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CONGRESSIONAL OVERSIGHT: THE NEW MORTAL ENEMY OF MILITARY JUSTICE ?

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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UNITED STATES ARMY

48TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
APRIL 2000

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ABSTRACT: This Thesis will examine Congressional action in relation to high-profile military justice cases in the past ten years to determine if it improperly influenced the processing of those cases. As the military dealt with an increase in the number and severity of high-profile cases, they also had to deal with an increase in Congressional attention on the processing of those cases. With that increased attention came demands for action. This Thesis will discuss the duties of Congress, with respect to the military justice system, in relation to the military and evaluate its recent actions to determine if they have exceeded those duties. To fully understand the scope of those duties, as well as the Congressional intent to maintain a separate system of military justice and the concept of command control of that system, the history of the Articles of War and the Uniform Code of Military Justice will also be reviewed. This Thesis will discuss the concept of unlawful command influence and the danger it poses to the fair and impartial operation of a system that principally relies on the discretion of the commander to determine what cases to prosecute. To understand what actions may cause unlawful command influence, this Thesis will evaluate the actions a commander may, or must, lawfully do in connection with the processing of military justice actions. Four solutions are proposed to combat the perceived unlawful command influence in the six recent cases discussed in the Thesis. The enactment of these proposals will ensure the continued fair and impartial operation of the military justice system under the pressures of intense oversight as well as develop and maintain the perception of fairness to the public and the soldier.

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CONGRESSIONAL OVERSIGHT:

THE NEW MORTAL ENEMY OF MILITARY JUSTICE?

MAJOR MISTI E. RAWLES*

I. INTRODUCTION

Mr. Speaker, today I am introducing, with the distinguished gentlewoman from Maryland, Mrs. Morella, a concurrent resolution condemning the reprehensible conduct that occurred at the annual symposium of the Tailhook Association in September 1991, calling on the Secretary of Defense to ensure that the ongoing investigation of the incident is full and uncompromising, and urging the Secretary of the Navy to recommend and initiate full disciplinary action against those responsible, including appropriate criminal prosecution pursuant to the Uniform Code of Military Justice.¹

With that resolution, the Navy's perceived mishandling of sexual abuse allegations at the their 1991 Tailhook Convention² became the focal point of Congressional outrage in July 1992. After Tailhook, Congress took a more active role in monitoring criminal

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¹ 138 CONG. REC. E2065 (daily ed. July 2, 1992) (statement of Rep. Kostmayer).

² In naval aviation, a "Tailhook" is the grappling device used to help stop a fixed wing aircraft landing on an aircraft carrier. The Tailhook Association adopted the term as the name for its professional organization dedicated to promoting naval aviation. The Association conducts annual conferences promoting naval aviation and officer development. Lieutenant Commander J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1 (1993). After the 1991 convention, held in Las Vegas, Nevada, the name became shorthand for the investigation into the alleged misconduct at the convention and will be used in that context in this Thesis.

justice investigations in the military. In 1992, many members of Congress believed that the military could not conduct fair investigations, or take appropriate actions in cases of misconduct involving their own soldiers, especially when the misconduct involved high-ranking officers.³

In November 1996, allegations of sexual abuse rocked the Army. On November 7, 1996, the Army announced the ongoing investigation of allegations made by female trainees of sexual abuse by their male drill sergeants at Aberdeen Proving Ground, Maryland.⁴ If the Army intended the news release to show an aggressive investigation that needed no Congressional prompting or oversight, it failed. Within forty-eight hours of the news release, female Senators began contacting Army leadership demanding the Army conduct a full investigation and "severely punish" those responsible for the misconduct.⁵ Senior Army and Department of Defense (DoD) leaders issued statements and appeared on various news shows discussing the investigation, stating their disgust with the content of the allegations and promising that appropriate actions would be taken to stop any similar future abuse of trainees.⁶

³ 138 CONG. REC. S1569 (daily ed. Sept. 29, 1992) (statement of Sen. Gorton). In describing the Naval investigation into the Tailhook allegations, Senator Gorton said it demonstrated "an inability to make tough decisions needed to ensure a fair and thorough investigation. The officers involved let their allegiance to the outdated culture within an institution and to their male colleagues overshadow their better judgment."

⁴ *Army Investigates Allegations of Sexual Misconduct and Rape in Training Command*, Army Public Affairs, Nov. 7, 1996 <<http://www.dtic.mil/armylink/news/Nov1996/r19961107apg.html>> (visited Sept. 26, 1999) (copy on file with author).

⁵ See Letter from Barbara A. Mikulski, Senator from Maryland, to Mr. Togo D. West, Jr., Secretary of the Army (Nov. 8, 1996). See also Letter from Barbara A. Mikulski, Senator from Maryland, to Mr. William J. Perry, Secretary of Defense (Nov. 8, 1996); Letter from Barbara Boxer, Senator from California, to Mr. William J. Perry, Secretary of Defense (Nov. 7, 1996) (copies on file with author).

Senator Barbara Mikulski, in a letter to General Shalikashvili, stated that Congress must hold hearings on the allegations and that "congressional support and oversight will be essential to change the culture of the Military."⁷ Oversight of the military is a duty imposed on Congress by the Constitution.⁸ To understand why Congressional involvement concerns many in the military, there must be an understanding of the military system of justice and the commander's role in it. To aid in that understanding I will trace the history and Congress' use of those powers to develop and maintain a separate system of military justice under the Articles of War and the Uniform Code of Military Justice. The discussion of that history will include the commander's position within the military justice system and an evaluation of Congress' intent that commanders retain control of that system. To fully understand the power a commander wields in the military justice system, I will discuss both the lawful actions and those actions by a commander, or anyone subject to the Uniform Code of Military Justice, that cause unlawful command influence.

⁶ *Army Sexual Misconduct* (ABC Nightline Broadcast, Nov. 12, 1996); *CNN Late Edition* (CNN Broadcast Network, Nov. 10, 1996); *CBS Face the Nation* (CBS Network Broadcast Nov. 17, 1996); *ABC This Week* (ABC Network Broadcast, Nov. 24, 1996); *CBS This Morning* (CBS Broadcast Network, Nov. 11, 1996); *ABC Good Morning America* (ABC Network Broadcast, Nov. 11, 1996).

⁷ Letter from Barbara A. Mikulski, Senator from Maryland, to General John M. Shalikashvili, Chairman, Joint Chiefs of Staff (Nov. 26, 1996).

⁸ U.S. CONST. art 1, § 8, cls. 12 & 13 imposes the duty on Congress to raise and support the Army and Navy of the United States. U.S. CONST. art. 1, § 8, cl. 14 gives Congress the power to make rules for the government and regulation of the Armed Forces. These powers together have been read to give Congress the implied power of oversight of the military to ensure the proper functioning of their other powers over the military.

To appreciate the level of undue influence exerted by Congress, I will use case discussions of six high-profile cases occurring in the past ten years. I will divide the case reviews into two sections. The first addresses the effects in four cases involving congressional actions prior to the initiation of courts-martial charges. The second section discusses congressional action in cases after the completion of the courts-martial process. I will begin the case discussions with the 1991 Tailhook investigation⁹ analyzing the outcome of any cases coming out of Tailhook in light of the statements and actions of Congressional members, and evaluating the effect of those actions on the case's outcomes. Next, I will examine the actions of both congressional members and senior military leaders following the disclosure of the misconduct at Aberdeen¹⁰ to determine their effect on the Army investigations and subsequent courts-martial of drill sergeants. The final two cases discussed that involve Congressional action prior to the court-martial involve the Air Force's processing of the courts-martial of Lieutenant Kelly Flinn¹¹ and

⁹ The misconduct that became known as Tailhook involved allegations by female attendees at the 1991 Tailhook Convention of sexual assault and sexual misconduct by male Navy and Marine officers. The Navy investigation of the allegations became the target of Congressional outrage with the allegations that the investigation was an attempt to protect senior Navy leaders. Demands for further investigation and action were followed by administrative actions against several officers, but not one court-martial conviction.

¹⁰ In the fall of 1996, several female trainees at Aberdeen Proving Ground in Maryland alleged their drill sergeants had sexually abused them. After the Army revealed the allegations to the public on November 7, 1996, a hotline was established to take calls from any former or current trainee who wanted to report similar charges. What started small soon expanded to a sex scandal involving nearly every Army training installation, as well as the Sergeant Major of the Army and a retired Army General.

¹¹ The court-martial of Air Force Lieutenant Kelly Flinn involved charges of Adultery, Fraternization, and Disobeying a Direct Order. Lieutenant Flinn engaged in a sexual relationship with the husband of an enlisted female airman. She continued the relationship after receiving orders to stop seeing the individual, and also previously engaged in a sexual relationship with an enlisted airman. Lieutenant Flinn's court-martial became a rallying point for congressional members opposed to the criminalization of adultery.

Major Sonnie Bates.¹² The evaluation will center on whether the congressional demands for dismissal of the charges in the cases effected the Air Force's final action.

The last two cases involve congressional action after the completion of the courts-martial actions. The first involves the assessment of congressional hearings questioning the processing of the cases arising out of the 1994 downing of two Army Blackhawk helicopters over Northern Iraq.¹³ I will evaluate if those hearings affected the Air Force's processing of the investigation and any subsequent punitive actions that followed those hearings. Finally, I will assess the congressional and executive attention on the courts-martial of two Marine Corps aviators¹⁴ to determine if it adversely affected the processing of those cases.

¹² Air Force Major Sonnie Bates was the first officer subjected to court-martial action for refusing the Anthrax vaccine. Major Bates' refusal came shortly after his testimony before a Congressional committee investigating the safety of the vaccine. His court-martial brought national attention to the issue and caused many in Congress to call for a halt to the Department of Defense policy of 100% military service member vaccination.

¹³ On April 14, 1994, an Air Force crew shot down two U.S. Army Blackhawk helicopters over Iraq. Twenty-six people were killed, including fifteen U.S. Service members, three Turkish, two British, and one French U.N worker and five Kurdish passengers. Many members of Congress and the public saw the Air Force's decision to court-martial only one member of the AWACs crew, Captain Jim Wang, as unsatisfactory. Many argued that Captain Wang became the scapegoat for actions of higher-ranking officials, and saw his acquittal as proof of that argument. The Congressional hearings conducted after the acquittal questioned the Air Force's decision to grant immunity to the pilot who shot down the helicopters as well as the decision to court-martial only Captain Wang when six officers had originally been charged.

¹⁴ On February 3, 1998, in the skies over Northern Italy, a Marine jet cut the guide wire to a ski lift cable car dropping it to the ground killing twenty passengers. Two Marine aviators were charged with involuntary manslaughter and negligent homicide. Captain Richard Ashby was acquitted in his court-martial for those charges, but convicted at a second court-martial on Obstruction of Justice charges for his part in the destruction of videotape taken in the plane earlier that day, and sentenced to six months confinement and dismissal from the service. The charges of manslaughter and negligent homicide charges were dismissed against Captain Joseph Schweitzer, who pled guilty to Obstruction of Justice charges and was sentenced to dismissal from the service.

After the individual discussions of the cases, I will analyze the level of interference and the ultimate case outcomes to determine if the actions of Congress affected the processing of those cases. The evaluation will attempt to determine if the Congressional actions adversely affected or helped the accused service members. The final evaluation will assess the ultimate effect on the future processing of cases throughout the military following the questioned actions of Congressional members.

I will propose four solutions to address the specter of improper influence raised by the congressional interference in the six cases discussed. The public, and the soldier, must believe the military justice system is fair in order to operate effectively. Each proposal addresses a different aspect of the issue of adverse influence, and taken together they are intended to ensure the maintenance of a fair criminal justice system that operates to not only protect the individual rights of the accused, but also to maintain discipline within the unit.

The first solution proposes an amendment to Article 37 of the Uniform Code of Military Justice. The amendment expands the scope of those individual whose actions can rise to the level of unlawful command influence. This expansion will specifically address the issues raised by statements of senior Army officials and Congressional members during the Aberdeen sex scandal.

The second solution proposes an amendment to the United States Code provision regulating House and Senate Committee hearings. The amendment would provide specific guidance for when and how to conduct hearings. The amendment provides that a Committee cannot conduct a hearing concerning military justice matters before the initiation of the court-martial process in the case in question. This will ensure that the conduct of Congressional hearings do not effect the commander's disposition decision in military justice cases.

As a means to ensure common standards throughout all the Services in these high-profile situations, the third solution proposes a DoD Directive to address the processing of those cases. Over the past ten years, each Service has had to deal with its own high-profile case of misconduct. Each Service has dealt differently with the issues raised when Congress and the press became involved in the decision making process of those cases. A DoD Directive establishing guidance on dealing with the similar issues raised in each of these cases will ensure that each Service deals fairly and in a similar manner with future cases of misconduct.

The final solution proposes the creation of a new command within each Service composed solely of Judge Advocate attorneys. The new command will be divided into two divisions that will make final decisions on which cases to take to court-martial, select panel members, and conduct the review of court-martial convictions and sentences for final action. The commander will continue to prefer court-martial charges, nominate panel members, and make a recommendation on final actions of courts-martial

convictions and sentences. The courts-martial process will be insulated enough to make commanders unable to commit the actions that lead to the improper influencing of subordinates, as well as the influencing of the commander's own decisions by military superiors and congressional demands.

II. DEVELOPMENT OF A SEPARATE SYSTEM OF MILITARY JUSTICE

Over the 225-year history of the military justice system, Congress has maintained a constant vigil to ensure courts-martial operated fairly. The military justice system did not experience any drastic changes in its operation until the 1950 adoption of the UCMJ. The commander's control of the process as a means to instill discipline within his unit remained the one consistent feature throughout the long history of the military justice system. This section will trace that long history paying particular attention to the apparent Congressional intent to maintain a separate system of criminal justice controlled by the commander. The responsibilities of the commander within the military justice system will also be discussed, along with when his actions cross over the line to create unlawful command influence on witnesses, subordinate commanders, and cause many to question the system's integrity.

A. *Birth of a Separate System: The Articles of War (1775-1920)*

On the eve of the Revolutionary War as the Second Continental Congress called up troops to join the New England forces surrounding Boston, it appointed a committee to draft a set of rules to govern the conduct of the newly created Continental Army.¹⁵

General George Washington chaired the committee and submitted sixty-nine articles that the Continental Congress adopted as the first Articles of War on June 30, 1775.¹⁶

Congress adopted General Washington's views on the need for swift discipline in the 1775 Articles allowing the execution of a general court's sentence after confirmation by the Commanding Officer without further review.¹⁷

¹⁵ See JONATHAN LURIE, *ARMING MILITARY JUSTICE*, VOL. 1: UNITED STATES COURT OF MILITARY APPEALS 1775-1950 5 (1992). See also *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS*, 1775-1975 7 (1975) [hereinafter *THE ARMY LAWYER*]; JOHN M. LINDLEY, *A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE, 1917-1920* 41 (1990); 2 *JOURNALS OF CONTINENTAL CONGRESS* 90 (1775), cited in Major Donald W. Hansen, *Judicial Functions for the Commander?*, 41 *MIL. L. REV.* 1, 10 (July 1968) (containing the orders given to General George Washington to draft the original Articles of War in 1775). The Committee, appointed on June 14, 1775, included General Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes.

¹⁶ AW 1775 [hereinafter 1775 Articles], cited in *THE ARMY LAWYER*, *supra* note 15, at 13. General Washington's views on military discipline dominated the 1775 Articles. Known as a strict but fair disciplinarian, he developed his beliefs while serving in the French and Indian War, where he protested a requirement that the Governor of Virginia must give permission in order to hold a General Court-Martial. General Washington also disagreed with the requirement for the issuance of a warrant from the colonial capital at Williamsburg before the execution of any sentence of such court-martial. He believed that if good discipline was to be maintained, justice had to be meted out expeditiously and complained that harmful delays caused by such requirements made the punishments for crimes like cowardice inadequate.

¹⁷ AW 1775, arts. 39, 40, cited in LURIE, *supra* note 15, at 4. This meant that sentences including death could be carried out with no appeal outside of the command. The 1775 Articles contained many provisions found in the Massachusetts Articles of War adopted three months earlier. The Massachusetts Articles of War also drawing heavily from the British Articles of War, provided for no appeals of court-martial convictions and sentences outside of the military of court-martial. The 1775 Articles retained the absence of appellate or judicial review of courts-martial convictions and sentences except through collateral attack on the courts-martial jurisdiction.

The willingness to place so much power in the hands of the commander resulted in the creation of a system nearly identical to the very system our Founding Fathers were fighting to overthrow. At the time of America's separation from England, the King prescribed the Articles of War.¹⁸ The courts-martial were agencies of power of the command, used to do the King's bidding.¹⁹

With this history as a backdrop, Congress still chose to place the military commander in a similar position of power. By 1775, all thirteen colonies provided for some fashion of appellate review of criminal convictions.²⁰ By contrast, Congress specifically left out any provision for appellate review of courts-martial convictions under the 1775 Articles.²¹ When Congress amended the 1775 Articles the next year, it provided for the first outside oversight of the courts-martial process by requiring reporting of all court-martial sentences to, and approval by, the Commander-in-Chief, the

¹⁸ See S.T. Ansell, *Military Justice*, 5 CORNELL L. Q. 1, 6 (Nov. 1919). The King prescribed the offenses and penalties; the substantive and procedural law; and the jurisdiction and procedure of the British courts-martial.

¹⁹ See *Id.* Courts-martial were agency of command, not in touch with the popular will. They were not judicial bodies and their functions were not seen as judicial functions. See also *United States v. Smith*, 32 C.M.R. 105, 115 (C.M.A. 1962). In *Smith*, the Judge cited Blackstone's commentaries on the discussion of the King's power over the court-martial: "This discretionary power of the court-martial is, indeed, to be guided by the directions of the crown; which, with regard to military offenses, has almost an absolute legislative power. 'His Majesty,' says the act, 'may form articles of war and constitute courts-martial, with power to try any crime by such articles, and influence penalties by sentence or judgment of the same.' . . ."

Id.

²⁰ See LURIE, *supra* note 15, at 3.

²¹ *Id.* The 1775 Articles provided for no oversight of the courts-martial process through appellate review or any other method, outside of the commander. With the presence of an appellate process in each of the colonies at the time of the adoption of the 1775 Articles, this omission clearly shows Congress' intent for the existence of a separate system of military courts with little or no civilian review of the conduct of the courts-martial.

General, or Congress prior to the sentence's execution.²² Congress retained this power in conjunction with the Commander-in-Chief until it amended the Articles of War in 1806 and gave the President, or his military agent, the appellate review function over court-martial sentences and convictions.²³ The loss of this Congressional review function removed one of the few forms of civilian control or oversight of the military criminal justice system.

The practice of allowing civilian authorities to prosecute soldiers for civilian criminal offenses, committed both on and off the military installation, developed into another form of civilian control over the military justice system.²⁴ The 1775 Articles provided that the military could use their criminal justice system only for the prosecution of military offenses.²⁵ Supporters of the military justice system argued that the court-martial served as a disciplinary tool of the commander used only to prosecute purely military offenses.²⁶ They argued that because the military primarily prosecuted military

²² AW 1776, sec. XIV, arts. 8, 10, *cited in* Major Thomas M. Crean, *The Military Commander: What Function Must He Have in the Military Criminal Justice Process*, 64-65 (1975) (unpublished LL.M. thesis, The Judge Advocate General School) (on file with the Judge Advocate General School library). *See* LURIE, *supra* note 15, at 5. The individual conducting the review had full power to issue a pardon or order mitigation of any punishment the court-martial imposed in the case.

²³ AW 1806, art. 65 (ch 20, 2 Stat. 359), *cited in* Hansen, *supra* note 15, at 12.

²⁴ *See* ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 173 (1970). This was a departure from the British Articles of War. The reason for this departure may be found in the Declaration of Independence signed four days after the enactment of the 1775 Articles. One reason cited in the Declaration for declaring King George's rule tyrannical and unacceptable was the practice of attempting to make the military independent of, and superior to, the civil powers by allowing courts-martial for purely civilian offenses.

²⁵ *Id.* This was practice until the beginning of World War I with the exception of a brief period during the Civil War where the military was allowed to prosecute service members for civilian offenses.

²⁶ If the military used courts-martial to prosecute purely civilian offenses it would have been much more difficult to argue that the system was a disciplinary tool for the commander. But because the military only

offenses, it needed to remain a system separated from the civilian criminal justice system.²⁷ It was not until the entrance of the United States into World War I that Congress formally granted the military jurisdiction to try a limited number of civilian offenses committed by service members.²⁸ As the military began to prosecute more and more civilian offenses, the argument supporting the military's separate system of justice evolved to one based on the need for maintaining discipline within the military unit.

The concept of a separate system of courts for military offenses evolved from the British Articles of War that served as the foundation for the 1775 Articles and the 1776 Amendments.²⁹ The supporters of the separate system argued that the commander could not maintain discipline if forced to use the often slow and cumbersome civilian legal system to prosecute purely military offenses.³⁰ Supporters argued that an army without

prosecuted cases involving purely military offenses that the civilian courts could not prosecute, it made it easier to argue that the courts-martial system was needed to enforce discipline within the unit and obedience to military orders and rules. The argument followed that since the military justice system, used to enforce discipline to military orders and rules, should be controlled by the commander.

²⁷ See SHERRILL, *supra* note 24, at 173.

²⁸ See *Id.* See also AW 1916, art. 92 cited in Crean, *supra* note 22, at 14. Congress was originally unwilling to extend the jurisdiction of courts-martial to civilian offenses. The change was made only after President Wilson appended the extension as an amendment to the 1917 military appropriations bill. The offenses the military could now prosecute included murder and rape committed in time of war, or outside the territorial limits of the United States. By World War II, the military had extended courts-martial jurisdiction over all civilian offenses committed by military members when on active duty regardless of where they committed the offense.

²⁹ See 5 JOURNALS OF CONTINENTAL CONGRESS 788 (1776), cited in Hansen, *supra* note 15, at 10. See also Ansell, *supra* note 18, at 3-4. In 1776, after drafting the new Articles of War, John Adams supported his nearly verbatim adoption of the British Articles of War by arguing that when they had a system to draw from that had led two great nations to world power, Rome and England, there was no need to try and create a new system from scratch.

³⁰ See JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE 21 (1974). The supporters argued that in order to be an effective tool of discipline within the unit, misconduct had to be dealt with swiftly and the civilian criminal system could not provide that required swiftness. See also *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866). Chief Justice Taney, writing for the Supreme Court stated that "[t]he discipline necessary to the

discipline is more dangerous than the enemy is to the civilian population.³¹ The system's early supporters specifically recognized that in order to complete his primary mission, that is to win the Revolutionary War, the Continental Army's Commander must have sole control over the processing of that separate military justice system.³²

That concept of command control over the courts-martial process that became an integral part of the American military justice system also originated in the British Articles of War. Military courts were not courts of law as that concept has developed in the civilian criminal justice system, but rather courts of honor belonging to the commander to assist in the maintenance of discipline among his soldiers.³³ Colonel W. Winthrop described the military courts-martial in his 1886 *Treatise on Military Justice* as an "instrumentality of the executive power, provided by Congress for the President as the Commander-in-Chief to aid him in properly commanding the Army and Navy and enforcing discipline therein and utilized under his orders or those of his authorized military representatives."³⁴ Colonel Winthrop based his description in part on General

efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts, . . ." *Id.*

³¹ See BISHOP, *supra* note 30, at 21.

³² See THE WORKS OF JOHN ADAMS (Charles Francis Adams, ed., 1850-1856), *quoted in* LINDLEY, *supra* note 15, at 42-43, n. 100.

³³ See Luther C. West, *A History of Command Influence on the Military Justice System*, 18 UCLA L. REV. 1, 11-12 (1970-1971). See also Ansell, *supra* note 18, at 6-7. Under the 1775 and 1776 Articles of War, no legal rules were established for the operation of the courts-martial. The courts-martial were strictly disciplinary courts for use by the commander as tools to maintain the required level of discipline among his troops.

³⁴ 1 W. WINTHROP, *MILITARY LAW AND PRECEDENT* 53 (1886) (2d ed. 1920, 51-53), *cited in* Honorable Walter T. Cox, III, *The Army, The Courts, and The Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 10 (1987). Under this theory, the court-martial was only an advisory body whose advice or decision the commander could reject in imposing punishment in a case. *Id.*

Washington's commission when he became the Commander of the Continental Army.³⁵ That Congress, before the adoption of the Constitution, having sole control over the military, chose to give the commander control over the courts-martial supported Winthrop's description. It also led to the development of the military justice system as a system separate from the civilian criminal justice system.

The belief that winning wars required a disciplined force made the denial of some of a soldier's basic rights acceptable to many.³⁶ Early supporters of the military justice system argued that when a citizen voluntarily entered into an enlistment contract, they voluntarily gave up rights felt to compromise the enforcement of discipline within the unit.³⁷ Mr. William Blackstone disagreed with this principle, believing that in a free state

³⁵ See WINTHROP, *supra* note 34, at 59, *quoted in* Major Robert K. Fricke, I'll Decide What Cases to Prosecute and You Decide What Infantry Tactics to Employ (unpublished LL.M. Thesis, The Judge Advocate General's School) (on file with The Judge Advocate General's School Library). General Washington's commission enjoined him to cause "strict discipline and order to be observed in the Army." The argument can be made based on that commission that in order to maintain the required discipline and successfully accomplish his commission, General Washington had to have complete control over the military justice system.

³⁶ See West, *supra* note 33, at 5. See also *Burns v. Wilson*, 346 U.S. 137, 140 (1953). The Court in *Burns* held that the "rights of men in the armed forces must perforce be conditioned to meet certain over-riding demands of discipline and duty. . ." *Id.* See also LURIE, *supra* note 15, at 5. When John Adams drafted the 1776 Articles of War, he believed that the military had to be governed by different standards than those that govern civilian society. His concern for a disciplined army outweighed any lack of due process in military courts-martial. That belief has continued throughout the history of military justice.

³⁷ See LUTHER C. WEST, *THEY CALL IT JUSTICE* 22 (1977). See also West, *supra* note 33, at 5. This argument did not disappear during the period of the mandatory draft. It has continued to be the main argument in support of a separate system of military justice. See also 3 AMERICAN ARCHIVES 1163-64 (Peter Force, ed., 4th ser. 1840), *cited in* LINDLEY, *supra* note 15, at 42. William Tudor, the First Judge Advocate General of the Army, agreed with this belief. During the Revolutionary War when soldiers of the Continental Army complained that one of their common law rights was trial by jury and that being in the military did not deprive them of that right, Tudor responded that "when a man assumes the soldier he lays aside the citizen, and must be content to submit to a temporary relinquishment of some of his civil rights; . . ." *Id.*

a man does not lose any of his rights when he enters military service.³⁸ The United States Constitution, adopted fourteen years after the enactment of the 1775 Articles, expressly supported the argument that soldier's lose some rights on entrance into military service by excepting soldiers and sailors from the protections of the Fifth Amendment.³⁹ Many argued that this exclusion of military members from its protections specifically supports the belief that soldiers lose rights deemed contrary to the maintenance of discipline.⁴⁰

The military avoided the Fifth Amendment's guarantee that a person not be tried twice for the same offense⁴¹ by not making the court-martial proceeding final until the commander reviewed and approved the findings and sentence. This allowed commanders to send back court-martial verdicts they felt inadequate or inappropriate for reconsideration and avoid the Fifth Amendment's protection against double jeopardy.⁴²

³⁸ 1 SIR WILLIAM BLACKSTONE, COMMENTAIRES ON THE LAWS OF ENGLAND 395 (Oxford: Clarendon Press, 1765), cited in LINDLEY, *supra* note 15 at 42. Mr. William Blackstone wrote that in "free states no man should take up arms, but with a view to defend his country and its laws: he puts not off the citizen when he enters camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier." *Id.*

³⁹ U.S. CONST. amend. V. The Fifth Amendment provides that "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, . . ." While the requirement for a Grand Jury indictment does not apply to courts-martial cases, the adoption of the requirement for an Article 32 pretrial hearing prior to allowing a case to proceed to General Court-Martial in 1920 is similar to a Grand Jury indictment. The Article 32 hearing actually provides greater protections and rights to an accused by allowing him to be present at the hearing, cross-examine witnesses, and present evidence to the Investigating Officer. AW 1920, Art. 70, cited in WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 10 (1973).

⁴⁰ See LURIE, *supra* note 15, at 3. The drafters of the early Articles of War and the Constitution believed that a system for the effective control of the military was essential and the rights of the soldiers were of minor importance when compared to this requirement.

⁴¹ U.S. CONST. amend. V.

⁴² *Swaim v. United States*, 165 U.S. 553 (1897). This case involved the court-martial of General David G. Swaim, the Judge Advocate General of the Army, for fraudulent transactions in private financial matters and making false statements about the transaction. The Court in *Swaim* upheld the President's return of the

The practice of reconsideration did not evoke much public attention or outrage until the 1842 court-martial convictions and executions of three sailors aboard the *Somers* while out at sea.⁴³ It likely received so much attention because one of those sailors, Philip Spencer, was the son of Secretary of War, John Spencer. The public outrage following the execution of the three sailors led to at least one proposal for the creation of an appellate tribunal to review courts-martial findings and sentences involving the commission of serious offenses before the execution of their sentences.⁴⁴

Once the excitement over the *Somers* executions died down, the public paid little attention to the practice of reconsideration until World War I. The Acting Judge Advocate General, Major General S.T. Ansell, became concerned when he began seeing cases involving reconsideration resulting in patently improper verdicts.⁴⁵ General Ansell

case to the court-martial panel twice for reconsideration indicating to the panel that he did not believe the sentence was "commensurate with the offenses as found by the court. . . ." *Id.* at 566. After the second reconsideration, the court-martial sentenced General Swaim to be "suspended from rank and duty for twelve years and forfeit one half his monthly pay every month for the same period." *Id.* at 564. The Supreme Court held that "Army Regulation, 1881, section 923 specifically authorized the practice of reconsideration and the ultimate sentence was not illegal or void." *Id.* at 564-565.

⁴³ See LURIE, *supra* note 15, at 21-29; LINDLEY, *supra* note 15, at 45. Philip Spencer, serving aboard the Naval vessel the *Somers*, faced court-martial on mutiny charges in 1842. The court-martial, held on board the *Somers* was conducted in secret. None of the three defendants were allowed to be present during the hearing or to present any evidence to the court. After deliberation, the court reported to the ship's Captain, Alexander S. Mackenzie, their inability to reach a verdict in any of the three cases. Captain Mackenzie sent the cases back to the court for reconsideration, making it clear that he wanted guilty verdicts and sentences of death on all three sailors. Not surprisingly, after further deliberations, the court-martial came back with findings of guilty on all three sailors and sentences of death. Captain Mackenzie ordered the sentences carried out immediately, with no review or report made to the President or the Commanding General as required at the time. As soon as the *Somers* returned to port, an inquiry into the courts-martial was conducted and issued a finding that Captain Mackenzie had not acted improperly. In an attempt to quiet public outrage over the executions, Captain Mackenzie demanded a court-martial, which after three months of testimony issued a not guilty finding in April 1843.

⁴⁴ See LURIE, *supra* note 15, at 21.

⁴⁵ See West, *supra* note 33, at 32. See also Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 171 (1953). One case in particular bothered General Ansell. The

used the Fort Gordon case and others to argue for the removal of the commander's power to order reconsideration. General Ansell also argued for many other reforms to prevent further abuses of the courts-martial process by the Commander similar to those reported by returning veterans after World War I.⁴⁶

The returning veterans complaints, and the resulting public outcry, resulted in Congressional action in 1920 revoking the power to order reconsideration.⁴⁷ Congress also created a Board of Review within the Judge Advocate General's Office to review cases receiving certain sentences.⁴⁸ Although Congress did not create a civilian appellate

case involved the court-martial of a military policeman at Fort Gordon for burglary. The court-martial initially acquitted the soldier. The Commanding General returned the case to the court-martial for reconsideration. After deliberating again on the case, the court-martial convicted the soldier of burglary and sentenced him to five years confinement. When The Judge Advocate General, Major General Enoch Crowder, reviewed the case, he noted that the evidence was not sufficient to prove guilt beyond a reasonable doubt and sent the case back to the Commander recommending a reconsideration of the verdict in light of the legal review. After reconsidering the verdict, the Commander re-affirmed the second court-martial conviction and sentence. General Crowder did not overturn the verdict but rather praised the Commander for reviewing the conviction when there was no legal requirement to do so.

⁴⁶ See West, *supra* note 33, at 39. General Ansell's proposed reforms included the creation of a civilian court of military appeals; the provision of a qualified civilian lawyer to an accused service member; the establishment of set maximum punishments for offenses under the Articles of War; the provision of a legally-trained military judge for General Courts-Martial; and the enactment of rules of evidence for the conduct of courts-martial.

⁴⁷ AW 1920, art. 40, *cited in* Hansen, *supra* note 15, at 18.

⁴⁸ AW 1920, art 50 ½. The Article provided that:

The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department. Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provision of Article 46, Article 48, or Article 51 is submitted to the President, such record shall be examined by the board of review. . . . Except as herein provided, no authority shall order the *execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary* unless and until the board of review shall, with the approval of the Judge Advocate General have held the record of trial upon which such sentence is based legally sufficient to support the sentence.

court, General Ansell's proposals paved the road for further amendments to the Articles of War as allegations of continued abuse of the military justice system by commanders flowed in at the end of World War II.

B. World War II Causes a Re-evaluation of the Military Justice System

At the height of World War II, the Army reached approximately 8,000,000 soldiers in uniform and the Navy grew to over 4,500,000 sailors.⁴⁹ The enormous, and rapid, increase in troop strength resulted in an increase in the number of soldiers with little to no previous experience with military discipline or culture. It is no surprise that when the number of soldiers and sailors increased, so did the amount of courts-martial actions. At the height of World War II, the military convened nearly 600,000 courts per year.⁵⁰ The military conducted over two million courts-martial during the four-year period the United States participated in the War.⁵¹ Not surprisingly, as the number of those exposed to the wrong end of the military justice system increased, so did the complaints. However, no

Id. [emphasis added]. The Article also provided guidance for processing cases where the Board of Review held the record of trial legally insufficient to support the findings and sentence of the court-martial; and what must happen when the Board disagrees with the recommendation of The Judge Advocate General in any case reviewed.

⁴⁹ LURIE, *supra* note 15, at 128. The Army had increased to six times its pre-war size of 1,460,000. The Navy had doubled from its pre-war rolls. The United States participated in World War from 1941 to 1945.

⁵⁰ *Id.*

⁵¹ Captain John T. Willis, *The United States Court of Military Appeals: Its Origins, Operation and Future*, 55 MIL. L. REV. 39, 39-40 (1972). The number of courts-martial conducted breaks down to roughly one court-martial for every six service members. Captain Willis' figures were reached by adding the figures reported by the Army and Navy in two reports prepared evaluating the conduct of courts-martial during World War II.

one expected the severity of the complaints that followed the citizen soldier's return from World War II.⁵² In response to these complaints, the Secretary of War and the Secretary of the Navy each appointed a committee to evaluate the complaints and make recommendations as to changes necessary to address those complaints.⁵³

The Keffe-Larkin panel, appointed in 1946, reviewed 5,000 World War II Naval courts-martial convictions.⁵⁴ The Panel's report, received in 1947, did not reflect

⁵² See Arthur John Keffe & Morton Moskin, *Codified Military Injustice*, 35 CORNELL L.Q. 151, 160 (1950); Arthur E. Farmer & Richard H. Wels, *Command Control-or Military Justice?*, 24 N.Y.U. L.Q. 263, 267-68 (1950). Two cases have come to signify the worst of what can happen in a system controlled by the commander. Opponents used both cases to argue for massive changes in the military justice system following World War II. One case involved the court-martial in Germany of Ben Beets. *Beets v. Hunter*, 75 F. Supp. 825 (1948). When Captain Morgan, Beets' assigned defense counsel, initially met with his client, Beets told him that he wanted another defense counsel to represent him, specifically Lieutenant Fox. Captain Morgan left the meeting leaving Beets with the impression that he would contact Lieutenant Fox about representing Beets, and believing that he no longer had any obligations to represent Beets. Unfortunately, no one told Lieutenant Fox about the representation request and days before the court-martial, Captain Morgan received the charge sheet on Beets and was ordered to represent him in the court two days later. On the witness stand before trial, Captain Morgan admitted that he was not competent to represent Beets but the proceedings continued resulting in a conviction and confinement. The District Court in Kansas overturned the conviction on a habeas corpus petition describing the proceeding as saturated with tyranny.

A second case involved the court-martial of Lieutenant Sidney Shapiro after his representation of a military defendant on rape charges. *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Claims 1947). See also WEST, *supra* note 37, at 39. Lieutenant Shapiro represented a Mexican-American soldier at a general court-martial for rape. During the court, Lieutenant Shapiro had another Mexican-American soldier sit next to him at the defense table that the victim identified as her attacker in court. After the prosecution rested, Lieutenant Shapiro notified the court of the switch and moved for a verdict of not guilty based on the victim's misidentification. Lieutenant Shapiro's switch did not amuse the court or the command and after his removal from the case, his former client was re-tried, identified by the victim, convicted of the rape, and sentenced to five years confinement. Lieutenant Shapiro's actions displeased the command so much that it initiated court-martial proceedings against him within days of the misrepresentation. The court-martial began only hours after Lieutenant Shapiro received the charge sheet and ended with a conviction and sentence of dismissal. Lieutenant Shapiro filed suit in the Court of Claims for back pay alleging illegal discharge from the service based on his court-martial. The court ruled in favor of Shapiro holding that, "a more flagrant case of military despotism would be hard to imagine." *Shapiro* at 207.

⁵³ The Secretary of the Navy, James Forrestal, appointed the Keffe-Larkin panel [hereinafter the Panel]. The membership of the panel included Arthur J. Keffe and Felix Larkin, who would later become instrumental to the creation of the Uniform Code of Military Justice. The Secretary of War, later renamed the Secretary of the Army, appointed the Vanderbilt Committee, chaired by Arthur Vanderbilt, Dean of the New York University Law School.

⁵⁴ See LURIE, *supra* note 15, at 142. Larkin's ability to compile the massive amounts of information received by the committee into understandable reports and recommendations impressed Navy Secretary

favorably on the existing system of military justice or the policy of command control.⁵⁵

The procedure of courts-martial review by the convening authority caused the Panel the most concern.⁵⁶ The Panel made two recommendations to fix the perceived problems.⁵⁷

Recognizing that the commanders removal might "be destructive of discipline" they argued that once referred to trial a case "ceases to be a mere disciplinary matter, and from that time on the process of law should be paramount, and command control should cease."⁵⁸

The Vanderbilt Committee held hearings across the country from March to December 1946, compiling over 2,500 pages of witness testimony containing numerous allegations of command abuse of the courts-martial process during World War II.⁵⁹ The

James Forrestal. Later when Mr. Forrestal became Secretary of Defense, he ensured Larkin was appointed to work on the 1950 Uniform Code of Military Justice drafting committee.

⁵⁵ *Id.* The Panel's report was entitled Report of the [Navy] General Court-Martial Sentence Review Board (1947) [hereinafter RGCMSRB]. See also Keeffe & Moskin, *supra* note 52, at 161.

⁵⁶ See RGCMSRB, *supra* note 55, at 194 cited in LURIE, *supra* note 15, at 142. One aspect in particular concerned the panel; the fact that the same person who decided the case should proceed to court-martial is also the individual who conducts the final review of that case. The panel felt that the convening authorities review resulted in the commander, not the court, fixing sentences and gave him "a large measure of indirect control over the court and its actions." *Id.* See also Keeffe & Moskin, *supra* note 52, at 161.

⁵⁷ RGCMSRB *supra* note 55, at 195, cited in LURIE, *supra* note 15, at 143. The first recommendation involved the removal of the reviewing officer from the process of convening the court. The second recommendation involved the abolishment of the convening authority's initial review making the sentence self-executory as in the civilian criminal justice system. The Panel intended that the convictions and sentences of military courts-martial become effective immediately on the court's decision rather than requiring a review by the convening authority to make the courts decision final.

⁵⁸ RGCMSRB, *supra* note 55, at 203, cited in LURIE, *supra* note 15, at 143. As more civilians were drafted involuntarily into the military, they brought with them the belief that the courts-martial system should provide the same rights as the civilian criminal system and operate in the same manner. This belief began to take hold as more and more abuses were reported at the end of the War.

⁵⁹ See WEST, *supra* note 37, at 43-44; West, *supra* note 33, at 74. War Department Memorandum No. 25-46 created the Vanderbilt Committee on March 25, 1946, with a mission to "study the administration of military justice within the Army and the Army's court-martial system, and to make recommendations to the

Committee concluded that during World War II, courts-martial members often imposed the maximum sentence so the "old man" could fix it during the review process to fit his desires.⁶⁰ This practice developed because commanders issued admonishments and reprimands to court members who had issued "inappropriate" findings or sentences.⁶¹ The Committee Report faulted Army leadership for allowing the practice to continue based on the popularly held belief in the military that "discipline is a function of

Secretary of War as to changes in existing laws, regulations, and practices which the Committee considers necessary or appropriate to improve the administration of military justice in the Army." The Vanderbilt Committee completed its report on December 13, 1946[hereinafter Committee Report]. *See also* Farmer & Wels, *supra* note 52, at 266. The Committee held hearings in New York, Philadelphia, Baltimore, Raleigh, Atlanta, Chicago, St. Louis, Denver, San Francisco, and Seattle. Witnesses included the Secretary of War, Chief of Staff of the Army, the Judge Advocate General, the Acting Judge Advocate General, general officers and other volunteers who had served in the Army during World War II. The one group missing from the interviewees were the soldiers who had been subjected to courts-martial during the War.

⁶⁰ *See* Committee Report, *supra* note 59, at 7, *cited in* Farmer & Wels, *supra* note 52, at 268. *See also* West, *supra* note 33, at 75-78; WEST, *supra* note 37, at 43-44. The Vanderbilt Committee found that often in an expression of "loyalty" to their commander, court members often attempted to reflect his desires in their findings and sentence. This practice effectively undercut the 1920 removal of the commander's power to order reconsideration by ensuring no higher sentence could be given so the commander would be satisfied with the courts outcome.

⁶¹ *See* WEST, *supra* note 37, at 44. *See also* West, *supra* note 33, at 76. Oral admonishments and written reprimands were given for gross dereliction of judicial duties. In one case cited by the Committee, members received reprimands for imposing a five year sentence in a desertion case because the Commanding General felt twenty-five years was appropriate and he felt a duty to chastise the members for their perceived leniency.

command.”⁶² As a means of discouraging the practice, the Committee recommended that such actions by commanders be violations of the Articles of War.⁶³

The reports from the two committees and their recommendations became catalysts leading to the 1948 Amendment to the Articles of War.⁶⁴ Although the policy of command control over most aspects of the courts-martial continued, the Elston Act did adopt the Vanderbilt Committee’s recommendation to make command interference with the courts-martial panel a violation of the Articles of War.⁶⁵ The 1948 Elston Act also

⁶² Committee Report, *supra* note 59, at 7, *cited in* West, *supra* note 33, at 77. The Committee Report concluded that

[u]ndoubtedly there was in many instances an honest conviction that since the appointing authority was responsible for the welfare and lives of his men, he also had the power to punish them, and consequently the courts appointed by him should carry out his will. We think this attitude is completely wrong and subversive of morale; and that it is necessary to take definite steps to guard against the breakdown of the system at this point by making such action contrary to the Articles of War or regulations and by protecting the courts from the influence of the officers who authorize and conduct the prosecution.

Id. See also Major Martha Huntley Bower, USAF, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65, 68 (1988).

⁶³ Committee Report, *supra* note 59, at 6, *cited in* Farmer & Wels, *supra* note 52, at 266. This recommendation would be adopted two years later in the 1948 Amendments to the Articles of War as Article 88 prohibiting unlawful command interference with the court-martial process for the first time.

⁶⁴ Pub. L. No. 80-759, 62 Stat. 604, 627-44 [hereinafter Elston Act], *cited in* Brigadier General (Ret.) John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, 1, 2. See also Farmer & Wels, *supra* note 52, at 270. The Elston Act passed in the House and Senate with virtually no opposition and became law when signed by the President on June 24, 1948. One reason the Elston Act passed the Senate was the assurances by its supporters that the ABA had approved the Act, which was untrue. Although the Elston Act only covered the Army and was only in effect for two years, it signaled Congress’ intent to curtail the alleged abuses of the system that came to light after World War II by curtailing the commander’s power.

⁶⁵ AW 1948, art. 88, *cited in* Farmer & Wels, *supra* note 52, at 271-72. Article 88 provides that:

No authority appointing a general, special, or summary court-martial nor any other commanding officer, shall censure, reprimand, or admonish such court, or any member thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise, by such court or any member thereof, of its or his judicial responsibility. No person subject to military law shall attempt to coerce or unlawfully influence the action of a court-martial or any military court or commission, or any

took one further step towards the creation of an appellate court with the formation of the Judicial Council within the Judge Advocate General's Department of each Service.⁶⁶ The changes made by the Elston Act attempted to correct the deficiencies in the military justice system uncovered by the Vanderbilt and Keffe-Larkin Committees. The Act laid the groundwork for the more massive changes adopted in the 1950 UCMJ.

C. The Passage of the Uniform Code of Military Justice

Only two months after the passage of the Elston Act, a committee appointed by the Secretary of Defense began work on what would become the Uniform Code of Military Justice that would govern all the Services' processing of military courts-martial.⁶⁷ The choice of the Committee's chair signaled the military's intent to seriously address the

member thereof, in reaching the findings or sentence in any case, or the action of an appointing or reviewing or confirming authority with respect to his judicial acts.

⁶⁶ See AW 1948, art. 50a. See also Farmer & Wels, *supra* note 52, at 272; Morgan, *supra* note 45, at 181-82. The Judicial Council would be composed of three Judge Advocate General officers. The Council could consider both law and fact, weigh evidence, judge witness credibility and determine controverted questions of fact. The intent behind the creation of the Judicial Council acting in combination with the Board of Review already in existence, was to have two appellate type agencies working together to lessen the dangers of command control and catch unlawful command influence when it occurred.

⁶⁷ See LURIE, *supra* note 15, at 154. The formation of the committee actually began in May 1948 even before passage of the Elston Act. The committee's task of preparing a uniform code of military justice applicable to all three Services was to be completed for submission to the 81st Congress. The membership of the committee included a representative of the Secretary of Defense's office, one civilian under-secretary of each Service, and a chairman independent of the Services. Felix Larkin, who had co-chaired the earlier Navy panel on military justice represented the Secretary of Defense, James Forrestal, on the Committee. See also Cox, *supra* note 34, at 13. Secretary Forrestal gave the Committee the tasks of integrating the military justice systems of all three Services; modernizing the system to promote the public's confidence; ensure the system's fairness, both without impeding the military function of the courts-martial; and to improve the arrangement and draftsmanship of the articles. The new code would be entitled the Uniform Code of Military Justice (UCMJ).

concerns raised during the past two World Wars.⁶⁸ With Professor Morgan appointed as the Committee's chair, the work began in August 1948 to reform the military's justice system. The focus of the reforms centered on the issue of command control and abuse of the courts-martial process by commanders.⁶⁹

Professor Morgan's committee held hearings and requested suggestions for changes to the military justice system. The critics of the commander's role in the system argued for the removal of his authority over any part of the courts-martial.⁷⁰ The supporters of command control felt that the Committee's recommendations went too far and would harm the commander's ability to maintain discipline within his unit.⁷¹ Recognizing that

⁶⁸ See Cooke, *supra* note 64, at 2. Secretary Forrestal appointed Professor Edmund M. Morgan of Harvard Law School as the Committee's chairman. Professor Morgan had served as a Major in the Judge Advocate Corps under Major General S. T. Ansell during World War I and was a vocal supporter of General Ansell's proposed reforms. Professor Morgan's concern about the effect of his earlier positions caused him to require Secretary Forrestal's review of his record and his assurances that the work of the Committee would not adversely be affected by his earlier views and opinions. The determination by Secretary Forrestal was that rather than hurt the operation of the Committee, his views and beliefs would help in his authority over the Committee and in his credibility when it came time to present the new Code to the Congress. See also West, *supra* note 33, at 78; LURIE, *supra* note 15, at 158; Colonel Frederick Bernays Wiener, AUS (Ret.), *American Military Law in Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 33 (1989).

⁶⁹ See THE ARMY LAWYER, *supra* note 15, at 199; Hansen, *supra* note 15, at 21. Many proposals were debated that would have drastically changed the operation of the military's criminal justice system. But most centered on the issue of placing some form of control on what was seen as the continued abuse of the system by commanders.

⁷⁰ See Farmer & Wels, *supra* note 52, at 276. A letter from George Spiegelberg, Chairman of the American Bar Association (ABA) Military Justice Committee, dated November 22, 1948, to the Committee summed up the ABA's opposition to command control of the military justice system. Mr. Spiegelberg and the ABA felt that "[o]nly by withdrawing from command the power to influence the court can we be sure that it will not be exercised in the future as it has been in the past." *Id.* See also LURIE, *supra* note 15, at 207. In particular, the ABA felt that it should be the Judge Advocates, not the Commanders, who should be appointing members of the court.

⁷¹ See West, *supra* note 33, at 79-80 (citing a letter from the New York State Bar Association to the subcommittee debating the new Code). The letter stated the Bar Association's belief that:

from the first to the last . . . the judicial system of the armed services should not be removed from command control. . . . The success of an army depends upon its commander. His is the responsibility to maintain discipline in the command. So also

the issue of command control would be the decisive issue during the debate on the new Code, Professor Morgan attempted to strike a balance between the two positions.⁷²

Professor Morgan had to reach a personal compromise on the issue as well.⁷³ In support of the Code's provisions concerning command control, Professor Morgan expressed the Committee's compromise: "We think we have removed the influence of the command as far as that is humanly possible by the provision which I suggest to you which forbids the command to censure any person connected practically with the administration of the court-martial system or to attempt improperly to influence them."⁷⁴

After Professor Morgan submitted the draft Code, Congress held hearings and heard witness testimony both in support of, and in opposition to, the new Code.⁷⁵ Several

must he bear the responsibility for the proper administration of the system of justice within his command.

Id.

⁷² See ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 12 (1956). The compromise allowed the commander to retain his position and power within the military justice system. But as a protection against further abuse by commanders, the committee drafted Article 98, making it a crime punishable under the UCMJ for the commander to unlawfully interfere in courts-martial actions or deliberations in violation of Article 37's prohibitions against unlawful command influence.

⁷³ See Crean, *supra* note 22, at 53. When Professor Morgan served under General Ansell during World War I, he opposed the commander's authority to appoint court members. See also, Morgan, *supra* note 45, at 73-74. Professor Morgan felt that the military courts were judicial in nature and that "[a]s the civil judiciary is free from the control of the executive, so the military judiciary must be untrammelled and uncontrolled in the exercise of its functions by the power of military command. *The decision of questions of law and legal rights is not an attribute of military command.*" *Id.* (emphasis added).

⁷⁴ See Crean, *supra* note 22, at 53. Professor Morgan also felt that the provision of a law officer to instruct the panel, whose decisions and instructions were subject to review by the new appellate court removed unlawful command influence from the military justice system as far as was humanly possible. At the same time, he acknowledged that if the commander was determined to disobey the provisions no matter how severe the potential penalties, he would find a way no matter how many protections the Code provided.

⁷⁵ See LURIE, *supra* note 15, at 212-55. Public hearings began before the House Armed Services Committee on March 7, 1949 and lasted until April 14, 1949 when the Committee went into executive session. Witnesses included members of the drafting committee as well as critics and supporters of the

critics testified that the UCMJ did not go far enough in eliminating improper command influence.⁷⁶ Even the military justice system's supporters did not view the UCMJ as a positive step forward.⁷⁷ One of the more vocal advocates supporting command control, Frederick B. Wiener, had served as a Colonel in the Judge Advocate General's Corps during World War II. Colonel Wiener disapproved of many provisions of the UCMJ.⁷⁸ Insisting on the absolute necessity of retaining the commander's authority to convene courts-martial, Colonel Wiener testified that:

military justice system from the ABA, Veteran's groups, former and current military members and leaders. On April 27, 1949, the House Committee unanimously approved the UCMJ and sent it to the full House for a vote. So sure of success, the leadership of the House scheduled only three hours of floor debate on the UCMJ. On May 5, 1949, the House considered the UCMJ and after very limited debate passed the bill without even a roll call vote required. The Senate took up the UCMJ in May 1949, scheduling only three days for public hearings and two additional sessions to hear from members of the drafting committee, especially Professor Morgan. It is of interest to note that while the belief was growing that courts-martial were judicial in nature, the UCMJ was debated in the Armed Services Committees in both the House and the Senate, not the Judicial Committees. It took the Senate nearly one year to get the UCMJ to a vote on the floor. On February 3, 1950 the Senate passed the bill sixty-two to nine, with twenty-five members abstaining. The UCMJ made it through both the House and the Senate with a minimum of changes, one of very few bills of such magnitude to be able to claim that success.

⁷⁶ See *Id.* at 217-19. The most vocal critics came from the ABA, the American Legion, and the War Veterans Bar Association. The common complaint from all three groups focused on the belief that the UCMJ did not go far enough in eliminating improper command influence. They argued that the intent behind Article 37's prohibitions was good but there were too many loopholes available to the commander. Arthur Farmer, representing the War Veterans Bar Association, testified in Congressional hearings that "the only way in which you can prevent command influence on the court is by taking it out of the power of command to do it." To emphasize his point, he asked of military commanders, "if you don't want to influence [courts], why should you insist on keeping that command influence?" *Id.* at 220-21. See also West, *supra* note 33, at 82.

⁷⁷ See West, *supra* note 33, at 84 (citing *Hearings to Enact a Uniform Code of Military Justice S. 857 and H.R. 4080 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong. 1st Sess. (1949)) [hereinafter *Hearings*]. William Hughes, President of the Judge Advocate Association, an advocate of command control, testified before the Senate committee "that the American people had gone just about far enough in protecting the basic rights of the accused and if we did not retain military authority over this phase of military discipline, we might lose all." Mr. Hughes felt that "if we take the power to punish away from the military, we will destroy discipline, and eventually the power to command." *Id.*

⁷⁸ See *Hearings supra* note 77, at 264, cited in LURIE, *supra* note 15, at 220-21. Colonel Wiener reserved his harshest criticism for the new appellate court. He felt that the new Court of Appeals would not be able to work during times of war. He questioned the appointment of civilians to the court as well asking "[w]hy should we seek to interpose civilians ["]for decision matters that are basically military?" See also West, *supra* note 33, at 80-81.

We make a man a multi-starred commander. He is generally trained at public expense; he is sent to service schools at public expense; and we give him a command of several millions of men; and he gives the signal to go; and as a result of that signal, thousands of men lose their lives and thousands more are maimed or blinded. . . . Yet when it is proposed that [this] same general, with those incalculable powers of life and death over fellow citizens be permitted to appoint a court for the trial of a soldier who has stolen a watch, oh no, we can't have that; we have to have a panel. Doesn't make sense, does it?⁷⁹

Most Congressional members agreed with this proposition. During the House and Senate debates, many argued that the commander's control over the military justice system must continue in order to maintain discipline within the military.⁸⁰ Others argued that the fair operation of courts-martial required removal of the commander from the system.⁸¹ Ultimately, Congress retained the commander's position within the military

⁷⁹ *Hearings supra* note 77, at 268, cited in LURIE, *supra* note 15, at 221. It is interesting to note that after representing accused service members for twelve years before courts-martial and military appellate courts, Mr. Wiener had a marked change in his beliefs about command control. Testifying before a Senate Subcommittee in 1962, Mr. Wiener felt that "those people are just not equipped to carry on a general criminal jurisdiction." *Hearings Pursuant to S. Res. 260 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong. 2d Sess., at 779 (1962). Mr. Wiener further stated that the Services themselves would never "stamp out the endemic existence of command influence without the supervision of the United States Court of Military Appeals." *Id.* at 780.

⁸⁰ CONGRESSIONAL FLOOR DEBATES ON THE UNIFORM CODE OF MILITARY JUSTICE 25 (1949). Representative Philbin argued that:

the commanding officers of the armed forces must, in the last analysis, be vested with disciplinary control over their members. We can't completely detach the trial of military cases and the handling of military offenses from the ranking officers of the services without destroying essential discipline and creating a veritable chaos. . . . There must be some central direction and guidance and disciplinary control or we will indeed be inviting demoralization of the services.

Id.

⁸¹ *Id.* at 258. Senator Wayne Morse of Oregon proposed an amendment that would have stripped "the commanding officer - as they should have been stripped years ago - of the control they now have over the courts-martial system." See LURIE, *supra* note 15, at 246-53. Senator Morse supported the ABA's position of removal of the commander's power to appoint panel members as a means of solving the issue of improper command control. Senator Morse believed that the military criminal justice system should mirror the civilian criminal justice system and provide the same protections to the accused. See also Cox, *supra* note 34, at 18. Senator Morse disagreed with the idea that the military justice system needed to be radically different from the civilian system. In the 1950 hearings on the UCMJ, Senator Morse expressed his views on this position:

justice system, but enacted six provisions designed to serve as restraints on the potential for command abuse of courts-martial.⁸² The two most significant changes adopted by the UCMJ involved the creation of the appellate court⁸³ and the prohibition on any actions by commanders intended to influence courts-martial actions.⁸⁴

I do not like this idea in this new era in which we are living of building up one justice system here for men in uniform and another one for so-called free citizens. You cannot keep a civilian Army, in my judgment, under two systems of justice. Differences, I recognize there will be, but I think the military had gone entirely too far in the direction of a system of justice we cannot reconcile with what I think are some basic guarantees of a fair trial.

Id. Senator Morse ultimately voted against passage of the UCMJ because the new Code allowed the commander to his position within the military justice system against Senator Morse's strident objections.

⁸² UCMJ art. 37 (1950) (serving as the chief restraint on the commander's ability to improperly influence the deliberations of the court-martial); UCMJ art. 34 (a) (requiring a review by the Installation Staff Judge Advocate (SJA) for legal sufficiency before trial); UCMJ art. 27(b) (requiring trained legal counsel to represent the government and the defense in all general courts-martial); UCMJ arts. 26, 39 & 51 (establishing the law officer as a nonvoting member of the court who would rule on questions of law and instruct the panel on the law to be applied in the case); UCMJ art. 61 (requiring SJA review and advice before the convening authorities final action on a court-martial conviction) and UCMJ art. 67 (creating a court of appeals to review military cases for legal errors).

⁸³ UCMJ art. 67. *See* COLONEL FREDERICK BERNAYS WIENER, *THE UNIFORM CODE OF MILITARY JUSTICE: EXPLANATION, COMPARATIVE TEXT, AND COMMENTARY*, 14-16, 164-172 (1950). The new Court of Military Appeals would consist of three civilian judges appointed by the President with the advice and consent of the Senate for fifteen year terms. The Court could only issue rulings on questions of law and would review those cases initially reviewed by the Board of Review established under Article 66. There was no direct appeal from the court-martial to the new appellate court.

⁸⁴ UCMJ, arts. 37, 98. *See* WIENER, *supra* note 83, at 105-06, 206-07. The language of Article 37 was taken from the 1948 Articles of War provision against unlawful command influence found in Article 88. Article 37 provided that:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this code shall 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 prohibitions of Article 37 were not intended to preclude the reviewing authority from making comment on error of the court during the course of the final review or taking appropriate action when a member of the court has misbehaved so as to abandon their judicial responsibilities or duties. WIENER, *supra* note 83, at 106. Any act in violation of Article 37's prohibitions was made a crime under Article 98 paragraph two,

Writing in a 1953 law review article, Professor Morgan issued a stern warning to the military that Congress would be watching, and if the improper influencing of court-martial continued, further actions were likely.⁸⁵ Congress, realizing that the protections encompassed in the UCMJ could be circumvented, also warned the military that it “intended to follow the situation as close as they can. . . and is going to try to see that the command control is kept within bounds as much as possible.”⁸⁶ At the same time, Congressional members realized that the military justice system “had to be permitted to function without undue interference by Congress in specific cases.”⁸⁷ The compromise between these two positions was the requirement for annual reports to the Committees on

punishable as a court-martial may direct. Commanders soon found ways around the prohibitions of Article 37, with the help of the *Manual for Courts-Martial* provisions allowing for general military justice instructions to be given to court members before their assuming those duties.

⁸⁵ Morgan, *supra* note 45, at 184. Professor Morgan warned:

If experience under the Code shows that the influence of command control has not been eliminated, it may well be that a new system will have to be established in which the military will have control only over the processes of prosecution and the defense, trial and review be under the exclusive control of civilians. The services have the opportunity of demonstrating to Congress that the concessions made in the Code to the demands for effective discipline do not impair the essentials of a fair, impartial trial and effective appellate review.

Id.

⁸⁶ CONGRESSIONAL FLOOR DEBATE ON UCMJ 29 (1949) (Statement by Representative Furcolo). Representative Furcolo did not believe the prohibitions of Article 37 would prevent the commander from influencing the court and intended that Congress should keep a wary eye on the military justice system to ensure that they did not overstep the bound established by Congress in the UCMJ.

⁸⁷ *Id.* at 32 (1949) (statement by Representative Martin). Representative Martin also recognized that it was important that “Congress be ever ready to revise and improve the system in the way best illustrated by the bill now before us.” *Id.*

Armed Services of the Senate and the House of Representatives on the operation of the UCMJ.⁸⁸

The military justice system operated with little interference from Congress for the first eighteen years after the UCMJ's enactment. As Congress maintained their vigilant oversight of the system, changes were deemed necessary in 1968 to combat what they saw as the renewed increase of command abuse of the system.

D. The Military Justice System Under the New Code (1950 to the present)

The first decade under the UCMJ saw an active Court of Military Appeals that did not shy away from overturning convictions or Board of Review decisions based on unlawful command influence.⁸⁹ Congress even felt confident enough in the Court's oversight that it no longer felt a need to intercede in courts-martial actions on behalf of their constituency.⁹⁰ In an effort to be proactive, the Army appointed a committee to

⁸⁸ UCMJ art. 67(g). *See also* WIENER, *supra* note 83, at 171. The report must detail the number and status of pending cases and discuss any recommendations for amendments to the UCMJ. This provision allowed Congress to keep an eye on the progress of the Services in meeting the requirements of the UCMJ without having to spend time with hearings and witnesses every year.

⁸⁹ *See* Wiener, *supra* note 68, at 40-41. The cases ranged from removal during a recess in the court-martial of the president of a special court-martial who had been ruling in favor of the defense to reversing the conviction of an accused whose defense counsel had received an adverse efficiency rating after zealously representing his client in court.

⁹⁰ *See Id.* at 41. It became sufficient for Congressional members to be able to tell the complaining constituent that the soldier's rights would be seriously considered by the wholly civilian Court of Military Appeals. The Court's very existence effectively removed Congressional members from interfering in individual courts-martial, at least in the beginning.

evaluate the military justice system under the UCMJ.⁹¹ The Powell Report found eight requirements for the effective operation of the military justice system.⁹² Among its recommendations, the Powell Report proposed enlarging the class of persons Article 37's prohibitions apply to;⁹³ removing the requirement for a convening authority to approve the findings of a general court-martial;⁹⁴ and the expansion of the law officer's powers by allowing trial by the law officer alone.⁹⁵ The Powell Report's recommendations were not well received when released in January 1960, but many eventually found their way into the first major revision of the UCMJ in 1968.⁹⁶

⁹¹ See *Id.* at 44. The Secretary of the Army, Wilber M. Brucker, appointed the Committee chaired by Lieutenant General Herbert B. Powell, on October 7, 1959. Eight other general officers sat on the committee, among them Major General William C. Westmoreland, then commanding at Fort Campbell, Kentucky. See also REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY, BY THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY (18 Jan 1960) [hereinafter POWELL REPORT]. The Committee was given the job of "studying and reporting on the effectiveness of the UCMJ and its bearing on good order and discipline within the Army. . . . and inquire into improvements that should be made in the Code by legislation or otherwise." *Id.* at 1.

⁹² POWELL REPORT, *supra* note 91, at 2. The eight requirements believed essential to the fair operation of the military justice system were to: (1) support the mission of the armed forces both in war and peace, at home and abroad; (2) provide for the rehabilitation of usable military manpower; (3) foster good order and discipline at all times and places; (4) protect the military community against offenses to persons and property at times and places where civilian courts are not available; (5) provide a commander with the authority needed to discharge efficiently his responsibility in connection with the points above; (6) provide practical checks and balances to assure protection of the rights of individuals and prevent abuse of punitive powers; (7) promote the confidence of military personnel and the general public in the overall fairness of the system; and (8) set an example of efficient and enlightened disposition of criminal charges within the framework of the American legal principals.

⁹³ *Id.* at 3, 12.

⁹⁴ *Id.* at 7, 161. The Committee felt the requirement for convening authority review of the facts had become an anachronism, developed in earlier days when lawyers did not participate in the courts-martial. They also found that the review caused "unnecessary duplication and wasted effort" and "provided no substantial value to an accused." *Id.* The recommendation would not remove the Convening Authority's powers to review the sentence and order mitigation or clemency. *Id.* at 162.

⁹⁵ *Id.* at 5.

⁹⁶ See Wiener, *supra* note 68, at 44. Because some of the Powell Report's recommendations were so extreme, the entire report lost credibility. One recommendation called for a new definition of harmless error so that all errors of law would be considered harmless unless "after consideration of the entire record, it is affirmatively determines that a rehearing would probably produce a materially more favorable result of the accused." *Id.* at 46 (citing POWELL REPORT, *supra* note 91, at 194, 197). The second recommendation

The Powell Report's recommendation to re-designate the law officer as a military judge and give him duties comparable to civilian judges found its way into the 1968 Amendment to the UCMJ.⁹⁷ Another main feature of the 1968 Amendments created a Field Judiciary for the assignment of all military judges, effectively removing them completely from the control of the installation commander.⁹⁸ The 1968 Amendments also expanded the entitlement of qualified defense counsel to accused service members facing Special Courts-Martial.⁹⁹ The 1968 Amendment also re-designated the Boards of

that caused concern proposed the addition of two retired military lawyers, who had served fifteen consecutive years on active duty as a judge advocate, to the Court of Military Appeals which appeared to many to be an attempt at court packing. *Id.* (citing POWELL REPORT *supra* note 91, at 194, 198-99).

⁹⁷ Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968 Amendments), *cited in* Charles M. Schiesser & Daniel H. Benson, *Modern Military Justice* 19 CATH. UNIV. L. REV. 489, 495-500 (1970). *See* THE ARMY LAWYER, *supra* note 15, at 245-46. The re-designation also carried an expansion of the new military judge's duties in an attempt to give him powers equivalent to civilian trial judges. The military judge could now call the court into session; hold hearings out of the presence of the panel members to hear and rule on motions; determine validity of challenges for cause against court members; and issue final rulings on questions of law. The military judge could also now sit alone, without members, and rule on guilt or innocence and issue sentence in a case. The one distinguishing factor between the civilian judge and the military judge remained the court-martial panel's duty to issue sentences in cases before them whereas in the civilian sector it is the judge who always hands down the sentence in criminal cases regardless if it was a jury or judge alone trial. It is interesting to note that the 1968 Amendments were debated in the Judicial Subcommittees of the House and Senate, unlike the UCMJ, which was debated before the Armed Services Committees. This could explain the expansion in the judge's duties and powers. *See also* Wiener, *supra* note 68, at 65. The military judge still could not suspend a sentence, even one he imposed; order an accused into or release him from confinement; or enforce his own orders without action by a commander. *See also* LURIE, *supra* note 15, at 197.

⁹⁸ 1968 Amendments 82 Stat. at 1336, *cited in* Wiener, *supra* note 68, at 63. The Field Judiciary is the name for the stove-pipe organization to which all military judges are now assigned for purposes of evaluations and administrative purposes. The Field Judiciary is organized under the Judge Advocate General's Office and assigns military judges to their posts. It is independent of the installation commanders so no military judge is subject to performance evaluations by the commanders whose cases they hear. *See* LURIE, *supra* note 15, at 197.

⁹⁹ 1968 Amendments 82 Stat. at 1335-36, *cited in* Wiener, *supra* note 68, at 63. *See* THE ARMY LAWYER, *supra* note 15, at 247. A qualified attorney must now represent the military accused unless one is not available due to military exigencies and then the convening authority must justify the unavailability determination in writing. The 1968 Amendments also expanded the penalties available at the Special Court-Martial by allowing the adjudication of a bad conduct discharge if legal counsel represents both sides and a military judge is present. *See also* LURIE, *supra* note 15, at 197.

Review within each Judge Advocate General's Office as Courts of Military Review.¹⁰⁰

Most of the changes in the 1968 Amendment involved making the military judiciary more independent of the command and making the conduct of the actual courts-martial appear to procedurally function like civilian criminal courts. The 1968 Amendment made only minor changes to the rules regarding unlawful command influence.¹⁰¹ In the years to come, the area of unlawful command influence would continue to remain the focus of the military justice system's critics.

As the Vietnam War escalated, and the military drafted more young men into the service, complaints of command abuse of courts-martial powers again increased.¹⁰² The dissatisfaction with the Vietnam War also brought public attention to certain cases

¹⁰⁰ 1968 Amendments, 82 Stat. at 1341-42, *cited in* Wiener, *supra* note 68, at 63. *See* THE ARMY LAWYER, *supra* note 15, at 247. The 1968 Amendments created one Court of Military Review composed of separate panels that could be divided into courts of no less than three judges or sit en banc to hear cases. The intent of this configuration was to promote consistency in decisions and higher quality legal decision-making. *See also* Schiesser & Benson, *supra* note 97, at 502. The judges sitting on the Court of Military Review could be civilian or military, but the judges have generally been military. The Judge Advocate General of each Service was still responsible for issuing the uniform rules of procedure for the Court. These Courts would provide the initial level of appellate review with the Court of Military Appeals serving as the highest military appellate court.

¹⁰¹ *See* Schiesser & Benson, *supra* note 97, at 510. The 1968 Amendments provided only minor changes to Article 37. The need for commanders to be allowed to provide general instructional guidance or courses in military justice was statutorily recognized for the first time. The one major change was the withdrawal of the commander's ability to consider court-martial performance of panel members and defense counsel for purposes of evaluation and preparation of efficiency reports. *See also* Wiener, *supra* note 68, at 65. The provision allowing commanders to provide generalized instruction on military justice specifically overruled an earlier Court of Military Appeals decision calling the practice unlawful command influence under the UCMJ's Article 37. *See also* LURIE, *supra* note 15, at 197.

¹⁰² *See* Edward F. Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25, 226 (1971); Cox, *supra* note 34, at 16-17. *See also* WEST, *supra* note 37, at 153. Mr. West details allegations made during his tenure as a defense counsel during the Vietnam War as well as allegations made during the high-profile cases involving the My Lai Massacre, the Green Berets murder case, and the case against Captain Howard Levy, a military doctor, for disloyalty. *See also* SHERRILL, *supra* note 24, at 98-190. Both West and Sherrill dislike and distrust the military justice system and that opinion colors their otherwise detailed telling of the facts of the cases discussed. But they also give insight on the critic's view of the system and how it operates in those situations involving high-profile misconduct.

causing many to question the ability of the military courts to administer justice.¹⁰³ The case causing the most controversy involved the court-martial of Lieutenant William Calley for his part in the massacre of civilians in the hamlet of My Lai in Vietnam.¹⁰⁴ Statements by the President, high-ranking military leaders, and members of Congress became the centerpiece of the defense motion alleging unlawful command influence.¹⁰⁵

¹⁰³ See WEST, *supra* note 37, at 154-212. The cases causing the most criticism involved the courts-martial of two officers involved in the massacre at the hamlet of My Lai in Vietnam, and one officer who had conducted the preliminary investigation into the alleged massacre immediately following its detection. After testifying about his informal investigation into the alleged massacre, Colonel Oran Henderson found himself charged with dereliction of duty for failing to fully investigate the allegations and failure to report the commission of war crimes. The charges were all based on his testimony before Congress on the massacre at My Lai. He was also charged with provided false testimony to the Congressional committee investigating the incident and the Army investigations following the allegations. Colonel Henderson ultimately was acquitted on all charges. *Id.* at 212. See also in Wiener, *supra* note 68, at 69; SHERRILL, *supra* note 24, at 98-157. Another case receiving large amounts of attention involved the court-martial of Captain Howard Levy for disobeying a lawful order to train enlisted men and making disloyal statements. Captain Levy was a medical officer assigned to Fort Bragg during the period of the Vietnam War to instruct and train Special Forces medical personnel. Captain Levy would often make antiwar statements to the personnel he trained. He would often state that he would refuse to go to Vietnam, and that the black soldiers should also refuse because they were discriminated against the United States. Captain Levy also faced charges of making degrading statements about U.S. Special Forces soldiers calling them liars, thieves, and murderers. The defense alleged that Captain Levy was set up because of his support of the Civil Rights movement and his anti-war sentiments. They argued that he was only exercising his First Amendment rights to express his opinion on the war in Vietnam. Captain Levy's arguments failed to impress the court-martial and he was convicted and sentenced to three years confinement in the summer of 1967.

¹⁰⁴ See WEST, *supra* note 37, at 156. A White House statement called the massacre "abhorrent to the conscience of all the American people." *Id.* On December 8, 1969, during the initial processing of the court-martial charges against Lieutenant Calley, President Nixon announced that the incident appeared to be a massacre and "under no circumstances was it justified" *Id.* Those statements made and repeated in national news media effectively ensured that everyone knew exactly where the Commander-in-Chief stood on the alleged misconduct. The defense argued that these statements amounted to unlawful command influence, and if someone subject to the UCMJ had uttered them, they would have been right.

¹⁰⁵ *Id.* at 156-66. Congressional members like Pennsylvania's Richard Schneider called My Lai "[a] simplistic, deliberate act of inhumanity. . . . One of the darkest days in American history." *Id.* at 156. When expressing their views on the alleged incident, Defense Secretary Melvin Laird stated he was "horrified" and Secretary of the Army, Stanley Risor stated he was "appalled." *Id.* President Nixon also announced early in the process that he would exercise the final review in Lieutenant Calley's case signaling to many the perception that he did not trust the convening authority in the case. This distrust arose because of all the allegations that the military had attempted to cover-up the massacre at all stages of the investigation or to hide important facts relevant to the full investigation of the incident. Defense counsel argued that the statements made on top of the transmittal of daily transcripts of the Calley court-martial to Washington for review amounted to unlawful command influence on the convening authority in the case and the court.

Although the defense failed to succeed on the motion¹⁰⁶ the allegations are eerily similar to those made by defense counsel and accused service members following Aberdeen.¹⁰⁷

The questioning of the military's ability to process cases like those arising out of My Lai resulted in proposals in the early 1970s calling for massive reforms to the military justice system.

The proposals submitted generally called for the removal of the commander's control over the courts-martial process.¹⁰⁸ The Congressional proposals submitted in 1970 all called for the creation of an independent command, in one form or another, separate from the control of military commanders to process courts-martial.¹⁰⁹ The issue

¹⁰⁶ *Id.* at 165-66. The trial judge found that the Government had dispelled any appearance of unlawful command influence that may have existed because of the statements.

¹⁰⁷ Defense Motion for Dismissal Due to Unlawful Command Influence, *United States v. Stephen Holloway* (Fort Leonard Wood, MO Apr. 21, 1997) (copy on file with author); Notice of Motion to Dismiss with Prejudice: Unlawful Influence, Unfair Pretrial Publicity, Pretrial Punishment, *United States v. Blackley*, (Fort Leonard Wood, MO Mar. 11, 1997) (copy on file with author) [hereinafter Defense Motions].

¹⁰⁸ See Birch Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971); Henry B. Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455, 462-470 (1971); Anthony P. De Giulio, *Command Control: Lawful versus Unlawful Application*, 10 SAN DIEGO L. REV. 72, 102-104 (1972); Edward F. Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971). These articles talk about the proposals put forward in the early 1970s calling for the removal of the commander from the courts-martial system. The two chief proposals discussed are those submitted by Senator Birch Bayh and Senator Hatfield initially in 1970 and in each following year until the mid-1970s when it became apparent that their ideas would not be adopted.

¹⁰⁹ See Bayh, *supra* note 108. Senator Bayh's proposal, submitted for consideration of the Senate as S.1127, The Military Justice Act of 1971, called for radical changes in the operation of the military justice system. Senator Bayh would create a courts-martial command divided into Regions covering the United States and overseas installations. Each Region would be divided into three divisions and filled with judge advocates. *Id.* at 14. The new command would be independent of the installation commanding officers. The Prosecution Division would function like a United States Attorney's office and make the initial preferral decisions in all cases. Only after a preliminary inquiry and determination by the military judge that sufficient evidence existed could the prosecutor refer a case to court-martial. The Administrative Division would convene the courts-martial and select court members on a random basis from service members assigned within the Region. *Id.* at 14-15. The commander would only retain the ability to refer cases to the Prosecution Division for investigation and possible court-martial. The commander would also retain his power to issue Article 15s. See also De Giulio, *supra* note 108, at 103-04. Senator Hatfield

of command control over courts-martial, and the actual and potential abuse of that power, remained the central focus of military justice system's critics in the 1980s.

The issue of unlawful command influence reached its peak in 1984. On June 24, 1984, the first case came before the Army Court of Military Review involving allegations of improper influence on potential witnesses by the Third Armored Division's Commanding General.¹¹⁰ Over General Anderson's tenure as Commanding General of Third Armored Division, those remarks resulted in over 350 challenges made to courts-martial convictions arising in the Division.¹¹¹ Conduct by commanders, like those of

proposed the establishment of armed forces judicial circuits divided into four sections: a field judiciary, trial counsel, defense counsel, and trial review. The field judiciary would detail investigating officers upon request of the commander. If either the investigating officer or the judicial circuit officer recommended against court-martial, and the convening authority still wanted to proceed to court, a request would have to be submitted to the Judge Advocate General of the Service for action. The judicial circuit officer would conduct the initial review. Panel selection would be on a random basis from available court-martial rolls. Finally, the military judge would receive and rule on all requests for discovery and witnesses by either the defense or prosecution. *See also* Sherman, *supra* note 102, at 25. While neither of these proposals succeeded, they remain in the minds of many as the only available option to cure the perceived defects in the military justice system.

¹¹⁰ *United States v. Treagle*, 18 M.J. 646 (A.C.M.R. 1984). The *Treagle* case involved statements made by the 3d Armored Division's Commander, Major General Thurman Anderson, over an eight month period after he took command. In statements given before entire groups of the command, small social gatherings, and officer calls, General Anderson continually questioned the practice of commanders testifying on behalf of soldiers who they had initiated court-martial proceedings against. The defendant in *Treagle*, and hundreds of cases following the decision, alleged that General Anderson's statements created an atmosphere of unlawful command influence where witnesses felt they couldn't testify on behalf of military accused. General Anderson did not intend his message to be interpreted this way and attempted to correct the misperception. He only intended to get commanders to seriously consider their decisions to court-martial soldiers if they believe, and are willing to testify that the soldier should be retained on active duty or given a light sentence. The Court felt that an atmosphere of unlawful command influence did exist but in *Treagle's* case did not influence his decision to plead guilty and refused to overturn the case.

¹¹¹ *See* Bower, *supra* note 62, at 85; Margaret Roth, *Twin Probes Rock Army Lawyers*, ARMY TIMES, 4, Jan 7, 1991. Although few cases resulted in reversal of convictions, many of those cases were sent back to the command for rehearing on the sentencing phases. In one of the final cases involving the comments by General Anderson, the Court of Military Appeals warned that if actions similar to this continued, further review of the commander's power may occur. *See also* *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986). The Court went on to state that "of vital importance, the adverse public perception of military justice which results from cases like these undercuts the continuing efforts of many-both in and out of the

General Anderson, will always cause critics to question the military's ability to conduct fair and impartial courts-martial. Comments like those made by senior military leaders following Aberdeen have already caused Congress to consider re-evaluating certain aspects of the commander's role in the military justice system.¹¹² The commander's role has always been the lightning rod for critics of military justice. To fully understand the criticisms, there must be a clear understanding of the commander's role in the military justice system.

E. The Commanders Role in the Military Justice System

Most of the criticism of the military justice system often arises out of the misconception of the term "discipline."¹¹³ To the civilian who does not understand the military, the term is synonymous with punishment.¹¹⁴ To the military, the term means

Armed Services-to demonstrate that military justice is fair and compares favorably in that respect to its civilian counterparts." *Id.* at 400.

¹¹² Pub. L. No. 105-261 §552, 112 Stat. 1920 (1998), *cited in* Colonel James A. Young III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 92 (Mar. 2000). Congress ordered the Secretary of Defense to submit alternatives to the military's current method of panel member selection, specifically the possibility of random selection methods.

¹¹³ A statement made by ACLU attorney Charles Morgan best shows this misunderstanding. When commenting on the inability of the military justice system to provide justice, he said: "It's impossible to have true justice in the military because courts-martial are almost totally dedicated to the preservation of discipline at the expense of justice." *New York Times Magazine*, Feb. 22, 1970 *quoted in* Major Larry J. Miner, *Military Justice-the Case for the Commander* 6 (1971) (unpublished LL.M. thesis, the Judge Advocate General School) (on file with the Judge Advocate General School library).

¹¹⁴ ROGET'S 21ST THESAURUS 234 (2d ed., 1999). *See* WEST, *supra* note 37, at 280. Mr. West did not accept that there was a connection between discipline and a "soldier's willingness to fight and die for a particular cause, Discipline, when used in the military sense (i.e., fear), contradicts justice." *Id.*

“an attitude of respect for authority that is developed through leadership and training.”¹¹⁵

Military leaders see discipline as essential if they are to complete their missions.¹¹⁶

Discipline and justice are interlinked in the military justice system; one cannot exist without the other.¹¹⁷ General Westmoreland expressed this belief in 1971 when he wrote that:

An effective system of military justice must provide the commander with the authority and means needed to discharge efficiently his responsibilities for developing and maintaining good order and discipline within his organization. . . . At the same time a military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.¹¹⁸

¹¹⁵ General William C. Westmoreland, *Military Justice-A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 5 (1971). General Westmoreland believed that discipline was a “state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed.” *Id.* “Discipline is not simply the fear of punishment for doing something wrong, it is faith in the value of doing something right.” *Id.* Retired General William W. Crouch said that discipline is doing what is right without orders and it comes through training and the absolute will of the commander. General (Ret.) William Crouch, Address at the Hugh J. Clausen lecture on leadership given at the Judge Advocate General's School (Mar. 9, 2000).

¹¹⁶ See Westmoreland, *supra* note 115 at 5. Military commanders also realize that the maintenance of discipline requires that soldiers believe the system will operate fairly. General Crouch believes that the uniform policy of justice creates an environment of discipline within the unit. Crouch, *supra* note 115. Even the first commander of the Continental Army understood the importance of discipline to the military stating that “[d]iscipline is the soul of an Army.” D.S. FREEMAN, WASHINGTON 116 (1968), *quoted in* Cooke, *supra* note 64, at 6.

¹¹⁷ See Hansen, *supra* note 15, at 52. Commanders realize that discipline will only be achieved through confidence in the system's fair operation. The availability of appellate avenues and potential for punishment of those who interfere with the fair operation of the system aid I the development of discipline within the military. See also Cooke, *supra* note 64, at 6. “Military justice is central to the system of discipline, it inculcates and reinforces morale and discipline through consistent adherence to holding persons responsible for their own actions and treating them all fairly.” *Id.*

¹¹⁸ Westmoreland, *supra* note 115, at 8. General Westmoreland expressed his view on the interplay of discipline and justice as well.

To talk of balancing discipline and justice is a mistake-the two are inseparable. An unfair or unjust correction never promotes the development of discipline. . . . Some types of corrective action are so severe that they should not be entrusted solely to the discretion of the commander. At some point he must bring into play judicial processes. At this point the sole concern should be to accomplish justice under the law, justice not only to the individual but to the Army and society as well.

Another area of misunderstanding occurs over the purpose of the military criminal justice system. The civilian criminal justice system is considered as generally preventative.¹¹⁹ The military justice system's purpose is motivational as well as preventative.¹²⁰ It is the commander's responsibility to maintain discipline and morale in the unit. To do this the commander must often resort to the use of his judicial powers within the military justice system.¹²¹

In order to ensure the fair operation of the military justice system and the maintenance of discipline within the unit, commanders must perform many judicial duties. Those duties begin with the initiation of the investigation into the alleged misconduct.¹²² During the processing of the case, the commander decides which cases to

Id.

¹¹⁹ See *Id.* at 5-6. Civilian criminal law restricts antisocial behavior so people can live together in peace. See also SHERRILL, *supra* note 24, at 68. "The civilian ideal has always been maximum freedom restricted by law only so far as necessary to permit others maximum freedom." *Id.*

¹²⁰ See Westmoreland, *supra* note 115, at 5-6. The motivational aspect is to promote within the military a reason to obey the law because when military personnel disobey orders or laws others may die or a mission may fail. The military mission demands absolute loyalty found nowhere else in society and must aid in the preservation of the military commander's authority. See also SHERRILL, *supra* note 24, at 68. General William T. Sherman believed the object of military law is to "govern armies composed of strong men. An army is an organization of armed men obligated to obey one man." *Id.* To accomplish this required discipline, if a soldier does not obey his superior, he must be removed so as not to contaminate the rest of the unit.

¹²¹ *Id.*

¹²² MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 303 (1998) [hereinafter MCM]. Rules for Court-Martial (RCM) 303 requires that "[u]pon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses." The preliminary inquiry is usually informal, and may entail review of police reports, or other investigative reports and statements. The inquiry's objective is to gather all available evidence necessary to make an initial determination on guilt or innocence sufficient to proceed to preferral of charges against the soldier or clearing the soldier of all allegations. See *Id.* RCM 303 Discussion. See also *Id.* RCM 405. RCM 405

prosecute,¹²³ appoints panel members,¹²⁴ and reviews any conviction and sentence for final action.¹²⁵ It is the fact that one person performs all these responsibilities that confuses and concerns civilians whose system divides these duties between different individuals.¹²⁶ It is also the fact that one person performs all these duties that often results in military commanders committing acts that cause unlawful command influence in a particular case or class of cases. To fully understand when the commander crosses that line between required lawful duties and unlawful command influence requires an understanding of the concept of unlawful command influence.

requires a formal investigation in compliance with UCMJ art. 32 before referral of any charges to a general court-martial. The investigation must be thorough and impartial and set forth the relevant matters in enough detail to ensure the convening authority has sufficient information on which to base a referral.

¹²³ *Id.* RCM 601. Referral of charges requires a convening authority authorized to convene the appropriate level of court-martial for the preferred charges. Any convening authority may refer charges to the level of court he has been authorized to convene. *See* UCMJ arts. 22-24 (LEXIS 2000) for a discussion of who may convene general, special, and summary level courts-martial.

¹²⁴ UCMJ art. 25. Article 25 establishes the guidelines and considerations a convening authority may use when selecting members to serve on court-martial panels. *See also*, MCM, *supra* note 122, RCM 503 for a discussion of the procedure to request enlisted membership on the court-martial panel, and when certain members should be excluded from courts-martial service such as the accuser or members of the accused's chain of command.

¹²⁵ UCMJ art. 60. *See also* MCM *supra* note 122, RCM 1107. RCM 1107 provides that "[t]he convening authority shall take action on the sentence and, and in the discretion of the convening authority, the findings, unless it is impracticable." This power may not be delegated to anyone not serving in the position of the convening authority with the power to convene the level of court-martial in question. RCM 1107 also sets out when final action may be taken and what the convening authority may consider in making his determination regarding mitigation and clemency during the review for final action on the case.

¹²⁶ *See* WEST, *supra* note 37, at 281. In the civilian criminal justice system, the Chief of Police is responsible for the conduct of the preliminary investigation, but does not select the jury that will hear the case. The prosecutor determines what cases will be prosecuted, but does not select the members of the grand jury who conduct the formal pre-trial investigation to determine if the case will proceed to court. Civilian juries do not rely on the person who selected them for jury duty for their future career or efficiency reports.

F. What is Unlawful Command Influence?

“Unlawful command influence is a malignancy that eats away at the fairness of our military justice system.”¹²⁷

The Elston Act, passed by Congress in 1948, first introduced the phrase “unlawful command influence” into the military vocabulary to define those actions taken by commanders that improperly influence courts-martial actions.¹²⁸ Since that time, the Court of Military Appeals has decided many cases involving unlawful command influence and decreed it as “the mortal enemy of military justice.”¹²⁹

¹²⁷ *United States v. Gleason*, 39 M.J. 776, 782 (A.C.M.R. 1994). The Court in *Gleason* held that the atmosphere created by the commander's actions resulted in unlawful command influence where potential witnesses were afraid that their career would be in jeopardy if they testified on behalf of the accused. The Commander characterized the defense counsel as the enemy when speaking to a group of battalion officers; ordered one commanding officer relieved with no explanation; returned the accused in leg irons under guard; ordered inspections and unit lock downs with no explanation; and filed adverse reports and relieved individuals from their duties after testifying for the accused. *Id.* at 780-81.

¹²⁸ AW 1949 art. 88. *See infra* note 65 for a full text of the article.

¹²⁹ *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). *See United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). *Thomas* involved four cases considered together in the opinion because all four arose from the same comments from the Division Commander. This case involved the same facts as discussed in *Treacle* earlier. The Court had been hearing appeals from the statements by the 3rd Armored Division Commander for two years by the time they decided this case. They held that “command influence involves a corruption of the truth-seeking function of the trial process.” *Id.* at 394. The Court was also concerned with the adverse public perception caused by cases like *Treacle* and *Thomas* stating that it “undercuts the continuing efforts of many—both in and out of the Armed Services—to demonstrate that military justice is fair and compares favorably in that respect to its civilian counterpart.” *Id.* at 400. The Court also issued an ominous warning to military commanders. The Court felt that commanders would not repeat events like those that occurred within 3rd Armored Division but stated that “if we have erred in this expectation, this Court—and undoubtedly other tribunals—will find it necessary to consider much more drastic remedies.” *Id.* at 400.

Since the passage of the UCMJ, the Court of Military Appeals has broadened and more clearly defined what actions by convening authorities constitute unlawful command influence. They have held that Article 37 prohibits commanders from ordering or influencing subordinates to process a case in a certain manner,¹³⁰ intimidating witnesses for the accused,¹³¹ and selecting court members based solely on the belief that they will return harsh verdicts or sentences.¹³²

¹³⁰ See *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990). In *Allen*, the accused argued that the involvement of the Secretary of the Navy in cases involving national security and the restriction on the number of convening authorities that could convene courts involving allegations in violation of national security; interfering with the discretion of those convening authorities by restricting their ability to enter into pretrial agreements with accused; and the creation of a special judge program to hear cases involving national security resulted in institutionalized unlawful command influence making him unable to receive a fair trial. *Id.* at 583. The Court held that while all these incidents raised the issue of unlawful command influence, the Government rebutted that allegation by showing that the convening authority was not influenced or pressured to act on the case in a manner contrary to his personal belief. See also *United States v. Weasler*, 43 M.J. 15 (1999). *Weasler* involved allegations that the acting commander had been ordered to act on the prefferal of the accused's charges if they were prepared before the commander's return from leave. The commander testified that she did tell the acting commander to act on the case and that all he had to do was "sign" the charge sheet. The commander also testified that if he had preferred the case to anything less than a general court-martial she would have withdrawn the charges and re-preferred them. The issue of whether the acting commander used his own discretion in signing the charges was never resolved at trial because defense counsel waived the issue in lieu of a guilty plea. The Court in *Weasler*, held that unlawful command influence "undermines the integrity of the military justice system as well as of the commanders who are responsible for discipline within their units." *Id.* at 16. The Court went on to hold that when a commander is coerced into preferring charges the charges will be treated as "unsigned and unsworn." *Id.* at 19. The Court held that the actions of the commander were not so "pernicious as to taint the entire proceeding" and upheld the conviction. As a warning the Court again reminded commanders that "[w]e will be ever vigilant to ensure that unlawful command influence does not play a part in our military justice system." *Id.* at 19.

¹³¹ See *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994). In *Stombaugh*, the appellant alleged unlawful command influence in the attempted intimidation of two defense witnesses. The first witness, Lieutenant Gonzalez, was approached by members of the Junior Officer Protection Association (JOPA) and told that he should not testify for appellant. The Court held that the members of JOPA did not represent the command but were making personal, private attempts to influence the witness so the "command element" of the test for unlawful command influence was not met. However, the second witness, Petty Officer Trickle was approached by his Division Officer and told not to get involved in the case and was harassed during the court-martial by members of the unit for testifying for the appellant. The Court found unlawful command influence in the second instance because of the "mantle of authority" of those attempting to influence Petty Officer Trickle but ruled that the appellant had not shown that the witnesses' testimony was influenced or that his case was adversely affected by the attempted influence. See also *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987). The alleged attempts to influence witnesses in *Levite*, done by members of the command other than the convening authority, broadened the concept of who could commit unlawful command influence. *Levite* involved the Battalion Sergeant Major calling a unit meeting before appellant's trial where he discussed information in appellant's personnel file showing bad character. The stated purpose of the meeting was to show that the command was not "unjustly prosecuting" the accused.

The holdings of the court have recognized two types of unlawful command influence, apparent and actual. Actual unlawful command influence occurs when actions of a convening authority, or member of his staff, affect the disposition of the case to the prejudice of the accused.¹³³ Apparent unlawful command influence, also referred to as

Id. at 336. Some time after this, a meeting was held where the company commander criticized a defense witness for associating with the accused leaving the witness with the impression that she should not testify on behalf of the accused at his trial. Another expected defense witness changed her testimony shortly after a counseling session with the Battalion Commander on other issues. During the trial, the company commander, Battalion Sergeant Major, and company First Sergeant sat in the gallery watching defense witnesses testify. Shortly after the completion of the trial, these individuals conducted individual counseling sessions with two Non-Commissioned Officers (NCO) who had testified on behalf of the accused at trial. The Company Commander told the NCO's that he "could not believe that the NCO's would testify favorable for a convicted drug offender and that their testimony was unprofessional." *Id.* at 337. The Court held that the actions of the members of the command "constituted a serious breach of good order and discipline within this command." *Id.* The court also held that actions by members of the command, other than the convening authority, can rise to the level of unlawful command influence. The Court reversed the conviction and sentence holding that the "command influence exercised in this case was as pervasive as it was pernicious." *Id.* at 340. *See also* United States v. Treacle, 18 M.J. 646 (A.C.M.R. 1984) (see note 110 for a discussion of when command statements made during unit formations and during social gatherings can rise to the level of unlawful command influence).

¹³² United States v. Autrey, 20 M.J. 912 (A.C.M.R. 1985). In *Autrey*, the convening authority specifically excluded all company grade officers from the panel that would hear appellant's case. The convening authority's basis for this exclusion was that the appellant was a well-known lieutenant on the installation and it would be difficult to find a company grade officer who did not know the appellant. The convening authority also stated that a second reason for the exclusion was his intent that the appellant have the benefit of the most mature, competent court members, those being field grade officers. The Court held that while some limitations on the selection of court members is permissible; the practice of appointing members in order to get a particular result is impermissible. *Id.* at 915. The Court "specifically reject[ed] as impermissible under the UCMJ any system of selection of court members which excludes a class of persons because they might be 'known' to the accused." *Id.* at 916. The conviction was set aside based on the impermissible exclusion of company grade officers from the court-martial panel. *See also* United States v. McClain, 22 M.J. 124 (C.M.A. 1986). *McClain* involved the exclusion of junior officers and enlisted members from court-martial panels based on comments made by previous court members that the previous lenient sentences were the result of the junior members on the panels. The Court held the intent of the convening authority was important and revealed that he was attempting to select members most likely to punish accused persons severely "creating an appearance that the Government was seeking to 'pack' the court-martial." *Id.* at 131. The Court set aside the sentence holding that "discrimination in the selection of court members on the basis of improper criteria threatens the integrity of the military justice system and violates the Uniform Code." *Id.* at 132.

¹³³ These types of actions can range from unit formations called to discuss the commander's philosophy on testifying for accused service members seen in *Thomas* and *Treacle*, to intimidating witnesses not to testify on behalf of an accused service member seen in *Levite* and *Stombaugh*. The military appellate courts have also found that the issuance of command policy statements can amount to unlawful command influence. United States v. Rivers, 49 M.J. 434 (1998). In *Rivers*, the Division Commander had issued a policy memo discussing his belief in the importance of physical fitness and personal hygiene. This memorandum was sent down to all levels of command on the installation. Near the end of the memorandum a sentence was included reading "[t]here is also no place in our Army for drugs or those who use them." *Id.* at 439. In

the appearance of unlawful command influence, occurs when "reasonable members" of the public believe the questioned actions have prejudiced the accused.¹³⁴ This type of

addition, some months later, the appellant's battery commander held a unit formation days after the appellant had been apprehended for drug distribution, where he told the soldiers "that they were entitled to a drug-free battery, and that they should stay away from those involved with drugs." *Id.* at 440. Finally, two to three months before appellant's trial, the battery first sergeant called four potential alibi witnesses into his office, read them their right under Article 31, and began questioning them about their anticipated testimony regarding the alibi. The Court found all three incidents to have risen to the level of unlawful command influence but held that the corrective actions taken by the Government as well as the conduct of "exhaustive fact finding hearings and comprehensive judicial orders" in the case resulted in no adverse impact on the accused. *Id.* at 443. The Court also found it important in its decision that the case was heard in front of a military judge rather than a panel in making their decision on the impact of the incidents on the accused's right to a fair trial free from the taint of unlawful command influence. Actual unlawful command influence also occurs whenever the commander's policy directives or opinions are brought into the courtroom. *United States v. Allen* 43 C.M.R. 157 (C.M.A. 1971). *Allen* involved an attempt to introduce a policy directive from the Secretary of the Navy into sentencing deliberations of a court-martial panel. Reversing the sentence, the Court held that this is the form of command influence "that the Code was initially directed." *Id.* at 158.

¹³⁴ See *United States v. Cruz*, 20 M.J. 873 (A.C.M.R. 1993). *Cruz* involved the mass apprehension during a large unit formation of approximately forty soldiers who had tested positive in a recent unit urinalysis for drug use. During the Brigade Commander's comments to the formation, CID and German police surrounded the parade filed where the formation was being held, as planned by the Commander. The Commander then called out the names of the forty soldiers and had them report to the front of the formation after having had the unit crest removed from their uniform. When the soldiers saluted and reported to the Commander, he refused to return their salutes. CID frisked and handcuffed the soldiers within sight of the unit formation and escorted onto a waiting bus. A number of the soldiers from the same company were placed in a platoon doing post support activities pending their courts-martial. Their platoon became affectionately known as the "Peyote platoon." *Id.* at 877. The Court in *Cruz* decided the case on the concept of the appearance of unlawful command influence rather than actual command influence. The Court held that "the appearance doctrine was devised to insure that public confidence in the military justice system would not be undermined by the appearance that the accused was prejudiced by unlawful command influence in a given case if that case were subjected to public attention." *Id.* at 882. In deciding an issue involving the appearance of unlawful command influence, the opinion "held by a substantial segment of the reasonable members of the public," is the determining factor. *Id.* The Court also believed that when deciding a case involving the appearance of unlawful command influence, "a court is fulfilling its own responsibility to safeguard the military justice system from a loss of public confidence." *Id.* at 883. In discussing why the issue of the appearance of unlawful command influence was of concern to the military courts, the Court stated:

The law and the courts concern themselves with the appearance of unlawful command influence because of its deleterious effects on public confidence in the military justice system, not because an accused has any legitimate claim to relief where he has in fact suffered no prejudice but only appears to have. It is in the interests of the military justice system itself which the appearance doctrine was designed to protect, since it is the military justice system itself which the appearance doctrine was designed to protect, since it is the military justice system itself which is harmed by the loss of public confidence.

Id. at 884. In discussing potential remedies, the Court articulated three considerations that must be made: the "remedy should be tailored to the restoration of public confidence under the particular circumstances of the case at hand; should avoid unnecessary expenditure of scarce resources; and should not create an actual injustice in place of an apparent one." *Id.* at 889. The Court determined that the appellate process itself

influence looks at the perception of those viewing the court from outside the court-martial process.¹³⁵

Actual unlawful command influence is generally easy to detect in most instances, and can often be corrected before trial if discovered.¹³⁶ Apparent unlawful command influence is sometimes more difficult to correct once it has occurred. The Army Court of Military Review in *United States v. Cruz* held that publishing the truth about the case in question and the appellate review process itself should be enough to dispel the specter of

along with the publication of the truth are the best means to correct the appearance of unlawful command influence. Holding that where an accused has not suffered any actual prejudice as a result of apparent unlawful command influence, reversal would be unwarranted, the Court left open the very real possibility that there may be instances where it is so aggravated and so ineradicable that reversal is the only way to restore public confidence. *Id.* at 890. *See also* *United States v. Campos*, 37 M.J. 894 (A.C.M.R. 1993). *Campos* involved the statement by a military judge during the preliminary court proceedings when asked if he knew cause for his recusal that he had recently been removed from his position as senior military judge on the installation and that the rumor was that the reason for the removal was that he had been too lenient on sentences recently. During extensive voir dire, the military judge indicated that no one in his chain of command had spoken to him about his sentences or indicated a lack of faith in his judicial abilities and that he would not let the recent removal affect his decision in this case. The Court held that while the appearance of unlawful command influence is just as evil as actual command influence, there must be more proof than just "evil in the air" to require a reversal of a lower court's decision. *Id.* at 899.

¹³⁵ *Cruz*, 20 M.J. at 882. The courts look at the case through the eyes of a reasonable member of the public based on the information they can be expected to possess on the case to determine if apparent unlawful command influence has occurred. The courts will not require or expect a technical analysis of the available information but rather expects broad conclusions to be drawn from a public that generally knows just enough about the military justice system to distrust its fairness.

¹³⁶ *Rivers*, 49 M.J. at 434. The Court in *Rivers* commended the command and the military judge in their efforts to correct the actions that had caused the unlawful command influence in the case. Some of the command's actions included a withdrawal of the offending Division Commander's policy memorandum and a re-issuance of a corrected memorandum with a statement of why the old one was incorrect; the public videotaped retraction by the Battery Commander of his previous statements followed by comments by the Battalion and Brigade commanders re-iterating that the prior statements by the Battery Commander were improper; and the administrative investigation conducted by the Command into the Battery Commander's statements. On the judicial side the Court specifically mentioned the exhaustive fact finding hearings by the judge into the allegations; the removal of the command from the courtroom during the trial; and the judicial order of production for any defense witness shown to have worked with the accused in the Battery and have any personal knowledge of the crimes alleged or the accused's character or work performance regardless of their current location.

apparent unlawful command influence.¹³⁷ No case has reached the appellate courts alleging apparent unlawful command influence as a result of actions or statements by members of Congress. It is unlikely that under the current law's definitions of who may commit unlawful command influence that such a case will ever reach the appellate courts.¹³⁸ Congressional member's actions and statements can sometimes have the same effect as those of a commander, and can have more far-reaching effects in some cases. In the age of twenty-four hour news coverage, statements by Congressional members can reach far more individuals, both in and out of the military, than any statement by a convening authority. Those statements can also have far more devastating effects on the perception of the system's fairness. That perception is crucial to the operation of any system of justice.

The Court of Military Appeals has recognized that "a judicial system operates effectively only with public confidence."¹³⁹ If the public loses confidence in the judicial

¹³⁷ *Cruz*, 20 M.J. at 889- 910.

¹³⁸ UCMJ art. 37 (LEXIS 2000). The scope of the individuals whose actions are covered under Article 37 included any convening authority and anyone who is subject to the UCMJ. Since members of Congress can neither convene courts-martial nor are they subject to the UCMJ, their actions and statements cannot violate article 37's prohibitions. Without a broader reading of the Article's coverage by the Courts, or an amendment to the UCMJ specifically making actions and statements made by Congressional members covered under Article 37, they will continue to go unchecked.

¹³⁹ *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983). *Grady* involved the government counsel bringing the command policy regarding the Command's rehabilitation program into sentencing arguments before a panel. The Court held that this practice invades the province of the panel's deliberations, reversed and set aside the sentence. The Court held that "[i]t is the specter of command influence which permeates such a practice and creates 'the appearance of improperly influencing the court-martial proceedings' which must be condemned." *Id.* at 276. In discussing the importance of public confidence in the military justice system, the Court stated that the required trust "exists only if there also exists a belief that triers of fact act fairly." *Id.* See *United States v. Pierce*, 29 C.M.R. 849, 851 (1960). *Pierce* involved inappropriate comments about what a base commander wanted a panel to do in a case overheard by members of that panel while it was still hearing evidence in the case. The comments were made during a conversation held at the Officer's Call held during the court-martial. The Court, although unable to say for sure that the

system, it can no longer operate effectively. In the military justice system, it could mean actions producing the appearance of unlawful command influence that result in a loss of public confidence could cause renewed calls for removal of military courts-martial jurisdiction. The ability to maintain a separate system of military justice depends on both public and Congressional support and acknowledgement that the courts-martial system is fundamentally fair. With each attack made on the system by those very individuals whose support is crucial, confidence lessens and the likelihood of renewed calls for reform increase.

The system's chief supporters in Congress have always been those with prior military service. With each election, the number of Representatives and Senators with that crucial military background decreases.¹⁴⁰ With the loss of experience also comes a loss of understanding about the military justice system and how it operates, including how Congressional members' statements can affect the operation of that system. The actions of Congressional members in the past ten years have shown an increasing willingness to make public statements about military investigations and courts-martial outcomes.¹⁴¹ These statements often included condemnations of the military's ability to

commander's statements affected the panel's decision, reversed saying, "not only must wrong be avoided, but the appearance of wrong." *Id.* at 851.

¹⁴⁰ See Rick Maze, *Fewer in Congress Have Military Experience*, ARMY TIMES, Nov. 23, 1998, at 8. See also Donald N. Zillman, *Political Leadership Without Military Service*, CHRISTIAN SCIENCE MONITOR, Dec. 30, 1993, at 19. In the 91st Congress, during the height of the Vietnam War, 69% of Senators and 71% of Representatives has seen military service. In the 103rd Congress that number had dropped to 57% of United States Senators and 38% of Representatives. By the 104th Congress in 1995, only 48% of Senators and only 32% of Representatives had seen military service. That number dropped again in 1999 when the 106th Congress convenes with only 43% of Senators and 31% of Representatives having served any time in the military.

properly handle cases of misconduct among their own ranks, especially when the accused service member is a high-ranking officer.¹⁴² Looking at the Court's own definition of apparent unlawful command influence, statements made by Congressional members regarding their belief in the appropriate punishment in a case, or among a class of offenders,¹⁴³ could cause unlawful command influence that the Court is unable to find a way to correct short of dismissal of the affected case.

III. CONGRESSIONAL POWERS OVER MILITARY JUSTICE

This section exams the statutory authority and history supporting Congress' oversight of the military justice system. I will review cases from the past ten years with particular attention on the level of Congressional attention and the appearance that it influenced the case's outcomes. The analysis will focus on the question of whether the

¹⁴¹ In response to the Navy's perceived mishandling of Tailhook, Congressional members called for independent investigations, resignations of senior Navy officials and harsh punishment for offenders. These comments were not restrained to the House and Senate floors, they were made in the media as well. *See infra* Section III B(1)(a) of this thesis for a full discussion of Tailhook. In response to the allegations at Aberdeen, many members of Congress publicly called for harsh punishments and made it very clear that the Army's actions in handling this incident would be closely watched and if found wanting Congress would step in. *See infra* Section III B(1)(b) of this thesis for a full discussion of Aberdeen. When the Air Force initiated courts-martial charges against Lieutenant Kelly Flinn, the first woman B-52 bomber pilot, Congressional members were not long in expressing their displeasure. Calls for investigations of DoD's policy on prosecuting adultery cases were made along with allegations that males in the military committing the same crime were not being prosecuted and that the Air Force was singling out Lieutenant Flinn because of her gender and status. Eventually female members of Congress, as well as Senator Trent Lott, called on the Air Force to dismiss the court-martial charges and process the case administratively. *See* Section III B(1)(c) of this thesis for full discussion of the facts in this case.

¹⁴² 138 CONG. REC. S15690.

¹⁴³ 138 CONG. REC. E2065. *See also* Letters, cited *supra* note 5. The calls by Congressional members for "full disciplinary action" against anyone committing misconduct at Tailhook and the demands for anyone responsible for the misconduct at Aberdeen be "severely punish[ed]" is exactly what the Appellate Courts

Congressional attention caused the equivalent of unlawful command influence in those cases as well as within the military justice system's processing of future cases.

A. What is Congress' Role in the Military Justice System?

Any discussion of Congress' role within the military justice system must begin with a review of the Constitution in order to understand its obligations concerning the military. As ratified in 1789, the Constitution provided for a division of power over the military between the President and Congress. The Constitution established the President as Commander in Chief of the Armed Forces,¹⁴⁴ and gave Congress the power to raise and support the army and navy.¹⁴⁵ The Constitution also gave Congress the duty to make rules for the government and regulation of the armed forces.¹⁴⁶

The delegation of the Commander in Chief duties to the President caused little debate or controversy during the Constitutional Convention.¹⁴⁷ The Convention debates

have held a military commander is prohibited from doing under Article 37. *See* *United States v. Pierce*, 29 C.M.R. at 849. *See also* *United States v. Allen*, 43 C.M.R. at 157 (C.M.A. 1971).

¹⁴⁴ U.S. CONST. Art. II, Sect. 2. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . ."

¹⁴⁵ U.S. CONST. art. I, § 8, cl. 12. "The Congress shall have power . . . To raise and support Armies, . . ." *See also*, U.S. CONST. Art. I, Sect. 8, Cl 13. "The Congress shall have power . . . To provide and maintain a navy."

¹⁴⁶ U.S. CONST. art. I, § 8, cl. 14. "The Congress shall have power . . . To make Rules for the Government and Regulation of the land and naval forces."

¹⁴⁷ THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 437 (Johnny H. Killian & George A. Costello, eds., 1996) [hereinafter THE CONSTITUTION, ANALYSIS AND INTERPRETATION]. During the Revolutionary War, Congress realized the importance of having one

focused on the military powers the President would possess as the Commander in Chief.¹⁴⁸ In 1866, the Supreme Court described the President's role as Commander in Chief as "the command[er] of the forces and conduct of the campaign."¹⁴⁹ Although it is clear that Congress intended to invest the President with supreme control of the military, it is also clear that it did not want him to also have the power to make the rules for the armed forces.¹⁵⁰

The power to make rules for the government of the armed forces carries with it the implied power to create a courts-martial system to enforce those rules.¹⁵¹ In Senate

individual, rather than a group, empowered with the command of the military forces. But, having learned through their experience with the King the potential for that person to abuse his power, Congress kept the power to raise and support the armed forces as a check on the President's powers as Commander in Chief.

¹⁴⁸ THE FEDERALIST, No. 69, 465 (J. Cooke, Ed., 1961), cited in THE CONSTITUTION, ANALYSIS AND INTERPRETATION, *supra* note 147, at 437. Alexander Hamilton wrote that the military powers of the Commander in Chief "would amount to nothing more than the supreme command and direction of the Military and naval forces, as first general and admiral of the confederacy."

¹⁴⁹ *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866); THE CONSTITUTION, ANALYSIS AND INTERPRETATION, *supra* note 147, at 453. The President generally delegates these responsibilities but is not required to do so. During the Civil War, President Lincoln in 1862 issued orders of advance to the Union troops, and in 1945 President Truman personally gave the order to drop the atomic bomb on Hiroshima and Nagasaki.

¹⁵⁰ See Ansell, *supra* note 18, at 2. In discussing why Congress chose to divide control of the military between the two branches of Government, General Ansell stated that:

[t]hey did not intend that the Chief Executive of this nation should inherit those military powers, which in the mother-land had been deemed inherent in the Crown. They resolved to make certain that the Army of the United States should be called into being only by Congress, and should be governed and disciplined only in accordance with laws enacted by Congress.

¹⁵¹ See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE, 625 (3d ed., 1999) [hereinafter TREATISE]. See also *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858). *Dynes* involved the question of whether the court-martial that convicted Dynes of attempted desertion, but found him not guilty of the only charged offense, desertion, was proper. In upholding the conviction, the Supreme Court held that the Constitutional provisions giving Congress the power to make rules for the government of the armed forces show "that Congress has the power to provide for the trial and punishment of military and naval offences . . . and that the power to do so is given without any connection between it and the 3d article of the Constitution." *Id.* at 79.

hearings on the 1919 Amendments to the Articles of War, General Ansell argued that courts-martial were “authorized by Congress. The offenses that they may try and the laws that are applied are prescribed and enacted by Congress. Their sentences and judgments must be in accordance with the laws of Congress.”¹⁵² If courts-martial are, as General Ansell argues, creatures of Congress, does that mean that Congress may order the court-martial of a soldier regardless of a commander’s wishes? If the logic of General Ansell’s argument is followed to its logical conclusion, the answer would be yes. However, Congress has explicitly stated that this cannot happen.¹⁵³ If courts-martial are governed by the laws of Congress, and not considered to be Article III courts under the Constitution, does that mean that the Constitutional protections afforded civilian criminal defendants do not apply in military courts-martial? The Supreme Court holding in *Dynes v. Hoover*, supports the argument that they do not.¹⁵⁴ However, when Congress drafted the 1950 UCMJ and its’ later amendments, it ensured that nearly all protections afforded the civilian defendant also apply to military defendants.¹⁵⁵ Congress’ intent is clear when looking at these protections; the military courts-martial should be conducted in a fair and

¹⁵² *Hearings, Committee Military Affairs, U.S. Senate*, 66th Cong., 1st Sess., 1919, quoted in LURIE, *supra* note 15, at 65. General Ansell was arguing that courts-martial were creatures of Congress and not “instrumentalities of the executive” as described by Colonel Winthrop in his 1886 Treatise on Military Justice. They were “judicial courts, the product of congressional statutory authority, not subject to the control of anyone but Congress.” *Id.*

¹⁵³ UCMJ arts. 22-24 (LEXIS 2000). These articles specifically provide who may convene the three levels of courts-martial in the military. Congress is not one of those listed individuals empowered to convene any of these courts. The power is given to the President, the Secretary of Defense, the Service Secretaries, and the commanders at specific levels, depending on the type of court-martial.

¹⁵⁴ *Dynes*, 61 U.S. at 79.

¹⁵⁵ UCMJ art. 32 (requiring a pre-trial hearing similar to the 5th Amendment’s requirement for a grand jury indictment before certain cases.) See UCMJ art. 31 (requiring rights warnings similar to those required by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966).) The military also provides free military defense counsel to the accused, regardless of an indigency showing that is required by most civilian courts systems.

impartial manner, as similar to the manner of civilian courts as possible. Congress conducts hearings and investigations when necessary into military justice actions and investigations to ensure the military carries out that intent.

Congress' ability to conduct hearings and investigations is implied from its legislative authority.¹⁵⁶ There are few limits on this power. The most noted check on that power is that the hearing or investigation must be used only "in the aid of the legislative function."¹⁵⁷ The Supreme Court has interpreted this to mean that "so long as

¹⁵⁶ See TREATISE, *supra* note 151, at 687. The power to conduct these hearings includes the power to compel witness testimony and issue contempt citations. See also THE CONSTITUTION, ANALYSIS AND INTERPRETATION, *supra* note 146, at 90; *McGrain v. Daugherty*, 273 U.S. 135 (1927). The Supreme Court in *McGrain* found that the "power of inquiry-with process to enforce it-is an essential and appropriate auxiliary to the legislative function." *Id.* at 174. The Court also held that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it." *Id.* at 175.

¹⁵⁷ See TREATISE, *supra* note 151, at 692; THE CONSTITUTION, ANALYSIS AND INTERPRETATION, *supra* note 147, at 91. The 'legislative function' language is very broad and has been construed to encompass inquiries into the effectiveness of existing legislation as well as the need for future legislation. *Id.* See also *Watkins v. United States*, 354 U.S. 178 (1957). The Supreme Court *Watkins*, held that the power to investigate includes

surveys of defects in our social, economic, or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But, as broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end of itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to punish those investigated are indefensible.

Id. at 187.

Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of the power.”¹⁵⁸

The invocation of the power to hold investigatory hearings into military justice matters by Congress is not new. In 1970, Congress conducted hearings into the My Lai incident and its alleged cover-up by military officials.¹⁵⁹ The Secretary of the Army refused to provide the testimony of thirty-nine Department of the Army witnesses requested by Congress without subpoenas.¹⁶⁰ The Subcommittee did not give in to the

¹⁵⁸ *Barenblatt v. United States*, 360 U.S. 109, 132 (1959). *Barenblatt* involved the ability of the Congressional Committee on Un-American Activities to compel witness testimony. Barenblatt refused to answer the Committee’s questions about his affiliation with the Communist Party, not on self-incrimination grounds, but rather claiming the questioning violated the First, Ninth, and Tenth Amendments, as well as the separation of powers. The Supreme Court held that an investigation cannot be determined not to be in furtherance of a legislative function simply because the “true objective of the Committee . . . was purely exposure.” *Id.* at 132.

¹⁵⁹ *Investigation of the My Lai Incident: Hearings of the House of Representatives Armed Services Investigating Subcommittee*, 91st Cong., 2d Sess. (1970). The Committee specifically avoided the question of criminal responsibility because of the pending court-martial proceedings against several of the witnesses. The specifically addressed five questions:

1. As of March 16, 1968, what were the established U.S. military policies and procedures relating to the treatment of civilians and the investigation of alleged civilian casualties?
2. Did the Task Force Barker operation in the Son My area on March 16, 1968, result in a substantial allegation of civilian casualties?
3. Was any such allegation brought to the attention of appropriate officers of the Americal Division, the 11th Brigade, or Task Force Barker?
4. If so, what action was taken by the aforesaid Army command?
5. Was such action in accordance with existing policies, orders and directives?

Id. at 1.

¹⁶⁰ *Id.* at 2. In a letter to the Subcommittee, Mr. Stanley R. Resor, Secretary of the Army, opposed the request for the testimony pointing out that several of the witnesses were crucial to the upcoming court-martial of individuals involved in the incident, including thirteen of the witnesses whose testimony the Committee requested. Captain Ernest Medina, the company commander for the unit involved in the incident was a requested witness by the Committee. Mr. Resor was concerned that the witnesses’ testimony before the Subcommittee would “imperil” the Army’s ability to carry out its responsibility to investigate and properly act on the cases arising out of My Lai. *Id.*

Army's concerns, issuing subpoenas to the witnesses to compel their appearance and testimony.¹⁶¹

Congress used its subpoena power again in 1995 to investigate the military justice actions against those individuals responsible for the friendly fire downing of two Army Blackhawk helicopters over Northern Iraq.¹⁶² Ultimately, the Pentagon refused the Subcommittee's request for witnesses and refused to obey the later subpoena's issued ordering the witness testimony.¹⁶³ Congress initiated hearings and requested witness testimony following the Marine courts-martial of two pilots whose jet had cut the ski lift guide wire in Aviano Italy,¹⁶⁴ and after the beating death of a gay soldier at Fort Campbell, Kentucky.¹⁶⁵ In both instances after the military explained the potential

¹⁶¹ *Id.* To avoid prejudice to the rights of those witnesses pending court-martial actions, the Committee allowed defense attorneys to be present during testimony and met in executive session to hear their testimony. *Id.* at 1. The Committee also did not release its final report or the transcripts of the hearings until the last action had been taken in the last court-martial involving My Lai. *Id.* at Foreward.

¹⁶² *Friendly Fire Shootdown of Army Helicopters Over Northern Iraq: Hearings Before the House of Representatives Military Personnel Subcommittee on National Security*, 104th Cong., 1st Sess. (1995) [hereinafter *Friendly Fire Hearings*]. The two stated objectives of the committee were: "First, to examine the causes of the incident and assess the effectiveness of corrective actions. . . . Second, to examine the accident investigation and the judicial actions that follow." *Id.* at 3.

¹⁶³ Matthew Brelis, *Pentagon Ignores Subpoenas in Friendly-Fire Investigation*, BOSTON GLOBE, Nov. 14, 1996, at 35. Among the witnesses requested were the legal advisor to one convening authority involved in the disposition of the cases arising from the shootdown and the judicial investigator. *See infra* Section III(B)(2)(a) for a full discussion of this issue.

¹⁶⁴ Telephone Interview with Lieutenant Colonel Pete Collins, Staff Judge Advocate, Camp LeJuene, North Carolina (Jan. 20, 2000). Shortly after the second court-martial of Captain Richard Ashby, Representative Dan Burton indicated he intended to conduct an investigation into defense allegations of unlawful command influence and the initial acquittal of Captain Ashby on the manslaughter charges. Representative Burton wanted the testimony of the convening authorities involved, the prosecutor, defense counsel, and the Article 32 investigating officer

¹⁶⁵ Telephone Interview with Major Jim Garrett, Chief, Military Justice, Fort Campbell, Kentucky (Jan. 18, 2000). Representative Barney Franks indicated his intent to hold hearings shortly after the soldier's death to determine if the command knew of the soldier's harassment by members in the unit and chose to ignore the complaints.

impact on the military justice process if the witnesses testified before the final actions in the two cases, both Representative Burton¹⁶⁶ and Representative Franks withdrew their requests.¹⁶⁷ If the Congressional members in these cases had chosen to ignore the Pentagon's concerns, Congress could have issued subpoenas compelling the witnesses' testimony. If those witnesses had refused, or if the military declined to produce them, Congress could have issued contempt citations.¹⁶⁸

As seen by the Pentagon's response to the requests for witness testimony, the foremost concern advanced was the potential adverse effect on the court-martial process. If Congressional hearings or investigations are held before the court-martial in a particular case, the potential for influencing a convening authority's actions is far greater than when they are held after final action in the case. Even if no actual influence occurs, the likelihood of the appearance of improper influence in the eyes of the public is too

¹⁶⁶ LTC Collins Interview, *supra* note 164. Marine officials explained that the actions against the two officers were not complete and refused access to the convening authority, prosecutors, and Article 32 investigating officer. However, they did provide Representative Burton with a copy of the Records of Trial and allowed him to speak to defense counsel if they would agreed. Representative Burton found that the allegation of unlawful command influence had been litigated fully at trial and all the information needed was present in the Records of Trial furnished by the Marines, and withdrew his request for the presence of the witnesses before his Committee.

¹⁶⁷ MAJ Garrett Interview, *supra* note 165. Once Army officials explained that the investigation into the soldier's death was ongoing and any testimony before Representative Franks' Committee could endanger the ability to hold a fair trial of the service member accused of the beating, he withdrew his request as well. These two instances show that an open avenue of communications assists more than anything else, in controlling the potential adverse impact on the military justice system of witness that are involved in an ongoing military justice matters testifying before Congressional Committees.

¹⁶⁸ 2 U.S.C.S. § 192 (LEXIS 2000), *cited in* Watkins v. United States, 334 U.S. 178, 207 (1957). Contempt before Congress by a witness subpoenaed to testify or produce documents carries with it a fine of between \$100.00 and \$1,000.00 and confinement for a period of between one to twelve months.

great and the damage to the ability of the military to conduct a fair proceeding would be nearly irreparable.¹⁶⁹

It is not just the ability to hold hearings and issue contempt citations that provides the potential to adversely affect the fair operation of the military justice system.

Congress also has the duty of approving, or consenting to, the promotions and appointments of military officers.¹⁷⁰ The extent to which this power is used to enforce Congress' intent that certain individuals be held accountable for perceived misconduct can be seen in the withholding of promotions of certain officers after Tailhook.¹⁷¹ The military expects commanders to make judgments on military justice cases based on their own judgment.¹⁷² When outside pressures adversely influence their decisions, improper influence occurs.¹⁷³ When Congress withholds promotions as they did after Tailhook,

¹⁶⁹ The public perception of a situation where court-martial proceedings are initiated after Congressional hearings condemning the specific incident, or a group of individuals would be that the military leadership caved into the Congressional demands or criticisms. This is similar to the defense argument in the court-martial of Colonel Oran Henderson discussed in footnote 103 who faced court-martial charges after testifying regarding the conduct of his investigation into the allegations of misconduct following My Lai.

¹⁷⁰ See THE CONSTITUTION, ANALYSIS AND INTERPRETATION, *supra* note 147, at 455; *Mimmack v. United States*, 97 U.S. 426, 437 (1878). The Supreme Court held that once the President accepts an officer's resignation, that officer could not be re-appointed, or receive another commission, without the advice and consent of the Senate. See also *United States v. Corson*, 114 U.S. 619, 622 (1885). *Corson* involved the question of whether an officer, once lawfully dismissed can regain his position by a revocation of the previous dismissal by the President. The Supreme Court answered in the negative, holding that only with "a new and original appointment, to which, by the Constitution, the advice and consent of the Senate were necessary; . . ." could that officer regain his commission. *Id.*

¹⁷¹ See Robert J. Caldwell, *Closing Tailhook's Bleeding Wound, Scandal Bred a Legacy of Mistrust and Bitterness*, SAN DIEGO UNION-TRIBUNE, Dec. 15, 1996 at G-4. Over 100 Navy and Marine officer's files were "flagged" if they had any involvement in, or had knowledge of, the offenses that occurred at the 1991 Tailhook Convention. See *infra* III B(1)(a) of this thesis for a more detailed discussion of these actions.

¹⁷² See De Giulio, *supra* note 108, at 106. De Giulio says that the commander "must exercise discretion independent from policy directives of superiors or improper action by his subordinates." *Id.*

¹⁷³ *Id.*

even in the absence of any actual instances of influence, the perception is that the actions influenced the commander's decisions. Who can say whether a Division Commander is not influenced to dispose of a case in a manner consistent with Congressional demands because he feels that his next promotion may be in jeopardy if he does not? It is the very fact that it appears to the public that a commander's actions may be influenced in this manner that causes the damage to the military justice system. That is not to say that Congressional intervention in refusing to approve the promotion of an officer for instances of misconduct, or for known instances of attempting to cover-up misconduct of their subordinates, is improper. In fact, it is a necessary aspect of Congress' oversight obligation to ensure that military leaders do not attempt to cover-up misconduct by their officers. However, it becomes unacceptable when officers, cleared of misconduct are affected.¹⁷⁴ This type of action causes the perception that it is Congress, not the commander, who decides the disposition of military justice cases. It is that perception that can result in the belief that the military justice system cannot operate a fair, unbiased court-martial system.

Historically, Congress has maintained an active role in the military justice system, but the extent of that attention has ebbed and flowed over time. The level of attention generally increases when instances of high-profile misconduct occur bringing public cries

¹⁷⁴ See Caldwell, *supra* note 171. This is exactly what happened following Tailhook. One officer who was "flagged" was not even present during the Convention but during the investigation, others had said that he was present and although he did not participate, he watched some of the alleged misconduct. He did not learn of the "flagged" status of his personnel file until three years after the allegations

for change in the process.¹⁷⁵ The danger inherent in this increased attention is the potential for adversely influencing the disposition decisions of commanders. If the attention results in commanders being more diligent and not attempting to cover-up misconduct, the result is an asset to the military justice system. However, if that attention causes commanders to dispose of cases in a certain manner simply because that is what Congressional members are demanding, the result is detrimental to the successful operation of the military justice system. Neither the defendant, who is entitled to a fair trial, nor the military justice system, that relies on the independent judgment of commanders, benefits from the latter type of attention.

B. Examples of Congressional Exercise of Oversight Duties in the 1990s

The actions and statements of Congressional members are organized into two categories: those taken before court-martial action in a case, and those taken after the court-martial is complete. The cases discussed in this section are broken down into these two categories with four cases involving Congressional actions before the court-martial and two cases involving Congressional action following the courts-martial. The four cases discussed involving actions taken prior to the courts-martial are: the Navy's Tailhook scandal; the sexual misconduct between drill sergeants and trainees occurring at

¹⁷⁵ Prior to the 1990's, either because of a lack of public interest or a lack of news coverage, Congressional attention did not seem to focus on the processing of specific military justice actions, with the exception of the Hearings into the My Lai massacre. Beginning with Tailhook in 1991, that all changed. Every high-profile case of misconduct has garnered Congressional demands for actions or investigation. With each demand that indicates the feeling by Congress that the military cannot police its own, the public confidence, as well as the confidence of the service members, that the military justice system is fair decreases.

Aberdeen Proving Ground; the Air Force's prosecution of Lieutenant Kelly Flinn for adultery; and the Air Force's prosecution of Major Sonny Bates for refusing a direct order to take the Anthrax vaccination. The two cases involving Congressional action after the completion of the courts-martial are the Air Force's processing of cases arising out of the downing of two U.S. Army Blackhawk helicopters over Northern Iraq, and the prosecution of two Marine pilots for cutting the ski lift guide wire in Aviano Italy with the wing of their jet.

The discussion of each case begins with a review of the facts and the military's response to each incident. Next, I will examine Congressional reaction to the incident and the military's processing of that incident. Finally, at the conclusion of the case discussions, I will analyze the effects of the Congressional actions on each case and on the military justice system based on those effects.

1. Congressional Action Before Court-Martial Action

Actions of Congressional members taken before a commander's disposition decision on a particular case can often result in the appearance of improper command influence on that commander. Because of the possibility of this adverse impact, any actions by members of Congress before the commander's decisions should be more closely scrutinized than actions taken after the commander's decision. One only has to look at the actions taken in the cases discussed immediately following to fully understand the

potential for adverse impact on a military justice case when Congress takes some action prior to the court-martial in a particular case.

a. The Navy's Mishandling of "Tailhook" in 1991

On September 5, 1991, the Navy held its annual Tailhook Convention in Las Vegas, Nevada. What began as lectures and presentations on naval aviation and military leadership, ended as a drunken orgy with reports of sexual assault by several female officers and civilians attending the convention. One month later, Navy officials received the first complaint of sexual assault.¹⁷⁶ The Navy Inspector General (IG) issued its' report of investigation into the alleged misconduct on April 30, 1992.¹⁷⁷ Not satisfied with the Navy's report, Secretary of the Navy, H. Lawrence Garrett, III, requested the DoD IG to conduct an independent investigation into the alleged misconduct at Tailhook.¹⁷⁸ Ten months later, the DOD IG issued its' final report finding 83 female

¹⁷⁶ See Associated Press, *Chronology of Tailhook*, Oct. 28, 1994, available in LEXIS, News Group File. [hereinafter *Chronology*]. Navy Lieutenant Paula Coughlin was the first victim to come forward with allegations of the misconduct that occurred at Tailhook. She resigned her commission two years later alleging she was being subjected to covert attacks on her career because of her allegations and could no longer fulfill her duties as a Naval officer.

¹⁷⁷ See *Id.* The report charged that top Navy officials knew the type of behavior that went on at the Tailhook Conventions and had "tacitly approved" it for years. The investigators were only able to find two aviators to be primary suspects of misconduct because of what they termed as a "closing of the ranks" by Navy officials impairing their ability to conduct a thorough investigation. Some of the alleged misconduct included "leg shaving suites" where female guests could have their legs, or any other part of their body by male volunteers. There were also hospitality suites with strippers and hookers provided for guests. The most publicized misconduct involved the gauntlet in the fifth floor hallway of the hotel. Male officers lined up along the walls of the hallway, groping and assaulting every female who walked through, voluntarily or involuntarily, sometimes even ripping clothes off the women.

¹⁷⁸ See *Id.* Secretary Garrett made the request on June 18, 1992. He resigned only eight days later, taking responsibility for the "leadership failure" in the Navy that allowed the misconduct at Tailhook to occur. *Id.* See also Charles Doe, *Pentagon Report on Navy Tailhook Wants Action Against 168 Officers*, UPI, Apr.

victims of sexual assault at Tailhook, and referring over 140 officer's files to commanders for further review.¹⁷⁹

The reported misconduct reached all the way to the top of the Navy's leadership.¹⁸⁰ The DOD IG investigation involved the questioning over 6,300 Naval officers and an unknown number of Marine officers who attended, or knew someone who attended, Tailhook.¹⁸¹ If an officer indicated they had been at Tailhook, or had an officer under their direct supervision who had attended, their "names were not sent forward for

23, 1993, available in LEXIS, News Group File. The DoD IG office was brought in because of the perceived attempts by Tailhook participants and witnesses to obstruct the earlier naval investigation.

¹⁷⁹ See *Chronology*, supra note 176. See also Doe, supra note 175. The DoD report found that there were twenty one Navy female officers and one Air Force female officer among the eighty-three victims.

¹⁸⁰ See Robert Burns, *Sex Scandal Rocked Navy to its Top, Though None Went on Trial*, ASSOCIATED PRESS, Feb. 15, 1994, available in LEXIS, News Group File. Rear Admiral Jack Snyder was permanently relieved of his command for failing to respond appropriately to the Tailhook complaints. Two other admirals lost their positions for failing to "aggressively investigate" the allegations. *Id.* See also *Excerpts From Ruling Dismissing Case Against Three Officers*, N.Y. TIMES, Feb. 9, 1994, at B7, Col. 1. Even Admiral Frank B. Kelso, the Navy's highest ranking officer, faced allegations of not only being at the Convention, but visiting in some of the hospitality suites. A military judge sitting on the courts-martial of the only three officers facing charges resulting from Tailhook, found in his ruling on the defense motion to dismiss all charges, that Admiral Kelso was "exposed to incidents of inappropriate behavior . . . including public nudity and leg shaving activities and did nothing to stop the misconduct." *Id.* The judge also found that Admiral Kelso had "manipulated the initial investigation process and the subsequent process in a manner designed to shield his personal involvement in Tailhook." *Id.* The judge ultimately granted the defense motion to dismiss based on unlawful command influence by Admiral Kelso by his manipulation of the investigation process. See also *Chronology*, supra note 175. In October 1993, Secretary of Defense, Les Aspin, overruled the new Navy Secretary's request to relieve Admiral Kelso of his duties for leadership failures leading to Tailhook. See also Richard A. Serrano, *Tailhook Woes Force Kelso to Quit Navy Early*, L.A. TIMES, Feb. 16, 1994, at A1, col. 3. Admiral Kelso submitted his retirement papers in February 1991, seven days after the judges ruling in the dismissal of the three officer's courts-martial, announcing that he no longer wanted to be the lightning rod for the complaints of Naval misconduct at Tailhook. *Id.*

¹⁸¹ See Andrea Stone, *Fairness of Intense Tailhook Probe Questioned*, USA TODAY, Aug. 13, 1992, at 3A. During the investigation, investigators required officers to sign sworn statements regarding their participation, or non-participation, in Tailhook. Investigators also used polygraphs as a tool during the investigation and anyone refusing to submit to the polygraph had their file flagged for further review. If any officer requested to speak to an attorney, they were deemed uncooperative and their files were also flagged for further review.

promotion.”¹⁸² The investigation held up thousands of promotions.¹⁸³ Of the 140 officers targeted by the DoD IG investigation, approximately sixty received administrative discipline, but no one received a court-martial conviction.¹⁸⁴

On July 2, 1992, eighteen days after Secretary Garret requested DoD IG assistance, the House of Representatives issued a resolution demanding a “full and uncompromising investigation” and urging the Secretary of the Navy to “initiate full disciplinary action against those responsible.”¹⁸⁵ One month after that demand for a thorough investigation, some Congressional members began to question the intensity of the DoD investigation.¹⁸⁶ However, that concern did not result in any calls from Congressional members to halt the investigation.

¹⁸² *Id.* (quoting Navy Lieutenant Commander Bruce Williams).

¹⁸³ *Id.*

¹⁸⁴ Burns, *supra* note 180. Thirty-three of those sixty officers were Admirals who received non-punitive reprimands, including Admiral Kelso.

¹⁸⁵ Representative Kostmayer statement, *supra* note 1. Representative Kostmayer went on to say that he believe[d] it [was] important that we as a Congress express clearly both our outrage and our intention to ensure that those responsible are fully prosecuted and fully punished. Secretary Garrett’s resignation was a welcome sign that the Navy recognizes the seriousness of this matter, but the matter is still far from being resolved.

Id.

¹⁸⁶ Stone, *supra* note 181. Representative Beverly Byron, acknowledging that those accused of the misconduct “must be found and dealt with,” stated that to do that the military had to be careful, “we cannot have a witch hunt going on.” *Id.* Representative Randy Cunningham found the use of polygraphs by investigators disturbing and believed that “[i]nvestigators [were] displaying far more vigor than fairness.” *Id.*

Following the release of the Naval IG investigation, Congress, believing an attempt to cover-up officer misconduct by Naval leadership had occurred, instituted a "flagging procedure" for all personnel files of Naval officers alleged to have witnessed or participated in the misconduct at Tailhook.¹⁸⁷ Some officers on this list were never charged or disciplined for any misconduct at Tailhook.¹⁸⁸ Many on the list were victims of rumors that they had been present at Tailhook, with no substantiating proof of their presence, or participation.¹⁸⁹ In 1995, the Senate Armed Forces Committee denied a Navy request for the rescission of the flagging and review requirement.¹⁹⁰ In the summer of 1996, Secretary of Defense, William Perry, requested the rescission of the Committee's blacklist policy.¹⁹¹ On September 29, 1996, the Senate Armed Services Committee agreed to relax, but not remove, the requirement to "flag" those officers implicated in Tailhook.¹⁹²

¹⁸⁷ See Dale Eisman, *Senate Promotions Panel Relaxes Tailhook Scrutiny*, VIRGINIAN-PILOT, Oct. 1, 1996, at A2. Any Naval officer "potentially implicated" in misconduct at Tailhook had their file highlighted for review by the Senate Armed Services Committee before every promotion nomination for that officer. This became known as the "Tailhook Certification." *Id.* Between the 1992 implementation of this requirement and the fall of 1996, dozens of promotions were delayed and eight were rejected because of their alleged involvement in Tailhook. *Id.* See also Dana Priest, *Navy Blocks Promotion for Flier at Insistence of Senate Committee; Pilot was Absolved in Tailhook Harassment Scandal Investigation*, WASH. POST, Jan. 7, 1996, at A04. From 1994 to 1996, the Senate Armed Services Committee allowed at least seven officer's promotions to languish before their committee because the officer's names were on the list of those alleged to have been involved in Tailhook. See also Caldwell, *supra* note 171. Originally 140 active duty Naval and Marine officer's names made it onto the secret Tailhook "blacklist" kept by the Senate Armed Services Committee.

¹⁸⁸ See Eisman, *supra* note 187.

¹⁸⁹ See Caldwell, *supra* note 171. In fact one officer discovered his name was on the Committee's blacklist based on allegations that he was present and witnessed misconduct at Tailhook, when he was not even near the state of Nevada on September 5, 1991.

¹⁹⁰ See Priest, *supra* note 187.

¹⁹¹ See Caldwell, *supra* note 171. Secretary Perry cited the "manifest injustice" of the list because those individuals on it had no ability to respond because they never knew of its existence.

b. The Army Sex Scandal at Aberdeen Proving Ground

Less than two months after the Senate Armed Forces Committee eased its scrutiny of Navy officers involved in Tailhook, the Army felt the pressure of Congressional attention on its processing of military justice investigations. On November 7, 1996, the Army Chief of Staff, General Dennis Reimer, held a press conference to announce sexual abuse allegations by newly enlisted female trainees at Aberdeen Proving Ground in Maryland.¹⁹³ The reported misconduct included allegations that male drill sergeants forced female trainees to engage in sexual intercourse.¹⁹⁴ In the press conference, General Reimer described the allegations as “unacceptable conduct for soldiers, it is unacceptable to the Army and we have a zero tolerance for that type of thing.”¹⁹⁵ One

¹⁹² See *Id.* Although the request to permanently remove all “flagging” was not approved, the Committee did agree to relax the requirements. Those officers still on the list, at that time there were ninety still on active duty, who had not been through any promotion nomination procedure would still be subjected to the scrutiny initially applied. However, those officers who had previously been nominated and been approved for one promotion would no longer be subjected to the Tailhook scrutiny with future promotion nominations. *Id.* See also Eisman, *supra* note 184. As proof of its good intentions, the Committee approved the promotions of sixteen officers whose names appeared on their blacklist. The Committee also ordered the Navy to inform those still on the blacklist of the allegations against them and give them the opportunity to respond to those allegations.

¹⁹³ ARMY LINK NEWS, *General Reimer Holds Press Conference*, Nov. 7, 1996 (visited Sept. 26, 1999) <<http://www.dtic.mil/armylink/news/Nov1996/19961108aberddeen/index.html>> [hereinafter Reimer press release]. The Army took a three-prong approach to the release of the information. General Reimer issued the initial statement followed later in the day by the Commander of Training Command (TRADOC), and the Commander of Aberdeen Proving Ground. Those statements were followed by numerous appearances on news shows by Secretary of the Army Togo West and the Chief of the Joint Chiefs of Staff, General Shalikashvili.

¹⁹⁴ See Art Pine, *Army Reacts Quickly to Sex Harassment Charges Military: Captain, 2 Sergeants are Accused in Case Involving 17 Female Recruits. Wider Probe is Underway*, L.A. TIMES, Nov. 8, 1996, at A1. The allegations also included charges of consensual sexual intercourse between male drill sergeants and female trainees.

¹⁹⁵ Reimer news release, *supra* note 193.

reporter described General Reimer as "obviously angry," vowing that the "service's leadership would move swiftly to ensure that those responsible are brought to justice."¹⁹⁶

The press conference was only the beginning of what would be numerous news program appearances and press conferences discussing the investigations and the Army's position on the alleged offenses and offenders.¹⁹⁷ The term "zero tolerance" became the most often quoted phrase when senior Army leaders discussed their opinion on the alleged misconduct.¹⁹⁸ Although Secretary West refused to answer questions about specific cases due to the possibility of unlawful command influence, eight days after the announcement at Aberdeen, he promised, "Aberdeen won't be a festering wound to the Army. Unlike Tailhook, the Aberdeen abuses will be examined quickly and openly. We will expose them and we will eradicate them."¹⁹⁹

¹⁹⁶ Pine, *supra* note 194.

¹⁹⁷ See News Appearances cited *supra* note 6. During his appearance on CNN's Late Edition, Secretary West vowed that the Army would "find out every incidence of violation here. We will expose them and we will eradicate them. We will not have this." In his appearance on ABC's Nightline, Secretary West promised to get to the bottom of the allegations and said that "[w]e are sending a message that says be careful, you can end up in jail." Secretary West was conscious of the possibility of unlawful command influence from his statements. Appearing on ABC's "This Week," when asked what he felt appropriate punishment in cases of sexual misconduct similar to that at Aberdeen would be, he responded that he could not answer because it "makes me potentially engage in command influence. Each commander, each general court-martial convening authority must decide for himself or herself what is appropriate in each case. *We will, nonetheless, hold everyone accountable.*" (emphasis added). *Id.*

¹⁹⁸ See Jim Wolf, *Perry Pledges Zero Tolerance for Harassment*, PITTSBURGH POST-GAZETTE, Nov. 14, 1996, at A21. See also Rowan Scarborough, *Army Trainees Accuse Instructors of Rape, Harassment*, WASH. TIMES, Nov. 8, 1996 at A3. See also *Defense Secretary Orders Full Review of Military Sexual Harassment Problems*, MSNBC NEWS SERVICE, Nov. 14, 1996 (visited Nov. 14, 1996) <<http://www.msnbc.com/news/41069.asp>> [hereinafter *Full Review Ordered*] (copy on file with author).

These types of statements and the often quoted position of "zero tolerance" for sexual misconduct led to allegations of unlawful command influence by defense counsel representing drill sergeants facing courts-martial following Aberdeen.²⁰⁰ Defense counsel alleged that the statements of the Army's senior leaders tainted all levels of command and no drill sergeant on trial after those statements could receive a fair trial.²⁰¹ The motions generally failed at the trial level, but the issue has recently been accepted for review by the United States Court of Appeals for the Armed Forces.²⁰²

Within days of the announcement of the allegations at Aberdeen, the Army established a task force to conduct a survey of the Army basic and advanced training environments.²⁰³ The task force's orders were to determine the exact cause of the "obvious breakdown in discipline that resulted in the sex scandal at Aberdeen."²⁰⁴ In an attempt to get an idea on how extensive the problem of sexual misconduct was, the Army

¹⁹⁹ *Scale of Violence Alleged in Army Scandal Tops Navy's Tailhook Affair*, JEFFERSON CITY POST TRIBUNE, Nov. 16, 1996 (copy on file with author). See also *Interview Transcript of Secretary West*, CNN LATE EDITION, Nov. 10, 1996, available in LEXIS, News Group File.

²⁰⁰ See Defense Motions *supra* note 107.

²⁰¹ *Id.*

²⁰² *United States v. Jeffrey L. Ayers*, 2000 CAAF Lexis 14, Sr., No. 99-0944/AR (Jan. 6, 2000). Ayers was convicted of indecent assault on a female trainee at Fort Lee, Virginia where he was a cadre member. One issue the appeal will address is whether Ayers was prejudiced by the appearance of unlawful command influence as a result of the statements made by Senior Army leaders in the wake of Aberdeen.

²⁰³ See *Military-Civilian Panel to Probe Army Sex Scandal*, CNN INTERACTIVE, U.S. News Story Page, Nov. 22, 1996 (visited Sept. 26, 1999) <<http://www.cnn.com/US/9611/22/army.sex.scandal/index.html>> [hereinafter *Military-Civilian Panel Appointed*] (hard copy on file with author).

²⁰⁴ See Dana Priest, *Army Harassment Inquiry to Focus on Senior Officers; Also, Pentagon says it Does Not Collect Statistics on Sex Crimes, Despite Law Ordering It To Do So*, AUSTIN AMERICAN-STATESMAN, Nov. 22, 1996, at A12. Secretary West directed the Army's Inspector General to investigate the issue of command responsibility for allowing this type of atmosphere to develop within the command.

set up a toll-free number that trainees, along with current and former military service members, could call to report allegations of abuse by a drill sergeant, or other member of the military.²⁰⁵ Army investigator's aggressive approach to the conduct of the investigations led to allegations of coercion by the female trainees at Aberdeen to make false accusations of more serious misconduct than had actually occurred, and of targeting minority drill sergeants for investigation.²⁰⁶ In response to the allegations, Secretary West promised a review of the investigations by the IG at their completion.²⁰⁷

After the completion of the investigations into the misconduct at Aberdeen, the Army suspended Lieutenant Colonel Martin T. Utzig, Commander, 143rd Ordnance

²⁰⁵ See Military-Civilian Panel Appointed, *supra* note 200. See also, Bradley Graham, *Shalikhshvili Vows Wide Army Probe*, WASH. POST, Nov. 12, 1996 at 7; *Full Review Ordered*, *supra* note 198; *Army's Sex Scandal*, MEMPHIS COMMERCIAL APPEAL, Nov. 12, 1996, at A8. The Army was not expecting the amount of calls received. In the first four days of the toll-free number, nearly 2,000 calls came in and 145 investigations opened. By the end of November, over 5,000 calls had come in and over 600 criminal investigations opened as a result of the calls to the hotline.

²⁰⁶ See *Black U.S. Lawmakers Say Army Sex Probe Contaminated*, Reuters News Service, Mar. 17, 1997, available in LEXIS, News Group File. (copy on file with author). See also News Service, *Female Soldiers say Army Wanted them to Overstate Sex Charges; The Army Sex Scandal Widens as White Women Accuse Investigators of Trying to Pressure Them into Saying That Consensual Sex with Their Black Superiors was Rape*, STAR TRIBUNE, Mar. 12, 1997 at 5A. Some of the trainees alleged to have been verbally abused by the investigators and that they pushed them to say their drill sergeants raped them when the trainees were saying it was consensual sex. Some of the trainees claim that they gave into the pressure and said it was rape even though it was not. Army spokesman, Kenneth Bacon responded that the allegations were untrue and "[t]he Army wants to get to the bottom of this. It wants to make sure that people are brought to justice for proven misconduct." *Id.*

²⁰⁷ *Army Promises Inspector General Review of Sex Harassment Inquiry*, CNN INTERACTIVE (visited on Mar. 13, 1997) <<http://www.cnn.com/US/970313/army.sex.ap/index.html>> (copy on file with author). Many felt this may be inadequate, that the Army could not truly investigate itself and demanded an independent investigation from an outside source. Military supporters in Congress were successful in defeating this move, arguing that any outside intervention into the investigation at that point in the process, whether by an outside source or by Congress "could jeopardize the legal cases." *Id.* (statement by Representative Steve Buyer). Representative Buyer went on to say that "[a]t this point, it's not necessary for a full committee hearing to beat them up . . . we have their [the Army's] attention." *Id.*

Battalion on Aberdeen Proving Ground.²⁰⁸ Lieutenant Colonel Utzig was not the last commander at Aberdeen to receive some form of censure for allowing a command climate to develop that permitted the level of reported misconduct at Aberdeen. On September 10, 1997, the Army announced the issuance of letters of reprimand to ten non-commissioned officers, Battalion and Brigade Commanders at Aberdeen for their failure to provide a safe training environment.²⁰⁹ The Installation Commander at Aberdeen in November 1996, also received a letter of reprimand as a result of the sexual misconduct of the drill sergeants on his installation, and for allowing an environment to develop within his command that permitted the drill sergeants on his installation to engage in serious misconduct with trainees without fear of discovery.²¹⁰

Congressional demands for action did not take long after the initial announcement of the misconduct at Aberdeen. Within days following the announcement, female members

²⁰⁸ See Paul Valentine, *Aberdeen Battalion Chief Suspended; Lt. Col. Is First Commander to Face Action in Scandal at Md. Base*, WASH. POST, Jul. 3, 1997, at D04. The suspension occurred on June 28, 1997, weeks before he was to pass over command and move onto his next assignment. The courts-martial of the drill sergeants at Aberdeen revealed what was, defense argued and the Army agreed with, a command climate that allowed drill sergeants to engage in sexual intercourse with female trainees with no fear of being caught. Lieutenant Utzig's Battalion took the hardest hit on the installation with six drill sergeants and one company commander accused and processed under the military justice system.

²⁰⁹ See Lou Waters & Jamie McIntyre, *Pentagon Responds to Sex Scandals with Heavy Reprimands*, CNN WORLDVIEW, transcript #97091003V18, Sept. 10, 1997, available in LEXIS, News Group File; Paul Richter, *Army Reprimand 11 in Sexual Harassment Case*, L.A. TIMES, Sept. 11, 1997, at A4; Associated Press, *2-star General Reprimanded in Harassment Case*, ST. LOUIS POST-DISPATCH, Sept. 11, 1997, at 1A.

²¹⁰ See Richter, *supra* note 209. Some felt that when General Shadley transferred to his next assignment, he had escaped any potential punishment for what occurred on his installation. This brought expressions of concern from lawmakers who "believed accountability extended through the chain of command." *Id.* (statement of Representative Jane Harman). The reprimands to officers in senior leadership positions at Aberdeen came after the Army's own sexual harassment panel found no grounds for penalizing individual high-ranking officers. The Inspector General's panel that investigated the issue of command responsibility found that "officers far removed can't be held responsible for what went on in two battalions at Aberdeen and that singling others out would not help remedy the broader problem." *Id.*

of Congress wrote letters to Army and Congressional leaders demanding that the Army “fully investigate and severely punish” any wrongdoers, and that Congress hold hearings immediately into the allegations.²¹¹ On November 18, 1996, female legislators met with four top Army Generals to hear explanations of the cause of the misconduct at Aberdeen, and the Army’s plan to deal with what was being called the “Army’s Tailhook.”²¹² One member of the legislative delegation, Representative Susan Molinari, said that the

Tailhook debacle had taught lawmakers that *Congress must intervene early to oversee the military’s handling of scandals*. Prior to Tailhook, I’d have concluded it was the responsibility of the United States Navy to deal with it. As a result of Tailhook, *it’s clear that unless there is rabble-rousing and fingers are pointed, justice will not occur*.²¹³ (emphasis added).

Florida Representative Tillie Fowler also expressed Congress’ intent to closely monitoring the progress of the investigation. After meeting with the Army Generals, she affirmed that the House National Security Committee would continue to exercise its oversight responsibilities over the investigation, saying that

[t]his is a situation of the utmost seriousness, involving violent crime, and the House National Security Committee will be monitoring it closely in

²¹¹ See Letters, cited *supra* note 5. Senator Mikulski called the allegations “absolutely despicable.” Senator Boxer described her reaction to the allegations as “shocked and horrified.” See also Letter from Barbara A. Mikulski, Senator from Maryland, to The Honorable Strom Thurmond, Chairman of the Senate Armed Services Committee (Nov. 26, 1996). Senator Mikulski believed that in addition to the military’s inquiry into the allegations, “Congress also has a responsibility to review this matter. Congressional hearings would help to provide the information and recommendations we need to change the culture of the military.” *Id.*

²¹² Eric Schmitt, *Female Legislators Push Generals for Answers*, N.Y. TIMES, Nov. 19, 1996, at D23. The closed meeting lasted approximately seventy minutes and ended with promises from the Army Generals for swift punishment of the perpetrators and protection for women in the ranks. The same four Army Generals were called to meet in closed session with the House National Security Committee the next day to discuss the sex scandal and the Army’s planned response.

²¹³ *Id.* Representative Molinari also made it clear Congress’ intent was to keep a vigilant eye on the Army’s handling of the misconduct when she said after the meeting that “we are not going away, we’re watching.” *Id.*

the coming months. *I am confident that if we are not satisfied that all appropriate actions are being taken to address these issues, the Committee will hold hearings and take such further action as is necessary on the subject.*²¹⁴ (emphasis added).

The Chairman of the House National Security Committee, Representative Floyd Spence, echoed Representative Fowler's assertions. In a November 19th press release, Representative Spence said his Committee would "closely monitor this situation in the months ahead to ensure that the Army[] continues its investigation and *that those service members who violated the Uniform Code of Military Justice are prosecuted to the fullest extent of the law.*"²¹⁵ (emphasis added). The House Speaker, Representative Newt Gingrich, also encouraged Representative Spence's Committee to maintain vigilant oversight of the Army's investigation "to ensure that all allegations are aggressively investigated and that *appropriate actions are taken by all military services to punish those responsible . . .*"²¹⁶ (emphasis added). These statements by members of Congress also served as the basis for motions by defense counsel to dismiss charges against drill sergeants facing court-martial following Aberdeen.²¹⁷

Secretary West and the Army's top Generals made several trips to Capital Hill following the announcement of the misconduct at Aberdeen. On February 4, 1997, the

²¹⁴ Tillie Fowler, *Army Moving Aggressively to Address Sexual Misconduct*, FEDERAL DOCUMENT CLEARING HOUSE, Press Release, Nov. 19, 1996, available in LEXIS, News Group File (copy on file with author).

²¹⁵ Floyd D. Spence, *Chairman Spence Responds to Allegations of Sexual Misconduct in the U.S. Army*, Press Release, Nov. 19, 1996, available in LEXIS, News Groups File (copy on file with author).

²¹⁶ Letter from Representative Newt Gingrich, Speaker of the House, to Representative Floyd Spence, Chairman, House National Security Committee, Nov. 20, 1996.

²¹⁷ Defense Motions, *supra* note 107.

Senate called them to meet with a panel investigating the allegations for assurances "that [the Army] took such allegations seriously."²¹⁸ The addition of the Army's highest ranking enlisted soldier to the list of those alleged to have committed sexual misconduct did nothing to foster that impression with the panel.²¹⁹

c. Court-Martial of Lieutenant Kelly Flinn

As the Army dealt with the sex scandal at Aberdeen and the resulting Congressional attention, another case of sexual misconduct involving the Air Force's first woman B-52 Bomber pilot made headlines. In February 1997, the Air Force released information that they had initiated court-martial proceedings against Lieutenant Kelly Flinn on charges of adultery, fraternization, disobeying a lawful order, and making a false statement.²²⁰

²¹⁸ Jamie McIntyre, *Senate Holds Hearings on Sexual Misconduct in the Military*, CNN INTERACTIVE, U.S. News Story Page, Feb. 4, 1997 (visited Feb. 6, 1997) <<http://www.cnn.com/US/9702/04/army.update/index.html>> (copy on file with author). Members of the panel were extremely concerned with the February 3rd allegations against the Army's senior enlisted soldier, Sergeant Major (SGM) Gene McKinney, of sexual assault and misconduct with subordinate females.

²¹⁹ See Kristin Patterson, *Shocker: Sex Scandal Widens as Allegations Target Army's Top NCO*, ARMY TIMES, Feb. 17, 1997, at 12. Senator Olympia Snowe, member of the Senate Armed Services Committee, said "the allegations against McKinney are indicative of the pervasiveness of sexual harassment and misconduct in the Service." *Id.* Some lawmakers used this incident to argue that the issue of gender-integrated training needed to be re-visited in light of all the sexual misconduct going on in the gender-integrated basic training units. See also Jane McHugh, *Days in Court May Not Be Over*, ARMY TIMES, Mar. 30, 1998, at 16. On March 16, 1998, SGM McKinney was found not guilty of seventeen counts of sexual misconduct and obstruction of justice, but guilty of one count of obstruction of justice and sentenced to a one grade reduction to the rank of Master Sergeant.

²²⁰ See John Aloysius Farrell, *1st Woman Bomber Pilot Faces Charges; Adultery Court-Martial Possible*, BOSTON GLOBE, Feb. 22, 1997, at A3. The charges were based on an alleged relationship between Lieutenant Flinn and the husband of an enlisted airman on her installation. The charges included disobeying a direct order from her commander to end the relationship, which she refused. The most egregious charges to the Air Force leaders was for making a false statement when she lied to her

Almost immediately, Lieutenant Flinn and her civilian attorney began making appearances on news programs and granting interviews to news media, selling her version of the misconduct.²²¹ The media coverage became so inaccurate and pervasive that Air Force Chief of Staff, General Ronald R. Fogelman, responded with the true basis for Lieutenant Flinn's court-martial in May 1997, saying "[i]n the end, this is not an issue of adultery. This is an issue about an officer entrusted to fly nuclear weapons who disobeyed an order, who lied."²²² The case soon became a referendum on the military's position on adultery instead of a military justice action for an officer who disobeyed orders.²²³

Days before her court-martial, Lieutenant Flinn submitted a request for discharge from the service.²²⁴ The Secretary of the Air Force, Sheila Widnall, announced she

commander about ending the adulterous relationship. See also BRIAN MITCHELL, *WOMEN IN THE MILITARY* 314 (1998).

²²¹ See MITCHELL, *supra* note 220, at 315-18. Lieutenant Flinn became the media darling and pictured in her flight suit and leather flight jacket quickly overshadowed the real victim, the young enlisted spouse of Lieutenant Flinn's lover, Marc Zigo. The media portrayed Lieutenant Flinn as a victim of a male-dominated military being persecuted for falling in love with a man who did not tell her he was married. But the truth was that she had been introduced to Marc Zigo's wife before the relationship even began, and was approached by Airman Zigo's first sergeant to stop the relationship before she met with her commander about the incident. See also Lisa Hoffman, *General: Pilot's Court-Martial is About Trust*, SACRAMENTO BEE, May 22, 1997, at A9. The media never portrayed Lieutenant Flinn in any manner other than that of a victim, of both Marc Zigo and the Air Force Leadership.

²²² MITCHELL, *supra* note 220, at 317. See also Hoffman, *supra* note 218; John McWethy & Asha Blake, *Lieutenant Kelly Flinn gets support from Capital Hill*, ABC WORLD NEWS THIS MORNING, transcript #97052203-j03, May 22, 1997, available in LEXIS, News Group File (copy on file with author). To the Air Force this was much more than a simple case of adultery. It was about an officer who deliberately disobeyed a direct order from a superior and then lied to cover-up her misconduct.

²²³ MITCHELL, *supra* note 220, at 317.

²²⁴ Jamie McIntyre, *Female Bomber Pilot Trial on Hold*, CNN INTERACTIVE, U.S. News Homepage, May 20, 1997 (visited on Sept. 26, 1999) <<http://www.cnn.com/US/9705/20/flinn.trial/index.html>>. Initially, Lieutenant Flinn requested an honorable discharge so she could maintain her flying status with the National Guard or Air Force Reserve. See also MITCHELL, *supra* note 220, at 318-19. Later, when it became

would accept Lieutenant Flinn's resignation on May 22, 1997, allowing her to leave the service with a general discharge.²²⁵

Lieutenant Flinn's supporters included many members of Congress. Senator Slade Gorton, a former Air Force lawyer, wrote to Secretary Widnall demanding, "that the charges against Flinn be dismissed."²²⁶ The day before the Air Forces' decision to accept Lieutenant Flinn's request for resignation, the Senate majority leader, Trent Lott, declared his support for Lieutenant Flinn.

I think it's unfair. I don't understand why she is being singled out and punished the way she is. I think at the minimum she ought to get an honorable discharge. . . . I'll tell you, the Pentagon is not in touch with reality on this so-called question of fraternization. I mean, get real. You're still dealing with human beings. And the way she has been treated really disturbs me greatly. . . .²²⁷

On the day Senator Lott made his comments, the Air Force's uniformed leaders were on Capital Hill testifying before the Senate Armed Forces Committee on budget

apparent that the Air Force would not grant the honorable discharge, she amended her request asking for a General Discharge form the Air Force. An Air Force officer "may submit a resignation for the good of the service . . . when their conduct makes them subject to trial by court-martial." U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-3207, SEPARATING COMMISSIONED OFFICERS, C-2.23 (1 Sept. 1996).

²²⁵ Jamie McIntyre & Jeff Flock, *Air Force Gives Pilot a General Discharge*, CNN INTERACTIVE, U.S. News Homepage, May 22, 1997 (visited on Sept. 26, 1999) <<http://www.cnn.com/US/9705/22/flinn.wrap/index.html>>. Lieutenant Flinn's family, unhappy with the court-martial process and ultimate dismissal of Lieutenant Flinn, called on Congress to review the way military justice is administered. They contended that Lieutenant Flinn was singled out for prosecution because she was a woman and her status as the first female B52 Bomber pilot. They argued that male officers committing the same misconduct did not face court-martial action. See also MITCHELL, *supra* note 220, at 319.

²²⁶ MITCHELL, *supra* note 220, at 317.

²²⁷ *Id.* at 318. Senator Lott apparently did not understand that Marc Zigo was a civilian, asking in the same statement why Zigo was not being punished calling it "very unfair." *Id.*

matters.²²⁸ Representative Nita Lowey told the Air Force to “[d]rop the charges against Lieutenant Flinn and grant her an honorable discharge that she deserves. . . . The Air Force should have offered Kelly Flinn counseling, warnings and a transfer.”²²⁹

Female Congressional members held a press conference shortly after Secretary Widnall granted Lieutenant Flinn’s resignation to discuss the case.²³⁰ The Congresswomen called for the re-examination of the military’s fraternization and adultery policies, and that Lieutenant Flinn’s discharge be upgraded to honorable so that she could continue to fly in the National Guard or Reserves.²³¹ Because of the belief that the Air Force handled Lieutenant Flinn’s case differently than if it had involved a male officer, Representative Carolyn Mahoney called for all adultery cases to be handled at the Department of Defense to ensure equal treatment in all future cases.²³²

²²⁸ See Leonard Larsen, *Military Blues; The Press and Flinn’s Spin*, THE PLAIN DEALER, May 28, 1997, at 13B. Unfortunately for General Fogelman, the hearing turned into a discussion of Lieutenant Flinn’s case and complaints about the Air Forces’ handling of the charges and Lieutenant Flinn.

²²⁹ *Air Force Treatment of Flinn Debated on the Hill*, THE BULLETIN’S FRONTRUNNER, May 22, 1997, available in LEXIS, News Group File (comments shown on ABC Evening News with Peter Jennings). This comment by Representative Lowey shows how little she actually knew about the facts of Lieutenant Flinn’s case. Lieutenant Flinn’s commander did in fact counsel her and ordered her to stop seeing Marc Zigo. An order that she disobeyed which was at the heart of the charges against her.

²³⁰ See *Representative Lowey Holds Press Conference With Other Congresswomen to Discuss the General Discharge of Lieutenant Kelly Flinn from the Air Force*, FDCH POLITICAL TRANSCRIPTS, May 22, 1997, available in LEXIS, News Group File. The press conference was held hours after the Air Force released the information that they would accept Lieutenant Flinn’s resignation request.

²³¹ *Id.* Representative Lowey called Lieutenant Flinn a “female pioneer,” and described what happened to her as a “tragedy [that] [w]e must ensure never happens to anyone again.” *Id.*

²³² *Id.* The Representatives also called for a re-evaluation of the military’s criminalization of adultery. The one member of the group that believed Lieutenant Flinn’s court-martial was appropriate was Representative Jane Harmon, member of the House Committee investigating the sexual misconduct scandal at Aberdeen. Representative Harmon understood that the case was about “not telling the truth and violating a direct order which were things the military must discipline.” *Id.*

Representative James Traficant, Jr. also condemned the Air Force's handling of Lieutenant Flinn's case saying it should "have been handled quietly through administrative procedures."²³³ The Air Force's disposition of sexual misconduct allegations against General Joseph Ralston, argued critics, proved the existence of the double standard Lieutenant Flinn faced.²³⁴

d. Air Force Charges Major for Refusing Anthrax Vaccine

The most recent military justice action subjected to Congressional interest involved the court-martial of Air Force Major Sonnie Bates for disobeying an order to take the Anthrax vaccination.²³⁵ The Air Force brought court-martial charges after Major Bates'

²³³ Paul Marcone, *Traficant to Appear on "Meet the Press" to Discuss Case of Female B-52 Pilot*, CONGRESSIONAL PRESS RELEASES, May 23, 1997, available in LEXIS, News Group File. Representative Traficant believed that Lieutenant Flinn was treated unfairly, that had she been a male officer, she would not have faced court-martial charges. He argued that the Air Force's acceptance of Lieutenant Flinn's resignation proved his point that her case never should have been before the court-martial but rather handled administratively.

²³⁴ See MITCHELL, *supra* note 220, at 320. Days after the Air Force accepted Lieutenant Flinn's resignation, General Ralston, the top candidate for the Chairman of the Joint Chiefs of Staff, announced that he had engaged in an adulterous affair in the 1980s. See also *Pentagon Panels to Examine Adultery, Gender Issues*, CNN INTERACTIVE, U.S. News Homepage, June 7, 1997 (visited June 8, 1997) <<http://www.cnn.com/US/9706/07/military.sex/index.html>>. Commenting on General Ralston's nomination, Senator Tom Daschle stated that the military must enforce rules consistently and if they were not then the "Pentagon needs to re-evaluate whether this nomination ought to go forward." *Id.* Ultimately, General Ralston's name was withdrawn from consideration for the position of Chairman. No further punitive action could be taken because the misconduct was not within the statute of limitations for any type of judicial or non-judicial punishment.

²³⁵ See Associated Press, *Air Force Major Charged in Vaccine Refusal*, WASH. POST, Jan. 15, 2000, at 10. On January 14, 2000, the Air Force charged Major Bates with disobeying a direct order to take his Anthrax vaccination.

earlier refusal to accept an Article 15 for the same offense.²³⁶ Major Bates believed the Air Force singled him out for punitive action after testifying before a Congressional committee about his concerns over the vaccine's safety.²³⁷ On February 17, 2000, the Air Force announced the dismissal of charges against Major Bates, who had now agreed to accept an Article 15 for his refusal to get the vaccination.²³⁸

Major Bates was not the first soldier to refuse the Anthrax vaccine, or the first to face court-martial for that refusal.²³⁹ However, no soldier had previously received

²³⁶ See Associated Press, *Air Force Major Faces Court-Martial*, WASH. POST ONLINE, Jan. 8, 2000 (visited Jan. 18, 2000) <http://www.washingtonpost.com/wp-srv/aponline011412_000.htm> [hereinafter *Air Force Major Faces Court-Martial*] (copy on file with author). Major Bates argued that accepting an Article 15 would do him no good because he was not going to take the vaccination so he would continue to be subjected to Article 15s for the refusal. For an explanation of Article 15 processing in the military, see UCMJ art 15 (LEXIS 2000). An Article 15 is an administrative non-judicial procedure where the soldier's commander hears the evidence and determines guilt or innocence and appropriate punishment when necessary. The Article 15 is not considered a conviction of any kind so the rules of court-martial generally followed in judicial proceedings are not applicable. But the commander must find the evidence proves guilt beyond a reasonable doubt before he can find a soldier guilty of the offense.

²³⁷ *Id.* Major Bates testified before the Committee investigating the safety of the DoD vaccination program in October 1999 that he became concerned after several members of his unit became ill after receiving the Anthrax vaccine. He argued that his command then ordered him to get his vaccination earlier than other personnel in the unit because of that testimony.

²³⁸ See Times Wire Reports, *AF Major Won't be Tried Over Vaccine*, L.A. TIMES, Feb. 17, 2000, at A20. See also *Air Force Major Discharged After Refusing Anthrax Vaccine*, CNN.COM, Mar. 31, 2000 (visited Mar. 31, 2000) <<http://www.cnn.com/2000/HEALTH/03/31/anthrax.vaccine.ap/index.html>>. The Air Force allowed Major Bates to resign from the Service in March 2000 with a General Discharge under honorable conditions based on his refusal to accept the vaccination.

²³⁹ See Andrea Stone, *Anthrax Vaccines Won't be Stopped*, USA TODAY, Feb. 18, 2000, at 2A. As of February 18, 2000, approximately 351 soldiers had refused the vaccination. Several of those soldiers received court-martial convictions for their refusal. See Jim Hill, *Marine Gets 30 Days in Jail, Bad Conduct Discharge for Refusing Anthrax Vaccine*, CNN.COM, U.S. Story Page, June 17, 1999 (visited Feb. 17, 2000) <<http://cnn.com/US/9906/17/marine.anthrax/index.html>>; Associated Press, *Sailor Pleads Guilty, Sentenced After Refusing Anthrax Vaccine*, JEFFERSON CITY NEWS TRIBUNE ONLINE, Aug. 18, 1999 (visited Feb. 17, 2000) <http://www.newstribune.com/stories/081899/wor_0818990038.asp>; Associated Press, *Marine Wins Discharge Over Mother's Anthrax Worries*, Jan. 20, 2000, available in LEXIS, News Group File. The case receiving the most attention before Major Bates' case involved the case of a Marine Private First Class whose mother was becoming deathly ill because of her fears of the effects on her son of taking the Anthrax vaccination. He had started the program only to have the Marine Corps take him off the

support from members of Congress. Representative Dan Burton, Chairman of the Committee Major Bates testified before in October 1999, wrote to Defense Secretary Cohen with his concern that Major Bates' court-martial was in retaliation for testifying before his Committee.²⁴⁰ He also requested that the Air Force allow Major Bates to resign rather than face court-martial.²⁴¹ Representative Burton's committee issued its findings on the DoD's Anthrax vaccination program on February 16, 2000.²⁴² The Committee felt that in establishing the vaccination program DoD had engaged in "absolutionist declarations and heavy-handed propaganda, labeling critics as paranoids rather than answering their questions."²⁴³

2. Congressional Actions Occurring After Court-Martial Completion

When Congress holds hearings regarding the outcome of a particular court-martial action, the danger of improper influence is not on that case, but on the system as a whole.

shots due to the failing health of his mother who reportedly lost sixty pounds after she found out he was receiving the shots. The young Marine ultimately received a hardship discharge from the Marines.

²⁴⁰ *Air Force Major Faces Court-Martial*, *supra* note 236.

²⁴¹ *Id.*

²⁴² See Catherine Strong, *House Report: Military's Anthrax Vaccination Program Should be Suspended*, Feb. 16, 2000 (visited Feb. 17, 2000), available in LEXIS, News Group File. The Committee's report was issued the day before the Air Force's dismissal of Major Bates' court-martial. The panel recommended suspension of the military's Anthrax vaccination program calling it a "well-intentioned but over-broad response to the threat of biological warfare." *Id.* See also Mike Ahlers, *Congressional Panel Recommends Suspension of Military's Anthrax Vaccine*, CNN.COM, Feb. 17, 2000 (visited Feb. 17, 2000) <<http://cnn.com/12000/HEALTH/02/17/anthrax.vaccine.01/index.html>>.

²⁴³ Ahlers, *supra* note 242. The Committee called for the DoD to halt the vaccination program until further testing could be done. The Pentagon reported the next day that they did not intend on halting the program. See also Stone, *supra* note 242.

Some oversight in this area is critical to Congress' constitutional obligations, and serves as a crucial check on the military to ensure misconduct is appropriately and fairly disposed of and not covered-up. However, when Congress attempts to question those members of the military, whose job it is to make judicial determinations based on the facts of each particular case, about their decisions in a particular case the danger outweighs the benefit. The two cases reviewed below demonstrate the inherent danger to the military justice system by this type of questioning.

a. Friendly Fire Downing of Two Army Blackhawks Over Northern Iraq

On April 14, 1994, at approximately 9:30 a.m. in the skies over Northern Iraq, Air Force fighter jets shot two U.S. Army Blackhawk helicopters out of the sky, killing all twenty-six passengers.²⁴⁴ Pentagon officials reported that the accident resulted from the misidentification of the Blackhawks as Iraqi Hinds by the fighter pilots and the AWACs crew.²⁴⁵ The accident report, released July 13, 1994, cited human error and poor training

²⁴⁴ See Michael R. Gordon, *U.S. Jets Over Iraq Attack Own Helicopters in Error; All 26 on Board are Killed*, N.Y. TIMES, Apr. 15, 1994, at A1, col. 6. The helicopters were carrying U.N. officials from Turkey, England, France, and five Kurdish passengers. Fifteen U.S. service members lost their lives in the tragedy. The helicopters were taking the passengers to a Kurdish enclave in Northern Iraq when two Air Force F-15 jet pilots mistook them for Iraqi Hind attack helicopters and fired. The jets were enforcing the northern no-fly zone at the time.

²⁴⁵ *Id.* Pentagon officials reported that the AWACs radar plane detected the helicopters and asked the F-15 pilots to take a look, without telling them there were two American helicopters in the area that had left their radar earlier. The F-15 lead pilot flew over the Blackhawks and identified them to the AWACs as Iraqi MI-24, Hind attack helicopters. The AWACs requested a second verification and the wing pilot flew over and made a similar identification, although later would say that he reported he could not identify the helicopters. At that point, the AWACs cleared the F-15 pilots to fire on the helicopters. At no time during the five-minute identification process did either the pilots or the AWACs crew attempt to contact the helicopters by radio. See Susanne M. Schafer, *U.S. Begins Investigation of Helicopter Shootdown*, AP WORLDSTREAM, Apr. 15, 1994, available in LEXIS, News Group File. The Iraqi Hind helicopters, at the time of the accident, were painted light tan and brown while the Army Blackhawks were painted dark green

as the major causes of the downing.²⁴⁶ The report's conclusion led many to believe that the Air Force would also hold several members of the chain of command, in addition to the F-15 pilots and the AWACs crew, responsible for the downing.²⁴⁷

In late August 1994, the Air Force initiated court-martial charges against eight officers for their part in the downing of the Blackhawks, the lead F-15 pilot, Captain Eric Wickson, who made the initial misidentification and fired the missile that hit the lead helicopter, was not among those eight facing court-martial proceedings.²⁴⁸ The only officer to ultimately face a court-martial was Captain Jim Wang, the Senior Director aboard the AWACs plane on April 14, 1994.²⁴⁹ Captain Wickson received testimonial

with black camouflage. See also *Friendly Fire Hearings*, *supra* note 162. Both Blackhawks also had U.S. flags painted on wither door and on the sides of the fuel tanks measuring approximately two and one-half feet by three feet in diameter. But two pilots indicated that even those would have been difficult at the altitude the F-15 pilots flew to make their identification. *Id.* at 236-37.

²⁴⁶ See *Friendly Fire Hearings*, *supra* note 162, at 228-37. The accident report was completed in May 1994 and released in July. See also Martha Raddatz, *Blackhawk Helicopter Shootdown Report Released Today*, ALL THINGS CONSIDERED (NPR), transcript #1542-1, July 13, 1994, available in LEXIS, News Group File. General James Andrus, who headed the investigation, also said the report found the AWACs crew at fault for not passing the information that friendly helicopters were in the area to the F-15 pilots at any time. The report also faulted command and control procedures as a contributing cause of the accident.

²⁴⁷ See *Friendly Fire Hearings*, *supra* note 162, at 228-37.

²⁴⁸ *Id.* at 396-403. Court-Martial charges against Brigadier General Jeffrey Pilkington, commander of Operation Provide Comfort, were preferred on August 28, 1994 for dereliction of duty for failing to ensure the mission was operating under a current operations plan. On August 20, 1992, a charge of dereliction of duty was also preferred against Colonel James O'Brien, Director of Operations for Operation Provide Comfort for failing to ensure that the mission was operating under the guidance of a current operations plan. On August 28, 1994, charges of dereliction of duty and negligent homicide were preferred against Lieutenant Colonel Randy W. May, the F-15 wing pilot and Operation Instructor pilot. On August 31, 1994, charges were preferred against Captain Jim Wang, Senior Director on AWACs for five counts of dereliction of duty. That same day charges of dereliction of duty were also preferred against the remaining four AWACs crew members: Major Tracey Lawrence, Mission Crew Commander; Major Douglas Martin, Airborne Command Element; First Lieutenant Joseph Halcli, Enroute Controller; and Second Lieutenant Rick Wilson, Tactical Area of Responsibility Controller. No charges were ever preferred against the lead F-15 pilot, Captain Eric Wickson, whose initial misidentification caused the accident.

²⁴⁹ *Id.* The charges against the other seven officers were dismissed either before or at the conclusion of the Article 32 pretrial investigations. Captain Wang's responsibilities included overseeing his weapons

immunity to testify at the Article 32 hearing of his wing pilot, Lieutenant Colonel May, and the court-martial of Captain Wang.²⁵⁰ On June 21, 1995, a military panel of officers acquitted Captain Wang of all charges.²⁵¹

Captain Wang's acquittal meant that no one would be held criminally responsible for the twenty-six deaths, although nine individuals received administrative punishments before Captain Wang's court-martial began.²⁵² On July 24, 1995, the Deputy Secretary of Defense, John P. White, directed the Secretary of the Air Force to "assess the adequacy of the administrative actions taken under the circumstances presented; . . . ; take (or recommend) further action with respect to this incident, if appropriate; . . . and

controllers. The Article 32 investigating officer found that Captain Wang did not provide clear guidance to his subordinates and during the intercept "did absolutely nothing to help or offer guidance to his new controller." He felt that Captain should have stepped forward and taken control of the intercept.

²⁵⁰ *Id.*

²⁵¹ *See Officer Cleared in Shootdown*, ST. PETERSBURG TIMES, June 21, 1995, at 1A. After a trial lasting three weeks, the panel deliberated only five hours before returning their verdict of not guilty.

²⁵² *Friendly Fire Hearings*, *supra* note 162, at 396-403. General Pilkington received a letter of admonition on Oct. 17, 1994. Colonel O'Brien received a letter of counseling on Oct. 17, 1994. Lieutenant Colonel May received a letter of reprimand on Dec. 20, 1994, filed in his Unfavorable Information File for one year. Major Tracey received a letter of reprimand on December 19, 1994, filed in his Unfavorable Information File for one year. Major Martin received a letter of Reprimand on Dec. 19, 1994, filed in his Unfavorable Information File for one year. Second Lieutenant Wilson received a letter of reprimand on Dec. 19, 1994 filed in his Unfavorable Information File for one year. And First Lieutenant Halcli received an Article 15 on Dec. 23, 1994 which was filed in his Unfavorable Information file for two years and the Officer HQ USAF Selection Record and Officer Command Selection Record, provided to Promotion Boards, for two years. Also receiving administrative punishment were Brigadier General Curtis Emery, Combined Forces Air Component Commander, who received a letter of admonition on Oct. 17, 1994 for "inadequacies within his command [which] were contributors to creating an atmosphere that permitted the tragic sequence of events to occur, . . ." *Id.* at 402. Lieutenant Colonel Clarence H. Wagner, Jr., Commander, 963 Airborne Air Control Squadron, received a letter of reprimand for failing to play an active role in the process of validating training and mission ready status as required by Air Force regulations. Finally, Captain Eric A. Wickson, the lead F-15 pilot who fired the first missile, did receive a letter of reprimand filed in his Unfavorable Information File for one year. He was later cleared of any wrongdoing, other than human error, or lack of judgment by a review board and allowed to remain on unrestricted flight status.

render an accounting of the same to me within 30 days.”²⁵³ The Secretary of the Air Force, Sheila E. Widnall, directed Air Force Chief of Staff, General Ronald R. Fogelman, to personally conduct the review.²⁵⁴ On August 16, 1995, the Air Force announced that at the completion of the required review, they determined that previous appropriate administrative actions were inadequate and that seven officers, including, Captain Wang and Captain Wickson, would receive additional administrative punishment for their role in the downing.²⁵⁵

Within days of the downing, Representative Bartlett called for Congressional hearings to determine what happened stating that “[w]e cannot undo what happened, but I believe there are steps we can take to prevent future needless deaths. It is becoming frighteningly clear that something is going wrong with the leadership our soldiers are receiving.”²⁵⁶ After his acquittal, Captain Wang, and family members of the soldiers killed in the downing, both agreed that the “Air Force need[ed] to have another

²⁵³ Memorandum, The Deputy Secretary of Defense, to Secretary of the Army; Secretary of the Air Force; and Chairman of the Joint Chiefs of Staff, subject: Actions in Response to Aircraft Accident (July 24, 1995), *reprinted in Friendly Fire Hearings*, *supra* note 216, at 27.

²⁵⁴ Memorandum, Secretary of the Air Force, to Chief of Staff, subject: Review of Actions in Response to the Blackhawk Shoot-Down (July 25, 1995), *reprinted in Friendly Fire Hearings*, *supra* note 216, at 29.

²⁵⁵ See Tribune Wires, *7 Disciplined in Shootdown of 2 Copters*, CHIC. TRIBUNE, Aug. 16, 1995, at 4N. These punishments would be in addition to the administrative actions already taken. Lieutenant Colonel May and Captain Wickson, the two F-15 pilots would be barred from flying duties for at least three years. Three members of the AWACs crew, Lieutenant Wilson, Lieutenant (now Captain) Halcli, and Captain Wang, would also be grounded for at least three years from flying in the Air Force. In addition, General Fogelman prepared “highly critical letters of evaluation: on these five officers as well as on General Pilkington and Colonel (now General) Emery to be filed in their permanent personnel file for consideration by promotion boards.

²⁵⁶ 140 CONG. REC. H2409, (daily ed. Apr. 19, 1994) (statement of Rep. Bartlett). It seemed that members of Congress intended that the chain of command be held accountable for the actions of their subordinates in the downing.

investigation. If that doesn't happen, then Congress needs to have a congressional hearing."²⁵⁷ The House of Representatives agreed, and on August 3, 1995, the Military Personnel Subcommittee of the House Committee on National Security held a hearing addressing the judicial actions that followed the downing, along with an examination of the cause of the accident.²⁵⁸

On July 19, 1995, less than one month after Captain Wang's acquittal, Senator William V. Roth, Jr., Chairman of the Permanent Subcommittee on Investigations, announced his intent to investigate the downing, saying "[t]o date no one has been held accountable, which serves only to make the tragedy greater."²⁵⁹ As part of the investigation, Senator Roth requested Defense Secretary William Perry provide six Air Force officers involved in the judicial process following the downing for sworn testimony before his Subcommittee.²⁶⁰ Deputy Secretary of Defense John White announced the Pentagon's refusal of Senator Roth's request saying that Congress has "no judicial

²⁵⁷ *Officer Cleared in Shootdown*, *supra* note 251. While the victim's families agreed with Captain Wang on the need for Congressional hearings, they also believed he, along with his AWACs crew and the two F-15 pilots belonged in jail.

²⁵⁸ *See Friendly Fire Hearings*, *supra* note 162. The majority of the hearings discussed the judicial actions taken against the officers involved in the downing. The hearing included testimony from the Air Force Judge Advocate General, Major General Nolan Sklute who addressed what actions had already been taken, but not why they were taken, and the defense attorney for Captain Wang, Frank Spinner speaking on the defense allegation of unlawful command influence in Captain Wang's court-martial.

²⁵⁹ William V. Roth, Jr., *Roth Announces Investigation of Blackhawk Shootdown*, CONGRESSIONAL PRESS RELEASES, July 19, 1995, available in LEXIS, News Group File. Senator Roth's concern centered around the fact that because of Captain Wang's acquittal, no one was held accountable for the incident. He believed that the military was running "the risk of losing its integrity" as a result.

²⁶⁰ *See Jamie McIntyre, Senate Committee Investigating Shootdown of Helicopters* CNN WORLDVIEW, transcript #260-1, Sept. 19, 1996, available in LEXIS, News Group File. Four of the witnesses requested were General Officers and included the Convening Authorities who dismissed court-martial charges against the officers, the legal advisor to the convening authority dismissing charges against the pilots, and the judicial investigating officer.

function or review authority and the request undercuts efforts to demonstrate military justice is fair.”²⁶¹ The Pentagon believed that “Congress has a right to look at how the friendly fire accident was investigated, but not to review the verdicts in individual cases, or the actions of military judges and prosecutors.”²⁶²

After the Pentagon’s refusal, Senator Roth’s Subcommittee had to decide whether to drop the matter or issue subpoenas. Senator Roth chose the latter and on October 31, 1996, issued subpoenas to four of the requested officers who were still in the Air Force to appear and testify before his Subcommittee.²⁶³ In a move that stunned the victim’s families, and Senator Roth, the Pentagon ignored the subpoenas saying it was “intensely concerned about th[e] unprecedented intrusion into quasi-judicial acts by officers,” and that “the damages to the military justice system by the officer’s depositions might be irretrievable.”²⁶⁴

²⁶¹ *Id.* Congressional investigators wanted to determine just that; did the system operate fairly? They wanted to determine if a system of officers “investigating each other result in accountability or cover-up.” Investigators were also interested in allegations that evidence was suppressed and that Air Force officers tried to influence the outcome of the trials.

²⁶² *Id.*

²⁶³ See Breilis, *supra* note 163.

²⁶⁴ *Id.* The ABA Criminal Justice Section Report of August 1996 supported this position finding that “Congressional committees should not seek . . . compelled testimony of prosecutorial agency officials or line attorneys regarding discretionary decisions being made in pending cases.” They also found that “[i]n the absence of highly unusual circumstances, . . . should not seek the compelled testimony of line attorneys about adjudicated cases, nor access to work product or other deliberative or privileged information relating to it.” Cara Lee Neville, Chairperson, ABA Criminal Justice Section, ABA Criminal Justice Section Report to the House of Delegates, August 1999 at 2. (The Section was specifically addressing Congress’ ability to compel testimony of career federal prosecutors in specific case investigations).

b. Marine Pilot's Plane Wing Cuts Guide Wire Killing Twenty

On February 3, 1998, an EA-6B Marine Prowler, flying low over a ski resort in Northern Italy, severed a cable car guide wire sending the car crashing to the ground killing all twenty passengers.²⁶⁵ The pilot, later identified as Captain Richard J. Ashby, was on a six-month rotation with his unit from Cherry Point, North Carolina in support of NATO's mission in Bosnia.²⁶⁶ The Marine Corps' preliminary accident investigation found that the accident resulted from "aircrew error," saying "the crew flew lower and faster than authorized whenever . . . there was a valley."²⁶⁷ The crew's command initiated Article 32 hearings immediately following the report's release.²⁶⁸

²⁶⁵ See Gayle Young, *Twenty Killed as U.S. Plane Hits Cable Car Wire in Italy*, CNN INTERACTIVE, World News Story Page, Feb. 3, 1998 (visited Sept. 26, 1999) <<http://www.cnn.com/WORLD/9802/03/italy.cablecar.update2/index.html>> (copy on file with author). The plane, part of the NATO forces patrolling the skies over Bosnia, was on a low-level training mission. The accident also stranded a second car on its way down the mountain

²⁶⁶ See Reuters, *U.S.: Marine Jet Crew at Fault in Italy Cable Car Accident*, CNN INTERACTIVE, World News Story Page, Mar. 12, 1998 (visited Sept. 26, 1999) <<http://www.cnn.com/WORLD/9803/12/italy.cable.car/index.html>> (copy on file with author).

²⁶⁷ *Id.* The investigation board concluded that the crew's decision to fly below the 1,000 foot authorized altitude and to exceed the authorized speed by approximately 100 nautical miles an hour caused the accident. Also contributing was the fact that the ski resort was not on any of the U.S. maps used in flight training in the area. See Associated Press, *Aircrew Could be Charged with Manslaughter*, CHIC. TRIBUNE, Mar. 13, 1998, at 6N [hereinafter *Aircrew Could be Charged*].

²⁶⁸ See *Aircrew Could be Charged*, *supra* note 267. The crewmembers included the Navigator, Captain Joseph P. Schwietzer, and electronic counter measure officers, Captain Chandler P. Seagraves, and Captain William L. Raney, II. The Article 32 would determine if the charges against the four should be involuntary manslaughter or negligent homicide, or if the cases should proceed to court at all.

The Italians conducted their own investigation into the accident, intending to prosecute the Marines in their system. Based on assurances from U.S. officials that the crew would face "some sort of punishment in the U.S.," the Italians did not immediately press forward with criminal charges against the four officers.²⁶⁹ But on May 26, 1998, Italian prosecutors filed a request to try the four crew members in addition to the head of the crew's squadron, the Aviano base Flight-Controller, and the Commander of the 31st Fleet.²⁷⁰ The United States denied the request for jurisdiction and proceeded with court-martial actions against the aircrew.²⁷¹

At the completion of the Article 32 investigation, the convening authority, Lieutenant General Peter Pace, determined sufficient evidence existed to proceed to a general court-martial on charges of involuntary manslaughter and negligent homicide against the pilot, Captain Richard Ashby, and the plane's navigator, Captain Joseph Schwietzer.²⁷² In pre-trial hearings in early December 1998, defense counsel for Captain Ashby filed a motion to dismiss all charges against their client due to unlawful command

²⁶⁹ See *Aircrew Could be Charged*, *supra* note 267. The mayor of Cavalese, where the accident occurred expressed his confidence in the U.S. promise of punishment, saying "[i]t isn't true that the U.S. wanted to close this with a note of reprimand. . . . They want to punish those responsible." The Italian Undersecretary of Defense believed the accident report itself "was enough to hold the crew criminally responsible."

²⁷⁰ See *Seven Soldiers Face Cable-Car Disaster Trial in Italy*, AGENCE FRANCE PRESSE, May 26, 1998, available in LEXIS, News Group File.

²⁷¹ See Steven Komarow, *Cohen Assures Italians on Aviano Crash*, USA TODAY, June 11, 1998, at 6A.

²⁷² See Jamie McIntyre, *Military Trials Ordered in Cable Car Accident*, CNN.COM, U.S. Storypage, July 10, 1998 (visited Sept. 26, 1999) <<http://www.cnn.com/US/9807/10/marines.cable.car/index/html>> (copy on file with author). Other charges included damage to military property, damage to private property, and dereliction of duty. Lieutenant General Pace dismissed charges against the other two crewmembers saying they sat in the rear of the cockpit and had "no control over the plane and very limited visibility."

influence.²⁷³ The motions ultimately failed, and Captain Ashby's court-martial began on February 8, 1999, ending in an acquittal on March 4, 1999.²⁷⁴

Captain Ashby's troubles did not end with his acquittal. A second court-martial on conspiracy and obstruction of justice charges began in late April 1999, ending on May 7, 1999, with a finding of guilty by a panel of Marine Corps officers.²⁷⁵ On May 10, 1999,

²⁷³ See Associated Press, *Generals will be Called to Testify About Influence*, CNN.COM, U.S. Storypage, DEC. 8, 1998 (visited Sept. 26, 1999) <<http://www.cnn.com/US/9812/08/marines.cable.car.01.ap/index.html>> (copy on file with author). The military judge stating that "[t]here's no doubt there was political pressure here," allowed defense to question the convening authority, Lieutenant General Pace and his former deputy, Major General Michael DeLong, who conducted the Commander's Investigation, about political pressure on them to court-martial the aircrew. Defense attorneys also alleged that Lieutenant General Pace improperly influenced Major General DeLong in the conduct of his investigation. See also Reuters, *USMC Commandant to be Questioned in Italian Deaths*, CNN.COM, U.S. Storypage, Dec. 10, 1998 (visited Sept. 26, 1999) <<http://www.cnn.com/US/9812/10/marines.cable.car.reut/index.html>> (copy on file with author). The military judge also allowed the submission of written questions by defense attorneys to Marine Corps Commandant General Charles Krulak even though he found "no direct evidence that political pressure from Washington prompted the charges."

²⁷⁴ See Tony Clark, *Pentagon: Verdict Reached in 'Fair, Open and Thorough' Process*, CNN.COM, U.S. Storypage, Mar. 4, 1999 (visited Sept. 26, 1999) <<http://www.cnn.com/US/9903/04/marines.cable.car.04/index.html>> (copy on file with author). Following the acquittal, Pentagon officials expressed sympathy for the victim's families saying "[i]t's a tragedy for everyone touched by the tragedy, . . . and the Marines as well." Jurors deliberated only seven and one-half hours on their verdict after hearing nearly thirty days of testimony. A Marine spokesman for the prosecution when commenting on the outcome said: "From the very beginning, the Marine Corps has emphasized that our purpose was to determine the truth, to ensure the integrity of the judicial process and to hold individuals accountable if they were found to be criminally liable. This court-martial proceeding allowed us to do just that." See also AP *Clinton 'Horried and Heartbroken' by Cable Car Accident*, CNN.COM, U.S. STORYPAGE, Mar. 5, 1999 (visited Sept. 26, 1999) <<http://www.cnn.com/US/9903/05/marines.cable.car.03/index.html>> (copy on file with author). President Clinton added that "the United States is not trying to duck its responsibilities." The Italian Prime Minister, Massimo D'Alema, expressed his opinion on the acquittal saying it "baffled him" and that "someone should be held accountable." In Italy, the verdict resulted in renewed calls by many for the closure of the U.S. bases there.

²⁷⁵ See Richard A. Serrano, *Pilot in Ski Gondola Accident Convicted in Tape Destruction*, L.A. TIMES, May 8, 1999, at A1. The charges alleged that Captain Ashby had helped Captain Schweitzer destroy a home video taken the morning of the accident from the cockpit area looking out at the area they were flying over. Prosecutors argued it was crucial evidence that could have shown why the jet cut the guide wire.

the same Marine officers that had found him guilty sentenced Captain Ashby to six months confinement and dismissal from the Marine Corps.²⁷⁶

After Captain Ashby's acquittal in his first court-martial, the Marine Corps dropped charges of involuntary manslaughter and negligent homicide against Captain Schwietzer, and proceeded in early April 1999, on the charges of conspiracy and obstruction of justice.²⁷⁷ Captain Schwietzer pled guilty to those charges, and on April 2, 1999, a court-martial panel sentenced him to dismissal from the Marine Corps.²⁷⁸

The allegations of unlawful command influence raised by defense attorneys in both courts-martial, attracted the attention of Representative Dan Burton, member of the House Government Reform and Oversight Committee. Representative Burton's Committee began an investigation into those allegations after Captain Ashby's court-

²⁷⁶ See Richard A. Serrano, *Marine Gets 6 Months in Gondola Case; Courts: Pilot Richard Ashby also is Ordered out of the Military for Helping to Destroy a Tape of the Flight that Killed 20 in the Alps, He Appeals Sentence*, L.A. TIMES, May 11, 1999, at A7. Captain Ashby immediately asked the convening authority to suspend the confinement because Captain Schweitzer had only received a dismissal.

²⁷⁷ See Steve Vogel, *Navigator In Alps Crash Freed From Most Charges*, WASH. POST, Mar. 16, 1999, at A07. Defense attorneys argued that Captain Schweitzer was being made into a scapegoat for the accident after Captain Ashby's acquittal, and that it "didn't make sense that you'd proceed with a charge of obstruction of justice when there's no underlying crime." *Id.* Defense attorneys had first argued for dismissal of the most serious charges after the prosecution in Captain Ashby's case stated in closing arguments that "Captain Schwietzer did not cause this accident." See also Clark, *supra* note 270.

²⁷⁸ See Matthew L. Wald, *Jury Sentences Marine in Ski-Lift Incident to Dismissal*, N.Y. TIMES, Apr. 3, 1999, at A10, Col. 1. A plea agreement ensured that Captain Schweitzer would not go to jail even had confinement been part of the panel's sentence. Captain Schweitzer testified in his trial that he never looked at the videotape but was afraid it would show him smiling because he remembered shooting his face earlier in the morning and that picture would be used by the media to portray him as cruel and unfeeling.

martial conviction.²⁷⁹ The Committee's investigator requested the testimony of the convening authorities, Staff Judge Advocate, court members, military judge, and prosecutors involved in both Captain Ashby and Captain Schweitzer's cases.²⁸⁰ DoD attorneys indicated their intent to refuse any such request, arguing that the questioning of those individuals would "improperly intrude on the discretion that Congress gave these officers when it enacted the Uniform Code of Military Justice, and could also undermine the independence of such officers in future high-visibility cases."²⁸¹ They supported the argument in part by pointing out that the convening authority had not taken final actions on the cases, and his testimony about why he decided to proceed in a certain manner on the cases could seriously jeopardize the fairness of the final review process, and create appellate issues.²⁸² The Marine Corps' legislative liaison and DoD officials explained the potential of improperly influencing the final action in the cases and provided a copy of the court-martial transcript from Captain Ashby's first court-martial to the investigator.²⁸³ The record of trial, with the verbatim testimony taken during the extensive pre-trial hearings on the unlawful command influence motion, including the testimony of the

²⁷⁹ SJA Marine Corps Newsletter, Aug. 1999 (visited Sept. 29, 1999)
<http://192.156.19.100/newsletter/8_99/Aug.htm> (copy on file with author).

²⁸⁰ *Id.* See also SJA Marine Corps Newsletter, Sept. 1999 (visited Sept. 29, 1999)
<http://192.156.19.100/newletter/9_99/newsletter.htm> [hereinafter SJA Marine Corps Newsletter 2] (copy on file with author).

²⁸¹ SJA Marine Corps Newsletter 2, *supra* note 280. See also MCM, *supra* note 122, MIL. R. EVID. 606 provides that:

a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent or to dissent from the findings or sentence or concerning the member's mental process in connection therewith, . . .

²⁸² Lieutenant Colonel Collins Interview, *supra* note 164.

²⁸³ *Id.*

convening authority, seemed to satisfy Representative Burton and his Committee. The Committee did not make any further requests, or issue subpoenas for the witnesses' testimony.²⁸⁴

3. Analysis of Impact on Military Justice System of Congressional Actions

This section will discuss the impact of the Congressional actions on each case discussed in the previous section in terms of both actual and apparent unlawful command influence. While Congress, under the UCMJ, does not fall within the scope of those individuals who can commit unlawful command influence, its actions will be evaluated as if they did to show the similarities in Congress' actions and the actions of those covered under Article 37 of the UCMJ that rise to the level of unlawful command influence. Following the analysis of the impact of Congressional actions on each case will be an analysis of their impact on the military justice system and its fair operation.

The administrative actions taken by the Navy following Tailhook all occurred after Congressional demands for an aggressive investigation and prosecution of any officer involved in the misconduct. This created the perception that the Navy imposed the administrative punishments on those sixty officers because of the Congressional demands, not because they believed them necessary. Initially, the Congressional pressure

²⁸⁴ *Id.*

for an aggressive investigation was necessary because it appeared that senior Naval officers, like Admiral Kelso, intended to cover-up the misconduct of the officers involved. The Navy's own investigators concluded that they were unable to find more than two officers responsible due to the interference of senior officers.²⁸⁵ It appeared to many, including Congress, that the Navy was closing ranks. By demanding an investigation, Congress was doing its job.

One aspect of Congress' oversight duties over the military's criminal justice system is to ensure investigations and prosecutions are fair; that officers do not use the system to protect each other. However, oversight turns to influence when Congress demands that commanders take specific actions on cases. In Tailhook, had Congressional members stopped at calls for a thorough, independent investigation, no allegations of improper influence could have been made. Congress went even further when the Senate Armed Services Committee initiated their special Tailhook review policy of all Navy and Marine officer promotions coming before them. If the officer's file showed involvement in Tailhook, he was unlikely to receive approval from the Committee for his promotion.²⁸⁶

²⁸⁵ See *Chronology*, *supra* note 176.

²⁸⁶ See Caldwell, *supra* note 171. Lieutenant Mike A. Bryan's promotion was blocked for three years with the Committee because he had the misfortune of getting off an elevator near the location of the infamous gauntlet. He never was alleged to have participated in the misconduct but his mere presence was enough for the Committee to withhold his promotion. See also Priest, *supra* note 187. The most controversial case involved the pulling of the promotion of Commander Robert E. Stumpf, after the Committee had approved it in 1994. Commander Stumpf's name appeared on the Committee's blacklist because of his presence in a hospitality suite sponsored by men in his command where there were strippers performing oral sex on officers in the suite. No one in the room stated that Commander Stumpf was present when the sex acts took place. But when the Committee learned that they had not been told by the Navy that Commander Stumpf's name appeared on the list of officer's investigated they requested that their approval be pulled and the promotion be halted. The Navy complied. Commander Stumpf was the commander of the Navy Blue Angels team and well respected both within the military and among the civilian flying community.

Where officer's careers are held up, even after being cleared of any misconduct at Tailhook, the appearance to many is that Congress, not military commanders, decided the outcome of the cases and imposed punishment in addition to the military's when they felt it appropriate. While it is completely within Congress' power to disapprove the promotion of officers involved in misconduct, to stigmatize an entire group of officers because of unproven allegations is completely contrary to our concept of justice and fairness. It is when Congress steps across the line from overseer of the system to actor within the system, that the appearance of unlawful command influence on the commander's actions are raised. It is this type of action that must be stopped if the military's system of justice is to continue to function and effectively deal with it's soldier's misconduct.

If any of the officers involved in Tailhook had received courts-martial convictions for their misconduct, they would likely have argued that the demands by Congressional members caused apparent unlawful command influence in their case. Unfortunately for those officers, however, the UCMJ's Article 37 prohibitions do not apply to Congressional members.

While Tailhook remains the worst case scenario for what can happen after Congressional calls for prompt and severe punishment of known offenders in high-profile cases, and what it will do if it feels those calls are ignored, it is by no means the only example. Tailhook's effects on the Navy were fresh in the memories of Army officials when they announced the misconduct at Aberdeen. In fact, one of the reasons the Army

released the information before the completion of the investigation was the fear that the public and Congress would perceive that the Army had attempted to cover-up the misconduct as the Navy had in Tailhook.²⁸⁷ The Army leadership promised a prompt investigation. Congressional members did not wait to see if the Army would follow through on those assurances. They met with Army leaders to monitor the investigations, and issued frequent statements designed to ensure that the Army knew they would continue to watch the response to the misconduct and at the slightest slip would step in with their own investigation. This immediate and aggressive stance was in sharp contrast to Congress' reaction in Tailhook. Congress had learned that in order to maintain their oversight duties over military justice, they had to be aggressive early and maintain a constant monitoring throughout the course of the investigations.

Receiving reports and monitoring the investigations was a proper exercise of its oversight duties. However, when Congress called for prosecutions, it again became less an impartial overseer of the process and more an accuser interested in the outcome of that process. The reactions of the Army leadership appeared to many within the military to signal that they would follow any Congressional demands in order to avoid the label the Navy received after Tailhook as uncooperative and unable to police its own.

²⁸⁷ See *Army Put Aberdeen in Spotlight to Head Off Cover-up Charge*, STAR TRIBUNE, Nov. 11, 1996, available in LEXIS, News Group File. See also *Army Made Pre-Emptive Strike in Public Airing of Sex Scandal*, SACRAMENTO BEE, Nov. 11, 1996, available in LEXIS, News Group File.

The UCMJ requires that convening authorities use their own independent discretion in disposing of military justice cases. When a convening authority's actions come after Congressional, or public, calls for specific actions, such as the prosecution of all offenders at Aberdeen, and he disposes of the case in the manner requested, apparent unlawful command influence has occurred. The Court of Military Appeals has ruled in its many decisions on unlawful command influence, that the measure of apparent command influence is what those individuals outside of the system would think looking at the actions in question.²⁸⁸ Anyone looking at the actions of Army convening authorities at Aberdeen and other basic training installations following the Congressional calls for prosecution of offenders, would likely believe that the later prosecutions of drill sergeants for engaging in consensual sexual intercourse with trainees resulted from those demands, and they may be right.

Who can say that a convening authority does not consider those demands when deciding how to dispose of a case? It is the very fact that no one can say with one hundred percent certainty that they do not that makes the danger of the appearance of unlawful command influence by those demands so very real. The number of drill sergeant prosecutions at Fort Leonard Wood increased nearly two hundred percent the year following the scandal at Aberdeen.²⁸⁹ Drill sergeant prosecutions on the installation for consensual sexual intercourse with female trainees occurred before 1996, and have continued long after the attention on Aberdeen has faded. However, the appearance to

²⁸⁸ See *Cruz v. United States*, 20 M.J. 873 (A.C.M.R. 1993), See *supra* note 134 for full discussion of case.

many service members on the installation, and the public, was that the prosecutions following Aberdeen were the result of the Congressional demands and the attention paid to the misconduct by the senior leadership of the Army. That makes it difficult for an Installation Commander to maintain the necessary belief among his soldiers that he will be fair and make independent decisions based on his own independent discretion. When a commander's actions following Congressional demands in a particular case mirror those demands, soldiers on the installation will generally view them as mere responses to Congress, rather than independent decisions of the commander. If the military justice system is going to work, those soldiers must believe the commander acts based on his own beliefs, and not those of superiors, or outside influences. When the soldier does not believe the commander will act independently, he will never believe his trial was fair, and will complain to anyone who will listen, including Congress and the press. It creates a viscous cycle where the Congressional involvement causes a particular convening authority action; that convening authority action then causes the belief in the accused's mind that his trial was unfair; that belief causes the accused to complain to his Congressional representative; his complaint causes that Congressional representative to call for Hearings on the action to determine why the convening authority acted the way he did. This ultimately leads to the appearance of unlawful influence to those viewing the process from the outside because it appears that Congress is decreeing what the convening authority will do in an individual or class of cases.

²⁸⁹ Based on information gathered during personal experience as the senior trial counsel at Fort Leonard Wood, Missouri from 1996 to 1998.

Congressional involvement in Tailhook and Aberdeen demonstrate that its actions can cause the appearance of unlawful command influence into what should be the independent discretionary matters of a convening authority. It not only causes the appearance of influencing the lower level commanders, but the senior leadership as well. The initial reaction of senior Army leaders after Aberdeen, and the choreographed response to the misconduct, was the result of a desire not to fall into the same trap that the Navy had in Tailhook. They were prompted to that reaction by the Congressional actions following Tailhook. The actions of Congress clearly caused the reactions of the senior Army leaders in responding to Aberdeen. The chief allegation by defense attorneys following Aberdeen was that the statements made by the Army's senior leaders tainted all the subsequent courts-martial. But what about the influence of the Congressional demands following Aberdeen on those same senior leaders? When the Court of Military Appeals hears arguments on those cases alleging unlawful command influence by Army leaders following Aberdeen, they will in essence be hearing arguments of unlawful influence by Congress on those senior leaders, because the acts of Congress in dealing with Navy leadership after Tailhook caused the Army's reactions that form the basis of those allegations.

Many observers believed that the manner that the Army handled SGM McKinney's case resulted of the intense Congressional scrutiny at the time of the allegations. They felt that without that interest, the Army would have handled his case quietly, much like those before where individuals in high positions accused of misconduct. That argument in itself points to the positive aspect of the Congressional attention. If the added attention

means that soldiers throughout the Army are treated similarly, and those in higher positions are not given lighter punishments, then Congress has fulfilled its responsibilities within the military justice system.

There is no direct evidence showing that the prosecutions of drill sergeants, or other service members, following Aberdeen resulted from the Congressional demands. There is no "smoking gun" memorandum from Congressional members to convening authorities telling them to prosecute the offenders. It is rather the appearance that this was clearly the message intended to be sent by Congress when they issued their original demands, knowing what their reaction had been to the Navy's refusal to meet those demands made after Tailhook, that creates the danger to the fair and impartial operation of all courts-martial following Aberdeen.

Congressional interest in military justice matters usually occurs after calls from constituents who are victims of crimes committed by military members, or from news reports of misconduct, and often results in demands for prosecution, like those after Tailhook and Aberdeen. However, the interest of Congressional members can also be to the benefit of the individual soldier on trial as shown by the cases involving Lieutenant Flinn and Major Bates. When this occurs it creates the perception of improper influence on behalf of those soldiers lucky enough to get Congressional attention and leaves similarly situated soldiers with no support as they go through the courts-martial process.

When Lieutenant Flinn's "plight" was brought to the attention of Congressional members by the media, the outcry was immediate. Many of the same members that called for the prosecution of Army drill sergeants for engaging in consensual sexual intercourse four months earlier, now questioned the military's criminalization of adultery, and the Air Force's prosecution of Lieutenant Flinn. Rather than focus on the charges of disobeying orders and making a false statement, Lieutenant Flinn's supporters in Congress chose to focus only on the charge of adultery.

Almost immediately following the Air Force's announcement of the charges against Lieutenant Flinn, members of Congress demanded that Secretary Widnall dismiss them. If those same members had instead demanded that the Air Force vigorously prosecute Lieutenant Flinn there would be no doubt that they amounted to improper influence. But because they demanded leniency many argued that Congress was only fulfilling its duties in attempting to ensure inappropriate or unfair prosecutions were not allowed to happen.

It is difficult to say with any certainty that the Air Force would not have allowed Lieutenant Flinn to resign without the Congressional pressure. The perception given by the timing of the resignation made it appear that these demands did in fact affect the Air Force's decision. The prosecution and conviction of Captain Joseph Belli on charges nearly identical to those facing Lieutenant Flinn made any doubt in their minds disappear.²⁹⁰ On April 25, 1999, a panel of officers sentenced Captain Belli to fifteen

²⁹⁰ Associated Press, *Air Force Pilot Gets Dismissal, 15-day Prison Term in Sex Case*, CNN.COM, U.S. Story Page, Apr. 26, 1999 (visited Sept. 26, 1999).

days confinement and dismissal from the service.²⁹¹ He had also submitted a request for resignation that the Acting Air Force Secretary, F. Whitten Peters, denied saying, "the request was inappropriate."²⁹² No member of Congress came to the aid of Captain Belli demanding the Air Force allow him to resign. The military justice system, allowed to operate without the interference of Congress, resulted in Captain Belli's conviction on charges for which the Air Force granted Lieutenant Flinn request for resignation after demands for the resignation by Congressional members. If Congress is going to perform its oversight duties by becoming involved in individual cases, like that of Lieutenant Flinn, they must become involved in every case. If they do not, they risk the perception of improperly influencing the outcome of only those cases that draw news coverage and positive public attention. The danger of Congressional involvement in individual cases is the creation of the perception that if an accused service member can get positive news spin, they will get the support of Congressional members who will intervene in the military's prosecution on their belief.

The Air Force's prosecution of Major Sonnie Bates brought a response similar to Lieutenant Flinn's from Congressional members. Shortly after the Air Force announced that they had initiated court-martial proceedings against Major Bates for refusing a direct

<<http://www.cnn.com/US/9904/26/military.belli.01/index.html>> (copy on file with author). Captain Belli faced charges of conspiracy, fraternization, and disobeying direct orders. The charges resulted from a sexual relationship he engaged in with an enlisted airman while still married. Shortly after his divorce, he and the airman married. His command ordered him to stop seeing the airman several times and each time he disobeyed saying he could not obey and stop seeing the woman because he was in love with her.

²⁹¹ *Id.*

²⁹² *Id.*

order to receive his anthrax vaccination, Representative Dan Burton wrote to the Air Force Secretary asking that Major Bates be allowed to resign. The interest in the case was due to Major Bates' testimony before Representative Burton's Committee regarding his concerns over the safety of the vaccination. Representative Burton did not intervene or attempt to intervene in any other service member's court-martial for refusing their vaccination. Courts-martial had been processed for refusal to receive the vaccine for months before the Committee's hearings.²⁹³ No member of Congress attempted to intervene in those previous cases that resulted in convictions and discharges from the military for most of the accused service members.

Similar to the arguments made regarding the disparate treatment of Lieutenant Flinn and Captain Belli, if Congressional representatives intervene in one soldier's case, they must intervene in all similar cases if they want to avoid the appearance of improperly influencing the results of only those cases they like. Maybe Representative Burton was fulfilling his obligations under the Constitution to ensure the conduct of military courts-martial are fair, and that cases that do not belong at court-martial are not there. But when the intervention is not equal to all similarly situated defendants, especially between enlisted and officer defendants, the appearance is that intervention is only done on behalf of officers, or those that get press coverage on their cases. This erodes the confidence necessary if the military is to maintain a fair, separate system of justice to deal with their soldier's misconduct. Although actions of Congressional members before courts-martial in a case has the greatest adverse impact on the military justice system's ability to operate

²⁹³ See Stone, *supra* note 181.

fairly, actions committed following the court-martial can also have detrimental effects on the system's operation.

The actions of Congress following the downing of two U.S. Army Blackhawk helicopters occurred following the acquittal of the only service member who faced a court-martial conviction for the accident. Although Congressional members issued statements following the accident, there was no attempt to interfere with the military justice process until after it appeared that the Air Force would hold no one criminally responsible for the twenty-six deaths. The appearance of unlawful command influence resulting from the dismissal of court-martial actions against everyone involved in the downing, except for the court-martial action against the AWACs senior director, Captain Wang, also raised concern with Congressional members. The Air Force reacted to the Congressional expressions of concern following Captain Wang's acquittal by conducting a re-evaluation of the actions taken against all the officers involved in the downing. What followed was a second round of punishments for all involved, including Captain Wang. If those punishments had been subsequent court-martial actions instead of administrative punishments, defense attorneys may have been able to successfully argue that improper influence by Congress caused the leadership of the Air Force to initiate the courts-martial to ensure someone was held responsible for the accident.

What concerned military representatives the most was the issuing by Senator Roth of subpoenas for the members of Captain Wang's court-martial in order to inquire into

their deliberations and their decision making process regarding the court-martial and the acquittal. The attempt to inquire into the independent decision making of the court members is in direct opposition to the Military Rules of Evidence.²⁹⁴ If the deliberations of court members are subject to inquiry when they return acquittals, they may be less likely to return them, or at least create the appearance that courts will be less likely to return acquittals if they can be called in for questioning by Congress when their verdict is displeasing to it's members. Court-martial panels must remain immune from inquiry into their deliberative process if they are to maintain the appearance of impartiality and fairness. To allow the issuance of subpoenas to inquire into that process damages the military justice system beyond repair. The Pentagon was correct in refusing to submit to the subpoenas of Senator Roth's Committee. It is unlikely that any Court would have upheld subpoenas intended for the sole purpose of inquiring into the deliberative and decision-making process of court members.

To the outside observer of the military justice system, the second court-martial of Captain Ashby for obstruction of justice appears to have been the result of demands by Congress and the Executive that he be held accountable in some manner for the twenty civilian deaths following his acquittal on involuntary manslaughter and negligent homicide for those deaths. However, the truth is that the Government initiated the obstruction of justice charge before the first court-martial.²⁹⁵ The Government never

²⁹⁴ MCM, *supra* note 122, MIL. R. EVID. 606. See MCM, MIL. R. EVID. 606, *supra* note 281 for a full discussion of the Rules prohibitions.

²⁹⁵ LTC Collins Interview, *supra* note 164.

released this message to the public. Commanders may not be required to disclose this type of information, but the truth is that in high-profile cases the governments' actions are often called into question when they appear unfair.

Congressional interest following the courts-martial was within their oversight duties. The intent behind the inquiry was to determine if the command or the executive exerted unlawful command influence on the Marine command affecting the courts-martial of Captain Ashby and Captain Schweitzer. Although there were initial requests for interviews with convening authorities, court-martial panels, convening authorities and prosecutors, once DoD explained the potential for improper influence on the cases, the Committee withdrew the requests. This case shows the proper exercise of Congressional duties regarding the oversight of military justice and the tempering of that oversight with the maintenance of fairness within the courts-martial system.

The pressure exerted over the past ten years by members of Congress on the military's processing of military justice matters has caused many to question the fairness of a system with so many aspects controlled by one person, especially when that one person's career may depend on those same members of Congress. The military's separate system of criminal justice depends on the support of both Congress and the public.²⁹⁶ That support requires that the military's system remain fair and unbiased in the

²⁹⁶ United States v. Grady, 15 M.J. 275, 276 (C.M.A. 1983).

prosecution of military accused. The potential for Congressional actions to influence, or appear to influence, a commander's decisions concerning military justice matters, raises the question of whether it is unlawful for Congress to influence those decisions, or whether it is part of their oversight duties.

Congress is obligated to oversee the military justice system in order to fulfill its Constitutional duties. During the debates on the UCMJ, Congress recognized that in its oversight duties, it had to remain ready to improve the military justice system when necessary. In order to do that, they must conduct hearings into the effectiveness of the system. However, when the hearings center on what was done, or should be done, in a particular military justice case, the specter of unlawful command influence raises its ugly head and calls into question any military justice action taken after those hearings or demands by congressional members. As was seen following the announcement of misconduct at Tailhook in 1991, and at Aberdeen in 1996, Congressional involvement clouds the fairness of the courts-martial resulting from those scandals. Did the command really intend to court-martial that drill sergeant at Aberdeen or Fort Jackson, or did Congressional calls for punishment cause the commander to change his opinion on how to process those types of courts-martial? In order to avoid the question, there should be a prohibition on Congress's ability to hold hearings or commenting on the desired outcome of a court-martial action until the case is completed. This is no different than what the UCMJ already prohibits military commanders from doing, and their statements reach and affect the thoughts of fewer people than the statements of Congressional members. The

potential effect of Congressional hearings on military justice matters that have not even proceeded to courts-martial is immense. If hearings are held demanding court-martial in a certain case, and the convening authority independently decides to initiate a court-martial, the perception is going to be that they only initiated court-martial because of the Congressional demands, not because they felt it was appropriate.

Article 37 of the UCMJ only prohibits convening authorities, and those subject to the jurisdiction of the Code, from improperly influencing the actions of courts-martial. When Congress enacted the UCMJ in 1950, its main concern was the improper actions of commanders taken with the intent to influence the decisions of courts-martial within their command. There was no discussion of the possibility that actions by members of Congress could cause the same improper influence. Up to this point, Congressional members had rarely gotten involved in military justice matters before their completion. When Congress passed the UCMJ, they felt they no longer had to monitor every court-martial case. The existence of the appellate court gave Congress the ability to now tell their constituents to allow the system to work and that the appellate process would correct any errors.²⁹⁷ Normally, they would become involved after receipt of a letter from a constituent requesting help getting out of confinement.

The argument is easier now, with the increased Congressional intervention before the initiation of courts-martial, that it is time to address the issue of Congressional

²⁹⁷ See Wiener, *supra* note 68, at 40-41.

members causing improper influence on military commanders. If Congress is empowered to make the rules for the military and approve all officer promotions, then it should be considered to be within the command structure for purposes of considering their actions under the prohibitions of Article 37. Actions or statements of members of Congress can reach the ears of far more commanders, and potential panel members, than can any one statement by a convening authority. If the statements of the Third Armored Division Commander²⁹⁸ can taint hundreds of cases with the specter of unlawful command influence, how many cases could the statements of Congressional members calling for the prosecution of all those responsible for engaging in misconduct at Tailhook have affected? Because no court-martial convictions followed Tailhook, there was no appellate review of the environment created by the Congressional pressures.

The appearance to the average person looking into the military justice system is that any disciplinary action taken after Congressional hearings on the issue are conducted demanding such action creates unlawful influence on the independent decision making power of the commander. This appearance of unlawful influence is as damaging as actual influence and more difficult to cure. The cases discussed earlier are examples of the appearance of adverse influence on cases that can result from Congressional hearings and demands for action. The Congressional hearings on Tailhook and calls for punishment and accountability appeared to result in disciplinary action of numerous Navy and Marine officers.

²⁹⁸ See *Treacle v. United States*, 18 M.J. 646 (A.C.M.R. 1984). See *infra* note 110 full discussion of the commander's statements and the subsequent appellate court reactions.

The appearance of unlawful command influence can be more damaging than actual interference in a case because it calls into question the impartiality of the entire system that is so critical to maintaining support for the separate system of justice for the military. Even where Congressional members do not exert actual influence on the processing of a particular case, the calls by Congressional members for a particular outcome in a case gives the appearance of unlawful influence when the outcome they demanded occurs. It is easy to correct the actions of a command that commits actual command influence in a case. But how do you correct the appearance of unlawful influence committed by members of Congress? Those statements can reach farther than any statement by a commander and have more far reaching results on the fair operation of the system. When the body that created the UCMJ, and makes the rules for the operation of the military, does not have enough faith in its operation to allow it to function without comment or calls for specific actions, it is unlikely that the service member or the public will believe that the system is fair and impartial.

Congress' actions following Tailhook caused the Army's approach the disclosure of the misconduct at Aberdeen. That approach caused many to question whether the Army could fairly prosecute drill sergeants following the disclosure and statements by senior Army leaders. The dismissal of the charges against Lieutenant Flinn and Major Bates following the Congressional demands for their resignation rather than court-martial convictions, added to this perception. If the military continues to decide how to proceed in disclosing, or processing, misconduct based on how Congress will react, the credibility

of the military justice system will continue to decline. That continued decline could result in the renewed calls for removal of the military's ability to prosecute cases of misconduct involving its own soldiers.

IV. PROPOSED SOLUTIONS

The proposals discussed deal with the issues and concerns raised in the previous discussion of the effects of Congressional oversight in the military justice process. The first proposal is to amend Article 37 of the UCMJ, which will require Congressional action. The second proposal is the amendment of the House and Senate rules for the conduct of Committee hearings, which will require Congressional action. The third proposal is for the issuance of a DoD Directive on processing high-profile cases that requires DoD action. The final proposal is for the creation of a separate court-martial command, which will require Congressional action to enact.

Each proposal deals with only one aspect of the problems identified, but taken together could result in a lowering, or even an end to the appearances that result in the complaints of outside influence exerting unlawful pressure on the courts-martial process. The objective of the proposals is to address the perceived problems in the military justice system. I will discuss the benefits and difficulties of each proposal along with the potential for successful adoption of each proposal.

A. *Amendment of Article 37 of the Uniform Code of Military Justice*

The first proposed solution is an amendment to Article 37 of the UCMJ.²⁹⁹ Currently the Article prohibits actions by anyone subject to the code intended to have, or that appear to have, the effect of unlawfully influencing the actions of a court-martial. The Article specifically prohibits anyone subject to the code from censuring or admonishing any member of a court-martial for the performance of his or her duties in that court-martial.³⁰⁰

While the Article is intended to cover anyone subject to the UCMJ, the language in the Article itself and the interpretations given in cases before the Military Court of Appeals have not had to address the question of whether that definition includes those senior military officials who do not convene court-martials, but most definitely have an effect on their operation. There is also no coverage under Article 37's prohibitions for the actions of Congressional members. *United States v. Ayers*³⁰¹ may allow the Court of Appeals for the Armed Forces to finally decide the issue of whether the Article prohibitions cover actions by the senior military leaders.

²⁹⁹ See *infra* Appendix A for the proposed amendment.

³⁰⁰ UCMJ art. 37 (LEXIS 2000).

³⁰¹ *United States v. Jeffrey L. Ayers*, 2000 CAAF Lexis 14, Sr., No. 99-0944/AR (Jan. 6, 2000). See *infra* note 202 for discussion of facts of charges against Ayers.

However, until that case is decided, the military practitioner is left not knowing if those officials actions are covered under the prohibitions of Article 37 because they are generally so far removed from the actual convening authorities at the installation level. Defense counsel in nearly every drill sergeant case tried after Aberdeen made the argument that the comments and appearances by Secretary West, General Shalikashvili and others in the chain of command rose to the level of unlawful command influence. The public's perception of those comments promising full investigations and a zero tolerance for sexual misconduct certainly supports that argument. When the public hears the senior Army leadership promising prompt prosecution of offenders, and stating that the military has a zero tolerance for sexual harassment, it is not difficult for them to draw the conclusion that anyone court-martialed for the offense of abusing a trainee would face court-martial.

The proposal would expand the coverage of Article 37 to include members of Congress and the President within the definition of those individuals who can commit unlawful command influence. The amended Article 37 would also specifically list those military officials considered to be within the chain of command for purposes of unlawful command influence actions. Those individuals would include the Secretary of Defense, Secretary of each Service, and the Chairman and members of the Joint Chiefs of Staff.

The expanded coverage would not put an end to Congressional members making public statements about the outcome they desire in a specific case. As we saw following

the enactment of Article 37 in 1950, military commanders did not stop committing acts or making statements that caused unlawful command influence on courts-martial actions. However, the provisions of Article 37 have provided some relief to those service members subjected to that unlawful command influence.³⁰² The same will be true of the acts of Congressional members under the new amendment. The Amendment will not guarantee that Congressional members will stop issuing demands for specific actions, but at least the affected service members will be entitled to some relief at the trial and appellate level when those actions adversely affects their case. This will help to ensure that the public perception is not that the military courts-martial are puppets of Congressional members in those cases drawing their interest, and will preserve the integrity of the courts-martial process.

B. Amendment of the House and Senate Committee Hearing Rules

The United States Code establishes rules for the conduct of House and Senate Committee hearings.³⁰³ The rules establish the scope and duties of standing Congressional committees, provide the procedures for submission of private bills of relief, and establish the procedure for service of subpoenas of witnesses whose testimony the Committee requests. There are no limits provided, within either the civilian or military criminal justice system, for the conduct of hearings into ongoing criminal

³⁰² See *infra* Section II(F) for discussion of Court of Military Appeals holdings granting relief to soldiers whose courts-martial were adversely affected by unlawful command influence.

³⁰³ 2 U.S.C.S § 190 (LEXIS 2000).

matters. During the recent inquiry into FBI conduct at the Branch Davidian Complex, Senator Danforth, the special prosecutor appointed to conduct the investigation, had to request that Congress postpone scheduled hearings into the matter, saying it would interfere with his ability to conduct a full and impartial investigation if witnesses testimony had previously been taken at Congressional hearings.³⁰⁴ At Senator Danforth's request, the Committee postponed the hearings until he could complete his interviews of witnesses necessary to the conduct of his investigation.

The solution proposed would amend the rules for the conduct of committee hearings by adding a section specifically addressing those hearings conducted to investigate specific cases of military misconduct. The new section prescribes rules for the conduct of those hearings any committee intends to hold before the completion of the military justice process in the case under investigation.³⁰⁵ The amended rules establish a procedure for Committee chairpersons to request the appearance of military witnesses, or the production of material in connection with the military justice action. The chairperson would file the request with the office within each Service that serves as the Legislative liaison.³⁰⁶ That office would review the request and contact the installation where the military justice action is located for information. The information requested should specifically include the stage the case is in within the system, and what effect the testimony of the requested witnesses may have on the processing of the case. If the

³⁰⁴ Telephone Interview of Mr. Eric Stamets, Legislative Branch, OTJAG (Jan. 10, 2000).

³⁰⁵ See *infra* Appendix C for proposed amendment.

³⁰⁶ In the Army, that office is called the Office of Congressional and Legislative Liaison (OCLL).

military justice action is not complete, or there has not been a disposition decision made in the case, the liaison office will issue a response denying the request for interviews due to the potential for the appearance of, or actual, adverse impact on the fairness of the individual action in question. The denial will list the stage the proceeding is currently in and provide a tentative date for the interviews after the completion of the court-martial actions. The liaison will deny any request for the testimony of panel members or military judges in a particular case. That denial will specifically list the provision of the UCMJ that prohibits the questioning of a member's deliberative process.

For purposes of this amendment, an action is complete and witnesses, other than panel members, convening authorities, and military judges, would be available to testify at Congressional hearings about the case, at the conclusion of the court-martial. The convening authority would not be available for questioning regarding the actions he took until he has taken final action in the case. The convening authority would never be available for questioning regarding why he decided to dispose of a case in a particular manner. This type of questioning interferes with the independent discretion given to the commander by Congress to determine the appropriate disposition of military justice actions. The court members who sat in judgment of the case would not be subject to questioning before any Committee hearing. To question panel members regarding why they decided a case in a particular manner, or why they issued a particular sentence, improperly intrudes into the deliberation room and would provide no benefit not outweighed by the adverse impact of allowing a jury's secret deliberations be made

public. The Military Rules of Evidence specifically prohibits the questioning of panel members regarding their deliberations.³⁰⁷

An informal policy similar to this has already been used when Congress requested the chain of command's testimony at Fort Campbell, Kentucky concerning the beating death of a gay soldier, and after the completion of Captain Ashby's court-martial for obstruction of justice and conspiracy. Congressional members had requested the testimony of witnesses in those two instances through the legislative liaison office and the Criminal Law Division of the Service Judge Advocate General's Department. Each of those departments responded by providing the requested information, but denied access to the witnesses arguing that requiring their testimony before the Congressional committee would adversely influence the impartial disposition of the cases. After receiving briefings on the potential adverse impact of requiring the chain of command's testimony, the Committee withdrew the requests. It appeared that once Congressional members understand the impact their actions could have on the fair operation of a justice system they do not commit acts that will adversely impact that process.

This amendment would simply establish the informal process now in operation as a formal requirement. Congress would not lose any powers that it now possesses to conduct hearings into military justice matters. The amendment would, however, require Congress to restrict the use of its powers until the point has passed where they could adversely effect the disposition of the particular case.

³⁰⁷ See *infra* MCM, MIL. R. EVID. 606, *supra* note 281, for full discussion of the Rule's prohibition.

C. Department of Defense Directive on Processing High-Profile Cases

All four Services presently manage requests for information and interviews of witnesses and commanders involved in high-profile military justice cases independently using different offices. Although each Service handles requests in a similar manner, there is no centralized procedure for processing these requests, or dealing with the complications that arise when conducting the investigation and processing of these types of court-martial cases. The manner that the Service handles each case should be the same regardless of which Service is prosecuting the case. Standard guidance developed by the DoD for use by each Service will ensure that commanders deal with high-profile cases in a similar manner. This will also avoid allegations by defendants of unfair treatment because a particular Service prosecuted their case.

The proposed Directive will provide guidance for dealing with media requests for both interviews and attendance at courts-martial.³⁰⁸ It will also establish a formalized procedure for Congressional requests for information, or interviews with witnesses or commanders, in connection with military justice actions. The Directive will develop the informal policies in existence within each Service into an established set of rules that would cover all Services' handling of high-profile military justice cases.

³⁰⁸ See *infra* Appendix D for the proposed amendment.

When any member of the press requests an interview in connection with a high-profile case, the Public Affairs Office will process the request and grant it only after conferring with the local Staff Judge Advocate's (SJA) office and ensuring that the interview will not adversely affect the appearance of fairness in the case. No interviews with commanders who made disposition decisions in the case in question will be allowed before the final action in a case is completed. This will prevent any comments by commanders that could result in unlawful command influence, or unfairly prejudice the accused service member before the court-martial. The Public Affairs Office in conjunction with the local SJA's office will establish the rules of conduct for press attendance at courts-martial proceedings.

Congressional members will make their requests for any information or interviews dealing with ongoing military justice actions to the legislative liaison office within each Service. If a field SJA office receives a request, they will immediately forward it to the liaison office for that Service. Any request for witness attendance and testimony at committee hearings will be denied if the commander has not made a disposition decision in the case, or the court-martial is not completed. The denial will include a thorough explanation of why the interview will adversely affect the ongoing case and offer alternatives such as supplying written information already disclosed in the case or setting interviews for a date after the completion of the court-martial action.

Each Service's Judge Advocate General's office will develop a commander's guide on dealing with high-profile misconduct cases. This guide will discuss how to deal with

press and Congressional inquiries. It will also establish guidelines to follow to avoid unlawful command influence in these types of cases. The guide will specifically address and establish specific procedures on avoiding the appearance of unlawful command influence in addition to avoiding conduct that would result in actual command influence. DoD will ensure distribution of the guide to all levels of command involved in court-martial disposition decisions.

Installation level SJA offices will conduct annual training of convening authorities and lower level commanders on dealing with high-profile cases. Included in the instruction should be methods to avoid unlawful command influence in the cases, dealing with requests for press interviews, and appropriate matters to consider when determining the disposition of military justice cases. The training will also include the duties of the Public Affairs Office regarding handling requests for information or interviews from the press and the public in a particular case and how to process any requests received directly by the convening authority or commander.

D. Creation of a Separate Court-Martial Command

The creation of a court-martial command removed from the complete control of the commander addresses those critics who complain that command control of courts-martial automatically result in unfair, biased results. Removing the commander from the position of complete control over the military justice system would also address the potentially

adverse impact of congressional interference with specific cases. If the commander no longer makes the final decision on who will be court-martialed, then he cannot be influenced by the possibility that Congress could hold his next promotion for disagreeing with their request for disposition in a particular case. Whether this pressure actually occurs, or is a factor the commander uses in his decision-making, is second to the perception that it has become a factor after the Tailhook blacklist.

This proposal is similar to the amendments submitted in the 1970s by Senators and Representatives calling for the complete removal of the commander from the military justice system.³⁰⁹ This proposal would create a new court-martial command within each Service to deal with all aspects of the military court-martial system. The command will not be within the chain of command or under the direct control of any field commander where the office is located. The new command is under the command and control of each Service's Judge Advocate General and will be physically located with that office in Washington, D.C.

The new command would consist of two divisions: the Prosecution division and the Administrative division with each division headed by a full Colonel and staffed by Judge Advocates. The Trial Defense Service and the Field Judiciary would continue to operate as they do today with the same duties and chains of command in the new system. Each division will be broken down into Regional offices identical to the regional system of the

³⁰⁹ See articles *supra* note 108.

Trial Defense Service and co-located in the same regional offices. Representatives from each division would be located in the local SJA office at the installation level. While the attorneys would be located with the SJA, he would not be the rater or senior rater of those attorneys. The SJA could submit a letters of input with the evaluation, so that he would have some input on the work performed, but would not control the futures of these officers through use of the rating system. This would prevent arguments that the SJA exerted pressure on behalf of the commander on the decisions made by the prosecution or administrative divisions.

The prosecution division would take over duties now performed by the criminal law divisions at local SJA offices. In addition, the prosecution division would make the final decision on who will be court-martialed. The commander would retain his Article 15 powers, and his powers in relation to summary court-martial currently provided for in the UCMJ.³¹⁰ Allowing the commander to retain control over these lower levels of military justice would permit the commander the use of these immediate actions to assist in maintaining discipline in his unit. Since none of these actions results in a conviction on a soldier's record there are fewer procedural safeguards attached, and they rarely attract the attention of Congress or the press so any possibility of outside influence on the

³¹⁰ MCM, *supra* note 122, R.C.M. 1300-1306. Summary courts-martial are composed of one commissioned officer acting as the judge and jury who decides the guilt or innocence of the accused and determines an appropriate sentence is necessary. The court may be convened by a Battalion level commander or higher. No government counsel is present and the accused is not entitled to Trial Defense representative at the trial unless determined available but he can hire a civilian attorney to represent him in the trial proceedings. The maximum punishment available at a summary court-martial is thirty days confinement, forty-five days hard labor without confinement, or sixty days restriction and forfeiture of two-thirds forfeiture pay for one month. The record of trial is summarized and the local SJA reviews it for legal sufficiency. A conviction at summary court-martial is not considered a court-martial or federal conviction.

commander's decision is minimal and can be off-set by the legal reviews that must be conducted within the SJA's office.

The commander would still begin the process by preferring, or swearing out, charges against a soldier, and appoint the Article 32 officer³¹¹ to conduct the pre-trial hearing. But under this proposal, the commander would no longer make the final decision on case disposition after the preferral charges to Special Courts-Martial, or the appointment of the Article 32 Investigating Officer in General Courts-Martial. The commander will review the case papers and make his recommendation on the disposition of the case to the chief of the prosecution division who will make the final decision about dismissing charges or proceeding to court-martial.

The prosecution must consider the commander's recommendation before to any decision made by the prosecution division. The removal of the commander's power of referral to court-martial will help insulate the system from allegations that outside pressures, especially congressional attention influenced the commander's decision on how to dispose of a particular case. While the attorney could still be subject to such pressures, the layer of protection available through the separate rating chain, and the fact that the attorney lacks the powers of the commander over soldier's everyday lives, should

³¹¹ UCMJ art. 32 (LEXIS 2000). The Article 32 Investigating Officer is appointed to conduct the pretrial investigation required for general court-martial cases under RCM 405. He hears evidence and argument from Government and Defense counsel. After hearing the evidence, he must find that reasonable grounds exist to believe that the accused committed the offenses alleged before the case may proceed to general court-martial.

be enough to assure the public, and the accused soldier, that the decision to proceed to court-martial was a fair and impartial one.

The most criticized and misunderstood aspect of the military justice system is the power of the commander to appoint the officers that will sit in judgment on a particular court-martial case.³¹² The perception of this practice is that the commander uses the power to stack the panel with members who will decide the case the way the commander wants it decided.

Under the new system, the administrative division would select panel members to serve on courts-martial. The commander would still provide a list of nominees for court-martial duty to the administrative division who would make the final selection of panel members using the list of nominees and the master list of available members within the command. The commander's nomination of members is a vital part of the military justice system's ability to operate smoothly within military operations. He knows what members of his command are not currently, or will not be available in the future for court-martial duty due to mission constraints. He also knows his soldiers and can more easily tell who has the qualities cited in Article 25 of the UMCJ that are necessary for court-martial duty.³¹³ The administrative division will not be limited to the nominees submitted by commanders in selecting panel members. If it appears that the command is

³¹² De Giulio, *supra* note 108, at 75.

³¹³ UCMJ art. 25. Article 25 establishes criteria to determine who may serve on courts-martial panels. Those criteria to consider include the prospective panel member's age, education, training, experience, length of service, and judicial temperament.

not submitting qualified individuals, or is attempting to stack the panels, the administrative attorney may go to the master list of available soldiers on the installation to select panel members.

This method of panel selection will appease both the critics of the current system as well as the commanders who want to continue to appoint the panel members who will hear cases on their installation. It is not the complete removal demanded by some critics, but it does put a control mechanism on the commander's ability to impermissibly stack a panel with soldiers and officers loyal to his desires. It does remove the power of final selection from the commander, but leaves some power by allowing the commander to make the initial nominations that will serve as the framework for the actual nominations made by the administrative division.

The last change is in the area of final action on court-martial convictions and sentences. The current system requires the convening authority to review and approve the court-martial conviction and sentence before it is final and appealable to outside authorities. Critics complain that this cannot result in any meaningful reduction or appellate type of review of the conviction or sentence, and only causes an increase in initial sentences at trial to allow the commander room to impose a sentence he feels is appropriate.³¹⁴ The supporters of the convening authority review say it is the best chance

³¹⁴ See De Giulio, *supra* note 108, at 76. See also Farmer & Wels, *supra* note 52, at 268.

for the military defendant to get a reduction in sentence because the commander knows the case, the command, and the soldier.

The convening authority is often in the best position to know what an appropriate penalty is for the soldiers in his command. The new system would still allow the convening authority to conduct the post-trial review of court-martial actions. But, instead of making the final decision, the convening authority would only make a recommendation on possible clemency. The Administrative Division would serve the recommendation on Defense counsel and give them a chance to respond before final action on the case by the administrative division. This allows an unbiased third party who had no part in the processing of the court-martial to determine the final disposition of the case, but the convening authority retains his ability to review and make recommendations about the possibility of clemency in the case. The additional time that would be required to conduct the review would be minimal because the post level administrative division conducts the review, but it would still give the protection of an independent review of the conviction and sentence.

This new court-martial command has its faults. It removes a large amount of the commander's control that supporters of the current system argue; he needs in order to maintain the required level of discipline in his unit. It is likely that military commanders will not support the concept of a separate court-martial command. They will argue that the removal of their complete control over the courts-martial system will destroy their ability to maintain discipline.

Those arguments were made by British commanders in 1996 when their powers over the courts-martial within their unit³¹⁵ were removed following a European Court of Human Rights decision holding their system in violation of Article six of the United Nations Convention on Human Rights.³¹⁶ Now, four years later, the system is in place and working and the commanders are satisfied that it is not interfering with their ability to maintain discipline within their unit.³¹⁷

³¹⁵ Judge J.W. Rant, *The British Courts-Martial System: It Ain't Broke, But it Needs Fixing*, 152 MIL. L. REV. 179, 180-81 (Spring 1996). Before 1996, the commander's role within the British system of military justice operated much as ours did. The commander referred charges against a soldier, appointed and convened the courts-martial, and reviewed the action for clemency and mitigation. The one difference was that the commander only reviewed the conviction for clemency if the defense requested the review, but in our system the convening authority may consider clemency during his final review even without a defense request.

³¹⁶ *Id.* at 182. In 1996, the European Commission on Human Rights reviewed a the court-martial conviction of Alexander Findlay, and found the British system violated Article 6(1) of the Convention for Human Rights and Fundamental Freedoms that provides in part that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, every one is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . ." The Commission found that the British military court-martial presented and "objective" unfairness, specifically that the role of the convening authority was unfair. *See also* Report of the Commission on Human Rights, Application NO. 22107/93, Alexander Findlay. There were three aspects of the British system that the Commission specifically objected to: First, the role of the convening authority made him at least appear to be part prosecutor. Second, the post-trial requirement was held in private. And third, the requirement to take an oath could not guarantee the independence of the court-martial members. *Id.*

³¹⁷ *Id.* In response to the Commission findings, the British Parliament made substantial changes to the courts-martial process. The commander could only refer a case to the prosecuting authority who makes the final determination of whether to refer charges in the case. *See* Armed Forces Act 1996, Ch. 18, Sect. 76A (1996) (U.K.). That prosecuting authority is a judge advocate. *See* Armed Forces Act 1996, Ch. 18, Sect. 83A (1996) (U.K.). The 1996 Act also removed the requirement that the findings of a court-martial be reviewed by the confirming officer. Armed Forces Act 1996, Ch. 46, Sect. 15 (1996) (U.K.).

V. CONCLUSION

The issue of unlawful command influence has always existed within the military justice system. It will likely always exist to some degree in a system where one individual controls so many aspects of the process. Over the past fifty years, the focus has remained on the commander's actions resulting in unlawful command influence. Today, the focus needs to re-adjust to include the actions of Congressional members. Members of Congress have shown an increasing willingness to get involved in the commander's decision-making process when disposing of cases of misconduct. With fewer and fewer members with military experience, Congress does not understand the impact of this interference. The more active they become in the particular case, the more damage done to the system by the interference.

Congressional interest in the conduct of military justice cases is unlikely to wane in the near future. As long as Congress is dependent on their constituents for re-election, it's members will continue to monitor the military justice system to ensure that their constituents within the military are treated fairly, and to appear concerned about the fairness of the system. Ensuring the system operates fairly is one of Congress' oversight duties and does have positive effects on the operation of the system of military justice. Unfortunately, Congress has also shown an increasing willingness to intrude on the commander's independent decision-making regarding military justice matters within the last ten years as a means to perform that duty. The actions by Congress usually occur when it perceives the military is unable to deal with the misconduct appropriately on their

own. If the military can continue to show, as it has in recent cases, that it is on top of the misconduct and subsequent investigation, is ensuring the system is operating fairly, and that the proper party is appropriately disciplined, no matter the rank, Congressional interference in military justice matters will likely decrease. If the military cannot do this, Congress has shown it is more than willing to step in, and give advice on how certain cases should be disposed, of and then monitor the cases to ensure appropriate disposition. This is when the danger of the appearance of unlawful influence on the commander's decisions occur.

When Congress created the UCMJ in 1950, they recognized that the military justice system had to be allowed to operate without the undue interference by Congressional members in specific cases.³¹⁸ Unfortunately, over the past fifty years that recognition has slowly dimmed. Today, members of Congress believe that without their interference, the military justice system cannot operate effectively.³¹⁹ This belief does not signal any intent by Congress to decrease the level of interference any time soon. Some level of Congressional oversight is important to ensure the military does operate a fair criminal justice system. However, the level of oversight that exists today is actually causing the appearance that the military justice system cannot operate in a fair and impartial manner.

³¹⁸ CONGRESSIONAL FLOOR DEBATE ON UCMJ, *supra* note 86, at 32.

³¹⁹ Schmitt, *supra* note 212.

Ensuring that the system remains fair when Congress steps in and demands specific action in a case, or makes statements about what it feels is an appropriate disposition is the most difficult task for the military. The appearance to both the civilian and military public when Congress demands a specific action that later occurs is that it has influenced the commander's decision. These types of doubts are deadly to the appearance of fairness essential to the continued operation of a separate system of military justice. If Congress intends to maintain the separate system of military justice, they must take a step back and let the system operate without interference. While its duties require some oversight and monitoring of the military justice system, it must not interfere with the individual operation of a court-martial case. When it does, credibility is lost, in both the military justice system, and Congress' ability to fairly monitor the system, and it appears to the average onlooker that Congress interferes only in those cases that will receive favorable press coverage. Hearings conducted on a systemic problem, such as sexual harassment, are appropriate. They may still have an adverse impact on the military justice system, but it will not give the appearance that Congress is demanding action in a particular case by conducting hearings on that case's disposition as occurred following Captain Wang's acquittal. Congress also must not use hearings into generalized misconduct to show piece a particular soldier's case. When that happens, the public views the hearings as a subterfuge to what the Congressional representative really wants, a specific action in that specific case.

The proposed solutions addressed in this thesis will allow Congress to continue to perform its Constitutionally mandated duty of military oversight while ensuring military

justice actions both appear, and in fact are, fair and impartial. A commander should not have to worry if his decision to prosecute a soldier for misconduct at a level he feels is appropriate will attract Congressional disapproval, and hold up a future promotion or job assignment. A soldier facing court-martial must not believe that his commander is making the disposition decision on his case, not Congress. The Commander's decisions must be truly independent and the influence wielded by Congress in the last ten years has made them appear anything but that. The system can function fairly and independently with Congressional oversight. However, that oversight must be done in a manner consistent with the military's system of independent command discretion. If it is not, the future of a continued separate system of military justice may be very limited.

APPENDIX A

A BILL

To amend Chapter 47 of Title 10, United States Code
(the Uniform Code of Military Justice), to expand class of persons
covered under prohibition of unlawfully influencing actions to
convening authorities and courts-martial

*Be it enacted by the Senate and House of Representatives of the United States of
American in Congress assembled,*

SECTION 1. UNLAWFUL COMMAND INFLUENCE

In General.- Chapter 47 of Title 10 of the United States Code is amended by adding the
following new paragraph:

“§ 837, Article 37. Unlawfully influencing action of court.

(c) Persons subject to the prohibitions listed in (a) specifically includes
members of Congress, the Secretary of Defense, the Service Secretaries, the Chairman
and members of the Joint Chiefs of Staff, and the Service Chiefs of Staff.”

SECTION 2. EFFECTIVE DATE

This Act shall take effect on _____, 2000. Nothing contained in this Act shall
be construed to prohibit any act done prior to _____, 2000, which was not
prohibited when done.

APPENDIX B

EXECUTIVE ORDER XXXXX AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution and the laws of the United States of America, including Chapter 47 of Title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801-946), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, Executive Order No. 12708, Executive Order No. 12767, Executive Order No. 12888, Executive Order No. 12936, Executive Order No. 12960, and Executive Order No. 13086, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. The following new paragraph is inserted after paragraph (2), Rule 104:

“(3) Persons subject to the prohibitions listed in (1) and (2) above specifically includes members of Congress, the Secretary of Defense, the Service Secretaries, the Chairman and members of the Joint Chiefs of Staff, and the Service Chiefs of Staff .”

Section 2. This amendment shall take effect on _____, 2000. Nothing contained in this amendment shall be construed to prohibit any act done prior to _____, 2000, which was not prohibited when done.

Section 3. The Secretary of Defense, on behalf of the President, shall transmit a copy of this order to the Congress of the United States in accord with section 836 of title 10 of the United States Code.

APPENDIX C

A BILL

To amend Chapter 6 of Title 2, United States Code, to provide rules for the conduct of House and Senate Committee Hearings in conjunction with military justice matters.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This section may be titled "Rules for Committee Hearings on Military Justice Matters."

SECTION 2.

In General.- Chapter 6 of title 2 of the United States Code is amended by adding the following new paragraph:

"Sec 190n. Rules for Committee Hearings on Military Justice Matters.

(1) Request for Testimony of Military Witnesses before Committee.

Requests for testimony of military members involved in the court-martial process of a case under investigation before a Senate or House committee on military justice matters must be made through the Service Office of Congressional Legislative Liaison. The requests will normally be granted for testimony of court-martial participants with the exception of the military judge and panel members.

(2) Request for Documentation involving Military Justice Matters.

Requests for documentation involving ongoing military justice matters will be made through the Service's Office of Congressional Legislative Liaison.

(3) Timing of Hearing

No Senate or House Committee may conduct a hearing to investigate matters that are currently under investigation through the military justice process that could lead to court-martial actions until final action is taken on the court-martial case.

No request for the testimony of court-martial panel members, military judges, or convening authorities inquiring into the deliberative process of either group will be granted, in accordance with the Military Rules of Evidence.

SECTION 3. EFFECTIVE DATE

This amendment shall take effect on _____ 2000. Nothing contained in this Act shall be construed to prohibit acts done prior to _____, 2000, which was not prohibited when done.

APPENDIX D
DEPARTMENT OF DEFENSE
DIRECTIVE

Department of Defense

DIRECTIVE

NUMBER XXXX.XX

_____, 2000

SUBJECT: Processing Information Requests in High-Profile Misconduct Cases

References: Chapter 47 of title 10, United States Code, "Uniform Code of Military Justice"

1. PURPOSE.

This Directive establishes a standard policy within the Services for processing requests for information in high-profile misconduct cases and training commanders in dealing with those requests.

2. APPLICABILITY.

This Directive applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Joint Staff, the Unified Combatant Commands, the Judge Advocate General's Office, the Inspector General, the Public Affairs Office, the Defense Agencies, and DoD Field Agencies.

3. POLICY.

It is DoD policy to release as much information regarding the processing of a military justice matter to the general public and Congress, as long as that release does not interfere with the due process rights of the accused service member or the impartial processing of the court-martial. Information regarding victims of crimes prosecuted within the military justice system will only be releases in accordance with rules established by the Victim Witness Program.

4. RESPONSIBILITIES.

4.1. The Assistant Secretary of Defense shall provide overall guidance.

4.2 The Service Judge Advocate General's will establish guidelines for release of information regarding courts-martial cases. They will also create and distribute guides for commanders providing information on dealing with requests for interviews or information regarding ongoing military justice matters.

4.3 The Public Affairs Office will establish, in conjunction with the Service Judge Advocate General's Office, rules for press attendance at courts-martial.

4.4 Each Service's Legislative Liaison Office will establish guidelines in conjunction with their Judge Advocate General's Office for the release of information or granting of witness interviews and testimony in matters concerning ongoing military justice matters to Congress.

5. EFFECTIVE DATE AND IMPLEMENTATION.

This Directive is effective immediately.