currently conferred upon District Chiefs, particularly those powers that are vested in the discretion of prosecuting authorities and the courts. Among other things, it was proposed that the authority held by District Chiefs to quash charges be revoked, so that this power would be vested in the MAG alone, that the power granted to the District Chiefs to order the Chief Military Prosecutor to file an appeal be cancelled, and that the need to bring every sentence for the approval of the confirming authority be cancelled. At the same time, the confirming authorities' power to mitigate sentences would be retained, except that there would no longer be any need to bring every sentence before it for approval, rather the accused would be allowed to file an application for mitigation only if he chooses.

### *3. Military Defense Counsel*

The office of the Military Defense Counsel also operates as part of the Military Advocate General. Under the provisions of the MJL, any accused arraigned before a court-martial may request that a military defense counsel be appointed for him.<sup>41</sup>

The Military Defense Counsel's office is subordinate, in terms of command, to the MAG, but is not subordinate to it in professional terms. Military Orders prescribe that a military defense counsel shall not, during the performance of his duties, be subject to the orders of his commanders, and he

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noted, however, that it was not required to make final rulings on this question in order to rule on the questions that the petition placed before it. *Id.* at 113. As to the power of the District Chief to order the Chief Military Prosecutor to file an appeal, the Military Court of Appeals has held that the exercise of this power must be effected with supreme care, naturally, and only in special circumstances, after a careful reading of the opinion of a military advocate. The Military Court of Appeals was of the opinion that the District Chief might not be aware of important material considerations related to acceptable practice in judicial and sentencing proceedings, which must be considered as part of the decision to file an appeal. Similarly, the District Chief may not be familiar with the legal issues that comprise the lion's share of the considerations of the prosecutor in examining the chances of success in a case before the Military Court of Appeals. Therefore, it was held that the District Chief must place decisive weight on the opinion of the Chief Military Prosecutor and that a deviation by the District Chief from the opinion of the prosecutor might be considered an extreme lack of reasonableness, which would void the decision. *See Cr.A. 44/97, Chief Military Prosecutor v. Aflalo.*

<sup>41</sup> Section 316(a) of the MJL. (This obligation does not apply to an accused in the Traffic Court-Martial, where the hearing is held in the absence of a Military Prosecutor). If the accused has not selected his own defense counsel, the convening authority may, prior to the commencement of the hearing, appoint a military defense counsel for him. Once the hearing commences, this power is vested in the court itself. *See* section 321 of the MJL.

shall have only the good of the accused in mind.<sup>42</sup> This subordination of the Military Defense Counsel to the MAG is not obvious, and in the past proposals were raised to separate the office of the Military Defense Counsel from the office of the MAG.<sup>43</sup> It appears that the subordination of the military defense counsel to the MAG reflects the legislative intent of placing the MAG at the head of the military's legal system and giving him total responsibility over the rule of law in the military. This is also the source of his responsibility for ensuring that any accused brought before a court-martial is afforded legal representation.<sup>44</sup>

#### 4. *On Military Justice*

As set out above, the Military Justice Law establishes a military justice system which includes first instance courts-martial and the Military Court of Appeals. The method of adjudication employed in the courts-martial differs from that used in criminal trials in the civilian courts of the State of Israel and, in this respect, is an exception to the Israeli criminal justice system. The

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<sup>42</sup> Supreme Command Order 2.0613, cl.11. Note that the duty of trust to the client, which is anchored in the Public Defense Counsel Law 5756-1995, was drafted even more broadly, in the following terms: "(a) In fulfilling his role, the public defense counsel shall act as an attorney for the benefit of his client, with trust and commitment, and the ethical rules that apply to an advocate in representation of his client shall apply to the public defense counsel. (b) Where there is a conflict of interests between the duties of a public defense counsel who is an employee of the office of the Public Defense Office towards his client and his duty to the state, his duty to his client shall prevail over his duty to the state."

<sup>43</sup> These proposals did not come about probably because the general opinion is that the current arrangement enables the Military Defense Counsel to operate efficiently, while maintaining full professional independence. (See Inbar, *supra* note 5, at 114, and *see also* Report of the committee for examining the Subordination, Status and Working Arrangements of the Military Defense Counsel (1997). This committee, which included former MAG (ret.), Brigadier General (Res.) Zvi Inbar and former Chief Military Defense Counsel the late Colonel (Res.) Itshak Axel, was appointed by the head of the Manpower Command, and examined, among other things, the organizational place of the office of the Military Defense Counsel, as well as examining proposals to move it from the office of the MAG and even to completely remove it from the military. And indeed it is not rare for military defense counsels to file petitions in the Supreme Court against military authorities, including the MAG. This was what happened in the *Bartelle* case, HCJ 5000/95, Pvt. Bertalle v. Military Advocate General, 49(5) P.D. 64, where military defense counsels filed petitions against the MAG on behalf of several soldiers. The petitioners, who had been charged with offenses under the Dangerous Drugs Ordinance, requested that the charge sheet filed against them be amended to a military offenses in the MJL, which did not carry with it a criminal record.

<sup>44</sup> Apparently, this concept is the grounds for the provisions of section 423 of the MJL, which imposes a duty on the MAG to ensure that an appeal be filed against a sentence imposing the death penalty in first instance. If the accused himself does not appeal such sentence, the MAG must instruct a military defense counsel to file a statement of appeal. At the same time, the death sentence has never been imposed at first instance (nor on appeal), and thus the need to exercise this power has never arisen.

criminal justice system in Israel is based on professional judges. The court-martial, however, is made up of professional judges (“legally qualified military judges” in the language of the MJL) and judges who are not such (“military judges” in the language of the MJL).<sup>45</sup> The legally qualified judges are not appointed by a commander, but by an independent, highly distinguished committee, the composition of which is similar to that which decides on the appointment of civilian judges.<sup>46</sup>

The participation of military judges without legal qualifications on the bench of a court-martial is one of the keystones of the military justice system. The court-martial of first instance sits, as a rule, in a panel of three judges.<sup>47</sup> Under the MJL, there are two options for composing a panel of judges: two military judges and one legally qualified judge; or the opposite—two legally

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<sup>45</sup> Section 202 of the MJL provides that the President of a district or special court-martial shall, in selecting a bench, include at least one military judge and one legally qualified military judge. This version of section 202 was enacted in 1982 and contains two innovations that were not in the original section. The first relates to the fact that in the past, the President of the court had discretion to hold a trial without a legally qualified military judge. However, apparently this power was only ever exercised once. See Yoram Galin, *Additional Amendments to the Military Justice Law*, 34 Hapraklit 296, 300 (5744-1984). This possibility was removed when the MJL was amended. The second innovation under the MJL was that it was originally possible to select a panel for a court-martial from legally qualified military judges only, without having a single military judge who was not legally qualified. This possibility, which was exercised on a number of occasions in the past, no longer existed either after the amendment. The amendment shows how important it was to the legislator (even in the 1980s) to combine legally qualified judges with commanders who are not professional judges in the judicial process of courts-martial.

<sup>46</sup> This manner of appointment was only enacted in 1986. It should be noted that under the Jurisdiction Law 5708-1948, the professional judges who sat on the bench were soldiers in the regular chain of command. In the MJL, the substantive distinction of military judges was prescribed and an independent military justice system was created. The third stage took place in 1986, as stated above, when Amendment No. 17 to the MJL took effect. This amendment provided that the legally qualified judges would be appointed by a selection committee made up of nine people: the Minister of Defense (Chair of the Committee), the Minister of Justice, the Chief Justice of the Supreme Court, another judge of the Supreme Court, a representative of the Israel Bar Association elected by the National Council of the Bar Association, the Chief of Staff, the Head of the Manpower Command, the President of the Military Court of Appeals, and one of the legally qualified military judges of the Military Court of Appeals. Sections 186-187 of the MJL.

<sup>47</sup> Section 201 of the MJL. Under this section, the district court-martial may also sit in a panel of five judges, however, apparently no use has ever been made of this option. See Galin, *supra* note 45. In 1998, an amendment to the MJL was passed which provided that the district court-martial may sit on a case regarding the offense of absence without leave in a panel of one legally qualified military judge only, provided that such judge shall not impose a sentence of more than nine months' actual imprisonment. However, the President or Deputy President of the court-martial may determine, at his or her own initiative or upon the application of an accused or a military prosecutor, that a larger bench shall hear the case of such an offense. In such case, the limitations imposed on a single judge shall not apply. See section 203 of the MJL.



qualified judges and one military judge. The first option is the one chosen in most cases. That is to say that usually the majority of a bench are military judges who are not legally qualified. This is different from the panels of the Military Court of Appeals, in which a majority of the judges on the bench must be legally qualified. There is nothing to prevent the Military Court of Appeals from being made up of legally qualified judges only.<sup>48</sup>

The Supreme Court stated the following reasons for including a military judge on the panel of a court-martial:

The fundamental trend, or one of the fundamental trends, upon which the Military Justice Law 5715-1955 rests, is that military judges who are not legally qualified military judges are to be included in judicial proceedings before the various instances of courts martial . . . We can see from the wording of the Law, and from the preparatory work expressed in the Knesset speeches, that the inclusion of military non-legal judges is required mainly *for educational reasons and in order to emphasize the common responsibility of all of those who serve in the military* regarding what happens in the military . . .<sup>49</sup>

In the explanatory note to the MJL Amendment Law,<sup>50</sup> the education and common responsibility arguments were set out, with another reason being added to them:

The uniqueness of the court-martial is in the fact that the accused soldier is judged not only by a professional judge, but also by his comrades at arms, who know military life and the special conditions of that life. The participation of soldiers who are not lawyers in the judicial process is of educational benefit . . . including from the point of view of the contribution that the soldier-judges have in determining the level of behavior required in the military . . .

Dr. Mudrik, who researched this issue, also sees the main justification for involving the laity in military judicial process as being the participation of these judges in “the formation of normative patterns of behavior for soldiers.”<sup>51</sup>

In terms of the exercise of judicial powers, the MJL does not distinguish between military judges and legally qualified judges, nor does it accord a special status to legally qualified judges. Military judges have the

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<sup>48</sup> Section 216 of the MJL. An exception is set out in section 215B of the MJL, regarding an appeal from a ruling of the Traffic Court-Martial. Where such an appeal is heard by a panel of three, it is sufficient that one of the judges be a legally qualified judge.

<sup>49</sup> HCJ 142/79, Katz v. President of the Court Martial, Central Jurisdictional District, 33(3) P.D. 346, 347-348 (emphasis added).

<sup>50</sup> Proposed Legislation (*Hatsaot Chok*) 1489 (5741-1981) 40, 42.

<sup>51</sup> Oded Mudrik, *Military Justice*, 145-147 (Tel Aviv, 5753-1993) [hereinafter Mudrik, *Military Justice*].

same say as legally qualified judges in terms of handing down rulings, sentencing, and making interim decisions. Decisions are made by majority.<sup>52</sup> Each judge is required to give an opinion and to vote on every question requiring a decision.<sup>53</sup>

Under the provisions of the MJL, when one of the judges voices a minority opinion in a particular matter, **all of the judges** sign the majority decision, noting the fact that the decision was handed down by majority, but not revealing the name of the dissenting judge.<sup>54</sup> According to Dr. Mudrik, concealing the identity of the dissenting judge is meant to prevent an indirect response by commanders, particularly against military judges, out of dissatisfaction with results of a judgment.<sup>55</sup> There are those who dispute this argument, and see this provision as being yet another of the provisions of the MJL that are intended to make the status of military judges who are not legally qualified equal to that of those who are.<sup>56</sup>

Granting judicial power to the non-professional justices, especially considering that laity usually comprises the majority of the panel in courts-martial, is an exception to Israeli criminal law. Clearly, this system has inherent difficulties.<sup>57</sup> On the one hand, “the military justice system is not an internal disciplinary system, but a competent court of the Israeli judicial system. The military justice system is a specialized criminal justice system with parallel powers to the ordinary justice system in criminal matters, and in some circumstances, with even broader powers than the ordinary justice system . . . .”<sup>58</sup> On the other hand, this criminal adjudication is also entrusted

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<sup>52</sup> Section 392 of the MJL.

<sup>53</sup> Section 391 of the MJL. And indeed, in one case, there was a doubt as to whether the military judges knew that they had the power to disagree with the head of the court, who was a legally qualified judge, and the case was remanded by the Military Court of Appeals to the first instance court. Cr.A. 142/87, Corporal Iris v. Chief Military Prosecutor.

<sup>54</sup> See section 394 of the MJL.

<sup>55</sup> Mudrik, Military Justice, *supra* note 51.

<sup>56</sup> See Cr. A. 100/96, Private Kiviti v. Chief Military Prosecutor. For a critical position which calls for the cancellation of section 394 of the MJL and the publication of the identity of majority and minority judges, see Cr.A. 137/99, Lieutenant Jonathan Sivan v. Chief Military Prosecutor, at 23-25. According to this critique: “judges are not ‘ghost writers’. An identified judge, who takes responsibility for the contents of his judgment, must stand behind every judgment made. In this manner, the status of judges will be strengthened and the prestige of military judges will increase, and with it the status of courts martial as a competent judicial institution in the State of Israel.” (Ironically, this position was the minority position in that case; however, the majority judges in that case, whose identities were secret, as stated above, were of the opinion that the question could go either way, and that the matter should be the subject of staff research.)

<sup>57</sup> The Military Court of Appeals held a comprehensive discussion of these difficulties in Private Kiviti, 100/96, where the question of disqualification of a military judge was discussed at length.

<sup>58</sup> Per the Emeritus Chief Justice of the Supreme Court, Shamgar, in C.A. 503/87, Shpek v. Egged Transportation Cooperative Society Ltd., 42(1) P.D. 162, 164 (*See also* the comment of

to military personnel, who do not have judicial or legal professionalism, skill, education, or experience. The Military Court of Appeals upheld this point in stating as follows:

The military judge is not blessed with the professional qualifications or acquired experience of the legally qualified judge. The military judge is not used to sitting in judgment and the act of judging is not what he lives by. There is some doubt, which has been expressed more than once in the past, whether the military judge is able to ignore inadmissible evidence brought before him, or always be free from the influences of irrelevant considerations.<sup>59</sup>

In this context, Dr. Mudrik noted three main problems:<sup>60</sup>

**The first problem** focuses on the question of professionalism. The question that Dr. Mudrik presents here is how is it possible to give lay people the ability to rule in criminal proceedings, on questions of law, or even on questions of fact, since procedure, evidence, and substantive penal law are all part of a doctrine that needs to be learned.

**The second problem** presented by Dr. Mudrik is the danger of over reliance on the legally qualified judge—the danger that the military judge will feel inferior, in comparison to the legally qualified judge, which could thwart the legislative intention of integrating judges who are not professional into the military justice system.

**The third problem**, in Dr. Mudrik's view, comes from the difficulty faced by a lay judge in examining the questions before him from a point of view that lacks bias or prejudice. Or, in his words:

It will be difficult for a lay judge to ignore the "general knowledge" that he has accumulated outside of the case, which might clash with evidence or the opinions of experts brought before him. The lay judge's personal identification with one of the systems in the military, or with a particular matter, might find exaggerated expression in his judicial rulings. He almost does not have the ability to look at an issue completely, since while the legally qualified judge brings his daily view of the various criminal phenomena that occur in his jurisdiction into the hearing, making him able to evaluate the extent of an offense and its significance in relation to the functioning of the military, the lay judge is not possessed of this point of view, and can only examine the issues in the perspective of concrete law.<sup>61</sup>

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Justice Haim Cohen to the effect that "in some courts-martial, a very considerable part of the judicial work is done in the area of criminal law." Cr.A. 221/77, Felicia Langer, Adv. v. The Committee for Certification of Defense Counsel in Courts Martial, 32(1) P.D. 182, 186.)

<sup>59</sup> Cr.A. 114/95, Colonel Dvir v. the Military Prosecutor, at 10.

<sup>60</sup> Mudrik, Military Justice, *supra* note 51, at 116-119.

<sup>61</sup> *Id.* at 118-119.

Indeed, the MJL provides that in terms of judging, a military judge is only subject to the authority of the law, and not to the authority of his commanders;<sup>62</sup> however, Dr. Mudrik is of the opinion that the general subordination of judges who are not legally qualified judges to their command ranks could indirectly influence their substantive independence. In his opinion, there is a suspicion that the positions of those judges who are not legally qualified will be more influenced by their “identifying with the system.” In this case he claims that one may consider that the identification of military judges with the military gives rise to a suspicion that they might be subject to an “institutional bias” which in turn raises doubts about the impartiality of such judges.

In other words, according to this argument, judges, being an organic part of the military system, are “suspected” of identifying with the military system in principle, which could prevent them from rendering objective rulings. Moreover, military judges live and operate from within the military community, in immediate proximity to officers and other office holders. They form friendships and relationships with these people, who become their reference group, and this could harm the requisite of distance that a judge is required to keep.<sup>63</sup>

The idea of this suspicion of “institutional dependence” was also referred to by the Military Court of Appeals, which viewed matters differently, noting that:

These judges [meaning judges who are not legally qualified] are appointed from amongst commanders or soldiers in the jurisdictional district. There is almost always the possibility of command subordinacy or work relations between commanders, it is frequently real and if judges such as these are disqualified due to objections on the grounds of a suspicion of institutional bias, the foundation of the entire system would falter.<sup>64</sup>

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<sup>62</sup> See section 184 of the MJL.

<sup>63</sup> Given these difficulties, Dr. Mudrik is of the opinion that the roles and powers of lay judges ought to be reduced, as part of his proposed sweeping reform of the military justice system, so as to complete a trend that will make courts-martial part of the judiciary, in the broad meaning of that word. See: Mudrik, *Military Justice*, *supra* note 8, at pp. 149-152; and also in his article Oded Mudrik, *Military Justice in Israel—from “Command Orientation” to “Court,”* *Plilim A* 83, 113-114 (5750-1990).

<sup>64</sup> Cr.A. 234/90, Staff Sergeant Noy v. Chief Military Prosecutor, P.D.Z. Selected (1990) 133, 136. In that case, the accused was charged with the offense of negligently causing death due to his participation in a training accident which took place in Officers’ School. The accused, who was a cadet in Officers’ School at the time of the accident, was aware that one of the non-legally qualified judges who was hearing his case had been transferred to serve as a platoon commander at the Officers’ School. The accused sought to have this judge disqualified claiming that there was a suspicion of bias due to possible relations or the possible subordinacy of the judge to certain officers at the school. The accused added, on appeal, that in one of his defense claims he had wanted to argue the existence of liability on the part of the second-in-command and the chief training officer at the school, which, he claimed, reduced his own

The court noted further on that the independence of military judges in issues of adjudication is to serve them as a substantive shield and to enable them to judge lawfully, despite fears of personal and institutional dependence. We may add that it would also be appropriate to distinguish between a judge's prior opinion in the general military context and prejudice in a particular military trial against a particular soldier.<sup>65</sup>

In any event, we should emphasize that even though military justice is not only in the hands of professional judges, as explained above, it cannot be compared to trial by jury. Military judges cannot be considered a jury, neither in terms of their number, the method of election of them, nor substantively.<sup>66</sup> The concept of trial by peers does not apply here. Under the MJL, most of the

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liability for the accident. In light of this, the accused claimed that there was a difficulty in the fact that the military judge, who was meant to be subordinate to these officers, would be judging his case and dealing with this claim. In rejecting the claim for dismissal against the judge in question, the court held that although the structure of the military justice system creates grounds for claiming "institutional dependence" between the military judge and various commanders, these theoretical views conflict with the basic concept of the system as a whole, which, as set out in the law, places military judges on the benches of courts-martial. Regarding the instant case, the court held that the military judge against whom the claim was raised was a judge holding the rank of Lieutenant Colonel, who would at most be required to hear matters regarding members of his own rank, and whose dependence upon such commanders, or subordination to them, was limited in the extreme. The court also held that it was not at all clear that the judge would be required to deal with the commanders in question and, in any event, he was not sitting in judgment on their case and only needs to "shed light on questions that might be connected to those people." We are of the opinion that, with the greatest respect, it would have been, perhaps, possible to reach a different conclusion. That is not in light of the claim of the existence of **institutional bias**, but rather because in the circumstances of the case it would seem as though there was a suspicion of a **concrete conflict of interest** between the military judge's new role as platoon commander at the Officers' School, and his continued acting as a judge, which itself gives rise to questions regarding the liability of office holders in the school. In our opinion, once the Military Court of Appeals found that there was dependence or subordination—even if limited—between the judge and these commanders, it ought to have disqualified him.

<sup>65</sup> See Cr.A. 100/96, *Private Kiviti v. Chief Military Prosecutor*, at 32. On the distinction between a prior opinion and prejudice see also Cr.A. 1988/94, *Braun v. State of Israel* 48(3) P.D. 608, 623. In that case, the Supreme Court, in referring to a claim for disqualification made against a professional judge in the civilian legal system, noted that "a judge who sits amongst his people has opinions about many different matters. He will obviously have opinions on legal questions and sometimes he has views regarding the subject matter of a hearing. There is room to distinguish in this type of case between a prior opinion and prejudice. Only when a prior opinion becomes absolute and final, without the reasonable possibility of persuasion or change, will it become prejudice, and only prejudice creates a real possibility of bias, which might disqualify a judge. Thus, for instance, a judge who is a religious person is not disqualified from hearing a matter of religious import merely because he is a religious person."

<sup>66</sup> Mudrik, *Military Justice*, *supra* note 7, at 117.

members of the court will be officers,<sup>67</sup> and it is customary for panels of the courts to be made up of officers only. On the other hand, the vast majority of accused persons are enlisted soldiers.<sup>68</sup> Secondly, contrary to jurors, who do not need to give reasons for their rulings, the ruling of a panel of judges in a court-martial must be reasoned, including minority opinions.<sup>69</sup> And most important, is that the ruling is not made by military judges alone, since at least one of the members of the bench is a legally qualified judge. In addition, naturally, the legally qualified judge instructs his military judicial colleagues on questions of law, continually, from the commencement of the trial until the end of it, and this dialogue is of great importance.<sup>70</sup>

Thus, the format of the military justice system falls somewhere between placing the judging in the hands of professional judges and transferring the power to hand down judgment to those who are not professional judges.<sup>71</sup>

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<sup>67</sup> The end of section 201 of the MJL.

<sup>68</sup> Note that the Military Justice Code (Amendment 21) required that a soldier of the same rank as the accused sit on the bench of the court, however, this provision was not copied into the Military Justice Law. The right of an accused to request that a judge of his rank be included on the bench of the court in his trial was retained initially. However, this arrangement also was repealed by the legislature in 1964 (*Sefer Hachukim* 184, 5724-1964).

<sup>69</sup> See section 393(b) of the MJL.

<sup>70</sup> Mudrik, *Military Justice*, *supra* note 7, at 116-117.

<sup>71</sup> This list would not be complete without making reference to the proposal, which appears on and off the public agenda in Israel, that treatment of training accidents be transferred to commanders, instead of trying those responsible in courts-martial. We cannot, in this article, expand on this proposal, however, we would like to set out the proposal in brief herein, as it was expressed in the "Pit Case." In 1992, while a unit of a section commanders' course was performing a drill in which they raided a building, one of the training soldiers fell into an open well, in the house that the unit had raided, and was killed. Five of the soldier's commanders were tried by a special court-martial, and convicted. In the sentence, the special court-martial proposed, on its own initiative, that there be an examination into the possibility that the investigation methods and legal treatment of training accidents in the IDF undergo a revolutionary change. Under this proposal, there should be a shift of emphasis from legal-judicial channels to command-administrative channels. The court stated as follows:

The model that we see before us is that of a committee to be steered by a Brigadier General (Res.) or Major-General (Res.) and a retired judge of the Supreme Court, or a lawyer with similar qualifications. This committee would be charged with the lion's share of actual treatment of these matters. The committee could hold in depth inquiries into training accidents and near accidents. The purpose of the inquiry would be to draw general conclusions (at various levels), to make findings regarding personal liability and to make recommendations to the Chief of Staff regarding the administrative-command steps that ought to be taken against those responsible. These steps will include various administrative options such as removal from office, delayed promotion of rank or office for various periods, the making of promotions conditional upon further study or training, termination of career service and stripping of rank . . . in addition, they could also include disciplinary arraignment . . . if the committee forms the opinion, at any stage in its work, that the seriousness of liability in a matter demands legal treatment, it shall

At this point, we should mention that as opposed to other sectors of public service in Israel, there is no disciplinary court in the IDF.<sup>72</sup> Thus, for

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transfer examination of liability to the military police. In our opinion, these would be few, extreme cases (mainly cases of drills with live ammunition), and these could, as a rule, be located at early stages.

The special court-martial noted that the advantages of the model proposed by it would be, *inter alia*, that questions of liability would be settled in a shorter time-frame; an additional advantage that the court mentioned is that the investigation would be of a higher and more professional quality; it was also stated therein that in the kind of proceedings described, it would be possible to claim that persons being investigated would not deny their liability subject to a provision in the Law to the effect that such would not be used against them in criminal proceedings. It was also noted that we could anticipate that some of those responsible would be able to draw their own conclusions regarding their continued service in the military, which would prevent the phenomenon of evading personal liability that is too often seen in the courts. In the opinion of the panel of the special court-martial, this proposed method would prevent a criminal stigma being attached to persons whose fault is mainly functional, and who are the best of our people, fulfilling essential positions, and not “people with criminal tendencies.” The court also noted that since the response would come from the level of supreme command, the message that this would send regarding the importance of safety would be clear and sharp, in comparison with judicial decisions. Finally, the court noted that such a committee, which would be accompanied by publicity and explanatory information, would strengthen the position of military command ranks and restore the trust of the military in the systemic treatment of these issues (District Court 7/93, Military Advocate General v. Lieutenant Colonel Lior Shalev & Ors.) The Military Court of Appeals, which heard a double appeal regarding the judgment of the special court-martial, found the special court-martial’s intervention in so controversial a matter inappropriate. In *obiter dicta*, the Military Court of Appeals commented that “in the aforementioned proposal, the court of first instance deviated from its proper boundaries . . . . The matter that the court commented on in *obiter dicta* is multi-faceted and it would have been better for the court not to have stuck its head into this extra-judicial subject, and should not have expressed an opinion on a matter such as this in respect of which there are so many differing opinions.” (Cr.A. 193/94, Lieutenant Colonel Lior Shalev v. Chief Military Prosecutor at p. 28-29 of the judgment.) Clearly even if we presume that the court-martial is not the appropriate forum for discussing the treatment of training accidents, this does not make it unnecessary for the competent authorities to deal with the matter in full sincerity. And indeed, the proposal of the special court-martial in the “Pit Case” gained widespread acclaim in academic writings. *See* Mudrik, *Commanders’ Liability*, *supra* note 4; Assa Kasher, *Public Trust in the Military*, 9 *Plilim* 257 (2000). We should also mention that the State Comptroller (Justice (Ret.) Eliezer Goldberg) who heard the appeal in the “Pit Case” also dealt with the proper method for dealing with training accidents in the IDF in a special report he had published in 1999, regarding a training accident known as the “Ze’elim B Case,” during which five soldiers in an elite reconnaissance company were killed (State Comptroller’s Report on Audit Findings regarding the “Ze’elim B” Disaster, 73-75 (March 1999)).

<sup>72</sup> For instance, there is a disciplinary tribunal for State employees in the public service (*see* Public Service (Discipline) Law, 5723-1963); there are disciplinary tribunals for employees of local authorities in the municipal sector (*see* Local Authorities (Discipline) Law, 5738-1978); advocates are subject to the authority of a disciplinary tribunal (*see* Chamber of Advocates Law, 5721-1961). Disciplinary tribunals also operate in the Prisons Authority (*see* Prisons Ordinance [New Version], 5732-1971) and in the police. It should be emphasized that disciplinary offenses committed by policemen may be heard either before the police officers’

instance, in other sectors when a person is found guilty of a criminal offense, he may be charged in disciplinary proceedings for the same acts, whereas an accused arraigned before a court-martial will be charged solely under criminal law, and it will not be possible to charge him in disciplinary proceedings.<sup>73</sup>

In our opinion, the special nature of the court-martial gives it a dual function: as a criminal court and as a disciplinary tribunal, dealing with the disciplinary aspects of the offenses heard in it, and competent to impose disciplinary sentences (such as reduction of rank, reprimand, detention, etc.).<sup>74</sup>

At the same time, under the current legal situation, quasi-judicial powers are granted to the commanders. Thus, for instance, the Chief of Staff has the power to deprive a career service soldier of his right to a pension when such soldier has been convicted of a crime of a flagrant nature, and has been dismissed from the IDF as a result.<sup>75</sup> The arrangement employed by the State in this context is completely different. Most of the difference lies in the fact that the power to deprive or reduce the retirement pension of a public servant is reserved for the public service disciplinary tribunal—a judicial body made up of a judge, an employee representative, and an employer representative.<sup>76</sup>

Given the current doubt as to whether, in times of fundamental freedoms, an administrative authority ought to be the body to determine pension rights or not, a bill is currently being prepared by the IDF which, if passed, will bring about a significant change in the existing situation. Under the bill, a military, quasi-judicial committee will be set up, the head of which shall be a legally qualified military judge appointed from one of the courts-martial, the other members being two senior commanders in the IDF, who shall be appointed by the Chief of Staff. It is proposed that this committee will deal with the deprivation of pensions of soldiers convicted in judicial instances of crimes of a flagrant nature.

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disciplinary tribunal, or before a single judge, viz. a police officer who ranks at two levels higher than the accused, in disciplinary proceedings that are reminiscent of those implemented in the military (section 51 of the Police Force Ordinance [New Version], 5731-1971).

<sup>73</sup> See sections 171-172 of the MJL.

<sup>74</sup> This view was recently expressed in a judgment of the Central District Court Martial (*See* HCJ 210/01, Military Prosecutor v. Sergeant Yevgeny Tokker. *Cf.* C.A 503/87, Shpek v. Egged Transportation Cooperative Society Ltd., 42(1) P.D. 162, 164, where Shamgar CJ notes that “disciplinary proceedings which may be instituted in various civilian contexts after criminal conviction are included in the criminal proceedings held in the courts-martial . . .”

<sup>75</sup> Section 10(b) of the Career Service in the Israel Defense Forces (Pensions) Law [Consolidated Version], 5745-1985.

<sup>76</sup> State Service (Pensions) Law [Consolidated Version], 5730-1970 (sections 15, 17, 22, and 57).



## 5. *Law in the Territories*

Since June 1967, governmental, legislative, and administrative powers of the territories held in Judea Samaria and the Gaza Strip have been in the hands of the IDF.<sup>77</sup> These powers are exercised in consultation with legal advisers. Military prosecutors are subordinate to the legal advisers, and they represent the military prosecution in the courts that operate in the territories.<sup>78</sup> Among other things, legal advisers in the territories are responsible for preparing statutory instruments in their regions; for supervising suspension and detention installations in their regions; for examining applications for administrative arrest; for dealing with applications by advocates, local residents, and various organizations on matters regarding their regions, and so forth. In addition, the international law department of the MAG deals with legal questions regarding the Territories, and is responsible for, among other things, the preparation of statutory instruments, for petitions filed to the High Court of Justice and for legal advice to commanders who operate in the Territories. Since this area gives rise to complex questions beyond the scope of this article, we shall not expand on it in this framework.

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<sup>77</sup> Proclamation Note 2 regarding Governmental and Legal Arrangements, 5727-1967.

<sup>78</sup> Note that in 1985 a petition was filed with the Supreme Court in which the petitioners requested the High Court of Justice to order the reservation of the right to appeal to judicial appeal instances on judgments of courts-martial operating in the Territories. The court rejected the petition, holding that the right of appeal was not a fundamental right and that the rules of international law—under treaty or custom—do not contain a binding provision regarding the setting up of a military appeal instance. At the same time, the court recommended that the military authorities consider setting up an appeal instance, noting that the setting up of such an instance would raise the esteem of the military justice system, since it will embed in it an element that will increase the ability to make legal considerations and the ability for the courts to operate professionally in the eyes of the local community and in the eyes of the world. In addition, the Supreme Court noted that the existence of an appeal court would stress the independence of the military justice system and that this would be an important element in strengthening its status and prestige. HCJ 87/85, Arjub v. IDF Commander, 42(1) P.D. 353. And indeed, following this proposal, the Order regarding Security Guidelines 5730-1970 was amended and an appeal court was set up for appeals against judgments of courts in the Territories. (Order Regarding Security Guidelines (Amendment Note 58) (Order Note 1265) dated 1 January 1989).

## II. THE LINK BETWEEN THE MILITARY LEGAL SYSTEM AND THE CIVILIAN LEGAL SYSTEM

### A. Interrelations between the Attorney General and the MAG

One of the central issues in discussing the connection between the military legal system and the civilian legal system is the question of the relationship between the MAG and the Israeli Attorney General.

As has already been set out in detail above, the MJL gives the Attorney General a certain foothold in military judicial proceedings;<sup>79</sup> however, Israeli Law does not provide a clear model which regulates the relationship between the Attorney General and the MAG.

This statutory lacuna gave rise to two cases which were heard before different courts, revolving around the question of MAG and Attorney General relations.<sup>80</sup>

#### 1. *The Sadiel Case*

The first case, known as the *Sadiel* case, began with a painful incident that occurred in December 1992. During an operation in Southern Lebanon, an IDF force, under the command of Second Lieutenant Sadiel, one of the soldiers, the Late Corporal Haim Bar Natan, was killed as a result of friendly fire by one of the other soldiers in the force who thought that he was a terrorist who was about to attack the unit.

This incident gave rise to a serious dispute between the MAG and the Attorney General on the question of whether a charge sheet ought to be filed against the officer. While the MAG was of the opinion that a charge should not be filed, the Attorney General thought that the officer ought to be arraigned on criminal charges, and instructed the MAG to do so.<sup>81</sup> Initially, the then

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<sup>79</sup> As stated above, the MJL provides that the Attorney General may order that a soldier's case be transferred for hearing in a civilian instance, if he is persuaded that the offense was not committed within the military, or due to the accused's belonging to the military (*see* section 14 of the MJL), and he may order that the trial of a citizen employed by the military be transferred to a civilian instance (section 15 of the MJL).

<sup>80</sup> Note that in these two cases, the relationship between the MAG and the Attorney General regarding the powers of the MAG as enforcer of the law in the military, were examined; however, in our opinion, this can also be used to indicate the relationship between them in the area of legal advice.

<sup>81</sup> The Attorney General's position was that Second Lieutenant Sadiel was, *prima facie*, negligent in fulfilling his duty; however, he did not think that there was a causal link between such negligence and the death of the soldier. Therefore, his position was that there was room to arraign the officer for the offense of criminal negligence under section 124 of the MJL (and not for the offense of causing death by negligence). On the other hand, the MAG was of the opinion that even presuming that the officer had been negligent, as the Attorney General thought (a presumption which, as we have seen, the MAG disagreed with, since he thought that

MAG thought that he, rather than the Attorney General, was the person authorized to order arraignment in a court-martial,<sup>82</sup> however, the Attorney General was of the opinion that the MAG was subordinate to him regarding arraignments and that in respect of the matter in dispute, his interpretation was binding. The MAG respected the view of the Attorney General, and ordered the Military Prosecutor to file a charge sheet against Second Lieutenant Sadiel.<sup>83</sup>

The accused's defense counsel argued before the court-martial during the preliminary plea stage that the charge sheet had been served *ultra vires*, because the MAG had ordered its service having been instructed to do so by the Attorney General, without exercising any discretion on his own part. The court-martial accepted this argument and cancelled the charge, holding that the Attorney General does not have the power to order the filing of a charge in a court-martial, either directly or indirectly. The MAG, who is the authorized person, exercised his discretion in deciding not to file a charge. As a result, the accused's constitutional right to proper proceedings in his matter was harmed. No appeal was filed against this decision.<sup>84</sup>

## 2. *The Atiyah Case*

The *Sadiel* case was publicized and created shockwaves. *Inter alia*, the case disclosed an important legal question—is the MAG subordinate to the Attorney General in terms of arraignment? The question was apparently answered in the Supreme Court's ruling on the *Atiyah* case.<sup>85</sup>

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at most this was a question of an error of discretion), there would still not be room to arraign the officer in criminal law when the facts were clearly in the context of a military operation, of a combat nature, and especially not where there was no causal link between the negligence and the death.

<sup>82</sup> In a letter sent by the MAG at that time to the Attorney General, he claimed that, given the independent status of the MAG, as is set out in the Military Justice Law and in case law, and in light of precedents regarding the independence of discretion of the administrative authority, which require that persons with authority exercise their discretion independently, there is some doubt whether he is entitled to act under the orders of the Attorney General if he does not agree with them.

<sup>83</sup> In accordance with the procedure for dealing with fatal accidents in the IDF, which was formulated by the Knesset Foreign Relations and Security Committee in 1980, members of the deceased person's family may file an objection to the Attorney General against the opinion of the MAG regarding the circumstances of death. This procedure is anchored in the Attorney General's Directives (*see* Directive 50.013 dated 20 January 1981, headed *MAG—Fatal Accidents in the IDF*).

<sup>84</sup> Following this decision of the court-martial, the then Attorney General declared that he would no longer deal with objections from families of deceased soldiers against the opinion of the MAG, however, when a new Attorney General was appointed, the procedure was renewed, allowing an objection to be filed with the Attorney General, and the procedure is still valid today.

<sup>85</sup> HCJ 4723/96, *Avivit Atiyah v. Attorney General*, 51(3) P.D. 714.

In that case, a charge sheet was filed against a soldier who was charged with use of a dangerous drug. The soldier's attorney applied to the MAG requesting that he cancel the charge against her. When this application was rejected, the attorney applied to the Attorney General, seeking a stay of proceedings against his client.<sup>86</sup> The Attorney General dismissed the application holding that his power to stay proceedings did not include proceedings in a court-martial. An appeal was filed with the Supreme Court against the Attorney General's decision.<sup>87</sup>

The Supreme Court was required to deal with two questions: one was whether the Attorney General was authorized to stay proceedings in a court-martial. The Supreme Court responded negatively to this question, by a majority. The second question that the court dealt with was whether the Attorney General was authorized to instruct the MAG to cancel a charge sheet. This question was answered positively. The Supreme Court, per Justice Beinish, held that the separation and uniqueness of the military justice system and the statutory powers granted to the MAG as the person responsible for the rule of law and the enforcement of the law in the military, did not derogate from the status of the Attorney General as a "superior power" in the law enforcement system.

The Supreme Court was of the opinion that the MAG's status, similar to that of the Attorney General, was inward towards the military, and that one ought not conclude from his status that in fulfilling his role, the MAG operates distinctly from the general law enforcement system. It was also held that in his day-to-day work, in exercising his powers, the MAG must consider the general policy that is being implemented regarding law enforcement, and he must accept the Attorney General's interpretation of legal provisions, since the Attorney General is the MAG's professional guide.

Given this concept, the Supreme Court outlined several guiding principles regarding the relationship between the military and civilian legal systems, as follows:

- a. The Attorney General may intervene and even instruct the MAG as to how to act in decisions which, in his view, exceed the realm of military law. The Attorney General's intervention in these matters is effected as part of his role as the functionary with supreme responsibility for the various

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<sup>86</sup> Under the Attorney General's powers under section 231 of the Criminal Procedure Law [Consolidated Version], 5742-1982.

<sup>87</sup> Alternatively, the Supreme Court was requested to order the Attorney General to require the MAG to cancel the information "by virtue of his powers as head of the General Prosecution Office." Alternatively to the alternative, the petitioner requested that the Supreme Court order the MAG directly to cancel the information under the MAG's powers in section 308 of the MJL.

prosecuting authorities and legal bodies in the executive branch.

b. The Attorney General shall intervene in decisions of the MAG in all cases where the MAG's decision exceeds acceptable legal norms. Intervention by the Attorney General in these decisions shall be effected in exercise of his powers as the functionary responsible for the lawfulness of the activities of the various arms of government.

c. In matters relating to general policy, such as the policy of the military prosecutor regarding arraignments, the MAG must consider the policy of the general prosecutor's office, which is prescribed by the Attorney General, and the need for uniformity and harmony of the various prosecution authorities. The Attorney General shall be entitled to intervene in the decisions of the MAG when the latter does not give sufficient weight to this consideration.

At the same time, Justice Beinisch went on to hold that the above shall not impede the independence of the MAG. The Attorney General is not to intervene in the day-to-day activities of the MAG, and does not participate in any of those matters that are routine in the military prosecution system. That is "so as not to harm the special structure of the military justice system on the one hand, and so as not to disrupt the priorities that the Attorney General sets in exercising his functions in the law enforcement system, on the other hand."<sup>88</sup>

An analysis of the position of the majority in the *Atiyah* case shows that the court distinguishes between the MAG's "routine" decisions and those "of special interest to the public" or "the implications of which exceed the military

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<sup>88</sup> HCJ 4723/96, *Avivit Atiyah v. Attorney General*, 51(3) P.D. 714, 731-733. It should be noted that Chief Justice Barak, who remained in the minority in this case, was of the opinion that the Attorney General's power to intervene ought to be broader. In his opinion, the first question ought also be answered positively, and the Attorney General ought to be allowed to stay proceedings commenced by a military prosecutor in a court-martial. This is because in Chief Justice Barak's view, "the Attorney General's control of the criminal proceedings taking place in the court-martial ought to be recognized. We ought not permit different foci of power that pull in different directions." *Id.* at 743-744. The third judge on the panel, Justice S. Levin, was of the opinion that the general considerations referred to in Chief Justice Barak's judgment justified a constitutional arrangement in principle, which would recognize the power of the Attorney General to stay proceedings taking place in a court-martial; however, in the existing constitutional framework, he preferred to join Justice Beinisch for pragmatic reasons, since in his view, "acceptance of the view of the Chief Justice is likely to create a mélange of powers and a mess regarding the identity of the person with direct power to deal with an application to stay proceedings." Therefore, in his view, the issue ought to be settled in statute, which would prescribe detailed powers and hierarchical provisions. *Id.* at 744.

framework.” In the first type, the Attorney General is authorized to intervene “if the MAG’s decision seems to him to exceed the boundaries of accepted legal norms, or to be unreasonable, or, heaven forbid, lacking in good faith,”<sup>89</sup> on the other hand, in decisions of the latter type, the Attorney General shall be entitled to “interfere and even make orders” not only regarding the causes of action referred to.

This distinction raises, in our view, serious difficulties. The first question that must be asked is what the criteria will be for distinguishing between these two types of decisions. The distinction held in the judgment leaves a large space for interpretation as to the question of the “routineness” of the decisions. Secondly, what is a decision that “exceeds the boundaries of accepted legal norms.” Justice Beinisch noted that it would be “extremely rare” for the Attorney General to intervene, however in all likelihood, disputes between the Attorney General and the MAG would only arise in “difficult cases.”<sup>90</sup>

In any event, under the *Atiyah* rule, the power of the Attorney General to impose his opinion on the MAG will, in those cases, include the cancellation of and the filing of a charge in a court-martial. In other words, even if the MAG thinks, in these cases, that a charge ought not be filed, and the matter is brought before the Attorney General—as happened in the *Sadiel* case—the Attorney General shall be authorized to decide that a charge should be filed, and his decision shall prevail. It is easy to see that a dispute between the MAG and the Attorney General regarding the question of instituting legal proceedings following a fatal accident would be “of public interest.”<sup>91</sup> Thus, in the *Sadiel* case as well we can see that the Attorney General would have

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<sup>89</sup> *Id.* at 472.

<sup>90</sup> Another question relates to the authority that the Supreme Court grants the Attorney General to intervene in a decision of the MAG in cases where the latter’s decision seems to the court to “exceed the boundaries of accepted legal norms, or as being unreasonable, or, heaven forbid, lacking good faith.” This test is very reminiscent of the tests set out for the intervention of the High Court of Justice in the decisions of the MAG. (We shall expand on this point below.) Thus, the question arises as to the justification for having a second level of examination. Moreover, it is possible to think of more procedural difficulties, such as whether in every special case in which a petition is filed in the High Court of Justice against a decision of the Military Advocate General in the area of arraignment, the High Court of Justice will refer the petitioner to the Attorney General as part of the duty to exhaust proceedings before applying to the High Court of Justice.

<sup>91</sup> Justice Beinisch gives this extra weight in stating that the intervention of the Attorney General, under the procedures for dealing with fatal accidents, “stems from the issue being of *first rate interest to the public* and relates to the protection of human life entrusted into the military system” (*emphasis added*). Indeed, the *Atiyah* case dealt with a charge sheet that attributed the accused with the offense of use of a dangerous drug; despite this, both Justice Beinisch and Chief Justice Barak use the example of **training accidents** (*see*, for instance, per Justice Beinisch, *Id.* at 471; and per Chief Justice Barak, *Id.* at 478-479).

been authorized, under the *Atiyah* rule, to order the MAG to file charges against the officer.<sup>92</sup>

## B. Civilian Judicial Supervision

Judicial review by the civilian judicial system regarding decisions made in the military justice system takes place on two levels. One relates to the possibility of filing an appeal against a judgment of the Military Court of Appeals; the second relates to the possibility of petitioning the High Court of Justice against decisions of the MAG's office, like any administrative authority.

### 1. "Appeal-like" Criticism of the Decisions of the Courts-Martial

In 1986, the MJL was amended and an option to appeal, by leave, against a judgment of the Military Court of Appeals to the Supreme Court on a "question of law that is important, difficult or innovative" was inserted.<sup>93</sup> To date, leave to appeal has been granted in six cases.

### 2. "Administrative" Criticism by the High Court of Justice

As set out above, it is possible to petition the High Court of Justice against the MAG's decisions. Indeed, petitions are often filed with the High Court of Justice in which decisions regarding arraignments or non-arraignment are challenged. Additionally, decisions regarding the institution of disciplinary proceedings are also challenged, the petitioners arguing that such proceedings are not sufficient and that legal proceedings, ought to be instituted in a court-martial.

The High Court of Justice's test for intervening in the MAG's decisions is similar to the test for intervening in decisions of the Attorney General. Case law states that the MAG, like the Attorney General, has broad discretion, and that so long as appropriate weight is given to appropriate considerations, the

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<sup>92</sup> That is despite the fact that the court-martial which cancelled charge, as set out above, did so because of the fact that the charge had been filed upon the order of the Attorney General, and not at the discretion of the MAG.

<sup>93</sup> See section 440I of the MJL. This amendment was passed following the recommendations of the Shamgar Committee which was appointed in 1977 by the Minister of Defense and the Minister of Justice. The wording of the section seems at first glance to have been copied from section 30 of the Courts Law [Consolidated Version], 5744-1984, which provides when leave is to be given for a further hearing, in an expanded panel, regarding a judgment of the Supreme Court. However, the Supreme Court held that the tests for granting leave to appeal a judgment of the Military Court of Appeals would be **broad**er than the tests for a further hearing in an expanded panel of the Supreme Court regarding a judgment of the Supreme Court. See App. for Leave to Appeal 25/87, Haber v. the Chief Military Prosecutor, 42(1) P.D. 45, 46-47.

MAG's decision will be legal, and the court will not replace the MAG's discretion with its own, and nor will it act as a "supreme MAG."<sup>94</sup> The Supreme Court will intervene in decisions of the MAG only in extreme circumstances, if it finds that the decision contains non-relevant considerations, a substantial distortion, lack of good faith, or extreme lack of reasonableness.<sup>95</sup>

One of the clearest examples of a petition filed against a decision of the MAG not to institute legal proceedings was the *Isha* case.<sup>96</sup> In this case, a petition was filed before the High Court of Justice by the father of a fighter in an elite unit. The petitioner's son, the Late Staff Sergeant Eli Isha, died as a result of "friendly fire" during an operation to capture a wanted terrorist. The petition challenged the then MAG not to institute legal proceedings against the commander of the unit, holding the rank of Lieutenant Colonel. In that case, immediately after the tragic event, serious command-related measures were taken against the commander, in that he was dismissed from his post and later on it was decided that he would not be promoted in rank and would never serve in a command post in a combat unit.

After examining the findings of the investigation, those authorized to do so in the MAG's office concluded that, even though the investigation showed that the commander of the unit had been negligent in managing the operation, the negligence was not grievous, and in light of the serious command-related steps already taken against the officer, there was no reason to arraign him on criminal charges.

While hearing the petition, the Supreme Court examined the approach of the MAG, that negligent behavior occurring during an operational activity ought to be examined in line with special criteria, giving considerable weight to the taking of significant command-related steps against the commander. In appropriate cases, when the negligence is not serious, these types of steps might suffice in lieu of an arraignment on criminal charges.<sup>97</sup> The Supreme Court dismissed the application and, in its judgment, confirmed the view that negligence during an operational activity was not like negligence during training. It was also held that the command-related steps taken against the unit commander were of serious penal significance and could not be ignored:

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<sup>94</sup> HCJ 425/89, *Jamal Abdel Kader Mahmoud v. the Chief Military Prosecutor*, 43(4) P.D. 718, 738-739.

<sup>95</sup> See HCJ 372/88, *Fuchs v. the Military Advocate General*, 42(3) P.D. 154; HCJ 425/89, *Zofan v. the Military Advocate General*, 43(4) P.D. 718; Cr.A. 6009/94, *Shafran & Ors v. the Chief Military Prosecutor & Ors*, 48(5) P.D. 573; HCJ 442/87, *Shaul v. the Military Advocate General*, 42(2) P.D. 749, 753; HCJ 4550/94, *Isha v. the Attorney General*, 49(5) P.D. 859, 870.

<sup>96</sup> See HCJ 4550/94, *Isha v. the Attorney General*, 49(5) P.D. 859.

<sup>97</sup> This distinction between negligence during an operational activity and negligence during training was approved in the past by the Supreme Court in HCJ 6009/94, *Shafran v. the Chief Military Prosecutor*, 48(5) P.D. 573.



The uniqueness of the military system is in the sanctions of discipline and command . . . the types of sanctions that were taken against unit commander Lieutenant Colonel A: against a person who had tied his fate to the military, who saw his destiny as serving in the military and who saw military service as a way of life, can be more serious than sanctions of criminal justice.<sup>98</sup>

It was held that there were no grounds for intervening in the discretion of the MAG.<sup>99</sup>

### III. CONCLUSION

We have set out, in brief, the structure of the military legal system—the Military Advocate General and the military justice system. In addition, we have shown the link between the military legal system and the civilian legal system.

The military legal system has, over the years, undergone many changes, and it will undergo many more. Some of these changes emphasize the independence of the military legal system.<sup>100</sup> Other changes create a certain subordination between the military legal system and the civilian legal system.<sup>101</sup> These changes are the fruit of various social processes that have taken place in the State of Israel, a discussion of which is outside of the scope of this paper.<sup>102</sup>

On the one hand, these changes could harm, to a certain extent, the independent status of the MAG in relation to the military legal system. But on the other hand, we are of the opinion that the increased connection between the military legal system and the civilian legal system will contribute to a

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<sup>98</sup> *Id.* at 873-874.

<sup>99</sup> Parenthetically, it should be noted that Justice Heshin stated in the same case that even if the MAG had decided to arraign the unit commander on criminal charges, he would not have intervened in the decision. *Id.* at 874.

<sup>100</sup> See for instance, the memorandum of the Law, which proposes repealing a large portion of the powers granted to chiefs of jurisdictional districts (and *cf.* Shamgar, Speech at the *Military Justice Jubilee*, *supra* note 4, at 20).

<sup>101</sup> A change such as this may be seen in the insertion of section 440I of the MJL, which affords the possibility of appealing (by leave) to the Supreme Court on a judgment of the Military Court of Appeals; another obvious change is the *Atiyah* judgment, which to an extent makes the Military Advocate General subordinate to the Attorney General.

<sup>102</sup> By way of example of these processes, we shall note the development that has taken place over recent years in the defense ethos in Israel; the transfer from collectivism to individualism; and the increasing readiness, *inter alia*, among families of deceased soldiers, to criticize decisions made in the military (“the slaughter of holy cows”) etc. (an in depth discussion of these processes may be found in Assa Kasher, *Public Trust in the Military*, *supra* note 71, and in Gidon Doron and Udi Lebel, *Defensive Organization—the Military versus Bereaved Parents*, 9 *Plilim* 369 (2000)).

strengthening of the status of the military legal system within the military.  
Time will tell whether this prediction is justified.

# THE COJUMA STORY

COLONEL ENRIQUE ARROYO\*

## INTRODUCTION

This is the story of COJUMA. It is the story of an acorn of an idea that grew into a tremendous oak of a program, one that continues to expand. It is a story of unrelenting belief in an ideal and dedication to international relationship-building that has developed beyond any of the original parties' imaginations into a vibrant, powerful engagement tool for Twelfth Air Force (12 AF), Headquarters US Air Force (USAF), US Southern Command (SOUTHCOM), and the Department of Defense (DOD). It is by far the most successful legal engagement program in the history of the USAF, and the most successful legal engagement program in DOD. It is being emulated by other services and unified commands and has been lauded by the Secretary of Defense, the Secretary of the Air Force, and various other high-ranking officials.<sup>1</sup>

## I. THE NAME

COJUMA is the acronym for the Spanish name of The American Military Legal Committee, *Comité Jurídico Militar de las Américas*. It consists of the first two letters of the word *Comité*, the first two letters of the word *Jurídico* and the first letter of each of the words *Militar* and *Américas*. The name describes the composition of the committee, which includes military

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<sup>1</sup> For related news articles, see Technical Sergeant Rian Clawson, *Cojuma creates a meeting of the minds*, AIR COMBAT COMMAND NEWS SERVICE, July 12, 2001, available at <http://www2.acc.af.mil/acnews/jul01/01220.html> and Lieutenant Amie Mize, *New Code sets right tone for military justice throughout the Americas*, AIR FORCE NEWS, June 29, 1998, available at [http://www.af.mil/news/Jun1998/n19980629\\_980953.html](http://www.af.mil/news/Jun1998/n19980629_980953.html) (noting the new military justice code's overriding themes: 1. balancing military interests with individual interests and democratic principles, 2. providing an independent judiciary and defense counsel, and 3. taking contemporary human rights standards into account).

and civilian attorneys from an ever-expanding number of countries in the Americas.<sup>2</sup>

## II. THE LEGAL ENGAGEMENT PROGRAM

The genesis of the Air Force engagement program was the enactment of the 1987 amendments to the Latin American Cooperation (LATAM Coop) Act,<sup>3</sup> whereby funds for the conduct of exchanges, seminars, conferences, briefings, orientation visits, and other similar activities are made available to each of the military departments. The military departments, in turn, distribute the funds throughout each of the departments for funding the engagement program. Within the Air Force, the International Affairs office of the Secretary of the Air Force (SAF/IA) manages LATAM Coop Funds.

Funds are allocated for distribution within the Air Force on an annual basis, using LATAM Coop funding proposals from all sectors of the Air Force with an interest in engagement with Latin America.<sup>4</sup> After receiving all funding proposals, SAF/IA determines the amount to be distributed to each Air Force activity, including both the Office of The Judge Advocate General (HQ USAF/JA) and Twelfth Air Force. Twelfth Air Force, in turn, further subdivides the funds—assigning a portion to the Office of the Staff Judge Advocate (HQ 12AF/JA) for its legal engagement activities.

The funding proposals are based on input from several sources. First, the Military Advisory Group (MILGP) in each country forwards information concerning legal engagement needs in the country they service to judge advocates at appropriate headquarters—this based on experience and existing relationships. If the engagement is one that is not service-specific, the MILGP will contact the office of the Staff Judge Advocate (SJA) at SOUTHCOM for coordination of the event. If the engagement is service specific, the information will usually be provided by the applicable service representative of the MILGP to the appropriate JAG office in his or her service. For example, if the Chilean Air Force wishes to discuss space law, the Military Advisory Group's Air Force member will discuss the requirement with the Chilean Air Force, then call either HQ USAF/JAI or HQ 12AF/JA, who would in turn call the SJA for the appropriate command—in this case, Space Command. A subject matter expert (SME) would be identified, the desired information would be prepared, arrangements for the exchange would be made, and the exchange would take place. Follow-on engagements would be planned and

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<sup>2</sup> COJUMA began with 13 countries: Argentina, Bolivia, Chile, Columbia, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, Peru, Uruguay, Venezuela, and the United States.

<sup>3</sup> 10 U.S.C. §1050.

<sup>4</sup> Latin America has been defined to include the Caribbean, Central and South America, and Mexico, thereby making the area covered by the LATAM Coop program coextensive with the SOUTHCOM area of responsibility (AOR), with the exception of Mexico, which is within the SOUTHCOM area of interest (AOI), as opposed to its AOR.

conducted, as required, including reciprocal visits by Latin American lawyers to the US.

### **III. THE CONCEPT**

The concept of forming a military law committee consisting of attorneys from the various countries in the Americas was discussed as early as 1990, when Twelfth Air Force began to engage in subject matter expert exchanges (SMEEs) with Latin American military lawyers under the leadership of then-Colonel William A. Moorman.<sup>5</sup>

The idea for such a committee arose after the Twelfth Air Force international law team conducted several SMEEs and realized that, despite interest in a host of common topics, it would not be easy to reach a common understanding of the topics as the legal systems of the Latin American countries, even though similar to the US's in some respects, were substantially different from the US system and, in many respects, different from each other.

The value of a comparative law program in which all of the countries would be able to discuss, compare, and contrast their legal systems became increasingly apparent as more exchanges occurred. Topics which were of universal interest were military justice, status of forces agreements, peacekeeping, operations law, rules of engagement, law of armed conflict, democratization and civilian control of the military, and military assistance to civilian law enforcement.

### **IV. BACKGROUND**

During the years 1990 to 1993, Twelfth Air Force continued to conduct bilateral engagement activities with military lawyers from numerous Latin American countries. The engagements led to several key events in 1993.

In March of 1993 a reverse SMEE (one in which Latin American military lawyers visit the US) was conducted wherein the Ecuadorean Judge Advocate General and his Deputy visited the Staff Judge Advocate (SJA) offices at Howard AFB and Albrook AFS, Panama. They also observed an entire general court martial at Fort Clayton, Panama in which cocaine use had been charged and which, after a long trial with considerable expert testimony, resulted in a finding of not guilty.

These exchanges enabled Twelfth Air Force lawyers to engage in dialogue with lawyers from all of the bases in Panama concerning their perspective on legal engagement needs in Latin America. More importantly, Twelfth Air Force lawyers were able to meet with United States Southern

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<sup>5</sup> Then—Colonel Morman went on to become Major General Morman, the Staff Judge Advocate for the United States Air Force.

Command (SOUTHCOM) lawyers and discuss legal engagement needs in the SOUTHCOM area of responsibility (AOR).

The Commander of SOUTHCOM at the time, General George Joulwan, was personally interested in the roles of the commander and his legal advisor—particularly from an operations law standpoint, and asked the group of lawyers to plan an engagement activity on the topic. The lawyers met immediately, and their discussions were extremely productive, resulting in a very loose sketch for a general conference.

Work continued on making the conference a reality, and in September of 1993, the First Operations and Law Conference of the Americas was held at SOUTHCOM Headquarters in Quarry Heights, Panama. Either the Commander or the Chief of Staff of the Armed Forces of each Latin American country, accompanied by his chief legal advisor, attended the Conference.

Representatives from all US armed services also attended, including The Judge Advocate General and the Chiefs of Military Law, Civil Law, and International Law of the Air Force, as well as the SJA for Twelfth Air Force and his international law staff. Both Latin American and US military lawyers made presentations on the topics of civilian control of the military and the role of the military lawyer, particularly in military operations. Speakers also covered other important topics, including the increasing curtailment of jurisdiction of military courts and the trend toward placing military courts under the supervision of the civilian judicial branch of government, with appeals to civilian courts.

The Conference was a resounding success, with positive reports from all attendees. However, the need for a forum in which a comparative study of military law issues could be achieved by the various countries became even more obvious.

In December of 1993, the First Aeronautical Law Symposium of the System of Cooperation Among the American Air Forces (SICOFAA) was conducted at Patrick AFB, Florida. The Symposium was presided by then Brigadier General Andrew M. Egeland, who independently saw the importance of having a forum in which topics of interest to military lawyers could be studied from a comparative law perspective. The topics covered were Air Force-specific, so, in this respect, the composition of the Symposium and the topics discussed were different from the topics which are typically of interest to COJUMA. However, the seed had been planted for the creation of an inter-American legal committee that would serve as a forum for such comparative law studies.

From December of 1993 to September of 1995, US Air Force and Latin American military lawyers continued engagement activities, with issues relating to the creation of an inter-American legal committee becoming a predominant theme.

Attempts were made in 1993 and 1994 to create a permanent legal committee within SICOFAA that could serve as a forum for comparative law activities, but these were without success.

SICOFAA is the entity which serves as the vehicle for engagement and coordination of matters of interest to the commanders/chiefs of staff of all of the Air Forces in the western hemisphere. This entity is the executive agency for the Conference of Chiefs of American Air Forces (CONJEFAMER). CONJEFAMER prescribes the activities which will be engaged in by SICOFAA, as well as the creation of committees and other structural entities.

A formal proposal to create a permanent legal committee within SICOFAA to serve as a forum for treatment of issues of common interest to the American Air Forces was presented at the CONJEFAMER meeting of late 1993. The chiefs of the American Air Forces considered the proposal at their 1994 annual meeting and decided that a permanent legal committee should not be formed. Instead, they directed the members of a legal committee be identified which could address matters of interest to CONJEFAMER on an as-required basis.

The members of this legal committee were identified and, shortly thereafter, asked to resolve legal issues concerning the definition of an “illicit flight,” which was fundamental to the establishment of policies related to interception of civilian aircraft engaged in narco-trafficking activities. The legal committee was also asked to provide the legal expertise needed in the development of an aircraft accident investigation manual which would prescribe the manner in which an aircraft mishap involving aircraft from one country operating in another country would be investigated. Thorny issues of sovereignty, national security, and interface between the military and civilian authorities in the country in which the mishap occurred were examined at length, and, after much debate, study, and drafting, an inter-American aircraft mishap investigation manual was finalized and presented to the SICOFAA Committee on Flight Safety, which recommended it for approval. It was adopted by CONJEFAMER at its 1995 meeting.

## **V. CREATION OF COJUMA**

In September of 1995, military lawyers from Twelfth Air Force and eight Latin American countries met at Howard AFB, Panama as part of an ongoing SMEE program centered on military law matters. The participants in this SMEE expressed a strong interest in improving the military justice systems of the Americas and agreed to work as a group to conduct a comparative study of the military justice systems of the Americas, with the ultimate goal of preparing a document which would serve as a model code of military justice. The manner in which this might be accomplished, and even the definition of the desired result, were not clear. The members agreed to continue studying the matter individually, to review and assess their respective

military justice systems, and to summarize the provisions of their military law systems. Finally, the participants agreed to develop suggested changes to their military justice systems.

The rough idea was to familiarize all members with the basic provisions of each of the legal systems, in order to establish commonalities and differences. Eventually, recommended changes would be described, and finally, a model code of military justice would be developed which would incorporate the needs of the participating countries.

From 22 to 25 April 1996, military lawyers from ten Latin American countries and the US met at Homestead Air Reserve Base, Florida for the exclusive purpose of establishing the framework within which to study and prepare a draft of a Model Code of Military Justice for the Armed Forces of the Continent. The countries represented were Argentina, Bolivia, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, Peru, Uruguay and Venezuela, in addition to the United States. The result of this meeting was the Miami Declaration, which provided, in part, as follows below. The text cited is from the English translation of the Spanish version of the Declaration.

From 22 to 25 April 1996, at Miami, Florida, United States of America, American Military Justice representatives . . . Convened at Homestead Air Force Reserve Base to study and prepare a draft Model Code of Military Justice for the Armed Forces of the Continent.

In consideration of the presentations made and the evaluations of the conclusions of the meeting held in Panama (September 1995-Subject Matter Expert Exchange on Military Law) on the above-mentioned draft, and as a source of guidance for ever changing situations and interpretations, and after first hearing each of the aforementioned representatives, concur and declare:

- I. Manifest a desire in the study, analysis, and writing of a draft Model Code of Military Justice for America, which will serve as a legal standard for military rules on the subject.
- II. Adopt as its designation for the works to be done on this matter the name of THE AMERICAN MILITARY LEGAL COMMITTEE, which shall be known by the acronym "COJUMA."
- III. To establish as its objectives for this and future meetings:
  1. Define the purpose of this Model Code.
  2. Establish the rules and procedures for the work group – COJUMA:
    - a. Create support groups in each country, and



- b. Establish permanent contact among the members of the work groups or through the corresponding authority.
  3. Promote the participation of other countries of America and to communicate to the non-attending countries the information generated by the work groups.
  4. Identify and discuss the common elements of the different systems of Military Justice;
    - a. Create a library of American Military Codes, and
    - b. Heed the constitutional standards of each nation.
  5. Identify and discuss the elements to be included in its format.
  6. Draft a Model Code.
  7. Establish means of action for the consideration of the draft code.
- IV. Definition of Purpose: Create and keep current an organic, substantive and procedural Model Code to provide the nations with an instrument to standardize, unify, implement, and modernize Military Law precepts, in such a manner so as to advance the interaction and judicial certainty between Domestic and International Law.

The parties enacted detailed rules and procedures for the organization and appointment of work groups, recording and translation of proceedings and minutes of each conference, resolution of issues, scope of deliberations, voting, and scheduling of workshops and meetings. Additionally, they provided in detail for the manner in which the work groups would proceed to study and compare existing military justice systems, the manner in which they would proceed to develop a uniform code, and the proposed format for the uniform code.

## **VI. CONFERENCES AND WORKSHOPS**

On 12 November 1996 representatives (eleven from Latin America and six from the US) met in San Juan, Puerto Rico to convene the Second Conference of COJUMA (COJUMA II). The meeting was chaired by Colonel Charles A. Matthewson, Staff Judge Advocate, 12<sup>th</sup> Air Force. The objectives were described in the English translation of the minutes of COJUMA II:

In accordance with the objectives set forth in COJUMA I, item 5, it was determined that COJUMA II analysis would include “[i]dentify and discuss the elements to be included in its format,” to which effect the order of deliberation includes:

## **VII. OBJECTIVES**

**First:** That the representative of each country shall make a presentation on the organization of the Military Code of Justice currently in use in his country.

**Second:** Each representative shall identify within its code the various legal topics shown in the comparison table.

**Third:** The group will define the three (3) parts which constitute the Model Code: Organic, Substantive, and Procedural Books.

**Fourth:** The group will discuss and will reach a consensus as to the first step to take towards drafting a Model Code.

**Fifth:** The group will meet in different committees which will discuss and take notes of the discussions relating to the three parts that constitute the Model Code. (Each representative will identify the method by which his country of origin will continue the effort and will establish a suspense date to submit preliminary outlines of the Model Code).

**Sixth:** A summary of the work accomplished during the conference will be drafted in Spanish.

After full discussion, the Committee decided:

- a. The parts comprising the Model Code will include:
  1. A Preamble or Statement of Purpose,
  2. An Organic Book,
  3. A Substantive Book, and
  4. A Procedural Book.
- b. To facilitate the continuation of the discussions, the group was divided into three work groups, corresponding with each Book of the Code, in order to identify and include the fundamental chapters or titles of each component, which resulted in the following conclusions:
  1. Organic Book:
    - a. Concept: that which structures the military judicial system determining its organisms, duties, and attributions,
    - b. Glossary
    - c. Persons subject to the code
    - d. Determination of authorities
    - e. Institutions of the State
    - f. Jurisdiction, and
    - g. Competence.
  2. Substantive Book: Crimes and punishments: General dispositions, which describe the legal form and elements of the Military Criminal Law.
  3. Procedural Book:
    - a. Due process-procedural guarantees,
    - b. Types and phases-peace and war,
    - c. Application of the civil process,
    - d. Extradition-International Criminal Law,
    - e. Writs,

- f. Relationship with Civil Authority.
- 4. Regarding the steps to achieve this objective, it is established:
  - a. The designation of three (3) external work groups:
    - 1. No. 1: Argentina, Chile, Paraguay and Uruguay,
    - 2. No. 2: Bolivia, Colombia, Ecuador, Peru, and Venezuela, and
    - 3. No. 3: United States, El Salvador, Guatemala and Honduras.
- 5. Assign the work groups the following tasks:
  - a. No.1: To draft the Organic Book
  - b. No. 2: To draft the Substantive Book, and
  - c. To draft the Procedural Book.
- 6. Copy of these drafts will be sent to each of the participating countries.
  - a. The United States of America will coordinate with the other countries the time and place for the respective work group meetings.
  - b. The work group meetings will be open to any COJUMA member wishing to attend.

By agreement, the participants ratified the Declaration of Miami of April 1996, which is incorporated to the official records of COJUMA.

The members of COJUMA subsequently met from 23-24 June 1997 in San Juan, Puerto Rico as COJUMA Work Group I; 26-27 June 1997 in San Juan as COJUMA Work Group II; 29 September to 3 October 1997 at Davis-Monthan AFB, Arizona, as COJUMA Work Group III; and 10-13 February 1998 at Davis-Monthan AFB, Arizona as COJUMA Work Group IV in order to develop and complete the Model Code.

### **VIII. METHODS USED**

COJUMA participants immediately recognized that the task which they would undertake was daunting. The development of a Model Code required that all participants be familiar with the existing military justice codes of the participating countries, as well as all those of other countries. It also required a study of problems which had been encountered by the various countries under their codes and under differing circumstances. Finally, it required a knowledge of the desired direction in which the countries would want to orient their efforts.

Several pragmatic problems drove the issue of the direction in which the countries would want to orient their new military codes, which in turn would provide the basis for the orientation of the Model Code. Foremost amongst the list was the existence of substantially different military justice codes between members of a military coalition, particularly coalitions engaged in peacekeeping. Additionally, there was a need to create simpler, more efficient systems which would ensure that military justice was dispensed in a timely and effective manner. The entire concept of an inquisitorial, as opposed to an adversarial, system of justice was examined in order to identify areas of

the adversarial system that might be incorporated into existing inquisitorial systems.

Other major hurdles were differences between the US military justice system, which evolved from the British Articles of War and which relies on common-law and adversarial rules of practice and procedure and the Latin-American military justice systems, which were based on the colonial Spanish military justice code, which was in turn based on the Napoleonic Code tradition and relies on the inquisitorial system of law. Differences in the court structure, procedures, evidentiary rules, and substantive criminal provisions were also remarkable. Finally, the differences in sentencing and potential maximum sentences were enormous, with the death penalty being the most controversial.

Despite the fact that the Latin-American legal systems all had a common origin, they had diverged substantially from the original colonial Spanish military justice code. Some countries had amended their codes to incorporate German military justice concepts, structures, and procedures; others had incorporated modern Spanish military justice concepts; still others had incorporated U.S. concepts, but within the context of a civil code legal system.

These problems were masterfully addressed by the members. They decided to identify all commonalities amongst the military justice codes, and to then build an exceptions table which would describe the provisions for particular subject areas in which substantial differences existed. Additionally, they decided early not to delve into the area of sentencing, other than to define the term and to discuss its judicial effect.

## **IX. ORGANIZATION OF THE CODE**

After agreeing upon the approach to follow in developing the substantive provisions of the Model Code, the manner in which it would be organized and presented was discussed. A review of the substantive articles contained in the Model Code reveals its strong civil code orientation. This is so because the vast majority of the countries participating in COJUMA are civil code countries. However, while not obvious from their titles, many of the procedural and evidentiary articles are more akin to US provisions, since it was in the procedural and evidentiary areas that modernization was felt to be necessary. The written procedures used for all phases of the inquisitorial system of military justice are simply too burdensome and time-consuming, resulting in unbelievable delays and bureaucratic complexity. The Model Code addressed these by essentially constructing a US procedural and evidentiary system to be used in conjunction with historically Spanish and Latin American definitions of infractions, many of which do not exist in our military legal system.

## **X. SUMMARY**

The Model Code is a truly unique amalgam of Latin American substantive, structural, and procedural provisions utilized in the context of a civil code legal system, and a US military law system with roots in the common law system and the British Articles of War. The best of both systems was taken and incorporated into the Model Code. Interestingly, the substantive provisions from the Latin American legal systems are understandable and work well within a U.S.-style procedural system. Each system is enriched through the incorporation of provisions from the other system, and a common understanding and uniform military justice system which facilitates joint and coalition operations was created.

## **APPENDIX**

### **MODEL CODE OF MILITARY JUSTICE**

#### **BOOK ONE** *ORGANIC LAW*

#### **TITLE I** **MILITARY COURTS**

#### **CHAPTER I** General Provisions

Article 1. Jurisdictional function.  
Article 2. Independence.  
Article 3. Civilian attorneys.

#### **CHAPTER II** Jurisdiction

Article 4. Scope of application.  
Article 5. Primary jurisdiction.  
Article 6. Determination of conflict of jurisdiction.

#### **CHAPTER III** Organization

Article 7. Composition and guarantees.  
Article 8. Composition of the courts.  
Article 9. Support agencies.  
Article 10. Legal staff-performance of duties.

#### **CHAPTER IV** Powers

Article 11. Essential Functions.

CHAPTER V  
Military Courts in Time of War

Article 12. Composition.

BOOK TWO

*MILITARY CRIMINAL LAW*

TITLE I  
GENERAL PROVISIONS

CHAPTER I  
Governing Principles

- Article 13. Legality.
- Article 14. Punishable Acts.
- Article 15. Typification.
- Article 16. Unlawfulness.
- Article 17. Favorable application of law.
- Article 18. Equality.
- Article 19. Res judicata.
- Article 20. Knowledge of the law.
- Article 21. Publicity.
- Article 22. Technical defense.
- Article 23. Presumption of innocence.
- Article 24. Recognition of human dignity.
- Article 25. *In dubio pro re.*
- Article 26. Impartiality.

CHAPTER II.  
Fundamental Principles and Rules.

- Article 27. Form and Time of the Punishable Act.
- Article 28. Participation.
- Article 29. Absence of responsibility.
- Article 30. Lack of responsibility.
- Article 31. Principles of culpability.
- Article 32. Attempts.
- Article 33. Punishments.
- Article 34. Criteria for Imposing punishment.
- Article 35. Mitigating factors.
- Article 36. Aggravating factors.
- Article 37. Conditional punishment.
- Article 38. Conditional liberty.
- Article 39. Extinction of the criminal action and punishment.

Article 40. Forfeiture.

TITLE II  
CRIMES

CHAPTER I

Crimes Against the Existence and Security of the State

Article 41. Espionage.

Article 42. Treason.

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# THE AMERICAN MILITARY JUSTICE SYSTEM IN THE NEW MILLENNIUM

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## I. INTRODUCTION

“Nothing is more harmful to the service than the neglect of discipline; for that discipline, more than numbers, gives one army superiority over another.”<sup>1</sup> As commander of the Continental Army, George Washington recognized that no military unit could function without an effective means of preserving discipline. These words uttered in 1759 ring no less true today. Commanders must have the ability to ensure that service members perform their duties and follow orders, even in situations involving life and death. The American military justice system, formulated over centuries of experience, meets this need.

Most people in the United States and abroad have glimpsed the American military justice process through fictionalized television programs such as “JAG,” or through movies such as “A Few Good Men” or “The Caine Mutiny.” However fleeting these images have been, they have created a perception of what military justice is in the United States. While these productions may be entertaining drama, they generally do not accurately portray the workings of the process, purpose, or importance of the military justice system and how it is inextricably linked to the national security of the United States.

We are in a time when some outside the American military are calling for fundamental changes to our system. The academic debate that has coincided with the 50<sup>th</sup> Anniversary of the Uniform Code of Military Justice<sup>2</sup> has been healthy and valuable. No legal system can or should operate in a vacuum, disregarding the changing norms of society. But make no mistake, the American military justice system is not static or outdated; it is dynamic and evolving. It incorporates the fundamental protections offered to all United

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<sup>1</sup> General George Washington, Letter of Instructions to the Captains of the Virginia Regiments (29 July 1759).

<sup>2</sup> See Act of March 5, 1950, ch. 169, 81<sup>st</sup> Cong., 2d Sess.

States citizens and, in many ways, exceeds them. To appreciate the merits and importance of the military justice system fully, it is essential to understand the purpose, development, and procedures behind this specialized form of legal jurisprudence. This article illustrates the necessity and merits of the United States military justice system. It is intended to foster a better understanding and appreciation for the system by all who read it.

## II. WHAT IS THE MILITARY JUSTICE SYSTEM?

The preamble to the Manual for Courts-Martial (MCM) declares that the purpose of military law “is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”<sup>3</sup> The maintenance of good order and discipline is an absolutely essential *function of command*. In fact, in the American military, a commander has a duty to ensure that good order and discipline is maintained throughout his or her unit.<sup>4</sup> The military justice system is an important means to discharge this duty.

The military justice system operates separately from our federal and state criminal systems.<sup>5</sup> Military law handles traditional crimes such as assault and larceny, as well as offenses unique to the military such as failure to obey orders and absence without leave. With worldwide application, the military justice system applies to all offenses committed by military members. Its central purpose is to provide commanders with the legal authority to enforce good order and discipline within their units.

The modern military justice system is based on the United States Constitution and is implemented through a combination of federal law and executive orders. The Constitution gives Congress the authority to “provide for the common Defence,” “to raise and support Armies,” and “to make rules for the Government and Regulation of the land and naval Forces.”<sup>6</sup> At the same time, the Constitution designates the President as Commander in Chief of the armed forces.<sup>7</sup> In this constitutional framework, the modern military justice system was established with a foundation resting on four authorities: the Uniform Code of Military Justice (UCMJ);<sup>8</sup> the Manual for Courts-Martial

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<sup>3</sup> MCM, para. 3, at I-1.

<sup>4</sup> These unique responsibilities include overseeing the health, safety, welfare, morale, and efficiency of those under his command. *United States v. Harris*, 5 M.J. 44, 59 (CMA 1978).

<sup>5</sup> The United States has three major criminal justice systems; the individual state system, the federal system, and the military justice system.

<sup>6</sup> U.S. Const. art. I, § 8. The Supreme Court has afforded great “deference to the determination of Congress made under its authority to regulate the land and naval forces.” *Weiss v. United States*, 510 U.S. 163, 177 (1994).

<sup>7</sup> U.S. Const. art. II, § 2. Historically, two civilian authorities govern the military: Congress and the President.

<sup>8</sup> Codified in title 10 USC §§ 801 - 941.

(MCM);<sup>9</sup> a Presidential Executive Order that includes the rules for trial by court-martial; and, the body of case law developed from the courts that review military justice cases: the service Courts of Criminal Appeals, the Court of Appeals for the Armed Forces, and the United States Supreme Court.<sup>10</sup>

#### A. *Creation of the Uniform Code of Military Justice*<sup>11</sup>

On May 5, 1950, President Truman signed into law the Uniform Code of Military Justice, a remarkable piece of legislation that dramatically changed the scope and practice of military law. Prior to the enactment of the UCMJ, military justice in the United States had remained virtually unchanged since the time of the Revolutionary War<sup>12</sup> when the Articles of War governed the Army disciplinary system while the Navy followed the Articles of Government for the Navy.<sup>13</sup>

World War II set the stage for the creation of today's military justice system. The American public, in the 1940's, was exposed as never before to the military justice system. During World War II, more than 16 million men and women served in the armed forces. There were more than two million courts-martial, including 80 thousand general courts-martial.<sup>14</sup>

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<sup>9</sup> The 2000 MCM incorporates all Executive Orders through 6 Oct 1999 (EOs 12473, 12484, 12550, 12586, 12708, 12767, 12888, 12936, 12960, 13086, and 13140). Although not currently drafted into the 2000 edition of the MCM, Executive Order 13262 was signed on 11 April 2002 and is applicable to current court practice. The MCM includes the Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the punitive articles, and nonjudicial punishment procedure (hereinafter NJP).

<sup>10</sup> 10 U.S.C. §§ 866 - 869 (1998) authorizes review of military courts-martial by appellate courts.

<sup>11</sup> For a more detailed history of the American military justice system, see John Lurie, *Arming Military Justice, The Origins of the United States Court of Military Appeals 1775-1950*, 130-149 (1992); see also William T. Generous, Jr., *Swords and Scales—Development of the Uniform Code of Military Justice* (1973).

<sup>12</sup> America's first military legal code was enacted in June 1775. See William Winthrop, *Military Law and Precedents* 12 (2d ed. 1920). Congress enacted a set of legal guidelines for the behavior of the forces, following an English practice in effect since 1689 when Parliament wrested from the Crown the power to legislate for the military and enacted the first Mutiny Act. *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975* (Reprinted 1993).

<sup>13</sup> See generally Edward M. Byrne, *Military Law 2-6* (3d ed. 1981).

<sup>14</sup> Court-martial statistics for this period may be misleading. Commanders considered courts-martial appropriate for all levels of misconduct. It was not uncommon for active duty members to be court-martialed for minor disciplinary infractions several times and then returned to the front-line of combat. See Capt John T. Willis, *The United States Court of Military Appeals, Its Origin, Operation, and Future*, 55 Mil. L. Rev. 39 (1972). The number of courts-martial tried during World War II amounted to one third of all criminal cases tried in the nation during the same period. See William T. Generous, Jr., *Swords and Scales—The Development of the Uniform Code of Military Justice* (1973) citing Judge Advocate General, Congressional Floor Debates on the Uniform Code of Military Justice (1950).

Many were concerned with the almost summary disposition of cases, the lack of rights afforded to an accused, and the perceived unlawful command control over the system. The system appeared arbitrary, with too few protections for the soldier and too much power for the commander. Rear Admiral Robert J. White described the ground swell of criticism against military justice thusly: "The emotions suppressed during the long, tense period of global warfare were released by peace, and erupted into a tornado-like explosion of violent feelings, abusive criticism of the military, and aggressive pressures on Congress for fundamental reforms in the court-martial system."<sup>15</sup> Congressional leaders sought to create a new disciplinary system that provided greater protections for service members. Ohio Congressman Charles H. Elston, Chairman of the House Armed Services Committee, expressed hope that "we will be able to write some legislation applicable to both the Army and the Navy, so that the entire system within those branches may be revised."<sup>16</sup>

On May 14, 1948, Secretary of Defense James Forrestal announced the creation of a committee, chaired by Harvard Law Professor Edmund Morgan, to draft the first American statute of criminal law and procedure applicable to all military personnel. The result was the Uniform Code of Military Justice, otherwise known as the UCMJ, which President Truman signed into law on May 5, 1950.<sup>17</sup> The Code became effective on May 31, 1951, in the midst of the Korean War.

The UCMJ marked a distinct evolution in philosophy. Its drafters recognized that justice and fairness were an integral component of the disciplinary process.<sup>18</sup> Under the UCMJ, the commander retained considerable authority over his troops, but that authority was balanced with a new system of military appellate courts and expanded rights for service members. A new federal court, the Court of Military Appeals, was created with civilian judges responsible for appellate review of the more serious

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<sup>15</sup> Rear Admiral Robert J. White, *The Background and the Problem*, ST JOHN'S L. REV. 35 (1961). See generally John Lurie, *Arming Military Justice, The Origins of the United States Court of Military Appeals 1775-1950*, 128-149 (1992).

<sup>16</sup> The Army Lawyer, *supra* note 12, at 169. See generally Index and Legislative History to the Uniform Code of Military Justice, 3 vols (1985). Indexed and Compiled by the Army Court of Military Review.

<sup>17</sup> Many proponents contributed to the creation and development of the Uniform Code of Military Justice (hereinafter UCMJ). Some of these noteworthy individuals and groups include (but are not limited to) Arthur Vanderbilt, Dean of New York University, chairman of the Vanderbilt Commission; Arthur J. Keefe, professor of law at Cornell University and Chairman of the Keefe Committee; Felix Larkin, member of the Keefe Committee; the Association of the Bar of New York (1948), *Report on Pending Legislation for the Revision of the Army Court-Martial System* (February 1948); Senator Charles Elston of Ohio, proponent of the *Elston Act* (June 1948); and Senator James Kern of Missouri.

<sup>18</sup> "We were convinced that a Code of Military Justice cannot ignore the military circumstances in which it must operate but we were equally determined that it must be designated to administer justice." *Hearings on H.R. 2498 Before a Subcomm. Of the House Armed Services Comm.*, 81st Cong., 1st Sess., at 606 (1949) (statement of Professor Edmund G. Morgan).

military justice cases.<sup>19</sup> The UCMJ provided an expanded role for lawyers, called judge advocates, gave increased responsibilities to the staff judge advocate to provide legal advice to commanders on military justice matters, and created the position of law officer, the precursor of the military judge, to make judicial rulings in all general courts-martial. The UCMJ was the most far-reaching change in military law in American history, providing for the first time one criminal code applicable to all the services and a criminal justice system containing safeguards for the soldier not yet enjoyed by civilians.<sup>20</sup>

### *B. Why Do We Have a Separate System?*

To appreciate the importance of the military justice system, it is necessary to first understand why a separate system of justice is needed. Judge Robinson O. Everett, former Chief Judge of the Court of Military Appeals, described the importance of having a separate justice system for the armed forces, this way:

[M]ilitary operations in modern war demand split second decisions - decisions that cannot be arrived at through the procedure of a debating society. In many military situations someone individual must be in a position to make choices for a group and have his decision enforced. For this reason, the armed services have a system of rank and of command which is designed clearly to place one person in charge when a group action must be decided upon. Of course, for American civilians, and those of many other lands for that matter, it is difficult to acquire habits of instantaneous obedience to another person's decisions. Military justice provides a stimulus to cultivate such habits by posing the threat that disobedience of commands will be penalized.<sup>21</sup>

The United States Supreme Court has recognized that the military is a specialized society that has developed laws and traditions of its own.<sup>22</sup> The difference between military and civilian cultures lies with the recognition that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."<sup>23</sup> The Court observed, "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No

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<sup>19</sup> Lurie, *supra* note 15.

<sup>20</sup> Brigadier General (Retired) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1 (2000).

<sup>21</sup> Robinson O. Everett, *Military Justice in the Armed Forces of the United States* (The Telegraph Press 1956).

<sup>22</sup> *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 743 (1974).

<sup>23</sup> *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."<sup>24</sup> Similarly, the Court concluded, "[T]he military constitutes a specialized community governed by a separate discipline from that of the civilian."<sup>25</sup>

Civilian law does not recognize uniquely military offenses, such as desertion, absence without leave, disobedience of orders, disrespect, or dereliction of duty.<sup>26</sup> These types of offenses exist to ensure military members follow orders and accomplish military objectives.<sup>27</sup> If a commander cannot rely on his subordinates to obey and execute directives and, more importantly, if the members cannot rely absolutely on each other to follow orders, the effectiveness of the fighting force will be undermined and, ultimately, our national interests will be imperiled. No civilian parallel may be drawn to explain the need for enforcing discipline. Civilian employers cannot legally *compel* their subordinates to come to work on time, much less induce them to perform a task resulting in substantial likelihood of death. Discipline for the sake of good order is not an objective of our civilian society, but is a necessary requirement of our military justice system.<sup>28</sup>

The Uniform Code of Military Justice provides a very effective means of not only handling military offenses, but also ensuring the process is widely available. This is advantageous in that United States military members are stationed all over the world.<sup>29</sup> The civilian justice system is not generally designed to be used outside the geographical boundaries of the United States.<sup>30</sup> The military justice system, on the other hand, goes wherever the troops go—to

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<sup>24</sup> *In re Grimley*, 137 U.S. 147, 153 (1890).

<sup>25</sup> *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

<sup>26</sup> R.C.M. 201(d)(1). Courts-Martial have exclusive jurisdiction of purely military offenses.

<sup>27</sup> *Solorio v. United States*, 483 U.S. 435 (1987) (That civil courts are "ill equipped to establish policies regarding matters of military concern is substantiated by the confusion evidenced in military court decisions attempting to apply the service connection approach."); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion) ("The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.")

<sup>28</sup> Although the civilian criminal system was not established to effectively deal with military members committing uniquely military offenses, military members may be tried by the civilian criminal system for the commission of traditional offenses. R.C.M. 201(d)(2). An act or omission which violates both the UCMJ and local criminal law, foreign or domestic, may be tried by court-martial, or by a proper civilian tribunal, foreign or domestic.

<sup>29</sup> R.C.M. 202; *see also* Art. 2, Persons subject to the code, UCMJ. The power granted Congress "To make Rules" to regulate "the land and naval Forces" is to be construed as restricting court-martial jurisdiction to persons who have a relationship with the armed forces. Quarles, *supra* note 23, at 15.

<sup>30</sup> As Judge Everett asks, "how would US civilian courts be able to operate overseas? How would a jury or grand jury be obtained? What civilian judges would be chosen to mete out justice on the frontlines in Korea, where the witnesses might be stationed? If no civilian jury were provided, would accused persons be willing to entrust their fates to one man, even though he was a civilian?" *Supra* note 21, at 4.



provide uniform treatment regardless of locale or circumstances.<sup>31</sup> While military members are frequently subjected to the criminal jurisdiction of host nations, most cases are tried in accordance with international agreements and treaties reflecting the American system's application. If the military justice system did not exist, our military members would have their cases tried in foreign courts and be imprisoned in foreign jails.<sup>32</sup>

Finally, the military justice system is designed to fairly adjudicate criminal cases *efficiently*.<sup>33</sup> This is particularly important in a deployed or contingency situation when a commander must expeditiously deal with misconduct to prevent degradation of the unit's effectiveness and cohesion. Delaying disciplinary action will invariably prejudice good order. As Judge Everett cogently points out, "justice delayed is justice defeated. ...In military life, where to maintain discipline, the unpleasant consequences of offenses must be quick, certain and vivid--not something vague in the remote future."<sup>34</sup>

### C. *The Military Justice System*

To some, "military justice is to justice as military music is to music!"<sup>35</sup> Detractors contend that our system is antiquated and in need of dramatic change.<sup>36</sup> The reality is that over the past 50 years, the military justice system has evolved into an even more fair and effective system. The UCMJ represents a masterful piece of legislation that balances the need for good order and discipline with the constitutional rights afforded to all United States

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<sup>31</sup> *Solorio v. United States*, 483 U.S. 435, 439 (1987). The Supreme Court rejected the "service-connection" requirement before jurisdiction could attach for court-martial purposes. The practical effect of the holding is that military members are subject to the UCMJ and may be tried for violations whether the crime occurred on or off duty, on or off the military installation.

<sup>32</sup> For example, the North Atlantic Treaty Organization Status of Forces Agreement delineates criminal jurisdiction between the sending states and receiving states. The German government has agreed to a general waiver of their jurisdiction due to the United States military's proven ability to handle disciplinary problems through the UCMJ. North Atlantic Treaty Organization, Status of Forces Agreement, Supplementary Agreement, Art. 19, para. 1. effective 1 Jul 63 (TIAS 5351).

<sup>33</sup> In 1999, the federal civilian criminal system averaged over nine months (over 270 days) from the time charges were filed to the time the case was concluded. BUREAU OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS (1999). In 1999, the Air Force military justice system averaged 126.6 days for general courts-martial from referral of charges until case completion and 151.7 days from referral until final action by the convening authority. *Statistics* maintained by the Air Force Military Justice Division (1999) (on file).

<sup>34</sup> Everett, *supra* note 21, at 4.

<sup>35</sup> Robert Sherril, *Military Justice is to Justice as Military Music is to Music* (Harper & Row 1970).

<sup>36</sup> Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 SW. U. L. REV 481 (1999). The authors argue that court-martial jurisdiction should be limited to service members serving overseas and during wartime.

citizens. Commanders are the foundation of the American military - people who make tough decisions and ensure success. Discipline begins and ends with commander involvement. The following discussion explains the authority and responsibilities commanders and others exercise in the military justice system.

#### *D. A Commander's Role*

Central to the military justice system is a commander's authority and discretion to control discipline within his or her unit.<sup>37</sup> A commander's wisdom and unshakable resolution ensures standards expected of every military member are met by all. Marshal Maurice de Saxe, one of the greatest French generals of the 18<sup>th</sup> century, stated, "After the organization of troops, military discipline is the first matter that presents itself. It is the soul of armies. If it is not established with wisdom and maintained with unshakable resolution you will have no soldiers."<sup>38</sup> Commanders at all levels are involved with every part of the military justice system to include: directing preliminary investigations into misconduct, evaluating the results of the investigation, disposing of cases, preferral and referral of charges, selecting panel members, and taking final action after the court-martial is concluded.

#### *E. Disciplinary Tools*

Although courts-martial are the most well known disciplinary option in the military justice system, commanders have a wide range of options to handle disciplinary problems without resorting to trial. A commander may choose to impose administrative sanctions or nonjudicial punishment. In deciding which disciplinary tool to employ, a commander considers more than just the nature of the misconduct; he also evaluates the suspect's record and weighs it against the impact of the misconduct to good order and discipline. The commander is trusted to use his best judgment so that the "punishment fits the crime."<sup>39</sup>

#### *I. Administrative Actions*

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<sup>37</sup> The commander serves as the keystone for the operation of the military criminal process. See David A. Schlueter, *Military Criminal Justice Practice and Procedure* (5<sup>th</sup> ed. 2000).

<sup>38</sup> Marshal Maurice de Saxe (1696-1750), *My Reveries Upon the Art of War* (published posthumously in 1757).

<sup>39</sup> The Supreme Court has held that great deference must be given to commanders in exercising their professional judgment, even when Constitutional rights are infringed. *Goldman v. Weinberger*, 475 US 503, 507 (1986).

The vast majority of disciplinary problems are minor in nature and do not require a more formal action. Commanders have several options to quickly correct these acts of minor misconduct. Short of punitive action, an Air Force commander may choose from a wide range of responses including, by order of seriousness, counselings, admonishments, and reprimands (each may be oral or written).<sup>40</sup> Those actions can be taken separately or in conjunction with, or may produce, collateral administrative consequences such as discharge from the service, demotion (enlisted members only), delay in promotion or removal from a promotion list, cancellation of an assignment, or establishment of an unfavorable information file. This assortment of options allows commanders to swiftly and efficiently deal with disciplinary infractions.

## 2. *Nonjudicial Punishment*

To give commanders more flexibility in handling minor offenses, Congress has vested commanders with the authority to impose nonjudicial punishment (NJP) under Article 15, UCMJ.<sup>41</sup> NJP is commonly referred to as an “Article 15” (or “mast” in the Navy and “office hours” in the Marine Corps). Nonjudicial punishment serves as a middle ground in the military justice process. It provides sanctions less onerous than a court-martial, yet more severe than nonpunitive measures.<sup>42</sup> By definition, an Article 15 is not judicial—it is not a trial and does not result in a federal conviction.<sup>43</sup> In fact, acceptance of the NJP is not even an admission of guilt.<sup>44</sup> Even so, a member who is offered an Article 15 has the right to consult counsel prior to accepting the nonjudicial punishment.<sup>45</sup> The military member may present evidence of his innocence or mitigating facts surrounding the alleged misconduct. After considering the matters presented by the accused, the commander will

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<sup>40</sup> Air Force Instruction (AFI) 36-2907, Chapter 3, Administrative Counselings, Admonitions, and Reprimands (1 May 1997).

<sup>41</sup> Article 15 provides a means whereby military commanders may impose nonjudicial punishment for minor infractions of discipline. Its use permits the services to reduce substantially the number of courts-martial for minor offenses, which result in stigmatizing and impairing the efficiency and morale of the person concerned. See generally S. Rep. No. 1911, 87<sup>th</sup> Cong., 2d Sess., U.S. Code Cong. & Ad. News 2379, 2380-82 (1962).

<sup>42</sup> See David A. Schlueter, *Military Criminal Justice Practice and Procedure* 114 (5<sup>th</sup> ed. 2000).

<sup>43</sup> “Since the punishment is nonjudicial, it is not considered a conviction of a crime and in this sense has no connection with the military court-martial system.” S. Rep. No. 1911, 87<sup>th</sup> Cong., 2nd Sess. 2, reprinted in 1962 U.S. Code Cong. & Admin. News 2379, 2380.

<sup>44</sup> Air Force Instruction (AFI) 51-202, Nonjudicial Punishment, para. 4.9.

<sup>45</sup> Air Force policy is to provide legal counsel to an individual receiving nonjudicial punishment. *Supra* at 58, para. 4.7. The other services have different policies as to when legal counsel is authorized.

determine whether the member committed the offense. If the commander makes that determination, he then imposes an appropriate punishment.<sup>46</sup>

NJP is an indispensable tool used to maintain good order and discipline while also promoting positive behavior changes in the member without the stigma of a court-martial conviction.<sup>47</sup> Punishments may include reduction in rank for enlisted members, forfeiture of pay, restriction to base, extra duties, for enlisted members correctional custody, and reprimand. While NJP is a powerful means for a commander to respond to minor offenses, the commander's authority is not unlimited.<sup>48</sup> Under specific circumstances,<sup>49</sup> the service member has the right to refuse the Article 15 and demand to be tried by a court-martial to have "their day in court."<sup>50</sup> Clearly, this flexibility allows a commander to tailor a disciplinary response based on the seriousness of the misconduct and its impact on good order. The service member benefits because the commander can deal with small problems quickly without having to resort to the sanctions that may result from a court-martial.

### III. FEATURES OF THE SYSTEM

#### A. *Pretrial Investigations, Pretrial Confinement & Preferral of Charges*

##### 1. *Pretrial Investigations*

After receiving information that a member may have engaged in misconduct, the service member's commander will ensure a preliminary inquiry is completed. Exculpatory evidence as well as inculpatory evidence is sought.<sup>51</sup> In more serious cases, the commander may seek the assistance of Security Forces or an other investigative office—for the Air Force, the Air Force Office of Special Investigations (AFOSI). Once an investigation is completed, the immediate commander will receive the report and decide upon an appropriate course of action.

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<sup>46</sup> The range of punishment is limited by both the commander's and service member's rank. For example, a captain may only impose forfeitures of not more than seven days pay, whereas a lieutenant colonel may take forfeitures of 30 days. This ensures that more extensive punishment is only imposed by more experienced officers. *See generally* Part V, MCM, for authorized punishments.

<sup>47</sup> MCM, Part V, para 1(c).

<sup>48</sup> MCM, Part V, para 5b, Authorized maximum punishments.

<sup>49</sup> MCM, Part V, para 3, Right to demand trial.

<sup>50</sup> Art. 15(a), UCMJ. A service member has the right to decline nonjudicial punishment and demand trial by court-martial unless the individual is attached to or embarked upon a vessel.

<sup>51</sup> Exculpatory evidence tends to establish a criminal defendant's innocence while inculpatory evidence tends to show one's involvement in a crime. *See* Black's Law Dictionary 577-8 (7<sup>th</sup> ed. 1999).

## 2. Pretrial Confinement

A commander is concerned not only with the well being of the member suspected of misconduct, but with overall community safety. If a commander determines that a service member suspected of a crime is a flight risk or may commit further misconduct, the commander may limit the accused's freedom before trial. Conditions on liberty,<sup>52</sup> restriction in lieu of arrest,<sup>53</sup> and pretrial confinement<sup>54</sup> are among these options. Commanders must make a careful assessment to determine whether some form of restraint short of confinement is more appropriate than confinement (e.g., restriction to the base).<sup>55</sup>

If a commander places an individual into pretrial confinement, the accused's rights are protected through an extensive review process.<sup>56</sup> A pretrial confinement reviewing officer will determine whether sufficient grounds exist to continue confinement.<sup>57</sup> The accused is represented by counsel and may argue that confinement is not warranted.<sup>58</sup> The reviewing officer is completely independent and his or her determination<sup>59</sup> to release a confinee generally will be binding upon the commander.<sup>60</sup> Once confinement is ordered, it may be terminated only by the accused's commander, the detailed military judge, or an individual officially charged with reviewing the

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<sup>52</sup> R.C.M. 304 (a)(1). Orders directing a person to do or refrain from doing specified acts.

<sup>53</sup> R.C.M. 304(a)(2). Moral restraint of a person by oral or written orders directing the person to remain within specified limits. The person can usually perform full military duties. R.C.M. 304(a)(3). Arrest in military practice is a form of moral, as opposed to physical restraint. An individual under arrest may be required to perform full military duties but may be required to take part in routine duties. This form of restraint is generally more confining than restriction.

<sup>54</sup> R.C.M. 304(a)(4). Physical restraint imposed by order of competent authority.

<sup>55</sup> R.C.M. 304(h)(2)(B)(iv) requires the commander to direct a prisoner's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that less severe forms of restraint are inadequate.

<sup>56</sup> R.C.M. 304 and R.C.M. 305 detail the extensive procedural requirements necessary to confine a service member prior to trial. A probable cause determination must be made within 48 hours after imposition of confinement. Within 72 hours, the commander must prepare a written memorandum stating the reasons for continued confinement. Pretrial confinement is subject to judicial review once the charges have been referred to trial. *See County of McLaughlin v. Riverside*, 111 S. Ct. 1661, (1991).

<sup>57</sup> R.C.M. 305(i)(2). No later than 7 days after confinement begins, an independent review must be conducted.

<sup>58</sup> R.C.M. 305(f). "...military counsel shall be provided to the prisoner."

<sup>59</sup> R.C.M. 305(h)(2)(B). Any person subject to trial by court-martial may be confined prior to trial if there is both probable cause and necessity. Probable cause to order pretrial confinement exists when there is a reasonable belief that an offense triable by court-martial has been committed, the person confined committed it, and confinement is required by the circumstances.

<sup>60</sup> *Courtney v. Williams*, 1 M.J. 267, 271 (C.M.A. 1976). "We believe, then, that a neutral and detached magistrate must decide more than the probable cause question. A magistrate must decide if a person could be detained and if he should be detained. The consequences of detention are too important to require less."

commander's decision to impose the confinement.<sup>61</sup> Additionally, failure to properly conduct a pretrial confinement hearing will entitle the accused to receive credit against any court-martial sentence that is approved.<sup>62</sup>

### 3. *Preferral of Charges*

As stated above, commanders have a number of disciplinary tools available to them based upon the nature of the particular circumstances. The Manual for Courts-Martial requires resolution of the case at the lowest disciplinary level consistent with the seriousness of the offense.<sup>63</sup> If the accused's immediate commander believes action by court-martial is warranted, the next step is preferring charges against the military member.<sup>64</sup> The commander has broad discretion in deciding what charges to prefer. He may prefer both minor and major offenses together. He should prefer all known charges at the same time.<sup>65</sup> A commander acts as the *accuser* when preferring charges,<sup>66</sup> although anyone subject to the UCMJ may serve as an accuser.<sup>67</sup> The accuser signs under oath and must have personal knowledge of or have investigated the matters set forth in the charges.<sup>68</sup>

#### *B. Convening Authorities*

The authority to convene courts-martial is incident to command at certain designated command levels. After preferral of charges, the evidence is forwarded to a commander authorized to convene courts-martial. Convening authorities are senior commanders, usually colonels or general officers within the military establishment. To be a convening authority, commanders must have demonstrated moral character, intelligence, military bearing, and successful management skills. Most have served for years, dedicating their

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<sup>61</sup> R.C.M. 305(g).

<sup>62</sup> R.C.M. 305(k). Such credit shall be computed at the rate of one day of credit for each day of confinement. The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. See *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984) and *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985).

<sup>63</sup> R.C.M. 306(b).

<sup>64</sup> Art. 30, UCMJ. See also R.C.M. 307(a). Common Air Force practice is for the immediate commander to notify the member of the charges at this stage of the proceedings.

<sup>65</sup> R.C.M. 307(c)(4).

<sup>66</sup> Art 1(9), UCMJ; Appendix 2 (Glossary). Persons serving as accusers are thereafter precluded from acting in a variety of roles; i.e., convening authority, pretrial investigating officer, trial counsel, defense counsel, interpreter, reporter, escort, bailiff, clerk, or orderly. See also R.C.M. 405(d)(1).

<sup>67</sup> The accuser is any person with personal knowledge of the charges who believes they are true in fact. *Id.*

<sup>68</sup> R.C.M. 307(b)(1); R.C.M. 307(b)(2).

lives to a military career. Their presence ensures the system works fairly and efficiently.

After reviewing the charges and evidence, the convening authority has a number of options. These options include: dismissing the charges, referring the charges to a court-martial, returning the charges to the immediate commander for a lesser disposition, forwarding the charges with his recommendations to a higher convening authority, or directing that further investigation take place.<sup>69</sup> The convening authority's military justice responsibility cannot be delegated to any other officer.<sup>70</sup>

Referring charges to court-martial is a straightforward process. Following referral of charges, the convening authority appoints the court members and refers the case to them for adjudication.<sup>71</sup> Court members are selected by their age, education, training, experience, length of service, and judicial temperament.<sup>72</sup> They must be independent and unbiased. Even though the convening authority convenes the court-martial, the law prohibits him from attempting to improperly influence or affect the outcome.<sup>73</sup>

To protect the integrity of the system, military judges are also prohibited from certain actions. To combat the danger of unlawful command influence permeating the court-martial, the Court of Appeals for the Armed Forces has made it clear that even the possibility of unlawful influence will constitute grounds for overturning a conviction.<sup>74</sup> The court acknowledged

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<sup>69</sup> See generally R.C.M. 403.

<sup>70</sup> R.C.M. 504(b)(4).

<sup>71</sup> Art. 25(d)(2), UCMJ.

<sup>72</sup> "The Uniform Code of Military Justice Art. 25(d)(2) states that the members should be selected on a "best qualified" basis, examining age, education, training, experience, length of service, and judicial temperament. However, once the defense comes forward and shows an improper jury selection, the burden is upon the government to demonstrate that no impropriety occurred." United States v. Roland, 50 M.J. 66, 69 (CAAF 1999).

<sup>73</sup> Art. 37(a), UCMJ. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any military tribunal or any member thereof.

<sup>74</sup> United States v. Osburn, 33 M.J. 810, 812 (AFCMR 1991). As we noted in our earlier decision, unlawful command influence can be either actual or apparent, United States v. Johnson, 14 U.S.C.M.A. 548, 34 C.M.R. 328 (1964), and in either form it is "the mortal enemy of military justice." United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986), cert. denied, 479 U.S. 1085, (1987); United States v. Biagase, 50 M.J. 143 (CAAF 1999) Unlawful command influence is an error of constitutional dimension. United States v. Rivers, 49 M.J. 434, 443 (CAAF 1998)

"Unlawful command influence is the mortal enemy of military justice. If the target of unlawful command influence is a court member or the military judge, then it violates the accused's right to an impartial forum. If unlawful command influence is directed at prospective witnesses to intimidate them from testifying, it violates an accused's right to have access to favorable evidence in violation of the Sixth Amendment and Art. 46, UCMJ. Where unlawful command influence is exercised, the court may not affirm findings and sentence unless it is satisfied beyond a reasonable doubt that the findings and sentence are not affected thereby." *Id.*

Congress's intent that "no judge will participate in the adjudication of a case if he is not "neutral and detached."<sup>75</sup> Any relationship that casts suspicion on whether a military judge is fair or impartial provides a basis for an accused to seek his disqualification.<sup>76</sup>

The convening authority has many ancillary powers in convening a court-martial. Included among these responsibilities is the convening authority's power to enter into a pretrial agreement with an accused.<sup>77</sup> The convening authority is also responsible for production of expert witnesses.<sup>78</sup> When necessary, the general court-martial convening authority has the power to grant a military witness immunity.<sup>79</sup> Following a court-martial, the convening authority has further discretion in ordering a rehearing or retrial.<sup>80</sup> No rehearing or retrial may take place if the member is acquitted.

If the court-martial finds an accused guilty, once sentencing is completed, the case is returned to the convening authority for final action.<sup>81</sup> The convening authority may approve or disapprove the court's findings of

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<sup>75</sup> United States v. Kincheloe, 14 M.J. 40, 48 (C.M.A. 1982). Inherent in any judge's role are the requirements of impartiality and basic fairness to the parties. Military justice is firmly committed to the proposition that the court's actions and deliberations must not only be untainted, but must also avoid the very appearance of impurity.

<sup>76</sup> United States v. Graf, 32 M.J. 809, 811 (NMC MR 1990) ("any relationship that casts suspicion on whether a military judge is fair or impartial provides a basis for an accused to seek his disqualification.") R.C.M. 902(b) identifies specific circumstances that are grounds for mandatory disqualification or recusal of military judges. R.C.M. 902(a) also provides for disqualification and recusal in more general terms, that is, when a military judge determines that under the circumstances of the case before him, if the facts were known by a reasonable man, his impartiality might reasonably be questioned. A military judge's denial of a challenge against him is reviewable for abuse of discretion. United States v. Allen, 31 M.J. 572 (N.M.C.M.R. 1990). Furthermore, Art. 26 and Art. 66, when read in conjunction with Art. 37, UCMJ, as enforced by Art. 98, UCMJ, provide both the accused and the military judge with a mechanism to bring to light, within the public forum of a court-martial, an attack on the military judge's independence, or lack thereof, due to unlawful command influence—the perniciousness of which is the same whether it be direct or indirect. United States v. Hagen, 25 M.J. 78 (C.M.A. 1987), cert. denied, 484 U.S. 1060, (1988).

<sup>77</sup> R.C.M. 705. An accused and the convening authority may enter into a pretrial agreement. The accused will plead guilty or waive certain rights in return for some specified relief from the convening authority.

<sup>78</sup> R.C.M. 703(d). When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize employment and to fix the compensation for the expert.

<sup>79</sup> R.C.M. 704(c), Discussion. Only general court-martial convening authorities are authorized to grant immunity. R.C.M. 704(a), Discussion. Immunity ordinarily should be granted only when testimony or other information from the person is necessary to the public interest, including the needs of good order and discipline, and when the person has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.

<sup>80</sup> R.C.M. 1107(d)(1)(A). The convening authority may in his discretion order a rehearing as to some or all offenses which findings of guilty were entered or as to the sentence only.

<sup>81</sup> See generally R.C.M. 1107.



guilt or grant clemency by suspending or disapproving a portion of the accused's sentence. This oversight gives a military accused an additional opportunity to argue that the court's findings should be dismissed and/or a reduction in sentence is warranted.<sup>82</sup> The convening authority may not change a finding of not guilty or increase a punishment. It is not unusual for a convening authority to make changes to the final action which are beneficial to the accused. This right to clemency is unique to the military justice system.

### *C. Courts-Martial*

Apart from popular movies or television programs, the term "court-martial" may conjure up the 1926 court-martial of General Billy Mitchell,<sup>83</sup> or the case of Lieutenant William Calley.<sup>84</sup> Court-martial is the most serious judicial process a commander has at his disposal for handling misconduct. In keeping with the flexibility of the military justice system as a whole, there are three distinct levels of court-martial: the summary court-martial, the special court-martial, and the general court-martial.

#### *1. Summary Court-Martial*

A summary court-martial is the lowest forum for trial. It is designed to dispose of offenses that merit more than nonjudicial punishment but are not appropriate for a special or general court-martial. Only enlisted members who consent may be tried in this forum.<sup>85</sup> A single officer presides over the hearing, renders the verdict, and if the accused is found guilty, imposes a sentence.<sup>86</sup> While the UCMJ does not *per se* guarantee an accused representation by a defense counsel in summary courts-martial, current Air Force practice is to provide counsel to the accused.<sup>87</sup>

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<sup>82</sup> R.C.M 1107(d)(1).

<sup>83</sup> General Mitchell, a strong advocate of air power, was tried and convicted by a General Court-Martial for being critical of War Department policies (1926).

<sup>84</sup> Accused of killing unarmed Vietnamese civilians in the village of My Lai, Republic of South Vietnam, Lt Calley was convicted by general court-martial in 1973. *United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973).

<sup>85</sup> The right to object to trial by summary court-martial must be exercised prior to arraignment. Art. 20, UCMJ.

<sup>86</sup> The convening authority designates an officer to sit as the summary court-martial. This officer need not be a lawyer, but should be of judicial temperament and further qualified because of age, education, training, and experience. See R.C.M. 1301(a). These qualifications are implied by Art. 25(d)(2), UCMJ.

<sup>87</sup> Art. 27, UCMJ, requires detailed defense counsel for only general and special courts-martial. However, Air Force Instruction (AFI) 51-201, paragraph 5.2.2.4, Administration of Military Justice (Oct 1997) requires defense counsel be made available to the accused in summary courts-martial as well. See also Lieutenant Colonel Michael H. Gilbert, *Summary Courts-Martial: Rediscovering the Spumoni of Military Justice*, 39 A.F. Law Rev. (1996).

The procedure for summary courts-martial generally follows the same procedural course of a general or special court-martial. The summary court-martial convening authority refers the charges to court.<sup>88</sup> The accused has the right to cross-examine witnesses, present evidence and require the Government prove guilt beyond a reasonable doubt. The summary court-martial does not apply all of the Constitutional and procedural protections of a special or general court-martial. This is one of the reasons why the accused must consent to the forum and why the range of punishment in a summary court-martial is significantly limited.<sup>89</sup>

## 2. *Special Court-martial*

This proceeding is an intermediate level of trial and must be convened by a commander empowered as a special court-martial convening authority.<sup>90</sup> A special court-martial is composed of at least three members and a military judge.<sup>91</sup> The accused may be tried by members or, by his request, military judge alone. In this forum, there is both a trial counsel representing the interests of the government and a defense counsel representing the accused.<sup>92</sup> The government may try an officer or enlisted accused for any noncapital offense in this forum.<sup>93</sup>

A special court-martial is very similar to a civilian criminal trial in that counsel may make opening statements, examine and cross-examine witnesses, present evidence, and make final arguments as counsel do in civilian trials. The military counsel appears in uniform, but the military judge may wear the traditional judicial robe.<sup>94</sup> A court reporter transcribes the proceeding. The military rules of evidence and rules for court-martial procedure govern special and general court-martial proceedings. The proceedings are open to the public, but are held outside the presence of the members.<sup>95</sup> Formal arraignment and

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<sup>88</sup> Art. 24, UCMJ sets out the requirements for who may convene summary courts-martial.

<sup>89</sup> Art. 20, UCMJ, limits the jurisdiction of a summary court martial to confinement to no more than one month, hard labor without confinement to no more than 45 days, restriction to specified limits for no more than two months and forfeiture of no more than two-thirds pay for one month.

<sup>90</sup> Art. 23, UCMJ. Special court-martial convening authorities are typically commanding officers of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or Air Force are on duty.

<sup>91</sup> Art. 19, UCMJ, defines the jurisdiction of a special court-martial. A minimum of three members must be detailed to the court-martial panel.

<sup>92</sup> Counsel in military courts-martial are certified as competent to act as counsel under Article 27(b), UCMJ, by The Judge Advocate General. To be certified, the attorneys must be members of the federal bar or the highest court of any state.

<sup>93</sup> Art 34, UCMJ.

<sup>94</sup> In the Army, Air Force and Coast Guard, the judges wear black judicial robes, although Navy and Marine judges still appear in their military uniform. See Uniform Rules of Practice before Air Force Courts-Martial, Rule 4.3 (May 2000).

<sup>95</sup> Art. 39, UCMJ.

contested motions are also held outside the presence of the members in these so-called "Article 39(a) sessions."<sup>96</sup> The government counsel has the burden to prove the elements of the crime(s) "beyond a reasonable doubt."<sup>97</sup>

Although the degree of punishment is greater than at a summary court-martial, it is still limited. The maximum punishment that may be adjudged in special courts-martial includes a bad conduct discharge, a maximum of one year confinement, forfeiture of two-thirds pay for twelve months and a reprimand.<sup>98</sup> The forum limitations apply regardless of the number of offenses or the maximum punishment authorized for the offenses for which the accused is found guilty.

### 3. *General Court-Martial*

This forum is reserved for the most serious offenses and is indistinguishable from the special court-martial except for composition and maximum punishment. General courts-martial are composed of at least five members with a military judge presiding.<sup>99</sup> If an accused chooses, in a noncapital case, he may be tried by a military judge alone. This forum may impose the maximum lawful punishment for any offense, including death.<sup>100</sup>

Before charges may be referred to a general court-martial, Article 32, UCMJ, requires a formal investigation into the evidence and charges.<sup>101</sup> The Article 32 investigation is the military's counterpart to the civilian grand jury.<sup>102</sup> Both are designed to avoid referring baseless charges to trial. The investigating officer (IO) inquires into the truth of the matters set forth in the

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<sup>96</sup> At the arraignment portion of the Article 39(a) session, the accused must state on the record his plea, choice of counsel, and the forum to decide his case. *Id.*

<sup>97</sup> R.C.M. 918(c). Findings may be based on direct or circumstantial evidence. Only matters properly before the court-martial on the merits of the case may be considered. A finding of guilty on any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt.

<sup>98</sup> R.C.M. 201(f)(2)(B) and R.C.M. 1103(b)(2) has been amended by Executive Order 13262 to implement changes to Article 19, UCMJ (10 U.S.C. 819) legislated in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Public Law No. 106-65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial to one year confinement and forfeitures of 2/3 pay for 12 months.

<sup>99</sup> For a capital case referred to a general court-martial there must be at least twelve members detailed to the panel (for offenses committed after 31 Dec 02). See National Defense Authorization Act for Fiscal Year 2001, Bill S. 1438, §§ 106 - 398.

<sup>100</sup> Art. 18, UCMJ, establishes the jurisdiction of general courts-martial.

<sup>101</sup> Art. 32, UCMJ. No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. *See also* R.C.M. 405(a).

<sup>102</sup> By its express terms, the Fifth Amendment right to grand jury indictment is inapplicable to the armed forces. "No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger..." U.S. Const. Amend. V.

charges, considers the form of the charges, and recommends disposition of the case in the interest of justice and discipline.<sup>103</sup> The IO is a commissioned officer.<sup>104</sup> He is independent (by law) from both the government and the defense.<sup>105</sup> Any attempt by the convening authority or the government to influence the IO's decision may itself constitute an offense under the UCMJ.<sup>106</sup> Typically, an Article 32 investigation is open to the public.<sup>107</sup> During the hearing itself, the accused is entitled to be present with counsel.<sup>108</sup> An accused may also elect to testify and may present witnesses and offer evidence for the IO's consideration.<sup>109</sup> The investigation is designed to give the accused a preliminary opportunity to hear the evidence against him. The accused has an opportunity to persuade the convening authority that the charges are baseless or that the case should be referred to a lesser forum.<sup>110</sup>

#### *D. Court Participants*

##### *1. Legal Counsel*

The typical court-martial contains at least one detailed prosecutor, also called the trial counsel, and one detailed defense counsel. The trial counsel is charged with prosecuting the criminal case on behalf of the United States<sup>111</sup> and the defense counsel represents the accused active duty member. For a general court-martial, both trial and defense counsel are certified as competent to act as counsel under Article 27(b), UCMJ, by The Judge Advocate

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<sup>103</sup> R.C.M. 405(a), Discussion.

<sup>104</sup> The discussion to R.C.M. 405(d)(1) states the Investigating Officer should be an officer in the grade of major or lieutenant commander or higher or one with legal training.

<sup>105</sup> U.S. v. Payne, 3 M.J. 354, 355 (CMA 1977).

<sup>106</sup> See Art. 37 and Art. 98, UCMJ.

<sup>107</sup> R.C.M. 405(h)(3). "Access by spectators to all or part of the proceedings may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer." The discussion after the rule says, "Ordinarily the proceedings of a pretrial investigation should be open to the public." In *San Antonio Express-News v. Morrow*, 44 M.J. 706 (CMA 1996), the Court of Military Appeals found a presumption in favor of open hearings.

<sup>108</sup> *United States v. Craig*, 22 C.M.R. 466 (A.B.R. 1956), *aff'd*, 8 U.S.C.M.A. 28, 24 C.M.R. 28 (1957). (The investigating officer must allow the defense to examine all matters considered by the investigation officer, without exception).

<sup>109</sup> Art. 32(b), UCMJ, "The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel... . At that investigation, full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation."

<sup>110</sup> See David A. Schlueter, *Military Criminal Justice Practice and Procedure* 324 (5<sup>th</sup> ed. 2000).

<sup>111</sup> Article 38(a), UCMJ; R.C.M. 502(d)(5). The trial counsel shall prosecute cases on behalf of the United States and shall cause the record of trial of such cases to be prepared.

General.<sup>112</sup> To be certified, the attorneys must be members of the federal bar or the highest court of any state.

Trial practice is governed by the Rules for Courts-Martial and Military Rules of Evidence, both of which are contained in the Manual for Courts-Martial (MCM). Among these rules are the provisions on discovery. The MCM gives both the government counsel and the defense counsel “equal access” to evidence.<sup>113</sup> The MCM specifically provides both will have an adequate opportunity to prepare the case and both will have equal opportunity to talk to the witnesses and examine the evidence.<sup>114</sup> Neither counsel should impede or frustrate the good faith efforts of opposing counsel in obtaining information. The MCM sets forth broad discovery rights for the defense, and the Military Rules of Evidence mandate disclosure of certain evidence by the prosecution to the defense in advance of trial and vice versa.<sup>115</sup>

In the military system, the trial counsel is charged with the responsibility to obtain witnesses for both the government and the defense. The witness’s testimony must be relevant and necessary.<sup>116</sup> To request defense witnesses, the defense counsel or accused must submit a request to the trial counsel requesting their presence. This request must include a synopsis of expected testimony sufficient to meet the standard of relevance and necessity. If the testimony meets this standard, the government is obligated to pay the costs of producing the witnesses. This obligation includes production of expert witnesses who charge fees for their service.<sup>117</sup>

## 2. *Defense counsel*

A suspect may seek the advice and assistance of defense counsel.<sup>118</sup> An Air Force member, regardless of rank or income status, may be represented by an Air Force Area Defense Counsel (ADC), without cost, at any stage of the process (including, as discussed below, post-trial appeals). ADCs are officers

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<sup>112</sup> Art. 27, UCMJ. In the case of special court-martial, the accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications stated above unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies.

<sup>113</sup> Art. 46, UCMJ, states that the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence.

<sup>114</sup> R.C.M. 701(c). *See* United States v. Eshalomi, 23 MJ 12, 24 (CMA 1986).

<sup>115</sup> R.C.M. 701, 914. *See also* MRE 304(d)(1), 311(d)(1), 321(c).

<sup>116</sup> R.C.M. 703(c)(1).

<sup>117</sup> R.C.M. 703(b)(1). In United States v. Ndanyi, 45 M.J. 315, 319 (CAAF, 1996), the Court of Appeals for the Armed Forces said “it is well-established that an accused service member has a limited right to expert assistance at government expense to prepare his defense.”

<sup>118</sup> A civilian suspect must either pay for that representation or prove, generally once charges already have been brought, that she is indigent and should have court-appointed counsel. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

who are entirely independent of an installation's chain of command.<sup>119</sup> The ADCs counsel and assist members facing investigation and adverse disciplinary actions.<sup>120</sup> A military member may choose to be represented by the ADC, may hire civilian counsel at his or her own expense, or may be represented by both the ADC and the civilian counsel.

Every ADC has served at a base legal office before assignment to the defense counsel position and often has extensive military justice experience. The Judge Advocate General of the Air Force personally appoints the attorney to this position. This selection and appointment is made only after a thorough review of the attorney's qualifications. Additionally, after selection, all ADCs are enrolled in on-going legal education and training programs to further increase the level of their trial skills. The creation of the ADC program has been a two-fold success: one being the continued zealous advocacy on the part of military members who are accused of misconduct; the other being the continued preservation of justice.

### *3. Circuit Counsel*

In addition to local trial and defense counsel, the Air Force employs senior litigation specialists. These attorneys, both trial and defense counsel, are located in five regional offices and travel throughout their respective circuits representing the government and accused members in complex cases. The Judge Advocate General selects attorneys to be circuit counsel based on their trial experience and litigation skill. In addition to this representation, circuit counsel also provide legal training at annual conferences for local trial and defense counsel.

### *4. The Accused*

Military members do not forfeit their constitutional rights once they join the military.<sup>121</sup> Like all American citizens, service members enjoy the fundamental protections of our Constitution. For example, every military member has the right to be protected against unreasonable searches and seizures,<sup>122</sup> to be protected against compelled self-incrimination,<sup>123</sup> to be

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<sup>119</sup> Air Force Legal Services Agency Operating Instruction 1, *Air Force Military Defense Counsel Charter* (22 June 1998).

<sup>120</sup> Air Force Manual 51-204, *United States Air Force Judiciary*, 4 (1 July 1995).

<sup>121</sup> *Rostker v. Goldberg*, 453 U.S. 57 (1981). Congress is not free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context. *See also Courtney v. Williams*, 1 M.J. 267, 270 (CMA 1976).

<sup>122</sup> *United States v. Ezell*, 6 M.J. 307 (CMA 1979). The protections of the Fourth Amendment and, indeed, the entire Bill of Rights, are applicable to the men and women serving in the

permitted discovery of evidence,<sup>124</sup> and to have legal counsel in all special and general courts-martial.<sup>125</sup> The Military Rules of Evidence protect these rights by prohibiting the Government from using evidence that was obtained by or derived from unlawful interrogations and illegal search and seizures.<sup>126</sup>

While service members enjoy most of the same protections afforded all citizens, the unique demands of the military services require a balancing act between military necessity and personal liberties. The Supreme Court has examined these competing interests and has consistently held that military personnel can be subjected to duties and restrictions that ordinarily would be impermissible in civilian life. In *Parker v. Levy*,<sup>127</sup> the Court stated that:

[In the armed forces] some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.<sup>128</sup>

However, the power of an armed service over its members is not unlimited. Military courts have consistently ruled that orders and directives that only tangentially further a military objective, are excessively broad in scope, are arbitrary and capricious, or needlessly abridge a personal right are subject to close scrutiny and may be invalid and unenforceable.<sup>129</sup> The courts

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military services of the United States unless expressly or by necessary implication they are made inapplicable.

<sup>123</sup> *United States v. Bubonics*, 45 M.J. 93 (CAAF 1996). If, instead, the maker's will was overborne and his capacity for self-determination was critically impaired, use of his confession would offend due process. The burden in this regard is on the Government, as the proponent of admission of the evidence, to prove by a preponderance of the evidence that the confession was voluntary.

<sup>124</sup> R.C.M. 703; *United States v. Morris*, 52 M.J. 193 (CAAF 1999).

<sup>125</sup> Art. 27, UCMJ; R.C.M. 401(b).

<sup>126</sup> See generally M.R.E. 301 - 321.

<sup>127</sup> 417 U.S. 733 (1974).

<sup>128</sup> *Id.*, at 758.

<sup>129</sup> *United States v. Green*, 22 MJ 711 (ACMR 1986). In *United States v. Martin*, 5 CMR 102 (1952), the Court of Military Appeals set forth the seminal test for assessing the legality of an

have made it clear that while the needs of the military must be considered, service members are still afforded constitutional protections.

From the very beginning of an inquiry or investigation into suspected misconduct, a military suspect has greater rights against self-incrimination than a civilian suspected of the very same offense.<sup>130</sup> Under Article 31 of the UCMJ, a military member suspected of an offense must be read his or her rights before questioning—merely because he or she is a suspect.<sup>131</sup> The member has the right to ask for an attorney and can choose not to make a statement to investigators. These rights are binding on both commanders and military police.<sup>132</sup>

### 5. Court-Martial Panels

Article 25, UCMJ, strictly governs the selection of court-martial panel members. Unlike the civilian system, which depends on the availability of jurors, the military justice system operates on a “best qualified” basis. The convening authority selects those individuals he or she believes to be best qualified for court-martial duty by reason of age, education, training, experience, length of service, and judicial temperament.<sup>133</sup> The court-martial panel will be comprised of officers unless the accused requests 1/3 of the panel be enlisted members.<sup>134</sup> Court-martial panels typically consist of members

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order or regulation: All activities which are reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and are directly connected with the maintenance of good order in the services are subject to the control of the officers upon whom the responsibility of the command rests.

<sup>130</sup> The Supreme Court celebrated the Miranda decision, which gave civilians the right to remain silent or ask for an attorney in 1966, fully 15 years after Congress enacted Article 31 into federal law. M.R.E. 305; *Miranda v. Arizona*, 384 U.S. 439 (1966). See Major General Jack L. Rives and Major Steven J. Ehlenbeck, *Civilian Versus Military Justice In the United States: A Comparative Analysis*, A.F. L. Rev., this volume, for a comparison between the civilian and military justice systems.

<sup>131</sup> Art. 31(b), UCMJ, reads: “No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.”

<sup>132</sup> M.R.E. 301(f). See *United States v. Jordan*, 38 M.J. 346 (“Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.”).

<sup>133</sup> Art. 25(d)(2), UCMJ. Members should be selected on a “best qualified” basis, examining age, education, training, experience, length of service, and judicial temperament. However, once the defense comes forward and shows an improper jury selection, the burden is upon the government to demonstrate that no impropriety occurred. *United States v. Roland*, 50 M.J. 66 (CAAF 1999).

<sup>134</sup> An enlisted accused has the absolute right to request enlisted members on his court-martial panel. *United States v. McClain*, 22 M.J. 124 (CMA 1986).



who have at least a high school degree.<sup>135</sup> Many members have bachelors, graduate, and post-graduate degrees.

Two competing interests exist in the court-martial selection process: to identify and select a panel of court-martial members that are competent, fair, and impartial, while at the same time not unduly restricting the conduct of the military mission or national security.<sup>136</sup> The current system of selection is sufficiently flexible to be applied in all military units, locations, operational conditions, and across all armed forces.<sup>137</sup> In addition to system flexibility, the commander is in the best position to determine whether an individual is needed for operational matters or is available to sit on a court-martial panel.<sup>138</sup> Adequate safeguards exist in the military justice system to ensure selection of fair and impartial court-martial panels.<sup>139</sup> These safeguards include the questioning, referred to as *voir dire*, of the panel members by the judge and counsel regarding their fitness to sit on the panel. Both government and defense counsel may peremptorily challenge a panel member or may request any panel member be excused for cause anytime during the trial.<sup>140</sup> Following challenges, the remaining members sit as the court-martial panel.<sup>141</sup>

Military panels are beneficial to the accused due to their understanding of the military environment. Military members share common experiences within the military community. This familiarity provides the members with an insight into the accused's actions and a level of appreciation for the circumstances under which the accused lives and works.<sup>142</sup> Article 37, UCMJ, ensures a court-martial member is free from improper influence in his or her decision-making.<sup>143</sup>

After presentation of evidence, trial and defense counsel make final arguments, and the members are excused to deliberate. The members vote by secret written ballot.<sup>144</sup> The military system generally convicts or acquits by

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<sup>135</sup> Air Force Instruction (AFI) 36-2002, Attachment 2, para. 2.1.5. (1999). Ninety-nine percent of all...enlistments must be high school graduates or higher.

<sup>136</sup> *Report on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial*, DOD Joint Service Committee on Military Justice, Aug. 1999, at 8.

<sup>137</sup> *Id.* at 46.

<sup>138</sup> *Id.* at 44.

<sup>139</sup> These safeguards include Article 37, UCMJ, Mil. R. Evid. 606(b), *voir dire*, and remedial action by the trial and appellate courts. *Id.* at 46.

<sup>140</sup> R.C.M. 912(f)(2).

<sup>141</sup> Art. 41, UCMJ.

<sup>142</sup> Judge Everett used the following example to show the importance of having members with military experience: "in a trial for dereliction of duty [for example], a court of military persons might be much better qualified by experience to understand the nature of the duties in which an accused supposedly had been derelict" than would a jury of civilians. Everett, *supra* note 21 at 5.

<sup>143</sup> Art. 37, UCMJ. Any attempts to coerce or, by lawful means, influence the action of a court-martial or any member involved are criminal.

<sup>144</sup> R.C.M. 921(c); *see also* R.C.M.1006(d).

2/3 vote of the members.<sup>145</sup> If the accused is not convicted on the charged offense or lesser included offenses, he or she is automatically acquitted. The concern of the civilian “hung jury,” where unanimous vote is necessary for conviction, does not exist under the military justice system. Hung juries produce no firm outcome, leaving the civilian accused under a cloud of doubt and leaving prosecutors to decide whether to retry the case.

## 6. Military Judges

Experienced, professional judges preside over all trials in the United States, and the military is no different.<sup>146</sup> In the Air Force, military trial judges are appointed by The Judge Advocate General and are organized in five geographic judicial circuits. A military judge’s only duty is to preside over courts-martial (and, on occasion, certain administrative proceedings).<sup>147</sup> Like military defense counsel and circuit trial counsel, trial judges report through a separate, legal chain of command. Court-martial convening authorities are not responsible for appointing an individual judge to a particular case, nor do they write or indorse a judge’s annual performance report.<sup>148</sup>

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<sup>145</sup> Unanimous verdicts are not constitutionally required. *Johnson v. Louisiana*, 406 U.S. 356 (1972) (upholding Louisiana statute allowing conviction by three-fourths majority); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding Oregon's ten-of-twelve majority rule). Moreover, "the right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions." *Whelchel v. McDonald*, 340 U.S. 122 (1950). "The constitution of courts-martial, like other matters relating to their organization and administration is a matter appropriate for congressional action." *Id.* See also *Mendrano v. Smith*, 797 F.2d 1538, 1544 (10th Cir. 1986) ("Statements by the [Supreme] Court and the courts of appeals reflect the universal view that members of the military have no right to jury trial in court-martial proceedings."). The same two-thirds holds for sentencing except that three-fourths are required for sentencing if the accused is to be confined for more than ten years and a unanimous vote is required for sentencing in a capital case.

<sup>146</sup> The military judge at a special or general court-martial acts as the presiding officer. He conducts pretrial sessions at which a defendant is arraigned and pleas are entered. He rules on all legal questions and he instructs the members on the laws and procedures to be followed in the case. R.C.M. 801(a). When a military judge presides over a court-martial composed of panel members, the members decide guilt or innocence and, when necessary, impose sentence. R.C.M. 921, 1006. When a military judge sits alone, he decides those issues. Art. 16, UCMJ. The sentence imposed by any type of court-martial does not become final until the officer who convened the court-martial approves it. Art. 60, UCMJ.

<sup>147</sup> Military judges are subject to the ABA Code of Judicial Conduct Canon 1 (1972), which requires them to uphold the independence and integrity of their courts. See also TJAG Policy Letter 3, *Uniform Code of Judicial Conduct for Military Trial and Appellate Judges and Uniform Regulations and Procedures Relating to Judicial Discipline* (1998).

<sup>148</sup> Art. 26(c), UCMJ, states that:

The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review

Military judges base their rulings in part on constitutional provisions, common law, Rules for Courts-Martial, and Military Rules of Evidence. These rules and procedures ensure an accused's rights are maintained throughout the trial. In 1980, the Manual for Courts-Martial was amended to include new Military Rules of Evidence (MREs).<sup>149</sup> These rules are unique to military practice in their terminology and specialized use in military practice. Applicable to all courts-martial, the MREs are for the most part based upon the Federal Rules of Evidence.<sup>150</sup> As the federal rules change, they are incorporated into the MREs unless the President takes action to the contrary.<sup>151</sup> These rules also apply to all Article 39(a) sessions, fact finding proceedings ordered on review, proceedings in revision, and contempt proceedings.<sup>152</sup>

### *E. Review of Courts-Martial*

#### *1. Clemency*

As discussed before, if an accused is convicted of an offense, the military system offers the accused an unparalleled opportunity for clemency. Before a convening authority approves a court-martial result, the accused and counsel may submit matters challenging the outcome of the trial and/or requesting clemency as to sentence.<sup>153</sup> The convening authority may, for any reason, disapprove any or all of the findings and suspend or reduce the sentence.<sup>154</sup> He may not change an acquittal or increase a sentence.

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any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge.

*See also* R.C.M. 503(b). A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

<sup>149</sup> MCM, 1984, Part III. *See generally* Lederer, *The Military Rules of Evidence, Origins and Judicial Implementation*, 130 Mil. L. Rev. 5 (1990).

<sup>150</sup> M.R.E. 101. *See also* M.R.E. 1101.

<sup>151</sup> M.R.E. 1102 requires any amendments to the Federal Rules of Evidence be incorporated into the Military Rules of Evidence 18 months after the effective date of such amendments unless the President takes action to the contrary.

<sup>152</sup> *See* Saltzburg, Schinasi & Schlueter, *Military Rules of Evidence Manual* (4<sup>th</sup> ed. 1997).

The rules may be relaxed by the judge at defense request during sentencing procedures and are not applied (with the exception of privileges) to proceedings involving search authorizations or pretrial confinement hearings.

<sup>153</sup> R.C.M. 1105 allows the accused to submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence.

<sup>154</sup> R.C.M. 1107(b)(1) states that the action to be taken on the findings and sentence is within the sole discretion of the convening authority and is a matter of command prerogative.

## 2. *The Appeal*

The military system offers the accused extraordinary access to the appeals process. All courts-martial receive a post-trial review. Every trial that results in a sentence that includes a punitive discharge or confinement for a year or more is automatically appealed to the first level of appellate military court, the service Courts of Criminal Appeals.<sup>155</sup> An Air Force accused is entitled to representation free of charge by a judge advocate assigned to the Appellate Defense Division in Washington, D.C. Like at the trial level, an accused may also hire a civilian lawyer at his or her own expense to operate alongside the military counsel. The case may be reviewed further by the highest court in the military system, the Court of Appeals for the Armed Forces. This court is constituted under Article I of the Constitution. It is comprised of five civilian judges appointed for 15-year terms.<sup>156</sup> Military accused may also petition the United States Supreme Court to review their cases.<sup>157</sup> This system of appellate courts provides significant oversight of the court-martial process, ensuring procedural and substantive fairness. In order to appeal a criminal conviction, a defendant must have a transcript of the trial court proceeding. In the military system, a record is prepared in every case and provided to the accused free of charge.

## 3. *“De novo” Review*

Congress has granted the service Courts of Criminal Appeals the authority to review the findings of courts-martial “de novo,” that is, anew or for a second time.<sup>158</sup> Such authority permits the Air Force Court of Criminal Appeals to determine, based on the facts in the record, that the evidence was not sufficient to convict the accused. They may even overturn the results of the court-martial on their own volition. This safeguard further ensures that an accused service member receives a fair and impartial trial.

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<sup>155</sup> Art. 66, UCMJ.

<sup>156</sup> 10 U.S.C.S. § 942. The law specifically prohibits an individual who retired after 20 years of active service in the armed forces from being appointed to the court of appeals.

<sup>157</sup> Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of Title 28. *See also* Art. 67a, UCMJ.

<sup>158</sup> *Supra* at note 156.

#### **IV. CONCLUSION: A “JUSTICE” BASED SYSTEM**

The American Military Justice system is founded in the concept that world-wide deployment of large numbers of military personnel requires a flexible, separate jurisprudence capable of operating in times of peace and conflict.<sup>159</sup> Fortunately, as American troops continue serving the world over, a comprehensive system of justice that balances the rights of the accused with the necessity of military operations travels with them. It is vital that the military justice system is understood, not only by American society, but by our allies as well. Despite attempts to portray the military justice system as being out of touch with modern legal thought, the system has withstood the test of time, both in terms of constitutional challenges and practical application. For the last 50 years, the military justice system has served the United States well and will continue to do so into the future.

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<sup>159</sup> David A. Schlueter, *Military Criminal Justice Practice and Procedure*, 3 (5<sup>th</sup> ed. 1999).

# CIVILIAN VERSUS MILITARY JUSTICE IN THE UNITED STATES: A COMPARATIVE ANALYSIS

MAJOR GENERAL JACK L. RIVES<sup>\*</sup>  
MAJOR STEVEN J. EHLENBECK<sup>\*\*</sup>

*Military court, compared to most civilian courts, is refreshing in many respects...The pretrial discovery features are the best and most complete of any system...Military juries are nearly always made up of intelligent commissioned officers...There are no hung juries, and verdicts are usually reached swiftly...I still try courts-martial on a regular basis, and still enjoy them more than any other trials.*

-F. Lee Bailey<sup>1</sup>

## I. INTRODUCTION

After more than a quarter century of an all-volunteer force, America's armed forces are largely unknown to the American public. Unlike previous generations, fewer Americans have personal experience with the military and fewer of them have family members, friends or neighbors who have served in the military. While the American public is generally unaware of military matters, they are especially uninformed about the military justice system. They know very little about the military's system of discipline or its criminal law process.

This article will explain the military criminal law process, known as the military justice system, and it will contrast the military justice system with the civilian criminal justice process familiar to most Americans. Using the Commonwealth of Virginia<sup>2</sup> as a representative jurisdiction, this article will

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<sup>1</sup> F. LEE BAILEY, TO BE A TRIAL LAWYER 225 (2d ed. 1994).

<sup>2</sup> Although there are differences among the criminal processes of each state, those differences have become less pronounced over time as the Supreme Court has now determined that almost all of the specific guarantees of the Bill of Rights are binding on the states. See RICHARD A. WILLIAMSON, DEFENDING CRIMINAL CASES IN VIRGINIA § 1.201 (6<sup>th</sup> ed. Supp. 2000). Some

examine how the same hypothetical offenses would be handled in the United States Air Force (USAF) military justice system and the Virginia state criminal justice system.

## II. FRAMEWORK FOR ANALYSIS

This article will analyze the hypothetical case of Heather Johnson. Assume that Heather Johnson consumed too many alcoholic beverages at the Enlisted Club on Langley Air Force Base, Virginia, then gets into her car to drive home. Before exiting the base, she drives across the centerline of the road, crashes head-on into another car, and kills the driver. The crash takes place in an area of the base where the United States has proprietary jurisdiction, but the state of Virginia retains legislative authority and criminal jurisdiction.<sup>3</sup>

Air Force Security Forces and medical personnel respond to the scene. They find a loaded handgun and more than a pound of marijuana on the floorboard of Johnson's car. The medics determine that the other driver is dead and transport Heather Johnson to the hospital. After treating Johnson for minor injuries, they turn her over to the Security Forces.

## III. THE SYSTEMS COMPARED

The story now diverges and follows the prosecution of Heather Johnson on two different tracks. One is the state criminal process that will follow if *Miss.* Heather Johnson is a civilian not subject to the Uniform Code of Military Justice (UCMJ).<sup>4</sup> The other is the military justice process that will follow if *Staff Sergeant (Sergeant)* Heather Johnson is an active duty, uniformed member of the United States Air Force.

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significant differences between Virginia criminal procedure and that of other states are noted within this article.

<sup>3</sup> The most common types of legislative jurisdiction on Air Force bases in the United States are proprietary and exclusive. Proprietary jurisdiction results when the federal government has acquired some right or title to an area in a state but has not obtained any of the state's authority to legislate over the area. Exclusive jurisdiction exists when the federal government has acquired, by state statute, all of the state's authority in an area, and the state concerned has not reserved the right to exercise any of that authority except the right to serve state civil or criminal process. See Air Force Instruction 32-9001, Acquisition of Real Property, Attachment 2 (July 27, 1994). Langley Air Force Base consists of areas with both types of jurisdiction.

<sup>4</sup> MANUAL FOR COURTS-MARTIAL [hereinafter MCM], app. 2 (2000).

## A. Nature of Criminal Jurisdiction

*Miss. Johnson* is subject to the criminal jurisdiction of the state of Virginia because the alleged offenses took place in Virginia.<sup>5</sup> She is not subject to military criminal jurisdiction, so the Security Forces will detain her only long enough to be turned over to civilian authorities.

Unlike state criminal jurisdiction, which is based on the location of the offense, military jurisdiction under the Uniform Code of Military Justice is predicated on the status of the offender.<sup>6</sup> Because *Sergeant Johnson* is an active duty member of the Air Force, she is subject to court-martial under the UCMJ regardless of where the offenses occur.<sup>7</sup> This assures commanders that they have the disciplinary tools they need wherever United States troops may be deployed. Note that while the offenses in this case are crimes common to the civilian and military justice systems, the UCMJ also includes uniquely military offenses, the prohibition of which is critical to the maintenance of good order and discipline in the armed forces.<sup>8</sup>

## B. Rights Advisement

After being turned over to civilian authorities, *Miss. Johnson* will be on her way to the local police station and jail.<sup>9</sup> The civilian investigators who are handling her case will read her the *Miranda* warning<sup>10</sup> prior to any

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<sup>5</sup> The circuit courts of Virginia, except where otherwise provided, have exclusive original jurisdiction for the trial of offenses committed within their respective circuits. Va. Code § 19.2-239 (2001). Langley Air Force Base falls within the jurisdiction of the Circuit Court for the City of Hampton.

<sup>6</sup> Courts-martial may try any person when authorized to do so under the code. MCM, *supra* note 4, pt. II, Rule for Courts-Martial [hereinafter RCM] 202(a). Article 2 of the UCMJ, *supra* note 4, lists classes of persons subject to the code, which include active duty personnel, cadets, aviation cadets, midshipmen, certain retired personnel, members of reserve components not on active duty under some circumstances, persons in the custody of the armed forces serving a sentence imposed by court-martial, and, under some circumstances, specified categories of civilians. In *Solario v. United States*, 483 U.S. 435 (1987), the Supreme Court held that court-martial jurisdiction depends solely on the status of the accused as a person subject to the UCMJ.

<sup>7</sup> Article 5 of the UCMJ, *supra* note 4, provides that it applies in all places.

<sup>8</sup> For example, desertion, absence without leave, disrespect toward a superior commissioned officer, and failure to obey a lawful order are military offenses with no civilian equivalent. UCMJ, *supra* note 4, Articles 85, 86, 89, 92. Such offenses are necessary because of the life and death consequences that can result if military members don't properly perform duties.

<sup>9</sup> Virginia law enforcement officers may make an arrest, without a warrant, when they have reasonable grounds to suspect an individual has committed a felony. Va. Code § 19.2-81 (2001).

<sup>10</sup> In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court found that custodial interrogation is inherently coercive and judicially established the requirement that suspects be



questioning. Assume Miss. Johnson exercises her rights and requests an attorney. She will then be escorted to her cell to await a hearing to determine whether she should be released.

*Sergeant* Johnson will initially remain in the custody of military investigators. They will read her her rights pursuant to Article 31 of the UCMJ.<sup>11</sup> Article 31 safeguards extend beyond *Miranda* in that they apply even to non-custodial questioning and require that the suspect also be informed of the nature of the accusation against her. Assume *Sergeant* Johnson exercises her rights and asks for an attorney. The interview will be terminated and *Sergeant* Johnson's commander will be called and briefed on the situation. The commander must then make the decision, that night, whether to place *Sergeant* Johnson into pretrial confinement or release her under some lesser form of restriction or no restriction at all.<sup>12</sup> If *Sergeant* Johnson is ordered into pretrial confinement, two additional reviews, discussed below, will take place to determine whether the confinement will continue.

### C. Right to Counsel

Back to *Miss.* Johnson and her right to an attorney. Unless *Miss.* Johnson is indigent, she must either hire an attorney at her own expense or represent herself. Virginia evaluates indigence by determining whether the family's available funds (income plus assets minus exceptional expenses) are above 125% of the federal poverty income guidelines.<sup>13</sup> For a family of four within the continental United States, the 2001 poverty guideline is \$17,650.<sup>14</sup> Thus, assuming *Miss.* Johnson has a husband and two children, she must provide her own attorney unless her family's available funds are less than \$22,063.

If *Miss.* Johnson *is* indigent, she will be entitled to the services of a court-appointed defense counsel.<sup>15</sup> Her counsel will be compensated based on

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warned of the right to remain silent and of the right to have counsel present at a custodial interrogation.

<sup>11</sup> See *supra* note 4. Upon the enactment of the UCMJ in 1951, Article 31 established protections similar to those of *Miranda* for all military personnel, 15 years before the *Miranda* decision.

<sup>12</sup> Pursuant to RCM 304, *supra* note 6, any commissioned officer may order pretrial restraint of any enlisted person. Pretrial restraint may be ordered only when there is a reasonable belief that the individual committed an offense triable by court-martial and the restraint is necessary to ensure the presence of the person restrained or to prevent foreseeable serious criminal misconduct.

<sup>13</sup> Va. Code § 19.2-159 (2001).

<sup>14</sup> 66 Fed. Reg. 10695 (Feb. 16, 2001).

<sup>15</sup> Selected jurisdictions throughout Virginia have public defender programs, under which full time, state-employed public defenders represent indigent persons charged with criminal offenses. Va. Code § 19.2-163.2 (2001). In jurisdictions without a public defender program, such as the City of Hampton, court-appointed counsel are selected by a system of rotation

the time and effort she puts into the case, but the maximum compensation is fixed by statute according to the seriousness of the offenses.<sup>16</sup> Because Miss. Johnson will be charged with three felonies, none of which is punishable by more than twenty years of confinement, her counsel will be paid a maximum of \$1335 in attorney fees (\$445 for each offense).<sup>17</sup> The Virginia Court of Appeals has ruled that this compensation scheme is adequate. The Court held that it does not operate to deny a defendant her right to conflict-free and effective assistance of counsel on the grounds that it creates a financial disincentive for a lawyer to effectively represent her client.<sup>18</sup>

Contrast this with *Sergeant* Johnson's right to representation by military counsel. Regardless of her income and assets, Sergeant Johnson is entitled to representation by a military defense counsel free of charge.<sup>19</sup> Her counsel must be a member of the bar of a federal court or the highest court of a state, who has been certified by The Judge Advocate General<sup>20</sup> of the Air Force as competent to perform duties as counsel in courts-martial.<sup>21</sup>

Military defense counsel are well-qualified, completely independent attorneys whose full-time duty is to represent military members to the best of their professional abilities. In the Air Force, the Area Defense Counsel (ADC) is the attorney who performs this function.<sup>22</sup> The ADC is typically chosen from the base legal office after gaining experience prosecuting cases. She manages an office, which includes a Defense Paralegal.<sup>23</sup> The ADC office is physically separate from the base legal office, and the ADC does not fall in the base chain-of-command.<sup>24</sup> She reports to a Chief Circuit Defense Counsel, who manages defense services in a geographic region and reports in a judge advocate (military attorney) chain of supervision.<sup>25</sup>

Unlike the civilian attorney appointed to represent *Miss.* Johnson if she is indigent, the ADC representing *Sergeant* Johnson will not have a financial incentive to limit the amount of time she spends on the case. Because the ADC is an active duty officer and full-time defense counsel, she can focus on representing her clients without the need to consider the business aspects of a

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among members of the local bar whose practice includes criminal representation and who have indicated their willingness to accept such appointments. Va. Code § 19.2-159 (2001).

<sup>16</sup> See Va. Code § 19.2-163 (2001).

<sup>17</sup> *Id.*

<sup>18</sup> *Webb v. Commonwealth*, 32 Va. App. 337, 528 S.E.2d 138 (2000).

<sup>19</sup> See RCM 501(b), *supra* note 6.

<sup>20</sup> The Judge Advocate General of the Air Force is a major general who is the senior uniformed attorney in the service.

<sup>21</sup> See RCM 502(d)(1), *supra* note 6, and Article 27(b) of the UCMJ, *supra* note 4.

<sup>22</sup> See Air Force Manual 51-204, United States Air Force Judiciary ¶ 2.7 (July 1, 1995)[hereinafter AFM 51-204].

<sup>23</sup> *Id.* at ¶ 2.10. The Defense Paralegal's primary duty is to support the ADC in the management and operation of the ADC office.

<sup>24</sup> See *id.*, at ¶ 1.5.

<sup>25</sup> See *id.*, at ¶ 2.5.

private law practice. On average, each ADC defends about ten courts-martial per year,<sup>26</sup> so they can devote a substantial amount of time to each client's case. In addition, a number of more experienced defense counsel (Circuit Defense Counsel, or CDCs) serve as co-counsel in the more complex cases and provide training and advice to ADCs.<sup>27</sup>

#### D. Charging Mechanism

*Miss. Johnson* was arrested immediately following the alleged offenses, without an arrest warrant. Within 48 hours, she will be brought before a magistrate, who will examine the arresting officer under oath and determine whether there is probable cause to believe that *Miss. Johnson* committed the alleged offenses.<sup>28</sup> If the magistrate finds probable cause, she will issue an arrest warrant.

In this case, *Miss. Johnson* will be charged with three offenses under Virginia law: aggravated involuntary manslaughter,<sup>29</sup> possession of marijuana with intent to distribute,<sup>30</sup> and possession of a firearm while committing the offense of possession of more than one pound of marijuana with intent to distribute.<sup>31</sup>

*Sergeant Johnson* will be charged with similar offenses under the Uniform Code of Military Justice: murder by engaging in an act inherently dangerous to another, in violation of Article 118, wrongful possession of marijuana with intent to distribute, in violation of Article 112a, and unlawful possession of a loaded firearm on Langley Air Force Base, in violation of Article 92.<sup>32</sup>

The process of bringing charges under the UCMJ is called "preferral."<sup>33</sup> Although any person subject to the UCMJ may do so, the immediate commander of the accused typically prefers charges in Air Force

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<sup>26</sup> See Annual Report of the Code Committee on Military Justice for the period October 1, 1999 to September 30, 2000, Section 5: Report of the Judge Advocate General of the Air Force, and Appendix – U.S. Air Force Military Justice Statistics. Excluding summary courts-martial, which may try minor offenses with the consent of the accused and impose up to one month of confinement (*see* Article 20 of the UCMJ, *supra* note 4), there were 758 courts-martial tried in fiscal year 2000. They were defended by 81 ADCs at 71 bases worldwide.

<sup>27</sup> See AFM 51-204 ¶ 2.6, *supra* note 22.

<sup>28</sup> Va. Code § 19.2-82 (2001).

<sup>29</sup> Va. Code § 18.2-36.1 (2001).

<sup>30</sup> Va. Code § 18.2-248.1 (2001).

<sup>31</sup> Va. Code § 18.2-308.4 (2001).

<sup>32</sup> Article 92 of the UCMJ, *supra* note 4, prohibits violations of written regulations of which the accused has knowledge. Air Force Instruction 31-209/Langley Air Force Base Supplement 1, The Air Force Resource Protection Program ¶ 5.1.1 (Nov. 15, 1995) prohibits carrying privately-owned firearms in vehicles on base except when traveling to or from an authorized activity, such as a storage facility. It also requires that firearms be unloaded and placed in the trunk of the vehicle during authorized transportation.

<sup>33</sup> See RCM 307, *supra* note 6.

practice.<sup>34</sup> The commander then forwards the charges to the special court-martial convening authority (SPCMCA), a commander authorized to direct that charges be tried by special court-martial.<sup>35</sup> If the SPCMCA concludes a more serious general court-martial may be warranted, she will direct a pretrial investigation under Article 32 of the UCMJ, as discussed below.

### E. Pretrial Confinement and Bail

The magistrate who found probable cause to believe *Miss. Johnson* committed the alleged offenses will also set the terms for her pretrial release. She will authorize her release under specified conditions unless she finds probable cause to believe that she will not appear for further proceedings or her liberty will impose an unreasonable danger to herself or the public.<sup>36</sup> Because *Miss. Johnson* is charged with possession of a firearm while committing the offense of possession of more than one pound of marijuana with intent to distribute—an offense carrying a minimum, mandatory sentence of five years imprisonment—there is a presumption under Virginia law that no condition or combination of conditions will reasonably assure her appearance or public safety.<sup>37</sup> In other words, there is a presumption that *Miss. Johnson* should remain confined pending trial and not be released under any bail conditions. Notwithstanding this presumption, the magistrate may decide to release *Miss. Johnson* on a secured bond. If so, she must either produce the cash bond amount or use the services of a bail bondsman. The services of a bail bondsman typically cost about 10% of the bond amount.<sup>38</sup> This money will not be reimbursed to *Miss. Johnson* regardless of the outcome of her case. It is the price of freedom pending trial in state court.

Back to *Sergeant Johnson* and the issue of pretrial confinement. Assuming she was ordered into confinement the night of the alleged offenses, her commander has 48 hours to decide whether to continue the confinement.<sup>39</sup> This decision must be in writing, including an explanation of the reason for continued confinement. Confinement is justified only if the commander finds probable cause to believe: (1) a court-martial offense has been committed,

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<sup>34</sup> See Air Force Instruction 51-201, Administration of Military Justice ¶ 3.5 (Nov. 2, 1999)[hereinafter AFI 51-201].

<sup>35</sup> The commanders of most Air Force installations, usually comprising Air Force wings, act as special court-martial convening authorities. See Article 23 of the UCMJ, *supra* note 4, RCM 504(b)(2), *supra* note 6, and Special Order GA-001, Department of the Air Force, October 10, 2000 (designating court-martial convening authorities). A special court-martial may not adjudge confinement greater than one year or the most severe forms of punitive discharges (dismissal for officers and dishonorable discharge for enlisted members). See Article 19 of the UCMJ, *supra* note 4.

<sup>36</sup> Va. Code § 19.2-120 (2001).

<sup>37</sup> *Id.*

<sup>38</sup> See [http://www.vabailbonds.com/Root/Why\\_A\\_Bondsman.htm](http://www.vabailbonds.com/Root/Why_A_Bondsman.htm) (last visited Apr 24, 2002).

<sup>39</sup> See RCM 305, *supra* note 6.

(2) the prisoner committed it, (3) confinement is necessary because it is foreseeable that the prisoner will not appear at further proceedings or will engage in serious criminal misconduct, and (4) less severe forms of restraint are inadequate.<sup>40</sup>

If the commander approves continued confinement, her decision will be provided to Sergeant Johnson and a reviewing officer.<sup>41</sup> Within seven days of the imposition of confinement, the reviewing officer will conduct a pretrial confinement hearing to evaluate the necessity for continued pretrial confinement. At the hearing, Sergeant Johnson and her counsel will have the opportunity to present written matters and make a statement. Upon completion of the review, the reviewing officer will either approve continued confinement or order Sergeant Johnson's immediate release.<sup>42</sup> If Sergeant Johnson is released, that decision may not be reversed. If she remains in confinement, the reviewing officer may reconsider the decision based on new information. In addition, a military judge may review the decision after the charges are referred to trial.<sup>43</sup>

If *Miss. Johnson* is not offered bail or is unable to post the required bond, she will remain in jail. Her job may be in jeopardy should she fail to go to work. If she does get out of jail and needs to work with her attorney to prepare for her defense, she can only hope her employer will allow her time to meet those appointments. There is no obligation for the employer to give *Miss. Johnson* time off, and there is normally nothing to prohibit the employer from firing *Miss. Johnson* for failing to work.

*Sergeant Johnson*, on the other hand, will continue to receive full pay and allowances whether she is in pretrial confinement or not. In no event will she be required to post bail to secure her release. She also will be given ample time to meet with her defense counsel to prepare her defense.

## F. Pretrial Investigation or Grand Jury

The next step in *Miss. Johnson's* case will be a preliminary hearing to determine whether there is sufficient cause to charge her with the alleged offenses.<sup>44</sup> The hearing will be held before a district court judge, with *Miss. Johnson* and her counsel present. The judge will question witnesses for and against *Miss. Johnson*, who will also have an opportunity to call witnesses in her own behalf. However, the prosecution is only required to produce a prima facie case, and need not present all evidence that might be used at trial. Therefore, the preliminary hearing will have limited value to *Miss. Johnson* as

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* The reviewing officer must be a neutral and detached officer.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Va. Code §§ 19.2-183, 19.2-218 (2001).

a discovery tool.<sup>45</sup> Following the hearing, the judge will either dismiss the charges or certify them to the circuit court for grand jury consideration.<sup>46</sup>

Assuming the charges are certified, the grand jury process will follow. A regular grand jury will consider bills of indictment prepared by the commonwealth's attorney to determine whether there is probable cause to return "true bills" and thereby formally accuse Miss. Johnson.<sup>47</sup> The grand jury contains five to seven members.<sup>48</sup> Its proceedings are conducted in secret,<sup>49</sup> with no opportunity for Miss. Johnson or her counsel to cross-examine witnesses or present defense evidence or witnesses. Once the grand jury has indicted Miss. Johnson, the trial process will begin.

In *Sergeant Johnson's* case, the special court-martial convening authority will direct a pretrial investigation under Article 32 of the UCMJ, which is required before charges may be referred to a general court-martial.<sup>50</sup> The Article 32 investigation is similar in purpose to a grand jury, but it provides substantially broader benefits to the accused.<sup>51</sup> Sergeant Johnson and her counsel will have the opportunity to fully prepare for the investigation and will be present throughout the hearing. All reasonably available witnesses, whose testimony is relevant and not cumulative, will be called to testify and subject to examination by Sergeant Johnson's counsel.<sup>52</sup> This includes witnesses requested by Sergeant Johnson; the investigating officer<sup>53</sup> will arrange their attendance. In addition, all relevant evidence under government control will be produced if reasonably available.<sup>54</sup>

Sergeant Johnson and her counsel can choose from a variety of tactics at the Article 32 hearing. They may elect to "litigate" the case in an attempt to show that she is not guilty, that she should be charged with lesser offenses, or that her case should be disposed of through a proceeding less severe than a general court-martial (i.e., a felony trial). In addition to questioning government witnesses and presenting her own witnesses, Sergeant Johnson may testify and present any evidence she desires.

The Article 32 investigation gives Sergeant Johnson the benefit of discovering the prosecution's case against her. All witness testimony will be summarized or recorded verbatim. Should the case be referred to a court-

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<sup>45</sup> See *Williams v. Commonwealth*, 208 Va. 724, 160 S.E.2d 781 (1968).

<sup>46</sup> Va. Code § 19.2-186 (2001).

<sup>47</sup> Va. Code § 19.2-191 (2001).

<sup>48</sup> Va. Code § 19.2-195 (2001).

<sup>49</sup> Va. Code § 19.2-192 (2001).

<sup>50</sup> See RCM 601(d)(2), *supra* note 6.

<sup>51</sup> See RCM 405, *supra* note 6.

<sup>52</sup> RCM 405(g), *supra* note 6.

<sup>53</sup> The investigating officer must be a commissioned officer who is not the accuser, preferably in the grade of major or higher or one with legal training. RCM 405(d)(1), *supra* note 6. In Air Force practice, the investigating officer is always a judge advocate (uniformed attorney).

<sup>54</sup> *Id.*

martial, the information developed at the Article 32 investigation can be used for cross-examination and other purposes at trial.

After the pretrial investigation, the investigating officer will submit a written report. It will contain her conclusions as to whether reasonable grounds exist to believe Sergeant Johnson committed the alleged offenses. The report will also include recommendations for disposition of the charges.<sup>55</sup> If the special court-martial convening authority, after reviewing the report from the Article 32 investigation, believes a general court-martial is warranted, she will forward that recommendation to the general court-martial convening authority (GCMCA).<sup>56</sup> If the GCMCA concurs, she will “refer” the charges to a general court-martial.<sup>57</sup> Once the charges against Sergeant Johnson have been referred to a general court-martial, the trial process begins.

### G. Discovery

Discovery is the process by which the accused obtains information about the prosecution’s case against her. *Miss. Johnson’s* discovery privilege is outlined in Rule 3A:11 of the Rules of the Supreme Court of Virginia.<sup>58</sup> Upon her request, she is entitled to receive copies of any written statements she has made that are in the government’s possession, as well as the substance of any oral statements she made to any law enforcement officer. She will also be provided copies of reports from any scientific analyses that have been performed, such as autopsies and blood, urine, and breath tests. In addition, she may obtain copies of other books, papers, and documents in the possession of the government, provided the request is reasonable and the items sought may be material to the preparation of her defense. There is also a constitutional right that applies in all criminal cases, which requires the prosecution to disclose any evidence that is favorable to the accused and material to either guilt or punishment.<sup>59</sup>

There are significant items that *Miss. Johnson* is not entitled to under the Virginia discovery rules. The prosecution is not required to provide a list of witnesses it intends to call or a list of all known eyewitnesses. Nor is there a requirement to provide statements made by prospective government witnesses to police officers in connection with the investigation or prosecution of the

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<sup>55</sup> See RCM 405(j), *supra* note 6.

<sup>56</sup> The commanders of most numbered air forces, and other headquarters organizations at echelons above Air Force wings, act as general court-martial convening authorities. See Article 22 of the UCMJ, *supra* note 4, RCM 504(b)(1), *supra* note 6, and Special Order GA-001, Department of the Air Force, October 10, 2000 (designating court-martial convening authorities). A general court-martial may adjudge any punishment authorized for the offenses of which the accused is convicted. See Article 18 of the UCMJ, *supra* note 4.

<sup>57</sup> Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial. RCM 601(a), *supra* note 6.

<sup>58</sup> See WILLIAMSON, *supra* note 2, at § 9.2.

<sup>59</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985).

case.<sup>60</sup> The absence of comprehensive discovery may result in surprises at trial that can negatively affect Miss. Johnson's case.

*Sergeant* Johnson, on the other hand, will receive virtually all information in the government's possession and will know exactly how the prosecution intends to prove its case well before trial. The discovery process begins when charges are preferred. At that time the defense counsel will be given a copy of any reports of investigation and witness statements pertaining to the alleged offenses.<sup>61</sup> The Article 32 investigation, discussed above, provides another opportunity for expansive discovery. *Sergeant* Johnson and her counsel are free to question prosecution and defense witnesses in detail. Sworn testimony of witnesses (usually in summarized format) will be included with the Article 32 report. It can enhance impeachment and be used for other purposes at trial.

After the charges have been referred for trial, the government is obligated to provide full and complete discovery even absent a defense request. The trial counsel (prosecutor) must provide any witness statements not previously provided, a list of witnesses to be called by the prosecution (either in the case-in-chief or to rebut affirmative defenses), notice of any prior convictions of the accused, and notice of any evidence that tends to negate the guilt of the accused, reduce the degree of guilt, or reduce the punishment.<sup>62</sup> If specifically requested by *Sergeant* Johnson, the prosecution must also permit the defense to inspect any evidence or information that is material to the preparation of the defense or intended for use as evidence at trial.<sup>63</sup>

In short, the comprehensive discovery rules under the UCMJ discourage surprise tactics and ensure that both parties to the trial are able to prepare their cases with the benefit of all relevant information. *Sergeant* Johnson's counsel is thus in a better position than *Miss.* Johnson's counsel to thoroughly prepare her defense and effectively respond to testimony and evidence presented by the prosecution at trial.

## H. Parties to Trial

To better understand the trial process, it is necessary to know who the players are and how they are appointed. Defense counsel are discussed above. The other major trial participants are the judge and the prosecutor.

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<sup>60</sup> *Currie v. Commonwealth*, 30 Va. App. 58, 515 S.E.2d 335 (1999); *Williams v. Commonwealth*, 30 Va. App. 378, 517 S.E.2d 246 (1999).

<sup>61</sup> See AFI 51-201, *supra* note 34, at ¶ 3.7. Staff judge advocates (legal advisors to commanders) are encouraged to provide basic discovery to defense counsel as soon as practicable, even before referral of charges.

<sup>62</sup> See RCM 701, *supra* note 6, and Rule 3.2, Uniform Rules of Practice Before Air Force Courts-Martial, May 1, 2000.

<sup>63</sup> *Id.*



In *Miss. Johnson's* case, the presiding judge will be a circuit court judge who has been chosen by majority vote of each house of the Virginia General Assembly to serve a term of eight years.<sup>64</sup> To be eligible for election, the judge must have been a member of the Virginia bar for at least five years.<sup>65</sup> The chief prosecuting attorney, called the Commonwealth's Attorney, is also an elected official, but she is elected directly by the voters of the city, for a four-year term.<sup>66</sup> An Assistant Commonwealth's Attorney, appointed by the Commonwealth's Attorney to serve a term equal to hers, will likely prosecute *Miss. Johnson*.<sup>67</sup>

The trial judge for *Sergeant Johnson's* general court-martial will be a judge advocate (military attorney) with substantial military justice experience, whom The Judge Advocate General of the Air Force has assigned to perform full-time duties as a military judge.<sup>68</sup> Air Force trial judges are supervised through a USAF Judiciary chain of supervision that is completely independent of the commanders and judge advocates who make decisions and recommendations concerning whether particular cases should go to trial.<sup>69</sup>

The prosecutor for *Sergeant Johnson's* case will be a judge advocate assigned to the base legal office at Langley Air Force Base. The senior judge advocate on a commander's staff (staff judge advocate or SJA) has overall responsibility to ensure that the prosecutor (Trial Counsel) effectively represents the government's interests.<sup>70</sup> However, the SJA herself is charged with ensuring that the administration of justice is fair and above board; her job is *not* to advocate the prosecution's position.<sup>71</sup>

Because of the seriousness of the charges in *Sergeant Johnson's* case, a Circuit Trial Counsel (CTC) will likely assist the trial counsel and act as lead prosecutor. CTCs are judge advocates with significant military justice

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<sup>64</sup> Va. Const. Art. VI, § 7 (2001).

<sup>65</sup> *Id.*

<sup>66</sup> Va. Const. Art. VII, § 4 (2001).

<sup>67</sup> See Va. Code § 15.2-1626 (2001), authorizing the appointment of Assistant Commonwealth's Attorneys. The Commonwealth's Attorney for the City of Hampton has one chief deputy, three deputies, two senior assistants, and nine assistants. Telephone call to Office of the Commonwealth's Attorney for the City of Hampton (757-727-6442) (Nov. 1, 2001).

<sup>68</sup> Military judges must be members of the bar of a Federal court or the highest court of a State, and must be certified as qualified for duty as a military judge by the Judge Advocate General of the Air Force. See RCM 502(c), *supra* note 6, Article 26 of the UCMJ, *supra* note 4, and AFM 51-204 ¶ 1, *supra* note 22.

<sup>69</sup> *Id.*

<sup>70</sup> See AFM 51-204 ¶ 2.4.7, *supra* note 22.

<sup>71</sup> "[T]he SJA's job is to insure a level playing field. The [Area Defense Counsel] is equal at the bar of justice with the prosecution function of the legal office. Advocacy of the prosecution's position in a military justice action is the responsibility of the trial counsel, not the SJA. The SJA's responsibility is to insure that the government is well represented and prepared." TJAG Policy Number 28, The Area Defense Counsel Function, AF/JA (Feb. 4, 1998).

experience who travel to various bases to represent the government in more serious cases.<sup>72</sup> As discussed above, Circuit Defense Counsel (CDCs) likewise have significant experience, and assist Area Defense Counsel (ADCs) in more serious cases. If Sergeant Johnson requests it, both an ADC and a CDC will represent her. Thus there could be two prosecutors and two defense counsel.

### I. Selection of Jury Members and Challenges

Both *Miss. Johnson* and *Sergeant Johnson* have a right to choose trial by jury or trial by a judge sitting alone. In *Miss. Johnson's* case, if she elects trial by jury, the jury will consist of twelve individuals.<sup>73</sup> They will be selected from a panel of twenty citizens who have been randomly selected from the community<sup>74</sup> and then questioned to ensure they can be fair and impartial.<sup>75</sup> When selecting potential jurors, the judge has wide discretion to exempt people whose service on a jury would cause them “a particular occupational inconvenience.”<sup>76</sup> This system has been criticized because it can result in a jury with under-representation by the better-educated and more affluent citizens.

To reduce the panel of twenty to the twelve jurors who will serve on *Miss. Johnson's* case, the court will use a statutory system of peremptory challenges.<sup>77</sup> The prosecution and the defense will take turns striking members of the panel until each side has eliminated four, and twelve jurors remain.<sup>78</sup>

The jurors in a court-martial case are called “court members” rather than “jurors” or “the jury.”<sup>79</sup> If *Sergeant Johnson* elects to be tried by court members rather than by a military judge sitting alone, the panel that decides her case will consist of at least five court members.<sup>80</sup> Prior to trial, the convening authority will choose members from throughout the command who are, in her opinion, best qualified to serve based on their age, education, training, experience, length of service, and judicial temperament.<sup>81</sup> Court members are usually commissioned officers, but an enlisted accused, such as *Sergeant Johnson*, may request that enlisted members also serve on her court, in which case at least one-third of the panel will be enlisted members.<sup>82</sup>

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<sup>72</sup> See AFM 51-204 ¶ 2.4, *supra* note 22.

<sup>73</sup> See Va. Const. Art. I, § 8 (2001) and Va. Code § 19.2-262(B) (2001).

<sup>74</sup> See Va. Code §§ 8.01-337, 8.01-357, 19.2-262(B) (2001).

<sup>75</sup> Va. Code § 8.01-358 (2001).

<sup>76</sup> Va. Code § 8.01-341.2 (2001).

<sup>77</sup> Va. Code § 19.2-262(C) (2001).

<sup>78</sup> *Id.*

<sup>79</sup> See Article 25 of the UCMJ, *supra* note 4.

<sup>80</sup> Article 16(1)(A) of the UCMJ, *supra* note 4.

<sup>81</sup> Article 25(d)(2) of the UCMJ, *supra* note 4.

<sup>82</sup> Article 25(c) of the UCMJ, *supra* note 4.

Like Miss. Johnson, Sergeant Johnson and her counsel will have the opportunity to question the court members and ask the judge to remove any member whose fairness or impartiality is in question.<sup>83</sup> In addition, the prosecution and defense may each strike one member from the panel peremptorily (without cause).<sup>84</sup>

## J. Command Influence

Commanders are responsible for administering the military justice system and maintaining good order and discipline within their commands. Because of the significant role of commanders in the court-martial process, a question arises as to whether improper command influence may deprive an accused of a fair trial. However, a number of checks built into the system minimize the likelihood of unlawful command influence and provide a remedy when it does occur.

As discussed above, the military judge and defense counsel for a court-martial fall within Air Force Judiciary chains of supervision, which are completely separate and independent from the convening authority and other commanders who decide which cases will go to trial. Thus the defense counsel is able to zealously represent the interests of Sergeant Johnson without fear of retribution. Similarly, the military judge can focus on ensuring a fair trial and need not be concerned about adverse reactions to rulings.

Although commanders are given wide discretion to decide whether a case should go to trial, the UCMJ specifically prohibits them, and anyone else subject to the UCMJ, from attempting to coerce or otherwise unlawfully influence the action of a court-martial in reaching findings or a sentence.<sup>85</sup> A similar prohibition forbids attempts to influence convening, approving, or reviewing authorities with respect to their judicial acts.<sup>86</sup> In addition, the performance evaluations of military members who have served as court members may not consider or evaluate how they performed their duties as a court member.<sup>87</sup> Thus the system is designed to ensure court members exercise their independent judgment in evaluating the evidence in the case. Commanders recognize that integrity in the military justice system requires fairness in fact and perception.

When questioning potential court members to determine whether they are able to evaluate the evidence fairly and impartially, the military judge

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<sup>83</sup> See Article 41 of the UCMJ, *supra* note 4, and RCM 912, *supra* note 6.

<sup>84</sup> *Id.*

<sup>85</sup> See Article 37 of the UCMJ, *supra* note 4, and RCM 104, *supra* note 6. Violations of the prohibition against unlawful command influence may be prosecuted under Article 98, and carry a maximum punishment including confinement for five years. MCM, *supra* note 4, pt. IV, Punitive Article 98.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

inquires into the issue of indirect command influence.<sup>88</sup> Counsel for both sides also have an opportunity to question the members further about possible command influence.<sup>89</sup> If there is substantial doubt as to whether a particular member will be fair and impartial, based on command influence or any other factor, that member may be removed from the panel for cause.<sup>90</sup> If the defense challenges a member for cause and the judge denies the challenge, the judge's ruling may be appealed in due course.

### **K. Production of Witnesses and Evidence**

Both Miss. Johnson and Sergeant Johnson enjoy the Sixth Amendment right to compulsory process for obtaining witnesses and evidence in their favor.<sup>91</sup> However, if she is convicted and not indigent, *Miss. Johnson* will have to pay for witness costs such as travel and expert witness fees, for her witnesses as well as prosecution witnesses, in addition to almost all other costs incurred by the government in prosecuting her.<sup>92</sup> *Sergeant Johnson*, in contrast, will not be responsible for any of these expenses, regardless of her ability to pay or the verdict at trial.<sup>93</sup>

### **L. Trial Procedure and Rules of Evidence**

If there is a litigated trial rather than a guilty plea, both Miss. Johnson and Sergeant Johnson's trials will be governed by similar rules of procedure and evidence.<sup>94</sup> After the jury or court members have been selected and the judge has ruled on any preliminary legal issues, counsel for each side will make an opening statement, in which they outline what they expect the evidence to show. The prosecution will then present its evidence and

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<sup>88</sup> The judge instructs and questions the members as follows: "You are all basically familiar with the military justice system, and you know that the accused has been charged, her charges have been forwarded to the convening authority and referred to trial. None of this warrants any inference of guilt. Can each of you follow this instruction and not infer that the accused is guilty of anything merely because the charges have been referred to trial?" Department of the Army Pamphlet 27-9, Military Judges' Benchbook ¶ 2-5-1 (Apr. 1, 2001)[hereinafter DA Pam 27-9].

<sup>89</sup> See Article 41 of the UCMJ, *supra* note 4, and RCM 912, *supra* note 6.

<sup>90</sup> *Id.*

<sup>91</sup> See Va. Code § 19.2-267 (2001), Article 46 of the UCMJ, *supra* note 4, and RCM 703, *supra* note 6.

<sup>92</sup> Va. Code § 19.2-336 (2001).

<sup>93</sup> See AFI 51-201, *supra* note 34, at § 6A.

<sup>94</sup> See generally WILLIAMSON, *supra* note 2, at Chapter 11, and RONALD J. BACIGAL, VIRGINIA CRIMINAL PROCEDURE § 17-1 *et seq.* (3<sup>rd</sup> ed. Supp. 1998), for Virginia procedure and rules of evidence. See RCM 901 *et seq.*, *supra* note 6, for court-martial procedure. Courts-martial are governed by the Military Rules of Evidence, which are similar to and derived from the Federal Rules of Evidence. MCM, *supra* note 4, pt. III, Military Rules of Evidence [hereinafter MRE] 1101, 1102.

witnesses, who are subject to cross-examination by the defense. After presenting its case, the prosecution will rest and the defense will have an opportunity to present evidence and witnesses. Once any rebuttal evidence has been presented, the judge will discuss her jury instructions with counsel and rule on any objections. Counsel will then make their closing arguments, after which the judge will instruct the jury and direct them to begin their deliberations.

The twelve jurors in *Miss. Johnson's* case must vote unanimously in order to convict or acquit her.<sup>95</sup> The need for unanimity can give rise to undue pressure by some jurors against others to disregard their own convictions and join the group consensus. In the event the jury cannot reach unanimity, they become a “hung jury” and a mistrial will be declared. The prosecution is then free to start the process over and retry *Miss. Johnson* on the same charges,<sup>96</sup> using the same or any other evidence. So, even if 11 of the 12 jurors voted “not guilty,” *Miss. Johnson* could be prosecuted anew.

In *Sergeant Johnson's* trial, the court members *will* reach a verdict and there is less potential for undue pressure by some court members against others. After fully and freely reviewing and discussing all of the evidence, the court members will vote only once on each offense.<sup>97</sup> At least two-thirds of the court members must vote for a finding of guilty in order to convict.<sup>98</sup> If fewer than two-thirds of the members vote for a finding of guilty, *Sergeant Johnson* is found not guilty of that offense. There is no hung jury or retrial in the military justice system.

### **M. Sentencing and Post-Trial Processing**

Assuming *Miss. Johnson* is found guilty of the charged offenses, the trial will move to a sentencing phase. Virginia is one of only a few remaining states that provide for jury sentencing.<sup>99</sup> A separate sentencing hearing takes place before the same jury that convicted the defendant.<sup>100</sup> The prosecution may offer evidence of any prior convictions and the defense may offer any relevant, admissible evidence related to punishment.<sup>101</sup> The jury will then deliberate on the sentence and impose a punishment within the limits prescribed by statute. It will impose a separate sentence for each offense, with

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<sup>95</sup> Va. Const. Art. I, § 8 (2001).

<sup>96</sup> *See Holloman v. Commonwealth*, 23 Va. App. 183, 475 S.E.2d 815 (1996).

<sup>97</sup> RCM 921, *supra* note 6.

<sup>98</sup> *Id.*

<sup>99</sup> Va. Code § 19.2-295 (2001). If the accused pleads guilty or elects trial by judge alone, the judge determines the sentence. *See generally* BACIGAL, *supra* note 94, at Chapter 19.

<sup>100</sup> Va. Code § 19.2-295.1 (2001).

<sup>101</sup> *See Pierce v. Commonwealth*, 21 Va. App. 581, 466 S.E.2d 130 (1996).

sentences to confinement running consecutively unless the court orders otherwise.<sup>102</sup>

Beginning in the 1990s, Virginia instituted a system of discretionary sentencing guidelines.<sup>103</sup> Juries are not given access to the guidelines, but the judge must consider them in deciding whether to suspend the sentence imposed by the jury in whole or in part. Neither judge nor jury has the authority to suspend or disregard minimum terms of confinement that are mandatory under the law for certain offenses.

In Miss. Johnson's case, assume she was found guilty of all three offenses. Aggravated involuntary manslaughter is a felony punishable by up to 20 years of confinement, with a mandatory minimum term of one year of confinement.<sup>104</sup> Possession of more than one-half ounce and up to five pounds of marijuana with intent to distribute is a Class 5 felony, for which up to 10 years of confinement may be imposed.<sup>105</sup> Finally, possession of a firearm, while committing the offense of possession of more than one pound of marijuana with intent to distribute, is a Class 6 felony carrying a mandatory term of confinement of five years.<sup>106</sup> Thus the jury will impose an aggregate sentence of at least 6 years confinement and no more than 35 years confinement.<sup>107</sup> The judge will consider the state sentencing guidelines and may suspend any or all confinement in excess of 6 years. However, Miss. Johnson will be sentenced to at least 6 years because of the mandatory minimum terms for two of her three offenses.

Like the jury in Miss. Johnson's case, the court members who found *Sergeant* Johnson guilty will determine her sentence. However, the court members will have the discretion to impose any sentence they find appropriate, from no punishment up to the maximum authorized for the offenses. They will impose a single sentence covering all offenses, rather than separate sentences for each offense. The military judge has no authority to modify their sentence. The convening authority, however, has broad discretion to modify the guilty findings or sentence—but only in a manner that is favorable to Sergeant Johnson.

In the sentencing phase of the trial, the prosecution will present personal data concerning Sergeant Johnson and the character of her prior service. This includes evidence of any prior military or civilian convictions, evidence in aggravation relating to the offenses for which she is being

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<sup>102</sup> Va. Code § 19.2-308 (2001).

<sup>103</sup> See WILLIAMSON, *supra* note 2, at § 12.3, and VIRGINIA CRIMINAL SENTENCING COMMISSION, VIRGINIA SENTENCING GUIDELINES (July 1, 2000).

<sup>104</sup> Va. Code § 18.2-36.1 (2001).

<sup>105</sup> Va. Code §§ 18.2-248.1, 18.2-10 (2001).

<sup>106</sup> Va. Code §§ 18.2-308.4, 18.2-10 (2001).

<sup>107</sup> This assumes the judge does not order the sentences to confinement to run concurrently. If the judge does order them to run concurrently, the actual term of confinement will be between 5 and 20 years.

sentenced, and evidence of her rehabilitative potential.<sup>108</sup> The defense then has the opportunity to present evidence explaining the circumstances surrounding the offenses and any other matters offered to lessen the punishment or support a recommendation for leniency.<sup>109</sup> Sergeant Johnson may submit matters in a variety of ways: through sworn testimony or via a written or oral unsworn statement, or through her attorney. Sergeant Johnson chooses the option that will be most effective for her. Sworn testimony is subject to cross-examination, while material presented by other means is subject to normal rebuttal.

The government is given an opportunity to present rebuttal evidence. If any such evidence is introduced, the defense also has the opportunity to present matters in rebuttal. The judge then instructs the members prior to their sentencing deliberations.

The UCMJ gives court members a much broader range of sentencing options than are available in the civilian justice system. Punishments may include death (for specified offenses), punitive discharges from the service, confinement, hard labor without confinement, restriction to specified locations, reduction in pay grade, fines, forfeiture of pay and allowances, and reprimands.<sup>110</sup> In Sergeant Johnson's case, the maximum punishment includes a dishonorable or bad conduct discharge, confinement for life, and other authorized punishments other than death.<sup>111</sup> There is no minimum punishment that the court members are required to adjudge in her case.<sup>112</sup>

After her sentence has been adjudged and the record of trial transcribed, Sergeant Johnson will have another opportunity to submit written matters. She may seek disapproval of any guilty finding or approval of a less severe sentence than the court members have adjudged. This process is called clemency.<sup>113</sup> The convening authority must consider the matters submitted by Sergeant Johnson before acting on her case. She has broad discretion to set aside findings of guilty, reduce them to findings of guilty to lesser offenses, or approve a less severe sentence than the one adjudged by the court members.<sup>114</sup> In no event may the convening authority take action against Sergeant Johnson that is more severe than that adjudged by the court members.

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<sup>108</sup> See RCM 1001, *supra* note 6.

<sup>109</sup> *Id.*

<sup>110</sup> See RCM 1003, *supra* note 6.

<sup>111</sup> Murder by engaging in an act inherently dangerous to another carries a maximum term of confinement of life, wrongful possession of marijuana with intent to distribute carries a maximum term of confinement of 15 years, and possession of a firearm in violation of a lawful regulation carries a maximum term of confinement of six months. MCM, *supra* note 4, pt. IV, Punitive Articles 112a, 118, 92.

<sup>112</sup> See RCM 1002, *supra* note 6. Except for a very small number of offenses where the UCMJ prescribes a mandatory minimum sentence, a court-martial may adjudge any sentence from no punishment to the maximum authorized.

<sup>113</sup> See RCM 1105, *supra* note 6.

<sup>114</sup> See Article 60 of the UCMJ, *supra* note 4, and RCM 1107, *supra* note 6.

## N. Appellate Process

After conviction and sentencing, the final step is the appeals process. If *Miss. Johnson* is indigent and represented by court-appointed counsel, the same attorney will handle any appeal.<sup>115</sup> If she is not indigent, *Miss. Johnson* is responsible for providing her own attorney and covering all costs associated with the appeal, including the cost of transcribing the record of trial.

There is no absolute right of appeal in Virginia, except in capital cases. However, *Miss. Johnson* does have the right to petition the Court of Appeals of Virginia for review of her case.<sup>116</sup> The judge receiving her petition will either grant it, allowing the appeal to proceed, or refer it to a three-judge panel and give *Miss. Johnson* the opportunity to make an oral presentation as to why her appeal should be considered. If all judges on the panel agree that the petition for appeal should not be granted, it will be denied and *Miss. Johnson's* remedies will be exhausted. If at least one judge on the panel decides the appeal should be heard, it will be referred to a panel for consideration on the merits.<sup>117</sup> If the decision on the merits is adverse to her, *Miss. Johnson* may petition the Virginia Supreme Court for an appeal.<sup>118</sup> The Virginia Supreme Court has complete discretion in deciding whether to grant her petition and consider her appeal on the merits. Once her last appeal is decided or her request for appeal is denied, *Miss. Johnson's* conviction and sentence are final.

In *Sergeant Johnson's* case, there will be an automatic appellate review if her approved sentence includes a punitive discharge from the service or confinement for one year or longer.<sup>119</sup> Whether indigent or not, *Sergeant Johnson* will be represented by an experienced judge advocate who is assigned to full-time duties as an appellate defense counsel.<sup>120</sup> A three-judge panel of the Air Force Court of Criminal Appeals will review her case.<sup>121</sup> In addition to deciding issues of law, the judges are required by the UCMJ to determine whether the record of trial supports both the findings and sentence as approved by the convening authority.<sup>122</sup> Very few appellate courts, other than the military Courts of Criminal Appeals, have the authority to reverse convictions if, based on the trial record, the appellate judges are not convinced of guilt beyond a reasonable doubt.

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<sup>115</sup> See Va. Code § 19.2-159 (2001).

<sup>116</sup> See Va. Code § 17.1-407 (2001).

<sup>117</sup> *Id.*

<sup>118</sup> Va. Code § 17.1-411 (2001).

<sup>119</sup> See Article 66 of the UCMJ, *supra* note 4, and RCM 1203, *supra* note 6.

<sup>120</sup> See Article 70 of the UCMJ, *supra* note 4, and RCM 1202, *supra* note 6.

<sup>121</sup> See Article 66 of the UCMJ, *supra* note 4, and RCM 1203, *supra* note 6.

<sup>122</sup> In considering the record of trial, the judges may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. Article 66(c) of the UCMJ, *supra* note 4.



If the Air Force Court of Criminal Appeals rules against Sergeant Johnson, she can request further review by the United States Court of Appeals for the Armed Forces (USCAAF).<sup>123</sup> USCAAF consists of five civilian judges, appointed to 15-year terms.<sup>124</sup> If USCAAF decides to review her case, and rules against Sergeant Johnson, she may request review by the United States Supreme Court through a writ of certiorari.<sup>125</sup> Once her last appeal is decided or her request for further appeal is denied, Sergeant Johnson's conviction and sentence are final.

#### IV. CONCLUSION

The military justice system gives service members virtually all rights and privileges that are afforded to citizens who face prosecution in civilian courts. In many areas—such as the right to counsel, the pretrial investigatory process, discovery, sentencing, post-trial processing, and appeals—the military system offers benefits to an accused that are more favorable than those available in civilian systems.

Americans, now firmly settled in the era of an all-volunteer military force, would not support a military justice system that did not provide fundamental due process and fair trial guarantees. The Uniform Code of Military Justice establishes a system that is separate and different, but one that fully meets expectations for fairness and protection of individual rights. The American citizens who volunteer to serve their country deserve nothing less.

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<sup>123</sup> See Article 67 of the UCMJ, *supra* note 4, and RCM 1204, *supra* note 6.

<sup>124</sup> Article 142 of the UCMJ, *supra* note 4.

<sup>125</sup> Article 67a of the UCMJ, *supra* note 4, and RCM 1205, *supra* note 6.

# **A REPLY TO THE REPORT OF THE COMMISSION ON THE 50<sup>TH</sup> ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (MAY 2001): “THE COX COMMISSION”**

LIEUTENANT COLONEL THEODORE ESSEX\*  
MAJOR LESLEA TATE PICKLE\*\*

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

## **I. INTRODUCTION**

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

This article will examine the Cox Commission’s recommendations for changing the current military justice system. Our position is that the changes

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

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

## **II. FAILURE TO KEEP PACE WITH STANDARDS OF PROCEDURAL JUSTICE**

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

“This landmark legislation created the fairest and most just system of courts-martial in any country in 1951. But the UCMJ has failed to keep pace with the standards of procedural justice adhered to not only in the United States, but in a growing number of countries around the world, in 2001.”<sup>3</sup>

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

## **III. NO EXTERNAL SCRUTINY**

The CCR states, “The UCMJ governs a criminal justice system with jurisdiction over millions of United States citizens, including members of the National Guard, reserves, retired military personnel, and the active-duty force, yet the Code has not been subjected to thorough or external scrutiny for thirty years.”<sup>5</sup> This statement makes it appear that there are no provisions in place

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

<sup>3</sup> CCR, *supra* note 1 at 1.

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

<sup>5</sup> CCR, *supra* note 1, at 2.

for reviewing the UCMJ. This is simply not the case. The UCMJ, as federal law, is subject to the oversight of the legislature. If the President proposes amendments to the UCMJ, there will be congressional oversight. Additionally, both the judiciary and the armed services committees have jurisdiction to review matters of military justice. There is even a Department of Defense directive<sup>6</sup> that establishes a Joint Service Committee on Military Justice that is required to report to the President annually and to propose legislation to improve military justice. The committee's annual review of the UCMJ is both thorough and extensive.<sup>7</sup>

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

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

The Commission states, "In recent years, countries around the world have modernized their military justice systems, moving well beyond the framework created by the UCMJ fifty years ago."<sup>11</sup> The Commission cites the

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

<sup>7</sup> For a summary of the 1998-2000 annual reviews done by the Joint Service Committee on Military Justice see [https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE/JUSTICE/JAJM/LEGISLAT.htm](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JUSTICE/JAJM/LEGISLAT.htm) (last accessed 22 Apr 02).

<sup>8</sup> UCMJ, art.146 (2000).

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

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

<sup>11</sup> CCR, *supra* note 1, at 3.

military justice systems of the United Kingdom, Canada, Austria, India, Ireland, Israel, Mexico and South Africa.<sup>12</sup> These countries did change their justice systems. However, the changes they made do not mean that the UCMJ is outdated. Rather, the countries that changed their military justice systems had other problems to correct. In the two cases cited by the Commission, *Findlay v. United Kingdom*<sup>13</sup> (England), and *R V. Genereux* (Canada), the legal issues decided were quite different than any that could be raised with regard to the UCMJ.<sup>14</sup>

### A. Contrast with Findlay

In *Findlay*, the court was concerned about two issues. The first issue was the central role played by the convening officer in the organization of the court-martial. The second issue involved a review process that did not address Mr. Findlay's concerns about a fair and impartial trial. The *Findlay* court was concerned about the following facts: the convening officer decided the nature and detail of the charges and recommended the type of court-martial on his own; the convening officer could comment on the evidence and its admissibility; there was no independent review of the charges; no legal officer sat on the court-martial (the court did not state whether the accused had a right to examine the court members or challenge them for cause); the only safeguard to ensure court members were unbiased was the oath they took (there was no mention of any judicial review of the court member selection process); the convening officer could comment on the proceedings of a court-martial which required confirmation—these remarks would not form part of the record and could be communicated to the court members; the convening officer appointed the prosecuting officer and the defense counsel; the convening officer ruled on applications by the defense during the trial; the sentence had no effect until confirmed by the convening officer, who could withhold confirmation, substitute or postpone or remit in whole or in part, any sentence; and finally, there were no statutory or formalized procedures set out for post-trial reviews and hearings.<sup>15</sup> The situation in *Findlay* stands in marked contrast to the procedures under the UCMJ.

Under the UCMJ, the convening authority determines the charges to refer and the type of court-martial to be convened. However, he or she does so only after reviewing the evidence (usually in the form of a report of investigation) and receiving advice on the charges from the base Staff Judge Advocate (SJA). The charges are drafted, not by the convening authority, but

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<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221 (1997).

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

<sup>15</sup> *Findlay*, *supra* note 13.

by lawyers in the base legal office.<sup>16</sup> For a case to be referred to a general court-martial, an independent review of the charges must be held at an Article 32 investigation.<sup>17</sup> The Article 32 investigation provides more procedural protections for the accused than a grand jury hearing.<sup>18</sup> Furthermore, once a case is referred to a court-martial, the military judge has the responsibility and authority to review the charges. The judge can dismiss one or all of the charges for multiplicity or simply based on equity.<sup>19</sup> Finally, even if court members are hearing the case, if the military judge believes a charge was not proven beyond a reasonable doubt, he may enter a finding of not guilty.<sup>20</sup>

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

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

Members who are found to be “biased,” whether the bias is actual or implied, may not sit on a court-martial,<sup>28</sup> and case law provides that military

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<sup>16</sup> MCM, *supra* note 9, R.C.M. 307(c).

<sup>17</sup> *Id.* at R.C.M. 405(a).

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

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

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

<sup>21</sup> UCMJ art. 25(d)(2) (2000).

<sup>22</sup> MCM, *supra* note 9, R.C.M. 911 Discussion.

<sup>23</sup> *Id.* at R.C.M. 501.

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

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

<sup>26</sup> *Id.* at R.C.M. 912(b-f).

<sup>27</sup> *Id.* at R.C.M. 912(g).

<sup>28</sup> *Id.* at R.C.M. 912(e); see also *United States v. Wiesen*, No. 9801770, 2001, CAAF LEXIS (Dec. 13, 2001).

judges are to grant challenges for “implied” bias very liberally.<sup>29</sup> Military judges may also disqualify a court member for bias *sua sponte*.<sup>30</sup>

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

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

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

In *Findlay*, the convening officer appointed both the prosecuting officer and the defense counsel. Under the UCMJ, the SJA appoints the trial counsel. The defense counsel is appointed by, and falls under the supervision of, a

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<sup>29</sup> United States v. Rome, 47 M.J. 467 (1998).

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

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

<sup>32</sup> *Id.* at R.C.M. 912(b)(1-2).

<sup>33</sup> *Id.* at R.C.M. 801(e)(1)(A).

<sup>34</sup> UCMJ, art. 37 (2000).

<sup>35</sup> *Id.*

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

<sup>37</sup> *Id.* at note 37.

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

separate chain of command.<sup>39</sup> In *Findlay* the convening officer also controlled the trial and defense witnesses, with no review process of his decisions. Under the UCMJ, while the convening authority controls the production of trial and defense witnesses, her decisions are subject to judicial review.<sup>40</sup>

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

## **B. Contrast with Genereux**

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

These concerns are not present in the United States' system. Under the UCMJ, the military judges are ultimately under the authority of The Judge Advocate General (TJAG) of each service. They are not in the same chain of command as the convening authority and are not detailed to the case by him.<sup>47</sup> Also, Article 37 of the UCMJ prevents the TJAG of each service, or anyone else, from censuring, reprimanding or admonishing a military judge for his

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

<sup>40</sup> *Id.* at R.C.M. 906(a).

<sup>41</sup> *Id.* at R.C.M. 1101, 1107 and 1209.

<sup>42</sup> *Id.* at R.C.M. 1107, 1108 and 1109.

<sup>43</sup> *Id.* at R.C.M. 1107(a)(3).

<sup>44</sup> *Id.* at R.C.M. 1107(h).

<sup>45</sup> *Id.* at R.C.M. 1201-1210.

<sup>46</sup> R v. Genereux, 1 S.C.R. 259.

<sup>47</sup> UCMJ, art. 26 (2000).



functions at a court-martial.<sup>48</sup> Finally, in contrast to a major concern in *Genereux*, a military judge's salary is not determined by his performance evaluation. He is paid the same as any other military member of the same rank and time in grade.

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

## V. GRASSROOTS ORGANIZATIONS AND "PERCEPTION"

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

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

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

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

For example, the report cites Citizens Against Military Justice (the group actually calls itself Citizens against Military Injustice, or CAMI)<sup>50</sup> as a group concerned with military justice reform. CAMI's site contains a mixed bag of complaints. The group is chaired by a mother who is upset because her

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<sup>48</sup> *Id* at 34.

<sup>49</sup> CCR, *supra* note 1, at 3.

<sup>50</sup> See [www.militaryinjustice.org](http://www.militaryinjustice.org) (last accessed 22 Apr 02).

son, a US soldier, was convicted of murder at a court-martial and is currently in confinement. The appellate process, including the then Court of Military Appeals (COMA--now renamed the US Court of Appeals for the Armed Forces, or CAAF, with Judge Walter Cox himself sitting as a member) upheld the conviction and sentence. The soldier's appellate rights were exhausted when the Supreme Court declined to review the case. For most of the other groups, military justice is not their primary cause. However, they come up on a web search because they are linked with the CAMI site. Thus, the commission attempts to bolster its conclusion that reform is needed by citing groups that either do not directly address the issues or ones that have an obvious bias.

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

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

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

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<sup>51</sup> CCR, *supra* note 1, at 3.

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

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

## VI. CONVENING AUTHORITIES AND UNLAWFUL COMMAND INFLUENCE

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

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

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

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

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

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<sup>53</sup> CCR, *supra* note 1, at 7.

<sup>54</sup> *Id.* at 7.

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

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

Professor Morgan: That is right.

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

Professor Morgan: That is exactly the way our committee felt about it. . . .<sup>55</sup>

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

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

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

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

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether

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

<sup>56</sup> Hearings, *supra* note 55, at 45.

a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member, as counsel, representing any accused before a court-martial.<sup>57</sup>

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

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

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

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

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

Finally, if the defense counsel does not receive satisfaction at the trial level, the issue can be raised on appeal. In some cases, additional facts

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<sup>57</sup> UCMJ, art. 37 (2000).

<sup>58</sup> UCMJ, art. 25 (d)(2) (2000).

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

regarding potential unlawful command influence become known after a trial is over. When these facts are brought to the attention of the appellate court, a post-trial hearing can be ordered to explore the possibility of unlawful command influence.<sup>60</sup>

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

## **VII. CONVENING AUTHORITY’S POWER OVER THE MILITARY JUSTICE PROCESS**

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

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

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

<sup>61</sup> CCR, *supra* note 1, at 5.

<sup>62</sup> *Id.* at 6.

<sup>63</sup> *Id.*

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

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

The court has recognized the convening authority's role in protecting the rights the convicted airmen as well:

Moreover, as noted above, appellant's offenses were committed prior to the effective date of Article 58b. Thus, the convening authority still had the power to remit or suspend any or all of the adjudged forfeitures under the clemency powers granted him in Article 60, UCMJ, 10 USC § 860 (1983). We continue to believe that the convening authority remains "the accused's best hope for sentence relief." See *United States v. Bono*, 26 M.J. 240, 243 n.3 (CMA 1988), citing *United States v. Wilson*, 9 U.S.C.M.A. 223, 226, 26 C.M.R. 3,6 (1958). A recommendation by a military judge must be brought to the attention of the convening authority to assist him in considering the action to take on the sentence.<sup>66</sup>

The convening authority is bound by law to act fairly and impartially. If he fails to do so at any step in the proceedings, he must disqualify himself, or the military judge will remove him. Failure to do so can result in a case being overturned.

The fairness of the convening authority is carefully scrutinized. Convening authorities have been disqualified where there was a perception that

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<sup>64</sup> *Id.* at 6-7.

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

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

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

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

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

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

<sup>68</sup> United States v. Wilson, 1 M.J. 694 (1975).

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

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

<sup>71</sup> United States v. Fisher, 45 M.J. 159 (1996).

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

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

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



## VIII. COX COMMISSION PROPOSAL FOR COURT MEMBER SELECTION

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

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

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

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

Implementing random member selection would not in any way prevent these examples of unlawful command influence. In fact, it might make the

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<sup>75</sup> CCR, *supra* note 1, at 7.

<sup>76</sup> *Id.*

potential problem worse. Removing the convening authority from the process also removes him from the advice and counsel of the SJA that went with the panel selection role. There would no longer be a legal requirement that the most qualified members serve. Consequently, the convening authority might feel less restrained to comment on the selected panel and its results. As the convening authority is removed from the process, courts and judges may feel his ability to influence a panel is lessened. Therefore, they may permit the convening authority more latitude when they determine the impact of remarks he may make or actions he may take. As a result, there may be more, rather than fewer, problems to address.

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

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

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

The commander's integrity is the very foundation of the military. If it is accepted that the system cannot trust its commanders, then the military as an institution cannot be trusted. The UCMJ incorporated the principle that service

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

## **IX. OTHER OBSERVATIONS REGARDING THE CONVENING AUTHORITY**

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

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

The rules provide that witnesses shall be produced if reasonably available.<sup>78</sup> The determination of reasonably available is set out in the rule, and it is further established by case law.<sup>79</sup> The convening authority may make the witnesses available based on the advice of the SJA. However, if he fails to do so, there are two levels of review. The Article 32 Investigating Officer (IO) has the independent authority to determine if a witness is reasonably available.<sup>80</sup> The nature of the Article 32 investigation is judicial, permitting the IO to suspend proceedings if the request is not complied with, and providing the IO with the same protections from unlawful command influence

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<sup>77</sup> *Id.*

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

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

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

that a court enjoys.<sup>81</sup> The decision of the IO may then be reviewed by the trial court. Ultimately, if there is a conviction, the trial judge's decision will be reviewed at the appellate level.

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

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

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

The defendant at a federal grand jury has no right to the testimony provided the grand jury, or to challenge it. Also, there is no requirement that a minimum number of grand jurors who vote to indict must hear all of the

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

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

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

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

<sup>85</sup> *Id.* at R.C.M. 405(f)(12).

<sup>86</sup> F.R.C.P., *supra* note 4.

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

evidence presented.<sup>88</sup> In every aspect, the accused has far more rights regarding the confrontation of witnesses against him and the presentment of evidence under the UCMJ than he would in any other federal pretrial hearing.

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

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

The power of the convening authority to make these decisions is limited by a number of factors that insure that the accused's procedural and substantive rights are protected. The convening authority may not "withhold or grant approval based on personal preference rather than a legal standard."<sup>96</sup> The convening authority must follow very exacting legal standards in each

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

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

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

<sup>91</sup> MCM, *supra* note 9, R.C.M. 703.

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

<sup>93</sup> Garries, 22 M.J. 288.

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

<sup>95</sup> MCM, *supra* note 9, R.C.M. 707.

<sup>96</sup> CCR, *supra* note 1, at 7.

instance listed above. These rights are codified in the MCM and clarified in the case law that has developed around each one.<sup>97</sup>

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

In *ABC, Inc. v. Powell*,<sup>99</sup> the decision as to whether to open an Article 32 investigation to the public was taken up by the US Court of Appeals for the Armed Forces after the Army Court of Criminal Appeals had ruled on the same issue. Based on that opinion, written by then Chief Judge Cox, it is clear that the military courts do exercise supervisory powers from the moment charges are preferred. The Army Court of Criminal Appeals finds its authority also extends to review of cases brought under Article 69 of the UCMJ.<sup>100</sup> This authority flows from what is commonly called the All Writs Act. The All Writs Act provides that “all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”<sup>101</sup>

The military courts and judges already oversee every step of the court-martial process from preferal of charges. Once charges are preferred, and a general court-martial is contemplated, they are sent to an Article 32 investigation. The Article 32 IO has quasi-judicial powers to conduct an

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

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

<sup>99</sup> 47 M.J. 363.

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

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

investigation with such independence that any effort to influence his decisions will amount to unlawful command influence. If a military judge were to oversee this process prior to referral, it is arguable that, under *current law*, the judge would be engaging in unlawful command influence if he attempted to interfere with the investigating officer's decision making process.

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

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

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

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

If convening authorities "loom over courts-martial," they loom low indeed. The only way the convening authority can prevent the review of a sentence that triggers the full appellate process is to reduce the sentence. Even

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

so, the office of the TJAG is charged with a review and may submit the issues to the appellate process on its own. Though the right to an appellate review is not absolute,<sup>103</sup> the review provided is more than is guaranteed in the civilian courts. In the civilian world, unless he is indigent, an accused must pay for the review process. Otherwise, unless an accused can pay, or find an attorney who will take the matter and move the court to waive its fees, meaningful appellate review may not be available.

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

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

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

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

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<sup>103</sup> MCM, *supra* note 9, R.C.M. 1201.

<sup>104</sup> CCR, *supra* note 1, at 8.

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



## X. OTHER RECOMMENDATIONS OF THE COX COMMISSION

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

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

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

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

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<sup>106</sup> CCR, *supra* note 1, at 8.

<sup>107</sup> *Id.*

<sup>108</sup> MCM, *supra* note 9, R.C.M. 801 and Discussion.

<sup>109</sup> *Id.* at R.C.M. 1203(b).

UCMJ, the military judge has all the independence and authority required to ensure a fair trial.<sup>110</sup> He also has a duty to ensure that a fair trial is conducted.

The Commission stated that, until very close to trial, neither the defense nor the prosecutors have a judicial authority to which to turn. This is untrue, as demonstrated in the *ABC, Inc. v Powell* case.<sup>111</sup> There has been, to date, no evidence offered that the current appointment system has prejudiced any right of a single accused. Moreover, the Supreme Court has upheld the method of appointing military judges and affirmed that it does not violate due process.<sup>112</sup> Absent some evidence of harm or prejudice, we should not tamper with a system that is working.

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

In quickly addressing the issue of public confidence in the system, the Commission is only able to provide references to several fringe groups of individuals who advocate changing the military justice system. Those the Commission cites as believing the system is unfair are neither neutral observers, legal experts, nor the average American off the street. Rather, their beliefs revolve around cases with which they disagree. To entertain the idea of change based on these views is unwarranted. The general public has, in the most recent polls, shown a tremendous degree of respect for the military.<sup>115</sup> There is absolutely no evidence offered to suggest they have any less respect for the military justice system. In any event, a system of justice that attempts to change in the face of uninformed public opinion will find itself achieving neither popularity nor justice. Only by adhering to principle can a system be a

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

<sup>111</sup> *ABC*, 47 M.J. 363.

<sup>112</sup> *Weiss*, 510 U.S. 163.

<sup>113</sup> CCR, *supra* note 1, at 9.

<sup>114</sup> See *supra* note 101.

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

true justice system. To bow to public pressure without a reason based in law and fact is to abandon justice for expediency. To educate the public is the far better answer. Absent a showing of a flaw in the UCMJ, we should not let the experience of others, whose systems and militaries are radically different from the United States', stampede us into rash movement just so we can claim reform. The many changes we have seen in systems of justice world-wide do not move those countries farther from the UCMJ, but rather, move them closer to it. We should defend a system that has served as a model for so many, rather than contemplate change because so many others have needed change.

### **B. Implement Additional Protections in Death Penalty Cases.**

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

1. Require a court-martial panel of 12 members.
2. Require an anti-discrimination instruction.
3. Address the issue of inadequate counsel by studying alternatives to the current method of supplying defense counsel.

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

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

Finally, while the courts should be ever vigilant to ensure a fair trial, particularly in a death penalty case, the court has never reversed a military death penalty conviction based on inadequate military counsel. It is vital that counsel be qualified in every criminal case, and we believe that the court is best qualified to examine whether the counsel that are practicing before it are

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<sup>116</sup> CCR, *supra* note 1, at 9.

competent. While additional training may be a good idea, neither training nor experience guarantee a counsel will be competent.

### **C. Replace Sexual Misconduct Provisions**

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

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

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

So long as defense counsel are willing to mischaracterize the evidence and charges to the media in an effort to rally public sympathy; and, so long as military authorities are willing to dismiss valid charges as a result of such public interest, the problem of public mistrust or misperceptions of the fairness of our system of military justice will persist. Changing the names of offenses or failing to prosecute those that have become unpopular or are misunderstood will not make the system fairer. Such modifications, whether *de facto* or *de jure*, may well result in a system that is less responsive to good order and discipline and casts even more discredit upon the military by demonstrating

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<sup>117</sup> *Id.* at 11.

<sup>118</sup> UCMJ, art. 134 (2000).

that we no longer hold our members to the high standard of morality and ethics the American people expect of their military. So long as manipulating perception is an advantage to one side, changing the law on the basis of perceptions so manufactured is unlikely to result in a more just system.

## **D. Discussion of Additional Issues**

### *1. Role of the Staff Judge Advocate*

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

The broad authority granted some staff judge advocates creates a number of unwanted, contradictory images of courts-martial: that over-zealous prosecutors can pursue charges at will and are rewarded for aggressive prosecution, that convening authorities routinely disregard the legal advice of their SJA's in order to pursue unwarranted or even vindictive prosecutions, and that lawyers, rather than line officers, control the military justice apparatus.<sup>119</sup>

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

### *2. Power of Prosecuting Attorneys*

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

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<sup>119</sup> CCR, *supra* note 1, at 12.

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

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

The UCMJ provides more oversight of the prosecutorial function than civilian systems can. The same restraints that prevent a commander or convening authority from manipulating the system apply to his SJA, and the trial counsel, as well as every military member. To lash out at the good faith of military attorneys, without support in the case law, is to strike a foul blow. This contention, that SJAs may taint the military justice system as a class, is without merit. The Commission goes on to say,

“The Code and the Manual for Courts-Martial should be amended to stress the need for impartiality, fairness and transparency on the part of staff judge advocates as well as all attorneys, investigators, and other command personnel involved in the court-martial process. These amendments should be drafted so as to make clear that violation of these principles as well as the trust inherent in these tasks is punishable under the UCMJ.”<sup>122</sup>

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

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

### 3. Sentencing

The Commission’s thoughts on sentencing bear some comment. The requirement that the sentence be passed by the members, when the case is tried before members, has served well for 50 years. Under military law, the sentence is determined on a case-by-case basis. There are no mandatory minimum sentences as there are in the civilian justice system. Indeed, a member may be challenged for cause if they take a rigid view of sentencing. A challenge for cause would be granted if the prospective court member said that

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<sup>122</sup> CCR, *supra* note 1, at 13.

<sup>123</sup> UCMJ, art. 37 (2000).

<sup>124</sup> MCM, *supra* note 9, R.C.M. 406.

<sup>125</sup> *Id.* at R.C.M. 1106.

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

they could not consider “no punishment” as a sentencing option.<sup>127</sup> We believe members listen to the judge’s instructions, honestly consider all the evidence, and arrive at what they believe to be a fair sentence for that case. They may only sit on one case their entire career, and they are disposed to attempt to do it correctly.

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

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

#### 4. Appellate Court Jurisdiction

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

Although military appellate courts are among those so empowered to issue extraordinary writs, see *Noyd v. Bond*, 395 U.S. 683, 695, n. 7, 23 L.Ed. 2d 631, 89 S. Ct. 1876, the All Writs Act does not enlarge those courts’ power to issue process “in aid of” their existing statutory jurisdiction, see, *e.g.*, *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 41, 88 L. Ed. 2d 189, 106 S. Ct. 355. The CAAF is accorded jurisdiction by statute to “review the record in [specified] cases reviewed by” the service courts of criminal appeals, 10 U.S.C. § 867 (a)(2), (3), which in turn have jurisdiction to “review court-martial cases,” § 866(a). Since the Air Force’s action to drop respondent from the rolls was an executive action, not a “finding” or “sentence,” § 867(c), that was (or could have been) imposed in a court-martial proceeding, the elimination of Goldsmith from the rolls appears straightforwardly to have been

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

<sup>128</sup> 526 U.S. 529 (1999).

beyond the CAAF's jurisdiction to review and hence beyond the "aid" of the All Writs Act in reviewing it. Goldsmith's claim that the CAAF has satisfied the "aid" requirement because it protected and effectuated the sentence meted out by the court-martial is beside the point, for two related reasons. First, his court-martial sentence has not been changed; another military agency has simply taken independent action. Second, the CAAF is not given authority, by the All Writs Act or any other source, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed. The CAAF spoke too expansively when it asserted that Congress intended it to have such broad responsibility. (b) Even if the CAAF had some seriously arguable basis for jurisdiction in these circumstances, resort to the All Writs Act would still be out of bounds, being unjustifiable either as "necessary" or as "appropriate" in light of alternative remedies available to a servicemember demanding to be kept on the rolls.<sup>129</sup>

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

##### *5. Enhanced Powers for Article 32 Investigation Officers*

Finally, the CCR recommends enhancing the powers of the Article 32 investigating officer so that his report is binding on convening authorities. This recommendation should be considered with caution. Though more extensive and open than a grand jury, the Article 32 investigation has limits not imposed on a court at a trial. For example, the IO cannot subpoena civilian witnesses. To make the IO's report, which may or may not consider all the evidence that a court could, binding on the convening authority, is to invite injustice. For example, an IO could recommend that a case be dismissed, without having seen all the evidence that could be offered at trial. If the report was binding on the convening authority, justice would not be served. Conversely, imagine the situation if the IO recommends the charges go to trial, but the SJA believes they are not legally sufficient. This puts a heavy burden on the accused that should not be imposed. Finally, consider the possibility that evidence may be discovered or developed after the Article 32. If the IO's recommendations are binding on the convening authority, with no provision to re-open the Article 32 investigation, the interests of justice would be harmed.

The CCR discusses the suggestion that the Article 32 officer should be either a military judge or a field grade judge advocate with enhanced powers. These powers would include the ability to issue subpoenas, and to make binding recommendations to dismiss charges where no probable cause is found. This suggestion equates to having a "judge alone trial before a trial." An acquittal at this "enhanced Article 32" would be binding on the

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<sup>129</sup> *Id.*



government. However, the defense would be fully able to fight the case at trial again. This asymmetrical burden would force government representatives to fully litigate Article 32 investigations, while permitting the defense to pick its strategy.

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

## XI. CONCLUSION

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

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

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

In the end, what the Commission ultimately proposes, is to change the military justice system simply because of the perceptions of some individuals,

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

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

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

To this judgment, the result of which I fully approve, I would add a brief remark. Once again reference is made in its reasoning to "appearances" (paragraphs 73 and 76). First of all, I would observe that the Court did not need to rely on "appearances", since there were enough convincing elements to enable it to conclude that the court-martial system, under which Lance-Sergeant Findlay was convicted and sentenced in the present case, was not acceptable. Moreover, I would like to stress that, as a matter of principle, we should never decide anything on the basis of "appearances", and that we should, in particular, not allow ourselves to be impressed by them in determining whether or not a court is independent and impartial. (emphasis added). We have been wrong to do so in the past, and we should not do so in the future.<sup>131</sup>

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

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<sup>131</sup> Findlay, *supra* note 13.

## APPENDIX

### COMPARISON OF UCMJ WITH FINDLAY CASE

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

<b>Convening Officer Under British System</b>	<b>Convening Authority Under UCMJ</b>
<p>Decided nature of the charges and type of court martial to be brought. The court does not state whether the JAG drafted the charges or made recommendation on the type of court martial. No provision for JAG to assist and advise convening authority.</p> <p>The convening officer sends an abstract of the evidence to the prosecuting officer and the judge advocate. The convening officer could include passages that might be inadmissible. No independent review of charges.</p>	<p>Decides which charges to prefer, after review of the evidence and advice of JAG. Charges are drafted by JAG. Decides type of court martial with advice of JAG. JAG assists and advises throughout the process.</p> <p>Military Judge can dismiss any or all of the charges at trial if they are multiplicitous. Even if charges are not “technically” multiplicitous, the judge may give equitable relief in sentencing. If a charge is unproven, the military judge may enter a finding of not guilty to that charge, even in a trial before members.</p> <p>If the convening authority decides to send the case to a general court martial (GCM), there must be an Article 32 investigation. An independent investigating officer is appointed. The accused has the following rights: to be present with counsel, to receive a fair and impartial hearing (which can later be challenged at court), to request the government produce witnesses if “reasonably available,” and to present evidence and make an unsworn statement. Prosecution and defense counsel present evidence, not the convening authority. Defense may challenge government evidence. Investigating officer conducts independent review of charges, determines whether government has a prima</p>

	facie case, and makes recommendations on the appropriate disposition of the charges.
<p>Convening officer appointed 5 court members, none of whom were legal officers. Court did not state accused had right to question members or challenge them for cause.</p> <p>Taking an oath was the only safeguard to ensure that the court members were unbiased.</p> <p>Court did not state that there was judicial/appellate overview of the selection process.</p> <p>Court did not state IG or similar process by which court members could bring complaint.</p> <p>Convening officer could comment on the 'proceedings of a court martial which require confirmation'. These remarks would not form part of the record. Could be communicated to members of the court.</p>	<p>A military judge is required at a court-martial. Court members are appointed by the convening authority, unless waived by accused (judge alone trial). The member selection process is documented, and the documentation is provided to the defense during discovery.</p> <p>The UCMJ requires that the convening authority pick the best qualified members. Both trial and defense counsel may question members. Members can be challenged for cause. Each side has one preemptory challenge. Members who are biased may not sit on the court. Members may be disqualified for actual or "implied" bias. Case law provides that judges are to grant implied bias challenges liberally.</p> <p>Defense can raise motion with military judge at trial as to command influence/ improper selection of court members; and can appeal the judge's decision. If the motion decided in favor of defense, case cannot go forward until command influence is corrected.</p> <p>Military judge may rule on bias of convening authority and disqualify the convening authority from any participation in the case.</p> <p>Article 37 of the UCMJ makes it unlawful for the convening authority to base OPR, promotion recommendation or assignment/transfer decisions based on performance as court member. Inspector General (IG) process by which court members can raise complaint of reprisal for unfair treatment based on their service as a court member.</p> <p>Once court is convened, convening authority may not speak to the members regarding the court. Military judge has sweeping powers to prevent any unlawful command influence, including dismissing the case.</p>

<p>Members of court communicated with judge advocate in private, without a record.</p>	<p>Military judge may only communicate with members in open court, with verbatim record kept of the proceeding. All parts of the hearing must be public or held with the attendance of counsel.</p>
	<p>Accused can potentially choose from three different forums: judge alone, officer members; or if the accused is enlisted, 1/3 enlisted members.</p>
<p>Judge advocate not a member of court.</p> <p>Convening officer appointed the prosecuting officer, assistant prosecuting officer, and defense counsel.</p> <p>Convening officer controlled production of witnesses for the prosecution and the defense; provided witnesses for the defense if “reasonably requested” by defense. No check on convening authority’s decision on witnesses.</p> <p>During the trial, the convening officer may rule on applications of the defense.</p>	<p>Military judge is independent member of court. Separate chain of command from convening authority.</p> <p>Defense counsel not appointed by convening authority. Defense counsel is not in convening authority’s chain of command.</p> <p>Convening authority may refuse defense witness request; however, defense can seek relief from military judge if witness request is denied. The military judge can order production of witness and stay proceedings if the witness is not produced.</p> <p>Accused has a right to expert witnesses; convening authority refusal may be overturned by military judge.</p> <p>Once the trial begins, the military judge rules on any motions. Once a case is referred, the defense may seek relief from the military judge if convening authority denies a defense request.</p>
<p>Judge advocate who gives advice in secret does not cure lack of court’s independence.</p>	<p>Military judge, independent defense counsel, and rejection of members for cause, all ensure an independent tribunal.</p>
<p>Sentence has no effect until confirmed, usually by the convening officer. Convening officer could withhold confirmation or substitute or postpone or remit in whole or in part any sentence.</p>	<p>Sentence effective immediately, unless stayed. Convening authority has discretion to approve/disapprove findings and sentence of the court. Can lessen degree of guilt to a lesser included offense, set aside finding of guilty, dismiss charges or direct a rehearing. The convening authority may ONLY lessen the severity of the punishment, cannot increase it. Can defer sentence of confinement. Required to review certain matters before he takes action, including the</p>

<p>Second set of appeals goes to non-legal qualified board of officers. No statutory or formalized procedures were laid down for the conduct of post-hearing reviews and no reasons given for decisions made. Also, there was a lack of participation by the accused in the post-hearing review process.</p> <p>Next level review also not legally qualified.</p> <p>Legal advice to the review officials kept private.</p> <p>Must obtain leave to appeal to Divisional Court, first level of legally trained review.</p> <p>A court-martial appeal court (made up of civilian judges) could hear appeals against conviction from a court-martial, but may not hear appeals against sentence in guilty plea case.</p>	<p>trial result, the staff judge advocate recommendation, and the matters presented by the accused. (Can also review record of trial and other matters considered appropriate)</p> <p>Review by convening authority is documented and copy is provided to the accused and defense counsel.</p> <p>There is appellate review of all cases, unless accused affirmatively waives review.</p> <p>Cases reviewed by judge advocate (summary courts-martial, special court if no bad conduct discharge, and general courts-martial if no punitive discharge and less than 1 year confinement adjudged)</p> <p>All correspondence is documented and available for review by defense.</p> <p>Court of Criminal Appeals (one for each service, composed of judge advocates) reviews all cases where a dismissal, punitive discharge or 1 year or longer of confinement is adjudged. Court has authority to do factual and legal review of cases. Appellate defense counsel provided free of charge, unless the accused waives this right.</p> <p>Court of Appeals for the Armed Forces is next appellate level and is composed of civilian judges.</p> <p>Accused can also appeal to Supreme Court as final appellate authority.</p> <p>All levels of appeal are open to scrutiny, hearings open to the public, and opinions of the courts published.</p> <p>Right to appeal is same regardless of plea.</p>
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