

WHO IS IN CHARGE, AND WHO SHOULD BE? THE DISCIPLINARY ROLE OF THE COMMANDER IN MILITARY JUSTICE SYSTEMS

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“Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all”¹

INTRODUCTION

Take a drive down the highway or a look into any parking lot and you will notice a plethora of yellow magnetic “Support Our Troops” ribbons decorating the backs of many cars. It is impossible to escape the fact that the American public has great support for, and interest in, the military. September 11th, the war in Iraq, and the aftermath of Hurricane Katrina keep the military as a perpetual topic in the news and in the minds of Americans. One aspect of the military seems to be particularly intriguing to Americans—military justice. The number of news stories focusing on issues of military justice—ranging from the investigation of the prisoner abuse scandal at Abu Ghraib, to the legal challenges made on behalf of the Guantanamo Bay detainees, and the court-martial of Sgt. Hasan Akbar at Fort Bragg—serve to illustrate the popularity and intrigue of the issue. Fictionalization of military justice in TV shows such as *E-Ring* and *JAG* or in movies like *A Few Good Men* also attracts broad audiences and, in doing so, provides the public with insight into the military justice process in action. While neither the news stories nor the dramatic cinematic portrayals of the military justice system may be com-

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1. General George Washington, Instructions to Company Captains (July 29, 1757) in *THE PAPERS OF GEORGE WASHINGTON*, Nov. 1756—Oct. 1757 341, 344 (W.W. Abbot & Dorothy Twohig eds., 1984).

pletely accurate, they do keep the topic in the forefront of the American public's interest.

Not only is the American public paying attention to issues of military justice, but, in light of the 50th anniversary of the Uniform Code of Military Justice (UCMJ) in 2001 and reforms taking place in other countries, an academic debate over the military justice system in the United States has evolved, triggering calls for reform from one side and fierce voicing of support from the other.² In particular, the debate has focused on the role of the commander in the military justice system. This Note will explore the dominant role of the U.S. military commander within the military justice system in comparison to the far smaller role of the Canadian military commander and the almost nonexistent role of the Israeli military commander. Canada and Israel were chosen for this comparative analysis because of their unique stances regarding the role of their commanders in military justice and because both countries were noted in the Cox Commission Report³ for their reform efforts.

I. THE DISCIPLINARY ROLE OF THE MILITARY COMMANDER IN THE UNITED STATES

In the United States military justice system, the commander plays a dominant role. The commander, often called "the convening authority" in light of his ability to convene court-martial proceedings, is given great latitude in dealing with disciplinary matters.⁴ "A military convening authority is singularly powerful with respect to his influence over the military justice system. He has no civilian equivalent. He is not a lawyer and generally has no formal legal training."⁵ His authority and discretion to make disciplinary decisions regarding the soldiers serving beneath him, however, stem from the convening authority's leadership position.⁶ The convening authority is a senior

2. See James F. Garrett, *Recent Developments in Unlawful Command Influence*, 2004 ARMY LAW. 2, 6 (2004) (outlining the debate over public perception of the military justice system).

3. See *infra* notes 26-46.

4. James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 192 (2002).

5. Meredith L. Robinson, *Volunteers for the Death Penalty? The Application of Solorio v. United States to Military Capital Litigation*, 6 GEO. MASON L. REV. 1049, 1058 (1998).

6. OFFICE OF THE JUDGE ADVOCATE GENERAL, MILITARY JUSTICE AT THE SUMMARY TRIAL LEVEL 1-13 (2001), available at http://www.forces.gc.ca/jag/training/publications/POCT_docs/military_justice_manual_e.pdf

commanding officer, often a colonel or general.⁷ The commander has the power to do the following: conduct direct investigations,⁸ authorize probable cause searches,⁹ refer charges to court-martial,¹⁰ convene courts-martial,¹¹ grant witnesses immunity,¹² negotiate and approve pretrial agreements,¹³ make capital referrals to courts-martial,¹⁴ select courts-martial panel members,¹⁵ grant funding to government and defense counsel for employment of expert witnesses,¹⁶ approve sentences,¹⁷ and grant clemency.¹⁸ The U.S. commander plays a dominant role in all aspects of the disciplinary system and “has near absolute discretion at every stage of a military justice proceeding.”¹⁹

By establishing such a dominant role for the convening authority, the military justice system presents the potential problem of a commander using his power and influence in such a way as to thwart the fairness, impartiality, and integrity of disciplinary proceedings. Such negative use of power has been termed “unlawful command influence.”²⁰ The general concern regarding unlawful command influence is that the commander has the ability to influence judicial proceedings and participants in such a way as to deprive the accused of his right to a fair trial.²¹ As stated bluntly by Chief Judge of the Court of Military Appeals (now renamed U.S. Court of Appeals for the Armed Forces), Robinson O. Everett, “[c]ommand influence is the mortal

(Can.) (“The ability to command respect and to effectively control subordinates is based to a large part on the leadership ability of the officer.”).

7. Roan, *supra* note 4, at 196.

8. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2005) [hereinafter MCM].

9. *Id.*, Mil. R. Evid. 315(d).

10. *Id.* R.C.M. 407(a).

11. UNIFORM CODE OF MILITARY JUSTICE arts. 22-24 (2005) [hereinafter UCMJ].

12. MCM, *supra* note 8, R.C.M. 704(c).

13. *Id.* R.C.M. 705.

14. *Id.* R.C.M. 601.

15. *Id.* R.C.M. 502(a)(1).

16. *Id.* R.C.M. 703(d).

17. *Id.* R.C.M. 1107. The commander does not, however, have the power to change a finding of not guilty or to increase a sentence. *Id.*

18. *Id.* R.C.M. 1107(d)(1).

19. Robinson, *supra* note 5, at 1061.

20. Unlawful command influence has been defined as “the improper interference by a superior in command with the independent judgment of a person responsible for judicial decision.” CHARLES A. SHANOR & L. LYNN HOGUE, *MILITARY LAW IN ANUTSHELL* 117 (1996).

21. Jack L. Rives & Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213, 226 (2002).

enemy of military justice.”²² For this reason, even the perception of unlawful command influence is considered problematic.²³ Thus, the UCMJ endeavors to remove actual instances of unlawful command influence and minimize any appearance of it by forbidding commanders from attempting to influence judicial proceedings.²⁴ Under Article 98, disciplinary action can be taken against those who obstruct courts-martial proceedings.²⁵ Nonetheless, the central role of the commander makes the potential for unlawful command influence a constant concern.

In 2001, in recognition of the 50th anniversary of the UCMJ, the National Institute of Military Justice, a private, non-profit organization focusing on fairness in the military, sponsored a commission to review the military justice system.²⁶ Named for its chair, the Honorable Walter T. Cox III, a former Chief Judge of the U.S. Court of Appeals for the Armed Forces, the Cox Commission solicited comments and held a public hearing in order to develop recommendations for improvements to the UCMJ.²⁷ The commission members also took this as a chance to learn from the experiences of other countries in the administration of military justice. The Cox Commission specifically noted that “[i]n recent years, countries around the world have modernized their military justice systems, moving well beyond the framework created by the UCMJ fifty years ago. In contrast, military justice in the United States has stagnated, remaining insulated from external review and largely unchanged despite dramatic shifts in armed forces demographics, military missions, and disciplinary strategies.”²⁸ The Cox Commission noted the influence of reform efforts in

22. United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

23. See James Kevin Lovejoy, *Watchdog or Pitbull?: Recent Developments in Judicial Review of Unlawful Command Influence*, 1999 ARMY LAW 25, 27 (1999).

24. UCMJ art. 37 (2005). See also MCM, *supra* note 8, R.C.M. 104(a)(1) (“No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions or the court-martial or tribunal or such persons in the conduct of the proceedings.”).

25. UCMJ, art. 98 (2005).

26. The Honorable Walter T. Cox, III, Chair, *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice*, 2001 NAT’L INST. OF MIL. JUST. 1. [hereinafter “Cox Commission Report”].

27. *Id.* at 3-4 (“More than 250 individuals, representing themselves and more than a dozen organizations, submitted written comments to the Commission. Nineteen testified in person. This Report, [is] intended for submission to the House and Senate Committees on Armed Services, the Secretary of Defense, the Service Secretaries, and the Code Committee . . .”).

28. *Id.* at 3 (citations omitted).

several foreign jurisdictions, including Canada and Israel.²⁹ After its review of concerns and potential solutions, the commission produced what is commonly referred to as the Cox Commission Report and made four recommendations regarding the practice and procedures of courts-martial.³⁰ Two of those recommendations relate specifically to the dominant role of the U.S. military commander:

1. Modify the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that best rest within the purview of a sitting military judge.
2. Increase the independence, availability, and responsibility of military judges.³¹

The Commission noted that command involvement is essential to the disciplinary system in the military, but should not go so far as to weaken the due process rights of service members.³²

In the opinion of the Cox Commission, convening authorities cast undeniable shadows of unfairness over courts-martial due to the commanders' ability to control the possible outcomes of trials.³³ The Cox Commission noted that "[t]he 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."³⁴ The dominant role of commanding officers was considered the most problematic issue in the military justice system because it permits actual unlawful command influence as well as the appearance of such.³⁵

The Cox Commission Report stresses that, in order to remedy this problem, the most immediate change necessary is to remove the selection of panel members from the control of convening authorities.³⁶ By requiring the convening authority to select panel members and charging that same authority with the investigation and prosecu-

29. *Id.* at 3 n.4 (noting reforms in the U.K. Australia, India, Ireland, Mexico, and South Africa, in addition to those in Canada and Israel).

30. *Id.* at 5.

31. *Id.*

32. Cox Commission Report, *supra* note 26, at 6.

33. *Id.*

34. *Id.* at 8.

35. *See id.* at 6-7 ("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.").

36. *Id.* at 7.

tion of the defendant, the present system unnecessarily risks the appearance of improper command influence.³⁷ To address this problem, the Cox Commission recommended that Article 25 of the UCMJ be amended to require the convening authority to prepare a list of eligible service members and then randomly select individuals from that list in order to build the slate of panel members.³⁸

The Cox Commission also notes its concern over the convening authorities' vast power over pretrial decisions, stating that "the perception that the convening authority can manipulate the pretrial process to the advantage of either side . . . mandates [a] change in authority [of commanders] over pretrial legal matters."³⁹ Pretrial decisions, from approving travel of witnesses to the control over the investigation of crimes,⁴⁰ necessarily involve issues of due process and equal protection. The Cox Commission further hones in on the point that, while the ability to make pretrial decisions can actually affect the outcome of the trial, even the mere appearance of a convening authority manipulating the process is sufficient to warrant a change.⁴¹ Since pretrial decisions involve legal questions, the Cox Commission noted that these decisions are more appropriately made by a military judge.⁴² Furthermore, in reference to judges, the Cox Commission Report advocated not only that their roles in the pretrial decisions be strengthened, but also that they be granted increased judicial independence from the convening authority.⁴³ The Cox Commission advised that in order to decrease the perception of the commander exercising unlawful command influence over judges, standing judicial circuits should be created and judges should be given tenure.⁴⁴

In summary, the Cox Commission's main recommendations with regard to fairness and the perception of fairness in the United States military justice system include limiting the dominant role of the commander in selecting panel members and making pretrial decisions, as well as increasing the independence of judges. As the Cox Commission noted, other countries have instituted reforms to deal with the

37. *Id.*

38. Cox Commission Report, *supra* note 26, at 7.

39. *Id.* at 8.

40. See *supra* notes 8-16 and accompanying text (discussing the powers of the convening authority in the disciplinary process).

41. Cox Commission Report, *supra* note 26, at 8.

42. *Id.*

43. *Id.* at 8-9.

44. *Id.*

problem of command influence in their military justice systems.⁴⁵ The approaches taken by Canada and Israel are particularly illustrative of the different methods by which a country can attempt to guarantee fairness within the military justice system.

II. THE DISCIPLINARY ROLE OF THE MILITARY COMMANDER IN CANADA

The military justice system used by the Canadian Forces was once very similar to that of the United States, since both systems were originally based on the English form of military justice under the British Articles of War.⁴⁶ Canada, however, has subsequently moved beyond the United States by greatly reducing the role of commanders in its military disciplinary system.⁴⁷ The statutory basis for the Canadian military justice system is the Code of Service Discipline, embodied in the National Defense Act, Part III.⁴⁸ Further provisions can also be found in the Queen's Regulations and Orders for the Canadian Forces, enacted by the Canadian Cabinet and Minister of National Defense.⁴⁹ Major changes to the Canadian military justice system have taken place in the last 25 years as a result of legal changes, court challenges, and public opinion.

In 1982, Canada significantly changed its domestic law by adopting the Canadian Charter of Rights and Freedoms.⁵⁰ The Charter established the rights that every Canadian citizen has, even those in the military, unless exceptions can be justified.⁵¹ Some rights guaranteed by the Charter, however, may be more limited in the context of military service: for example, the Charter specifies that offenses under military law are to be tried by military tribunal.⁵² The adoption of the

45. *Id.* at 3 n.4. See also *supra* note 29.

46. Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 193, 266 (2003).

47. See *id.* at 193-94.

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

49. *Id.*

50. Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 (being sched. B to the Canada Act 1982, c. 11 (U.K.)).

51. Telephone Interview with Ken Watkin, Deputy Judge Advocate General for the Canadian International Forces in Durham, North Carolina (Apr. 19, 2005).

52. MILITARY JUSTICE AT THE SUMMARY TRIAL LEVEL, *supra* note 6, at 1-3, 1-4, 1-6. Article 11(d) of the Charter guarantees that a person charged with an offense has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." Charter of Rights and Freedoms, art. 11(d).

Charter forced the Canadian Forces to “reconcile its military justice provisions and processes with the constitutional protections embodied in the Charter.”⁵³ Incremental changes in the military justice system resulted from this *de facto* merger between certain aspects of the military and civilian criminal legal processes.⁵⁴

Encouraged by the adoption of the Charter, legal challenges to the independence of the military court arose. The most significant of these cases is *R. v. Généreux*, argued before the Canadian Supreme Court in 1992.⁵⁵ In *Généreux*, a corporal appealed his general court-martial conviction for drug trafficking and desertion, arguing that the court-martial did not constitute an independent and impartial tribunal under the Charter’s Article 11(d).⁵⁶ The Court held that military commanders should not be able to interfere in matters directly and immediately relevant to the judicial process.⁵⁷ The court analyzed the differences between true independence and perceived independence, concluding that actual lack of judicial independence did not need to be established for a successful challenge.⁵⁸ Moreover, the Court noted that “irrespective of any actual bias on the part of the tribunal, [the law] seeks to maintain the integrity of the judicial system by preventing any reasonable apprehensions of such bias.”⁵⁹ The Court used an objective standard, asking whether an informed, reasonable person would perceive the military court as being independent.⁶⁰ In the Court’s opinion, the dominant role of the commander cast serious doubts on the institutional independence of military justice proceedings.⁶¹ In particular, judges in the court-martial system lacked the safety of tenure, financial security, and institutional independence.⁶² Regarding tenure, the Court noted that judges should only be removable for cause. The Court also voiced concern that making the commanding officer responsible for a judge’s fitness reports was inappropriate because doing so gave the commanding officer the power to jeopardize a judge’s career by issuing negative reports.⁶³ The Cana-

53. Pitzul, *supra* note 48, at 8.

54. Watkin Interview, *supra* note 51.

55. *R. v. Généreux*, [1992] 1 S.C.R. 259.

56. *Id.* at 260.

57. *Id.* at 308-10.

58. *Id.* at 286.

59. *Id.* at 283.

60. *Id.* at 286-87.

61. *R. v. Généreux*, [1992] 1 S.C.R. 308-09.

62. *Id.* at 302-03, 307-10.

63. *Id.* at 305.

dian Supreme Court held that military tribunals were not independent and impartial and thus violated the Canadian Charter of Rights and Freedoms.⁶⁴

Following the decision in *Généreux*, public interest and inquiry into the Canadian military justice system was further heightened in 1993 after Canadian Forces committed human rights violations while involved in peacekeeping missions in Somalia and Bosnia.⁶⁵ There was great public outcry against how the punishment of the offenders was handled, resulting in the creation of a governmental Commission of Inquiry to investigate allegations that the commanders' involvement in the military justice system was inappropriate.⁶⁶ The Commission took a broad approach and examined both civilian and military expectations of the military justice system.⁶⁷

As a result of the adoption of the Charter, court challenges, and the increase in public scrutiny due to the incidents in Somalia and Bosnia, Canada implemented a number of legislative changes to adjust the Canadian Forces' military justice system.⁶⁸ Important changes, which increased courts-martial independence include:

- “[S]eparating the functions of convening courts-martial and appointing judges and panel members;
- [A]dopting a random methodology for selecting courts-martial panel members; and
- [I]mplementing reforms to ensure the protection 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.”⁶⁹

Furthermore, the prosecutorial function was removed from the commander's control and assigned to the Director of Military Prosecutions, and the appointment of panel members was centralized under the Chief Military Trial Judge.⁷⁰ These changes have minimized the role of the Canadian commander in the military justice system so that

64. *Id.* at 314.

65. Pitzul, *supra* note 48, at 11.

66. *Id.*

67. Watkin Interview, *supra* note 51.

68. Behan, *supra* note 46, at 267.

69. Pitzul, *supra* note 48, at 8.

70. Behan, *supra* note 46, at 267-68.

he now exerts less influence in military justice proceedings than his U.S. counterpart.

III. THE DISCIPLINARY ROLE OF THE MILITARY COMMANDER IN ISRAEL

Israel has taken a more extreme approach than Canada to limit the risk of undue command influence in their military justice system. The Israel Defense Forces are governed by the Military Justice Law (MJL) enacted in 1955.⁷¹ Under the MJL, legal powers “are granted to the Military Advocate General, which is a professional body made up of lawyers who operate independently and free from external influences.”⁷² The Military Advocate General (MAG) is responsible for several key functions of the military justice system, including the filing of the charge sheet,⁷³ arraignment,⁷⁴ ordering a preliminary investigation by an investigating judge,⁷⁵ and supervision of disciplinary proceedings before a commander.⁷⁶ In addition, the MAG can overturn or adjust an unlawful sentence imposed by a commander.⁷⁷ This last power, the ability to interfere in the judicial activity of a commanding officer who may outrank the MAG, is unique to the Israeli military justice system⁷⁸ and ensures that sentences are reviewed by a legally trained member of the military.⁷⁹

Although the MAG has broad military justice powers in the Israel Defense Forces, commanders also retain some limited control. The Israeli equivalent of the American convening authority is the District Chief.⁸⁰ The District Chief can order the Chief Military

71. Military Justice Law, 5715-1955, 9 LSI 195, (1954-55) (Isr.).

72. Menachem Finkelstein & Yifat Tomer, *The Israeli Military Legal System—Overview of the Current Situation and a Glimpse into the Future*, 52 A.F. L. REV. 137, 144 (2002).

73. Military Justice Law §§ 280-82.

74. *Id.*

75. *Id.* § 178(4).

76. *Id.* §§ 136-76.

77. *Id.* § 168(4).

78. Finkelstein & Tomer, *supra* note 72, at 144.

79. Telephone Interview with Lt. Col. Amos N. Guiora, former Military Advocate General with the Israel Defense Forces and current Professor of Law at Case School of Law in Durham, North Carolina (Apr. 18, 2005). “[T]he MAG is generally subordinate to military orders but at the same time has a separate, independent obligation to fulfill the roles prescribed by law.” Finkelstein & Tomer, *supra* note 72, at 140 n.12. Furthermore, in a MAG’s chain of command, his superior is not the District Chief, but is also a MAG who is at least a two star general. Guiora Interview, *supra*.

80. Guiora Interview, *supra* note 79.

Prosecutor to file an appeal,⁸¹ he can order, with consent of the MAG, the quashing of a charge sheet,⁸² and he can confirm a judgment or mitigate an imposed sentence.⁸³ The Israeli Supreme Court, however, has taken the position that the ability of District Chiefs to intervene in judicial proceedings, even in this limited fashion, undermines the independence of the military justice system.⁸⁴ Thus, the Supreme Court has “tended to give a narrow interpretation to the scope and substance of the powers vested in District Chiefs.”⁸⁵

For instance, in what was termed the “Duvedan” case, four commanders charged with the negligent death of a civilian at a checkpoint filed an application first with the MAG and then with the District Chief to quash the charges against them.⁸⁶ The MAG dismissed the application. The District Chief stated that had the MAG not already dismissed the application, he would have ordered the charges quashed, but because the District Chief’s power to quash charges requires the consent of the MAG, he lacked the authority to do so when the MAG had already dismissed the application.⁸⁷ In response to this problem of parallel powers, the Supreme Court limited the power of District Chief saying, “we ought not to presume that a military commander may make a decision that contradicts that of the Military Advocate General.”⁸⁸

In *Chief Military Prosecutor v. Aflalo*,⁸⁹ which focused on the District Chief’s power to order a Chief Military Prosecutor to file an appeal, the Supreme Court further limited the District Chief’s discretion. It noted that because District Chiefs are not always legally trained or familiar with legal issues and judicial proceedings, the power to make decisions of a legal and judicial nature should be directed away from them and decisive weight should be given to the opinion of the Chief Military Prosecutor. The Court found that a District Chief’s choice not to follow the opinion of the Chief Military

81. Military Justice Law § 424.

82. *Id.* § 308.

83. *Id.* §§ 441-42.

84. See Finkelstein & Tomer, *supra* note 72, at 146.

85. *Id.*

86. HCJ 2702/97, Anon. v. Minister of Defense, 53(4) P.D. 97, *cited in* Finkelstein & Tomer, *supra* note 72, at 146 & n.40.

87. *Id.*

88. *Id.*

89. Cr.A. 44/97, Chief Military Prosecutor v. Aflalo, *cited in* Finkelstein & Tomer, *supra* note 72, at 147 n.40.

Prosecutor might constitute grounds for finding an extreme lack of reasonableness, thereby voiding the District Chief's decision.⁹⁰

Military judges in Israel also enjoy independence from commanding officers much in the same way that the MAG does. Under the Israeli military justice system, judicial panels are comprised of three judges—one of whom is always a legally qualified judge, while the other two can be military judges without formal legal training.⁹¹ Although the military judges are sometimes perceived to be less independent because they are part of the military system and thus considered subject to institutional bias, the presence of legally qualified judges helps to negate this perception.⁹² Furthermore, judges must answer only to the dictates of the law when rendering decisions—not their commanders.⁹³

Finally, the Israel Defense Forces have eschewed the U.S. model for selecting panel members and have adopted the model used by Canada—the random selection process.⁹⁴ This process ensures that the panels are guaranteed to be independent.⁹⁵ There have been no credible allegations of unlawful command influence regarding panel selection as the system simply does not allow for that as a possibility.⁹⁶ Thus, between the random selection of panel members, the statutory independence of judges and MAGs, and the great limitations placed on the already minimal disciplinary powers of the District Chiefs, the issue of unlawful command influence is moot in the Israeli military justice system.

IV. CHANGES TO THE U.S. MILITARY JUSTICE SYSTEM

There are many who are skeptical of the need to reduce the role of the commander in the U.S. military justice system, despite the success of such reforms in foreign jurisdictions. Likewise, there are many who think the methods used in Canada and Israel, including random selection of panel members or increased judicial independence, would not be transferable to the American system. Moreover, some critics are opposed to making changes based on adjustments made in other countries. They believe that the “just because they did

90. *Id.*

91. Military Justice Law § 202.

92. Finkelstein & Tomer, *supra* note 72, at 153.

93. Military Justice Law § 184.

94. Guiora Interview, *supra* note 79.

95. *Id.*

96. *Id.*

it” attitude is not a good argument for why the United States should change. These critics point out that the contextual and structural frameworks of Canada and Israel are not germane or applicable to the United States.⁹⁷

A. Random Selection of Panel Members

The random selection of military panel members has been viciously attacked as unnecessary in the United States because some believe that the current system does not lead to biased panel members. Currently, the convening authority chooses panel members based on who is “best qualified” by considering a candidate’s “age, education, training, experience, length of service, and judicial temperament.”⁹⁸ To mitigate any potential unlawful command influence, which has been placed upon the panel up to this point, both the government and defense counsel have one preemptory challenge.⁹⁹ A judge also has the power to grant additional preemptory challenges¹⁰⁰ and may, himself, remove a panel member.¹⁰¹ Furthermore, during discovery the defense receives documentation of the convening authority’s nomination and selection process of panel members.¹⁰² The defense counsel may also interview those involved in the selection process, including the convening authority himself and his Staff Judge Advocate.¹⁰³ Then, if the defense believes that unlawful command influence has taken place, she can raise a motion at trial.¹⁰⁴ The defense counsel may also question panel members specifically about unlawful command influence during trial and request removal if she finds a lack of impartiality or fairness.¹⁰⁵ Moreover, the judge has an independent duty to question panel members on whether they were sub-

97. See Behan, *supra* note 46, at 263; see also Theodore Essex & Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): “The Cox Commission,”* 52 A.F. L. REV. 233, 236 (2002) (“[T]he legal issues decided [in Canada] were quite different than any that could be raised with regard to the UCMJ.”).

98. UCMJ art. 25(d)(2); MCM., *supra* note 8, R.C.M. 502(a)(1).

99. UCMJ, art. 41; MCM., *supra* note 8, R.C.M. 912(g).

100. *United States v. Carter*, 25 M.J. 471, 476 (C.M.A. 1988).

101. MCM, *supra* note 8, R.C.M. 912(f).

102. MCM, *supra* note 8, R.C.M. 701(a)(1).

103. Essex, *supra* note 97, at 244.

104. *Id.*

105. UCMJ art. 41 (2005).

ject to command influence.¹⁰⁶ If a judge denies removal for cause, that ruling is subject to appeal.¹⁰⁷ Finally, opportunities for unlawful command influence over a panel are further limited by the Article 37 requirement that performance evaluations may not take into account how soldiers performed their duties as court-martial panel members.¹⁰⁸ “Thus the system is designed to ensure court members exercise their independent judgment in evaluating the evidence in the case.”¹⁰⁹

Since the U.S. military justice system has many safeguards to protect the impartiality of panel members, critics of change argue that there is no reason to adjust the system. Moreover, they observe that the random selection method used in both the Canadian and Israeli militaries has its own set of problems. Most importantly, as evidenced by the Canadian and Israeli systems, the implementation mechanics and cost increase exponentially by taking the selection power away from the commander.¹¹⁰ For example, initial problems with the random selection model in Canada included a computer assigning a military attaché in Malaysia to be the president of a court-martial proceeding being held in Eastern Canada.¹¹¹ Due to the sheer size of the American military system, this problem has the potential to be much more serious if the random selection method were adopted in the United States.¹¹²

Another problem with the adoption of random selection in the United States is that a majority of service members are of junior enlisted rank—meaning they have little military experience.¹¹³ Thus, a panel chosen under a random selection method would statistically comprise a majority of junior members.¹¹⁴ Such a move would have significant deleterious effects:

106. Rives, *supra* note 21, at 226. For instance, judges question and instruct panel members by stating: “You are 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?” U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES’ BENCHMARK, ¶ 2-5-1 (1 Apr. 2001).

107. Rives, *supra* note 21, at 227.

108. UCMJ art. 37 (2005).

109. Rives, *supra* note 21, at 226.

110. Watkin Interview, *supra* note 51; Guiora Interview, *supra* note 79.

111. Behan, *supra* note 46, at 268.

112. *Id.*

113. *Id.* at 255.

114. *Id.*

[A] number of venerable and practical military justice customs [would be discarded]: the tradition that one's actions will never be judged by someone junior in rank or experience, the philosophy that those who judge will be sufficiently acquainted with the principles of good order and discipline to place alleged offenses in their proper context, and the statutory mandate to assure that those who serve on courts-martial are best qualified for the duty.¹¹⁵

Moreover, random selection could undermine the unique goals of the military and its justice system. Random selection reduces efficiency by increasing administrative burdens and producing delays, and it is not uniformly operable within all units or under all conditions, such as during war or contingency operations.¹¹⁶ The withdrawal of selection power away from the commander infringes on his command ability because he is no longer able to direct the engagement of his personnel.¹¹⁷ It also frustrates the military justice system by taking away the commander's ability to choose a specialized panel based on the needs of a case.¹¹⁸ Furthermore, it may even lower the collective competency of a panel.¹¹⁹ Additionally, a random selection method would not live up to its promise to reduce the appearance of unlawful command influence because panel members are still subject to orders, assignments, evaluations, and approval of commanders.¹²⁰

Use of the random selection method was tried in the U.S. military in the 1970s at Fort Riley, Kansas.¹²¹ The method used was not a pure application of random selection; it disqualified the two lowest enlisted ranks, used optional questionnaires to create a list of qualified panel members, and after the random selection of the panel members, the list still passed by the convening authority to receive his final approval.¹²² In *United States v. Yager*, Ft. Riley's use of a modified random selection process was challenged.¹²³ The Court of Military Appeals upheld the method with the proviso that the convening authority must make the final decision that the panel was acceptable based on Article 25(d)(2) criteria.¹²⁴ Even approval by the Court of

115. *Id.* at 255-56.

116. *Id.* at 257, 261.

117. Behan, *supra* note 46, at 257.

118. *Id.*

119. *Id.* at 261.

120. *Id.* at 257.

121. *Id.* at 258.

122. *Id.*

123. *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979).

124. *Id.* at 172-73.

Military Appeals, however, was not enough to begin a movement toward the random selection method.¹²⁵ Many in the military felt that the large administrative burden on the Staff Judge Advocate and the installation personnel offices, which were charged with screening the questionnaires, was too great.¹²⁶ In addition, some felt that the panels failed to meet the “best qualified” criteria.¹²⁷ The random selection model used in *Yager* has since been considered “an anomaly of panel selection jurisprudence.”¹²⁸

Finally, Congress has addressed the merits of random selection versus those of allowing commanders to appoint court-martial members based on subjective criteria. The issue was debated in the late ‘40s and early ‘50s when Congress passed the UCMJ and has since been revisited, most recently in 1999 in a study by the Joint Services Committee on Military Justice.¹²⁹ Congress chose not to include a random selection method when passing the UCMJ, and the Joint Services Committee report recommended that the current system of discretionary command appointment satisfied the needs of the military and, therefore, should be maintained.¹³⁰

B. Independence of Military Judges

Critics of changing the U.S. military justice system also argue against increasing the independence of military judges.¹³¹ One of the most cogent arguments in their favor is supplied by *United States v. Graf*, in which the United States Court of Military Appeals analyzed the positions taken by the Canadian Supreme Court in the *Généreux* case and found them inapplicable in the U.S. system.¹³² Additional support for their point of view stems from the requirement that military judges report through a legal chain of command separate from

125. Behan, *supra* note 46, at 259.

126. See, e.g., *id.* at 259-61.

127. *Id.* at 259-61 & n.397. The optional questionnaires created a self-selecting opt out privilege by those who chose not to fill them out and return them. Thus, many unbiased and qualified services members who felt that they were too busy with their other important military duties simply chose not to return the questionnaire and thus were not eligible to serve as a panel member. *Id.* at 260.

128. *Id.* at 259.

129. *Id.* at 195.

130. Behan, *supra* note 46, at 195-96.

131. See, e.g., Essex, *supra* note 97.

132. *United States v. Graf*, 35 M.J. 450, 465-67 (C.M.A. 1992). See discussion *infra* notes 132-145 and accompanying text.

that of the convening authority;¹³³ moreover, military judges are appointed by and serve at the pleasure of the Judge Advocate General (JAG),¹³⁴ a disinterested party. As one last safeguard against undue command influence, the convening authority does not assign individual judges to specific cases or write the judge's annual performance report.¹³⁵

Despite these safeguards, *Graf* set forth a challenge to military judicial independence. In *Graf*, a naval airman was tried by a general court-martial for numerous offenses.¹³⁶ The airman alleged that the lack of fixed terms for military judges violated the judiciary independence required under the Fifth Amendment.¹³⁷ In developing its conclusion, the court looked at the Canadian military system and analyzed the U.S. military justice system under the framework established in *Généreux* because of the analogous questions raised in both cases.¹³⁸ The court decided, however, that consideration of the principles flowing from the *Généreux* case—removal only for cause, no convening authority influence over judges' fitness reports, and the institutional independence of the court¹³⁹—did not lead to the same conclusions within the U.S. system. The court stated that the United States' "general courts-martial as presently constituted can be objectively perceived as being independent and impartial, . . ." ¹⁴⁰ and that "[i]n reality, the Uniform Code of Military Justice provides substantial independence and protection for military judges, both trial and appellate, despite their subordinate position in the military hierarchy."¹⁴¹ Specifically addressing the Canadian court's concern that judges only be removable for cause, the court noted that judges are sufficiently protected by rulings in past cases, which prohibit a judge from being removed based on his judicial actions.¹⁴² Regarding ma-

133. See UCMJ art. 26 (2005) (stating that military judges are directly responsible to the Judge Advocate General (JAG) or his designee).

134. UCMJ art 6(a) (2005). The U.S. Army, however, has instituted fixed terms for military judges. Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195, 203 (2000).

135. See *id.* (stating that judges for courts-martial are designated by the JAG, and that the convening authority does not write the judges' annual performance reports).

136. *Graf*, 35 M.J. at 451.

137. *Id.* at 452.

138. *Id.* at 465-67.

139. *Regina v. Généreux*, [1992] 1 S.C.R. 259, 301-05.

140. *Graf*, 35 M.J. at 466.

141. *Id.* at 463.

142. *Id.* at 466.

nipulation of a judge's fitness report by a commander, the court stated that prior rulings in this area have held that neither the JAG nor another commander can influence the fitness reports based on their dissatisfaction with the judge's legal opinion or sentencing.¹⁴³ Similarly, the court also found that case law protects the institutional independence of the U.S. military judicial system through holdings which "protect the military appellate judiciary from untoward interference by the Department of Defense, its Inspector General and the Judge Advocate General."¹⁴⁴ Overall, the *Graf* court found the U.S. military justice system did not suffer from the same shortcomings that plagued the Canadian system prior to the ruling in the *Généreux* case and, thus, held that fixed terms were not mandatory in the U.S. military context since they are only one part of determining judicial independence.¹⁴⁵

C. Perceptions and Perceived Bias

Finally, critics of change note that a foreign jurisdiction's belief that a perception of unlawful command influence damages its system of military discipline has no bearing on whether the U.S. system actually suffers from any problem of unlawful command influence.¹⁴⁶ Thus, "the better course of action would be to determine whether the perceptions were accurate, and if not, suggest ways to correct them."¹⁴⁷ Critics point out that there will always be those who hold a grudge against the military justice system—no matter how fair the system actually is in practice.¹⁴⁸ Changing the system in order to appease those people would only place the military at the mercy of these fickle individuals. "A justice system that responds to this sort of political pressure will not be seen to do justice. Justice is better

143. *Id.*

144. *Id.* "We note that a military judge at a court-martial of the United States cannot be overruled in his judicial decisions by the president of the court-martial, the convening authority, or his staff judge advocate." *Id.* at 466 n.10.

145. See *Graf*, 35 M.J. at 466-67 ("In sum, our military justice system and its military judges are not constituted the same as those considered in the *Généreux* case."). See also *Weiss v. United States*, 510 U.S. 163, 176-81 (1994) (supporting the legitimacy and independence of military judges in the U.S. military justice system and reiterating the holding from *Graf* that the lack of fixed terms of office for military judges does not violate the Due Process Clause).

146. *Essex*, *supra* note 97, at 242.

147. *Id.* at 242.

148. *Id.* at 241.

served in the long run, when incorrect perceptions are challenged and correct information is disseminated.”¹⁴⁹

In response to critics who believe that America should take a more isolationist perspective and disregard alterations made in other nations, former Supreme Court Justice Sandra Day O’Connor offers three reasons why the U.S. should consider foreign law: (1) the need to apply foreign law in domestic courts, (2) the ability to borrow beneficial ideas, and (3) the enhancement of cross-border cooperation.¹⁵⁰ Justice O’Connor’s second and third points are particularly valid in the context of this Note. The examination of the practices and failures of other nations’ military justice systems can lead the U.S. to the realization that the way its military does things is not the only way, or even the best way, to accomplish the goals of fairness and independence in disciplinary proceedings.

Analyzing other military justice systems forces one to engage in a critical reflection of the strengths and weaknesses of the U.S. system. America has a precedent for looking to persuasive reasoning outside of its own borders, and it should not disregard this precedent now, especially when reviewing innovations from other constitutional democracies that struggle with similar problems of due process, equal protection, and the rule of law.¹⁵¹ Former Justice O’Connor concludes: “Our flexibility, our ability to borrow ideas from other legal systems, is what will enable us to remain a progressive legal system, a system that is able to cope with a rapidly shrinking world.”¹⁵² In light of joint military efforts in Iraq and the trend toward joint and United Nations sponsored humanitarian and peacekeeping missions around the world, global cooperation reinforces the need to take a broader, international approach in evaluating the military justice system of the United States.¹⁵³

Not only do international perspectives furnish ways of improving the U.S. military justice system, they also affect how that system is perceived. Although critics would argue that emphasis should be placed on the reality of the system and not on perceived bias, “[g]iven

149. *Id.* at 242.

150. Sandra Day O’Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INTERNATIONAL JUDICIAL OBSERVER, June 1997, at 2-3.

151. *See id.* at 2 (noting that “it was commonplace for American courts to follow developments in English courts. Even today, first-year students of contract law cut their teeth on English cases like *Hadley v. Baxendale*.”).

152. *Id.* at 3.

153. *See* Fidell, *supra* note 134, at 202.

the extraordinarily delicate situations the military faces around the world, anything that fosters foreign confidence in the integrity and intellectual rigor of our system eases the task of preserving the primacy of the United States military jurisdiction over deployed personnel.”¹⁵⁴ Perceived bias is a credible concern because public perception, whether foreign or internal, can force change. For example, the public outcry that arose after the egregious acts by the Canadian military in Somalia and Bosnia led to an intense focus on the Canadian military justice systems that ultimately resulted in changes.

A similar situation could very easily happen in the United States. In light of the war in Iraq, operations in Afghanistan, the large numbers of troops being called up for active duty and sent abroad, and the resultant increased awareness of military issues, any perception that a proceeding within the military justice system is not independent and unbiased could lead to an intense public opinion reaction and political pressure for change. “The appearance argument is a significant one, because you . . . want to have the confidence of people inside and outside of the military.”¹⁵⁵ As noted in the Cox Commission Report, perceptions and potential perceptions of injustices are a “threat to morale and a public relations disaster.”¹⁵⁶

V. RECOMMENDATIONS

The perception argument, therefore, is a noteworthy justification for limiting the role of the U.S. military commander in the military justice context. However, “[t]here is a fundamental anomaly that vests a commander with life-or-death authority over his troops in combat but does not trust that same commander to make a sound decision with respect to justice and fairness to the individual.”¹⁵⁷ Commanders are in a unique position: they are responsible for military operations which necessarily require adherence to discipline. To

154. *Id.* at 202.

155. Major Walter M. Hudson, *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III*, 165 MIL. L. REV. 42, 86 (2000).

156. See Cox Commission Report, *supra* note 26, at 3 (referring to a “near-constant parade of high-profile criminal investigations and courts-martial” and noting that “[a]s a result of the perceived inability of military law to deal fairly with the alleged crimes of servicemembers, a cottage industry of grassroots organizations devoted to dismantling the current court-martial system has appeared, aided by the reach of the worldwide web and driven by the passions of frustrated servicemembers, their families, and their counsel.”).

157. Behan, *supra* note 46, at 305 (quoting Generals William Westmoreland and George Prugh).

make a commander responsible for maintaining discipline among his or her troops without giving the commander power and authority over the military justice system, places the commander at an extreme disadvantage. Furthermore, an attempt to substantially limit the role of the commander in the military justice system is at odds with the ultimate objective of maintaining the system's efficiency and effectiveness. Commanders are in the best position to know the needs of a mission, how impacts on a mission can be minimized, and whether a particular individual can be spared to serve as a panel member.¹⁵⁸ Similarly, commanders are privy to private information concerning the suitability of individual service members to sit on a panel.¹⁵⁹ Hence, commanders not only need to play a role in the military justice system, but the military justice system needs the commanders.

It does not logically follow, however, that the need for commanders to play a role requires the commander to play a dominant role. For the reasons stated above—mission flexibility, discipline responsibility, and knowledge of privileged information – the commander should retain some authority in the military justice system. The current balance struck with regard to command influence and the independence of judges, as illustrated by the *Graf* court, seems to be particularly appropriate. However, as demonstrated by the systems in Canada and Israel, reducing the commander's power to appoint panel members to courts-martial would not unduly limit the strength of his control over discipline nor excessively burden the utility of the military justice system. It would, on the other hand, greatly decrease the appearance and perception of unlawful command influence.

Although there are many safeguards against a commander's unlawful influence on a panel, in some instances, the safeguards are not very effective. For instance, judicial removal of a panel member is very difficult to accomplish because the standard set for removal—that the member “expressed a definite opinion”¹⁶⁰ as to the guilt of the defendant—is very high. Thus, in some respects, the safeguards still leave the door open for unlawful command influence. The institution of a random selection method would close the door on the question of panel independence and bias.

158. *Essex*, *supra* note 97, at 249.

159. *Id.*

160. MCM, *supra* note 8, R.C.M. 912(f).

A modification of the random selection method is recommended in the Cox Commission Report.¹⁶¹ As stated above, under this form the convening authority would create a list from which panel members would be randomly chosen.¹⁶² Consequently, the convening authority would still select who could serve as panel members; it would be within his or her discretion to list only the toughest and most partial officers and enlisted service members, or perhaps those deemed most easily influenced.¹⁶³

Hence, this method would do very little to decrease bias, perceived or otherwise. To avoid the possibility of continued opportunity for undue command influence, a different version of the random selection method should be used instead. First, panel members should be screened using Article 25(d)(2) criteria by a body independent of the convening authority. Next, those who are below the rank of the accused should be presumptively disqualified. Finally, a random selection of the remaining qualified candidates should be conducted, while ensuring that a cross-section of ranks be represented.¹⁶⁴ The convening authority should then be given the power to review the randomly selected panel members to prevent any potential mission conflicts, but his decision to remove a member from the panel should be reviewed with great scrutiny. This system would ensure independence, while preserving the custom that an accused is not judged by a person of a lower rank, guaranteeing that missions are not compromised, and minimizing any public perception of bias.¹⁶⁵

Even if the role of the U.S. commander in the military justice system was exceedingly limited, like that of the Israeli commander, he would still maintain a sizeable toehold in the military justice system through the use of administrative corrective measures¹⁶⁶ and nonjudicial punishment.¹⁶⁷ Most disciplinary problems fall into these categories.

161. Cox Commission Report, *supra* note 26, at 7.

162. *Id.*

163. Essex, *supra* note 97, at 248.

164. In the Canadian Forces, chaplains, legal officers, security officers, witnesses, and officers from the accused's unit are presumptively disqualified. Behan, *supra* note 46, at 267-68.

165. A greater administrative burden would naturally ensue, but could be somewhat mitigated by the use of computers. Furthermore, the increased administrative burdens and cost is a trade-off necessary to attain greater protection of soldiers' rights and a decrease in actual and perceived unlawful command influence.

166. MCM, *supra* note 8, Part V, ¶ 1(g).

167. UCMJ art. 15 (2005); MCM, *supra* note 8, Part V, ¶ 4.

ries and, thus, fall outside of the court-martial system.¹⁶⁸ Leaving the majority of disciplinary matters within the power of commanders recognizes the authority and leadership of the commander and his ultimate responsibility for the discipline of his troops.

CONCLUSION

In summary, the U.S. commander's role in the military justice system is distinctive because of his dominant position and control over many aspects of disciplinary proceedings. Other nations, such as Canada and Israel, have restricted the role of commanders in their military justice systems in order to limit actual bias as well as accusations and perceptions of unlawful command influence in judicial proceedings. Perception of bias is also a credible concern in the U.S. military justice system. One method of handling this problem would be to focus on educating the public about the military justice system and the safeguards in place to protect fairness. This route would be particularly satisfactory in the instance of judicial independence, as explained in *Graf*. A change in society's frame of reference would go a long way to reverse mistaken perceptions.

Regarding the selection of panel members, the justifications for the commander maintaining control in this area do not outweigh the rights of the accused and society's need to not only know, but to perceive that the selection process is fair. "The procedures for disciplining the military forces of a nation are a direct reflection of the society that the forces were created to protect."¹⁶⁹ A random selection method for panel members, similar to the process in Canada and Israel, but modified to meet the particular needs of the United States military, would balance the American public's fairness concerns with the need for the commander to maintain some authority and control over the discipline of his soldiers.

168. Shanor, *supra* note 20, at 103. The same is true in Canada, where most disciplinary matters are handled in Summary Tribunals, the equivalent of a U.S. Article 15 administrative punishment. Watkin, *supra* note 51.

169. Pitzul, *supra* note 48, at 1, quoting R.A. McDonald, *The Trail of Discipline: The Historical Roots of Canadian Military Law*, 1 C.F. JAG J. 1, 1 (1985).