FROM LAW MEMBER TO MILITARY JUDGE: THE CONTINUING EVOLUTION OF AN INDEPENDENT TRIAL JUDICIARY IN THE TWENTY-FIRST CENTURY

MAJOR FANSU KU*

Judicial independence is the freedom we give judges to act as principled decision-makers. The independence is intended to allow judges to consider the facts and the law of each case with an open mind and unbiased judgment. When truly independent, judges are not influenced by personal interests or relationships, the identity or status of the parties to a case, or external economic or political pressures.[1]

Judicial accountability is yin to the judicial independence yang.[2]

I. Introduction

Judicial independence is a frequent topic of discussion among members of the judiciary and bar associations in recent years.[3] For

* Judge Advocate, U.S. Army. Presently assigned as Chief of Military Justice, 101st Airborne Division (Air Assault), Fort Campbell, Ky. LL.M., 2008, The Judge Advocate General's School, Charlottesville, Va.; J.D., 1998, Case Western Reserve Univ.; B.A., 1991, Univ. of Mass. at Boston. Previous assignments include Branch Chief, Defense Appellate Division, U.S. Army Legal Services Agency, Va., 2006–2007; Senior Defense Counsel, Camp Liberty, Iraq, 2005–2006; Commissioner, U.S. Army Court of Criminal Appeals, Va., 2004–2005; Trial Attorney, Contract Appeals Division, U.S. Army Legal Services Agency (USALSA), Va., 2003–2004; Appellate Attorney, Defense Appellate Division, USALSA, Va., 2001–2003; Trial Counsel, 25th Infantry Division (Light), Schofield Barracks, Haw., 1999–2001. Member of the bars of Texas, U.S. Army Court of Criminal Appeals, U.S. Court of Appeals for the Armed Forces, U.S. Court of Federal Claims, and the U.S. Supreme Court. This article was submitted in partial completion of the Master of Laws requirements of the 56th Judge Advocate Officer Graduate Course. Many thanks to Lieutenant Colonel Steven Henricks, Major David Coombs, and Major James Barkei for their invaluable assistance in the writing and editing of this article.

[1] Brennan Center for Justice at New York University School of Law, Questions and Answers about Judicial Independence, http://www.abanet.org/judind/downloads/jidef4-9-02.pdf (last visited Jan. 22, 2009).

[2] Charles Gardner Geyh, *Symposium: Judicial Independence and Judicial Accountability: Searching for the Right Balance*, 56 CASE W. RES. L. REV. 911, 916 (2006).

[3] *See, e.g.*, *id.* (exploring the right balance between judicial accountability and judicial independence); James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Elections Versus*

instance, last year Justice Stephen Breyer of the U.S. Supreme Court, on his first visit to Hawaii as a Jurist-in-Residence at the University of Hawaii Law School, addressed members of the Hawaii Bar and Judiciary about the meaning and importance of judicial independence in American society.[4] Justice Breyer spoke of some of his concerns with judicial independence in this country, such as initiatives to punish judges for unpopular decisions and judges being forced to raise money in order to fund their re-election.[5] He is not alone in his assessment. The 2003 Report of the American Bar Association's Commission on the 21st Century Judiciary similarly addressed concerns with judicial independence and set forth numerous recommendations addressing challenges facing the judiciary in the twenty-first century.[6]

What is judicial independence? It has been described as "the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing."[7] It has also been described as the means to promote the rule of law, separation of powers, and due process.[8] While the concept appears straightforward, its implementation, as illustrated by the ongoing dialogue in the civilian sector, is anything but straightforward. In the military, the concept of judicial independence is no easier to implement. Like its civilian counterparts, the military justice system wrestles with the contours of judicial power. While the Supreme Court found that "Congress has achieved an acceptable balance between independence

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Merit Selection: Judicial Diversity: Where Independence and Accountability Meet, 67 ALB. L. REV. 775 (2004) (discussing the challenge of balancing the competing interests of judicial independence and judicial accountability); JUSTICE IN JEOPARDY, REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, executive summary, at ii (July 2003) [hereinafter ABA REPORT] (reporting on the fairness and impartiality of state judiciaries).

[4] Mark Murakami, *Justice Breyer and Judicial Independence*, HAWAIIOCEANLAW.COM, Feb. 4, 2008, http://www.hawaiioceanlaw.com/hawaiioceanlaw/2008/02/justice-breyer.html.

[5] *Id.*; *see also* Norman L. Greene, *Issues Facing the Judiciary: Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597, 598 n.2 (2005) ("The paradox is that while we are the envy of the world for our independent judiciary and we are exporting the notion of the rule of law across the world, at home we have not yet decided how to choose judges or exactly what the limits of their role should be." (quoting Thomas Phillips, former Chief Justice of the Texas Supreme Court)).

[6] ABA REPORT, *supra* note 3, at ii; *see also* N.Y. State Bd. of Elections et al. v. Lopez Torres, 128 S. Ct. 791 (2008) (Kennedy, J., concurring) (expressing concerns over the State of New York's requirement that its judicial candidates conduct electoral campaigns).

[7] Geyh, *supra* note 2, at 925 (quoting Tennessee Justice Adolpho Birch).

[8] *Id.* at 915.

and accountability"[9] where the military judiciary is concerned, some contend that an "acceptable balance" is a far cry from "best balance," and that legislative action creating a permanent judiciary is needed to achieve judicial independence.[10]

This article will argue that legislative action creating a permanent judiciary is not needed to achieve judicial independence. Judicial independence in the military, as in the civilian sector, is not an end in itself. Rather, it is a means to advance the goals of military law[11]—"to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[12] The current judicial structure sufficiently realizes the goals of military law. The military's judicial system, however, is designed to be dynamic.[13] While legislative action creating a permanent judiciary is unnecessary to achieve judicial independence, we must examine ways to build on the system Congress established to maintain judicial independence and the ends it promotes.

Before examining ways of improving the military judiciary to advance judicial independence in the current environment,[14] this article will first explore the historical development of the military judiciary, including the evolving debate over the proper balance between judicial independence and accountability.[15] It will next address the proposition that legislative action creating a permanent judiciary will achieve the "best balance" between judicial independence and accountability. This article next discusses why the proposed legislation is impracticable, and thus unhelpful in achieving its intended purpose. It will then examine

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[9] Weiss v. United States, 510 U.S. 163, 180 (1994).

[10] Fredric Lederer & Barbara S. Hundley, *An Independent Military Judiciary—A Proposal to Amend the UCMJ*, 3 WM. & MARY BILL OF RTS. J. 629, 669 (1994).

[11] "Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders." MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2008) [hereinafter MCM].

[12] *Id.*

[13] *See, e.g.*, Article 146, UCMJ, which requires a committee composed of members of the different services and certain members of the public to meet annually to survey the operation of the UCMJ. UCMJ art. 146 (2008).

[14] Within the limits of this article, the author will examine only those initiatives designed to improve the military trial judiciary.

[15] Within the limits of this article, the author will address only the historical development of the military trial judiciary.

other initiatives that have been put forth to cultivate judicial independence. Finally, this article will propose an initiative short of legislation to promote judicial independence.

II. Evolution of the Military Trial Judiciary

A. Creation of the Law Member

> The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.[16]

For the first 175 years of its history, military justice largely reflected this view.[17] Because military law at the time aimed to secure the immediate and unquestioned obedience of these "strong men," courts-martial were not independent instruments of justice, but tools to serve the commanders.[18] Commanders were the "fountain of justice" in the military.[19] Thus, from the Revolutionary War through World War I, courts-martial consisted of officer panels appointed by convening authorities that decided all questions, including interlocutory issues.[20] There were no judge figures.[21]

At the end of World War I, Congress amended the Articles of War[22] in response to dissatisfaction from the large number of people brought into contact with the command-dominated justice system for the first

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[16] Brigadier General (Retired) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 3 n.4 (2000) (quoting General William T. Sherman).
[17] Brigadier General John S. Cooke, *Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 7 (1998).
[18] Cooke, *supra* note 16, at 3.
[19] Walter T. Cox, III, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 10 (1987).
[20] United States v. Norfleet, 53 M.J. 262, 266 (C.A.A.F. 2000) (citations omitted).
[21] WILLIAM T. GENEROUS, JR., SWORDS AND SCALES 7 (1973).
[22] Pub. L. No. 64-242, § 3, 39 Stat. 619, 650–70 (also known as the 1916 Articles of War).

time.[23] Congress now required the convening authority to appoint, in each Army general courts-martial, one of the panel members to serve as a "law member."[24] As one of the panel members, this law member would vote with the rest of the panel, but was assigned certain judge-like duties, such as ruling on the admissibility of evidence and instructing on the applicable law in a given case.[25] Whenever possible, this law member would be a Judge Advocate, although a "specially qualified" officer could be appointed if a Judge Advocate was not available.[26] There was still no requirement that the law member be a licensed attorney.[27] Moreover, a majority of the panel could overrule the law member's decisions.[28] In the absence of a law member, the president of the court-martial panel ruled upon all interlocutory issues.[29] As with the law member, a majority of the panel could also overrule the president's decisions.[30]

World War II generated further change as an even greater number of people were brought into contact with the command-dominated justice system; most disliked what they saw.[31] In 1948, Congress again amended the Articles of War to now require that the law member be a Judge Advocate or a licensed attorney serving as a commissioned officer on active duty and certified by The Judge Advocate General (TJAG) as qualified for such detail.[32] Law members continued to rule on

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[23] GENEROUS, *supra* note 21, at 7–8; *see also* Cooke, *supra* note 16, at 5 (citing as an example of the dissatisfaction that incited change the mass execution of thirteen black soldiers for mutiny one day after their trial ended).
[24] *Norfleet*, 53 M.J. at 266.
[25] GENEROUS, *supra* note 21, at 10.
[26] *Norfleet*, 53 M.J. at 266.
[27] GENEROUS, *supra* note 21, at 10.
[28] *Norfleet*, 53 M.J. at 266.
[29] *Id.*
[30] *Id.* Naval courts-martial, governed by the Articles for the Government of the Navy, continued without a law member. FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURTS-MARTIAL PROCEDURE 14-3 (3d ed. 2006).
[31] GENEROUS, *supra* note 21, at 14–16 (1973) (describing widespread complaints about improper command influence over trials such as demands for convictions regardless of actual guilt or innocence); *see also* Cooke, *supra* note 16, at 6–7 (noting that over sixteen million men and women served during World War II—nearly one in eight Americans).
[32] Major Clyde Tate & Lieutenant Colonel Gary Holland, *An Ongoing Trend: Expanding the Status and Power of the Military Judges*, ARMY LAW., Oct. 1992, at 24; *see also* Pub. L. No. 80-625, § 201, 62 Stat. 604, 627 (also known as 1948 Articles of War). On 25 June 1948, President Truman signed the Air Force Military Justice Act, which extended the Articles of War to the Air Force, which became a separate service on 26 July 1947. GENEROUS, *supra* note 21, at 31–32 (1973); *see also* Cox, *supra* note 19, at 13; Air Force History Overview, http://www.af.mil/history/overview.asp (last visited Jan. 22, 2009).

interlocutory questions and their rulings in this respect were generally final except in two circumstances: (a) on motions for finding of not guilty; and (b) on questions regarding an accused's sanity.[33] The law members had the additional responsibility of instructing other court-martial panel members regarding the burden of persuasion and standard of proof.[34]

B. Creation of the Uniform Code of Military Justice (UCMJ) and the Law Officer

In 1950, following World War II and the historic number of men and women serving in the armed forces, Congress enacted the UCMJ to provide greater and more uniform protection to servicemembers.[35] "We were convinced that a Code of Military Justice cannot ignore the military circumstances in which it must operate but we were equally determined that it must be designated to administer justice."[36] Justice means a greater acceptance of the civilian judicial system that General Sherman once dismissed as inapposite to the object of military law.[37] A key figure in the civilian judicial system is naturally the judge.

Foreshadowing the advent of the military judge, Congress changed the title of the "law member" to the "law officer" and required the law officer to be an attorney certified by TJAG as qualified for such service at each general court-martial.[38] Under the UCMJ, the law officer, unlike the law member, did not serve as a member of the court-martial.[39] Instead, the law officer assumed duties similar to those of a civilian judge.[40] The law officer ruled on most interlocutory questions and provided instructions to the court-martial panel members on matters of law.[41] The law officer also assumed general responsibility for the

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[33] Tate & Holland, *supra* note 32, at 24 n.18.
[34] *Id.* at 24 n.19; *see also* Pub. L. No. 80-625, § 201, 62 Stat. 604, 627 (also known as 1948 Articles of War).
[35] *Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 606 (1949).
[36] Cooke, *supra* note 16, at 9 (quoting Professor Edmund Morgan, chair of the committee that drafted the Uniform Code of Military Justice).
[37] *Id.* at 3 n.4 (citing General William T. Sherman regarding the separate objectives of civil versus military law).
[38] 64 Stat. 117, 124; *see also* United States v. Norfleet, 53 M.J. 262, 267 (C.A.A.F. 2000).
[39] *Norfleet*, 53 M.J. at 267.
[40] *Id.*
[41] *Id.*; *see also* GENEROUS, *supra* note 21, at 43.

orderly conduct of the court-martial proceedings.[42] "The legislative background of the Uniform Code makes clear beyond question Congress' conception of the law officer as [a] judge."[43]

C. Creation of the Military Judge

In keeping with its conception of the law officer as a judge and in response to continued wartime criticisms[44] of unlawful command influence and lack of procedural safeguards for servicemembers, Congress enacted the Military Justice Act of 1968.[45] This legislation was designed to

> streamline court-martial procedures in line with procedures in U.S. district courts, to redesignate the law officer of a court-martial as a "military judge" and give him functions and powers more closely aligned to those of Federal district judges, . . . [and] to increase the independence of military judges and members and other officials of courts-martial from unlawful influence by convening authorities and other commanding officers.[46]

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[42] *Norfleet*, 53 M.J. at 267; *see also* GENEROUS, *supra* note 21, at 43 ("It would be the responsibility of the law officer to insure a fair and orderly trial.").

[43] United States v. Berry, 2 C.M.R. 141, 147 (C.M.A. 1952). The UCMJ also created the United States Court of Military Appeals (COMA) as a civilian check on the operation of military justice. *See* Lederer & Hundley, *supra* note 10, at 637 (stating that the UCMJ and the COMA were compromises between those who wanted commanders to retain unlimited control over military law and those who wanted to place more power in the hands of lawyers and judges). The United States Court of Military Appeals was not officially named until the passage of the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. *Id.* at 637 n.30. In 1994, Congress renamed the U.S. COMA as the United States Court of Appeals for the Armed Forces (CAAF). *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a), 108 Stat. 2663 (1994).

[44] "The public increasingly held the Armed Forces in disfavor because of the military's expanding presence in Vietnam. . . . The introduction of an independent military judiciary would curtail some of these criticisms by establishing authority figures to protect the rights of accused servicemembers." Tate & Holland, *supra* note 32, at 26.

[45] Pub. L. No. 90-632, 82 Stat. 1335; *see also* Tate & Holland, *supra* note 32, at 25 ("Congress concluded that the military justice system needed a substantial overhaul to convince the public that the system actually protected the rights of accused service members. One way to accomplish this goal was to align the military justice system more closely with the civilian system.").

[46] *Norfleet*, 53 M.J. at 267.

To this end, TJAG or his designee, instead of the convening authority, now details military judges to preside over general courts-martial.[47] The Judge Advocate General continues to certify the qualification of military judges.[48] In addition, the military judges must be assigned to an organization "directly responsible to the JAG, or his designee" where their primary duty is to serve as military judges.[49] Moreover, "neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge . . . which relates to his performance of duty as a military judge."[50]

To further protect the independence of the judiciary, Congress enacted Article 6a and expanded the protection of Article 37, UCMJ.[51] Article 6a requires the President to prescribe procedures governing investigation and disposition of matters concerning the fitness of military judges.[52] The legislative history notes that the procedures, "to the extent consistent with the [UCMJ] . . . should emulate the standards and procedures that govern investigation and disposition of allegations concerning judges in the civilian sector."[53] Article 37 prohibits convening authorities and "any other commanding officer" from censuring or reprimanding court-martial members, military judges, or counsel "with respect to any other exercises of its or his functions in the conduct of the proceedings."[54] Article 37 further prohibits attempts to coerce or unlawfully influence the actions of a court-martial.[55] Thus, with the advent of the military judge, Congress created a military judicial system more independent and more closely resembling the civilian judicial system.

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[47] UCMJ art. 26(c) (2008). In addition, "[s]ubject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial." *Id*. art. 26(a).
[48] *Id.* art. 26(b).
[49] *Id.* art. 26(c).
[50] *Id.*
[51] Congress enacted Article 6a in 1989 and expanded the protections of Article 37 in the Military Justice Act of 1968. *See* 10 U.S.C. §§ 806a, 837 (2006).
[52] UCMJ art. 6a.
[53] H.R. REP. NO. 101-331, at 659 (1989) (Conf. Rep.).
[54] UCMJ art. 37.
[55] *Id.*

D. Debate Over Judicial Tenure for Military Judges and the Appointments Clause

1. Tenure

While Congress has substantially increased the independence of the military judiciary to more closely resemble the civilian judiciary, Congress did not provide military judges with tenure or a fixed term of office in the UCMJ.[56] Moreover, unlike the federal judiciary, the Constitution does not require life tenure for military judges.[57] Some argue, however, that military judges are a special category of military officers, one that requires a change to the structure of the military judiciary itself.[58] The Supreme Court concluded in *Weiss v. United States* that a structural change is not constitutionally required.[59]

Private Eric J. Weiss, a U.S. Marine, pleaded guilty to one specification of stealing a racquetball glove, in violation of Article 121 of the UCMJ, and was sentenced to confinement and partial forfeitures for three months, and a bad-conduct discharge.[60] The Navy-Marine Corps Court of Military Review and the Court of Military Appeals (COMA) both affirmed Private Weiss's conviction.[61] Private Weiss petitioned the Supreme Court of the United States, arguing that military judges' appointments violated the Appointments Clause of the Constitution[62] and

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[56] In the debate over tenure for military judges, the words "tenure" versus "term of office" are often used interchangeably. However, the word "tenure" generally connotes one's right to hold an office for an indefinite period of time while the words "term of office" connote one's right to hold an office for a fixed period of time. United States v. Graf, 35 M.J. 450, 454 n.3 (C.M.A. 1992).

[57] *See* U.S. CONST. art. III, § 1, cl. 2 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

[58] *See generally* Lederer & Hundley, *supra* note 10, at 629 (outlining criticisms of the military judiciary and arguing for an amendment to the UCMJ to create a permanent judiciary); GILLIGAN & LEDERER, *supra* note 30, at 14-6 (arguing that military judges occupy a unique military role and therefore deserve special protection).

[59] Weiss v. United States, 510 U.S. 163, 179 (1994).

[60] United States v. Weiss, 36 M.J. 224 (C.M.A. 1992).

[61] *Id.* at 225.

[62] U.S. CONST. art. II, § 2, cl. 2.

that their lack of a fixed term of office violated the Due Process Clause.[63] The Court granted certiorari.[64]

The Supreme Court held that the Due Process Clause of the Constitution does not require that military judges have a fixed term of office, reasoning that a fixed term of office has never been part of the military justice tradition.[65] Given its historical absence, the Supreme Court rejected the claim that fundamental fairness requires a fixed term of office.[66] Moreover, the Supreme Court noted that a fixed term of office is not an end in itself.[67] Rather, it is only one way to advance judicial independence, which in turn ensures judicial impartiality.[68] The Supreme Court cited provisions in the UCMJ that it believes sufficiently insulate military judges from unlawful command influence and promote judicial independence and impartiality so as to satisfy the Due Process Clause.[69] Specifically, the Supreme Court pointed out that

> Article 26 places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. . . . Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability.[70]

Lastly, the Supreme Court noted that the COMA,[71] an appellate court composed of civilian judges who serve for fixed terms of fifteen years,

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[63] *Id.* amend. V.
[64] *Weiss*, 510 U.S. at 163. *Hernandez v. United States*, a companion case raising the same issues as *Weiss*, was decided at the same time.
[65] *Id.* at 178–79 (noting that for over 150 years, courts-martial were conducted without the presence of any judge).
[66] *Id.* at 179.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 179–80 (citing Articles 37 and 98 of the UCMJ, which provide for the possible court-martial of servicemembers who influence or attempt to influence a military judge's findings or sentencing decisions).
[70] *Id.* at 180.
[71] Congress later renamed the United States Court of Military Appeals the United States Court of Appeals for the Armed Forces. *See supra* note 43 and accompanying text.

oversees the entire military justice system.[72] In short, the Supreme Court believes the arguments for tenure or a fixed term of office are not so extraordinary as to justify overruling the balance struck by Congress in the UCMJ.[73]

2. Appointments Clause

Besides tenure, critics argue that military judges occupy such a unique military role that a separate appointment is required under the Appointments Clause of the United States Constitution.[74] As with the tenure issue, the Supreme Court concluded otherwise in *Weiss v. United States*.[75]

The Appointments Clause of Article II of the Constitution provides that

> [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[76]

As commissioned officers of the United States, military judges must receive an appointment pursuant to the Appointments Clause.[77] Weiss argued that the position of the military judge is so unique that the Appointments Clause requires a second appointment before a military

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[72] *Weiss*, 510 U.S. at 181.
[73] *Id.*
[74] *See generally* GILLIGAN & LEDERER, *supra* note 30, at 14-6 (arguing that military judges occupy a unique military role and therefore deserves special protection); Lederer & Hundley, *supra* note 10 at 658, 666–67 (arguing that issues of tenure and appointment go to the "very office and image of the military judge.").
[75] *Weiss*, 510 U.S. at 176.
[76] U.S. CONST. art. II, § 2, cl. 2.
[77] *Weiss*, 510 U.S. at 169–70.

officer can assume military judge duties.[78] While recognizing that Congress has gradually changed the military justice system to more closely parallel the civilian judicial system, including the expanded judicial duties of the military judge, the Supreme Court emphasized that "the military in important respects remains a 'specialized society separate from civilian society.'"[79] In this "specialized society," military judges do not have any judicial authority separate from the court-martial to which they have been detailed.[80] Moreover, until detailed to a specific court-martial, a military judge has "no more authority than any other military officer of the same grade and rank."[81] Article 26(c) of the UCMJ further provides that while serving as a military judge, an officer may perform non-judicial duties with the permission of TJAG.[82] Thus, a military judge remains a military officer, an officer already appointed pursuant to the Appointments Clause.[83] As such, a separate appointment is not necessary before an officer assumes the duties of a military judge.[84]

Concurring, Justice Ginsburg noted that

> [t]he care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally trained officers preside or even participate as judges.[85]

Warning that the Supreme Court's praise is "too broad and dangerous," critics argue that structurally, the military judiciary remains susceptible to abuse and that legislative action creating a permanent

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[78] *Id.* at 170.
[79] *Id.* at 174 (citing Parker v. Levy, 417 U.S. 733, 743 (1974)).
[80] *Id.* at 175.
[81] *Id.* (quoting United States v. Weiss, 36 M.J. 224, 228 (C.M.A. 1992)).
[82] UCMJ art. 26(c) (2008).
[83] *Weiss*, 510 U.S. at 175–76.
[84] *Id.* at 176.
[85] *Id.* at 194.

judiciary would ensure the "best balance" between judicial independence and accountability.[86]

III. Legislative Action Creating a Permanent Judiciary—Is It Needed?

In 1994, after the Supreme Court's decision in *Weiss v. United States*, Professor Fredric Lederer and Lieutenant Barbara S. Hundley proposed that Congress amend the UCMJ to create a permanent judiciary to eliminate even the appearance of a lack of judicial independence.[87] While Congress has taken no action toward adopting the proposal, a former chief judge of the United States Court of Appeals for the Armed Forces (CAAF) recently encouraged military justice practitioners to reexamine the proposal and consider its viability in the current wartime environment.[88] While the proposal has positive attributes, it is impracticable, and thus unhelpful in achieving its intended goal of advancing judicial independence. Before examining the proposal's difficulties, this article will analyze the rationale behind the proposal for legislative action.

A. Rationale for Proposed Legislation is Unsupported

Professor Lederer and Lieutenant Hundley's main critique of the current military judiciary structure is that the military's hierarchical scheme, including its personnel practices (i.e., promotions and assignments), extends to military judges.[89] In their opinion, as TJAG maintains technical control over the entire Judge Advocate assignments process, any number of informal actions may result against military judges for "unpopular" decisions that will defy detection or clear causation.[90] For instance, should TJAG and the senior clients he serves decide to "punish" a military judge for a decision they did not like, they need not resort to formal disciplinary actions or bad fitness evaluations.[91]

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[86] Lederer & Hundley, *supra* note 10, at 658, 669.
[87] *Id.* at 673.
[88] H.F. "Sparky" Gierke, *Reflections of the Past: Continuing to Grow, Willing to Change, Always Striving to Serve*, 193 MIL. L. REV. 178, 198 (2007); *see also* H.F. "Sparky" Gierke, *Five Questions About the Military Justice System*, 56 A.F. L. REV. 249, 257 (2005) (asking whether it is time to take a fresh look at the plan).
[89] Lederer & Hundley, *supra* note 10, at 650–53.
[90] *Id.* at 650.
[91] *Id.* at 653.

They can simply reassign the offending military judge to an undesirable assignment, one not considered "career enhancing."[92] The possibility of unlawful command influence is therefore very real in the minds of these critics.[93]

Moreover, Professor Lederer and Lieutenant Hundley argue that even if military judges are in fact impartial, the military's hierarchical scheme can cause a reasonable person to perceive that unlawful command influence may sometimes occur.[94] In their opinion, this possibility itself justifies legislative action.[95] According to them, a regulatory-mandated fixed term of office for the military judiciary does not sufficiently insulate military judges from possible command influence.[96] "So long as the judge knows that his or her future is in the hands of those who have non-judicial interests, both the perception and the reality of possible tampering will exist."[97] A fixed term of office thus provides little protection, as military judges may still be influenced by their interests in future promotions and assignments, unless they are serving the last assignment of their career.[98] These concerns are unwarranted for several reasons.

First, current personnel practices indicate that military judges are unlikely to be influenced by their interests in future promotions and assignments. To begin with, eligibility requirements preclude most Army Judge Advocates from applying for judgeships until late in their careers.[99] While senior majors may apply for judgeship,[100] those selected

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[92] *Id.*
[93] *Id.* at 657, 673.
[94] *Id.* at 633, 657.
[95] *Id.* at 673.
[96] *Id.* at 666.
[97] GILLIGAN & LEDERER, *supra* note 30, at 14-8; *see also* Lederer & Hundley, *supra* note 10, at 666 ("The degree of protection afforded a judge by fixed tenure is de minimis."); Major Walter M. Hudson, *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III*, 165 MIL. L. REV. 42, 78 (2000) (commenting on the Army's three-year tenure policy, Senior Judge Everett noted that the policy is adequate for now, although "when you get to the two year nine month mark, you're going to feel a little bit ill at ease, and one of the concerns has been that the person who is hanging on may favor the government in order to be reappointed").
[98] Lederer & Hundley, *supra* note 10, at 666.
[99] *See* JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES, JAG PUB 1-1, app. VIII, para. 8-1 (2007–2008) [hereinafter JAG PUB 1-1] (listing the selection criteria of active duty military trial judges, including advanced schooling).

to be military judges are usually in the grade of O-5 or O-6. Moreover, even before the Army instituted a three-year fixed term of office for military judges,[101] the standard tour was three to four years.[102] Many went on to serve consecutive tours as military judges until retirement.[103] This policy is true for the Navy as well.[104] "[T]he military is developing a tradition of reappointing people who are doing a good job. By 'good job,' I don't mean just affirming conviction."[105]

Second, no concrete evidence supports a threat to military judges' independence, by TJAG or anyone else. As an example of the threat facing the military judiciary, Professor Lederer and other critics cite an incident related by Rear Admiral Jenkins at a Judge Advocates Association program on 7 August 1993.[106] Rear Admiral Jenkins, former JAG of the Navy, stated that the Secretary of the Navy once ordered him to fire a military judge.[107] Admiral Jenkins stated that he refused the order as unlawful and that he subsequently worked things out with the Secretary of the Navy.[108] According to critics, the mere fact that the request was made suggests that the military justice system is subject to abuse.[109] In their mind, not all senior officers have the ethical integrity of Admiral Jenkins and some may choose a more subtle approach to

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[100] As will be explained in more detail *infra*, the Army started a judicial apprenticeship program where select senior majors are eligible to participate in the one-year program.

[101] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 8-1g (16 Nov. 2005) [hereinafter AR 27-10]. "This regulation implements UCMJ, Art. 26, which provides for an independent judiciary within the U.S. Army." *Id.* para. 8-1a; *see also* JAG PUB 1-1, *supra* note 99, app. VIII, para. 8-6.

[102] Cooke, *supra* note 17, at 18.

[103] Interview with Colonel Stephen R. Henley, Chief Trial Judge of the Army, in Charlottesville, Va. (Nov. 19, 2007) [hereinafter Henley November Interview]; Telephone Interview with Colonel Stephen R. Henley, Chief Trial Judge of the Army, in Arlington, Va. (Jan. 3, 2008) [hereinafter Henley January Interview]. *But see* JAG PUB 1-1, *supra* note 99, app. VIII, para. 8-4b ("As a general rule, officers below the grade of colonel will not receive consecutive trial judge assignments.").

[104] E-mail from Captain Christian L. Reismeier, U.S. Navy, Office of the Judge Advocate General, Criminal Law Division (Code 20), to author (Feb. 21, 2008, 15:34 EST) hereinafter Reismeier Feb. E-mail] (on file with author) ("No one wants even the appearance that duty changes might be caused by 'unpopular' rulings.").

[105] Hudson, *supra* note 97, at 78 (Senior Judge Everett remarking that a three-year fixed term is adequate for the present given the tradition of reappointing good people).

[106] GILLIGAN & LEDERER, *supra* note 30, at 14-7; *see also* Lederer & Hundley, *supra* note 10, at 630–31, 653 (stating that such incident demonstrates not just the possibility of command influence, but its actuality).

[107] GILLIGAN & LEDERER, *supra* note 30, at 14-7.

[108] *Id.*

[109] *Id.* at 14-7 to 14-8.

influence military judges.[110] For instance, they argue that in *United States v. Mabe*,[111] the chief judge of the Navy-Marine Corps Trial Judiciary sent a letter to a trial judge expressing concern about the sentences that came out of that trial judge's circuit, and stating that his circuit was fast becoming the "forum of choice for an accused."[112] A majority of the court in *Mabe* concluded that while the chief trial judge's action was improper, no prejudice resulted based on remedial actions taken by the chief trial judge's superiors.[113]

While the actions of the Secretary of the Navy and the Navy chief trial judge were improper, they represent the exception rather than the rule.[114] Although unlawful command influence may sometimes occur, this does not mean that it occurs frequently or that it is viewed as occurring frequently. As noted even by Professor Lederer and the other critics of the military justice system, the available evidence indicates that "many, if not all, of our judges are honorable professionals who act properly."[115] Available evidence further indicates that outside observers see the military justice system as open and fair, capable of protecting individuals and this nation. [116] This does not mean that the military

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[110] *Id.*

[111] United States v. Mabe, 33 M.J. 200 (C.M.A. 1991).

[112] GILLIGAN & LEDERER, *supra* note 30, at 14-8 n.31.

[113] *Mabe*, 33 M.J. at 206. Dissenting in part, Judge Cox stated that he viewed the letter as a "frank communication between a Chief Judge and a trial judge concerning the work of the judges in the Transatlantic Circuit of the Navy." *Id.* at 207.

[114] Most of the cases cited as examples of unlawful command influence appear in the early 1990s, some even earlier. *See* Lederer & Hundley, *supra* note 10, at 630–31, 653–58; *see also* GILLIGAN & LEDERER, *supra* note 30, at 14-7 to 14-8. In the majority of the cases cited, like *Mabe*, the COMA found a lack of prejudice and sometimes even a lack of improper command action to begin with. In only one case, United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 337 (C.M.A. 1988), did the COMA grant a protective order, prohibiting the Inspector General from investigating the Navy-Marine Corps Court of Military Review. While a lack of prejudice on appeal does not mean the absence of impropriety, it usually does mean that any impropriety was discovered early enough for corrective action to be taken.

[115] Lederer & Hundley, *supra* note 10, at 630–31, 658; *see also* Cooke, *supra* note 17, at 18 (noting that the Judge Advocates General he has worked with and for all had great respect for the independence of military judges and that none would think of penalizing military judges based on their rulings).

[116] *See, e.g.*, Michael C. Dorf, *Why The Military Commissions Act is No Moderate Compromise*, FINDLAW, Oct. 11, 2006, http://writ.news.findlaw.com/dorf/20061011.html (arguing that courts-martial are a viable option to military commissions); Neal Katyal, *Sins of Commissions: Why Aren't We Using the Courts-Martial System at Guantanamo*, SLATE, Sept. 8, 2004, http://www.slate.com/id/2106406 (arguing that the American military justice system, including the military judges within it, is capable of protecting

justice system is "trouble free" or that the public sees the military justice system as "trouble free."[117] The same, however, can be said of any justice system.[118] The possibility of judge tampering and perceptions of unfairness by some will always be there.

The primary criticism remains: Military judges are commissioned officers and as commissioned officers, they are subject to the personnel policies that apply to all military officers, such as involuntary assignments and performance evaluation.[119] This criticism fails for several reasons. First, the status of military judges as commissioned officers in the armed forces is vital. If the military judges are no longer military, "the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively."[120] Thus, as noted by the CAAF, Congress established the position of the military judge within the context of the military establishment, not as a separate entity.[121] "A military judge shall be a commissioned officer of the armed forces."[122] As accountability is the essence of the military establishment, all military officers' future, in one sense or the other, are in another's

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our nation while preserving our nation's fundamental liberties); William Glaberson, *A Nation Challenged: The Law; Tribunal v. Court-Martial: Matter of Perception*, NYTIMES.COM, Dec. 2, 2001, http://query.nytimes.com/gst/fullpage.html?res=9F07E0DC113DF931A35751C1A9679C8B63&sec=&spon=&pagewanted=all (describing American courts-martial as having a "longstanding reputation for openness and procedural fairness").

[117] Lederer & Hundley, *supra* note 10, at 658 (arguing that one should not take the fact that most, if not all, of our military judges are honorable professionals to mean that our system is trouble-free or free of unnecessary systemic risks).

[118] Dissatisfaction with judicial opinions and subsequent attempts to curb judiciary power are not unique to the military justice system. *See* Geyh, *supra* note 2, at 912–13 (describing attempts by Congress to curb powers of the federal judiciary after the United States Court of Appeals for the Eleventh Circuit affirmed the federal district judge's decision to order the removal of Teresa Schiavo's feeding tube).

[119] *See* GILLIGAN & LEDERER, *supra* note 30, at 14-6 ("The one facet common and critically necessary to all military officers is responsibility to senior authority; the heart of that system is command and the rating system. Judges are part of that system."); Lederer & Hundley, *supra* note 10, at 632 ("The concept of judges as officers responsible to other officers who are, in turn, at least pragmatically responsible to still other officers is a natural consequence of the military paradigm.").

[120] Lederer & Hundley, *supra* note 10, at 673 n.213 (quoting C.F. Blair, *Military Efficiency and Military Justice: Peaceful Co-Existence?*, 42 U.N.B. L.J. 237, 241 (1993)).

[121] United States v. Norfleet, 53 M.J. 262, 268 (C.A.A.F. 2000).

[122] UCMJ art. 26(b) (2008).

hands. Unless one takes away the military status of the military judge, there can be no complete independence from the military establishment.[123] Military status, however, is not necessarily incompatible with independence and impartiality.

As pointed out by the Supreme Court and the CAAF, several provisions within the UCMJ protect judicial independence in the military.[124] Article 26, UCMJ, places military judges under the authority of the Judge Advocates General and precludes a convening authority or his staff from preparing or reviewing any report concerning the fitness of military judges relating to their judicial duties.[125] Article 37, UCMJ, further prohibits attempts to influence the actions of a court-martial and its members.[126] In addition, in the Supreme Court's view, the CAAF in overseeing the military justice system "has demonstrated its vigilance in checking any attempts to exert improper influence over military judges."[127]

Finally, military judges, as commissioned officers, enjoy a form of job security that civilian judges do not.[128] There are those who say that military judges are federal judges but do not enjoy similar job security.[129] "[T]he pay, status, and life tenure of the federal judiciary is such that it can hardly be compared with that of a military officer whose location can

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[123] Moreover, as noted by the CAAF, "The circumstances faced by military judges are not at all dissimilar from those facing judges in those state court systems that provide for relatively brief terms of office, particularly those that provide for popular election of judges or retention through the electoral process." *Norfleet*, 53 M.J. at 268–69; *see also* United States v. Mitchell, 39 M.J. 131, 147 (C.M.A. 1994) (Cox, J., concurring) ("The irony is that the essence of good politics and government requires that civilian jurists be selected (elected/appointed), promoted, and given increased responsibilities and assignments on the basis of perceived merit. In the eyes of some, obviously, the military must be barred from attempting same.").

[124] *See* Weiss v. United States, 510 U.S. 163, 180–81 (1994) (listing provisions within the UCMJ that protect the independence of the military trial judiciary); *see also Norfleet*, 53 M.J. at 267–68 (listing provisions within the UCMJ that separate the military judiciary from the traditional lines of command).

[125] UCMJ art. 26(c) (2008).

[126] *Id.* art. 37; *see also* MCM, *supra* note 11, R.C.M. 104 (prohibitions against unlawful command influence).

[127] *Weiss*, 510 U.S. at 181; *see also Norfleet*, 53 M.J. at 269 (citing cases where the court has examined asserted improper attempts to exert influence over military judges).

[128] E-mail from Brigadier General (Retired) John S. Cooke, to author (June 19, 2008, 07:51 EST) [hereinafter Cooke E-mail] (on file with author).

[129] Lederer & Hundley, *supra* note 10, at 670–71 (considering it as a fact that military judges are federal judges).

be changed in a moment by the decision of superiors."[130] With lifetime job security, it is argued, federal judges are less likely to succumb to inappropriate influences.[131] Military judges who "lose" their job as judges through reassignment, however, continue to receive the same pay and benefits.[132] The pay and status of military judges as commissioned officers do not change with a different assignment.[133] The new job may in fact be equally or more rewarding for the officers, personally and professionally.[134]

In the end, both critics and defenders of the current system agree that "judicial neutrality and independence are essential to the military criminal legal system" just as they are in the civilian system.[135] However, just as in the civilian system, the possibility of wrongdoing, including judge tampering, will always exist. No matter the systemic balance struck, human nature dictates judges will have their integrity tested. Judges, military and civilian alike, do not and cannot live in ivory towers, separated from the population upon which they have to pass judgment.

B. Concerns with Proposed Legislative Action

Amending the UCMJ to provide for a permanent judiciary based on the above criticism is unwarranted. Even assuming the criticism justifies change, the proposed legislative plan has several weaknesses. The major components of the plan for a permanent judiciary include the following:

> 1. The Judge Advocate General of the Department will still appoint all military trial judges. The Secretary concerned may appoint a Judicial Appointment Commission to review and recommend candidates for

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[130] *Id.*
[131] *Id.* at 671.
[132] Cooke E-mail, *supra* note 128.
[133] *Id.*
[134] *Id.*
[135] GILLIGAN & LEDERER, *supra* note 30, at 14-48 ("Just as it is in civilian life, judicial neutrality and independence are essential to the military criminal legal system."); *see also Weiss*, 510 U.S. at 194 (Ginsburg, J., concurring) ("The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service.").

appointment. Such a commission may have civilian as well as military members.

2. New military judges, who must be in the grade of O-4 or higher at the time of appointment, will be appointed for a single probationary period;

3. Each Department shall maintain a permanent trial judiciary where each member has served a three-year probationary period;

4. Each trial judge shall remain a judge until retirement, unless removed for good cause;

5. Each trial judge is ineligible for reassignment to a non-judicial position except with the consent of the Secretary of Defense;

6. While serving as a trial judge, the judge shall hold the grade of O-6 and shall retire in that grade;

7. Personnel assigned to the permanent judiciary shall not count against the statutory grade limitation ceilings;

8. The Secretary of Defense may prescribe a judicial fitness/efficiency report and provide that judges be evaluated using such form. No judge may be evaluated by a non-judge, and no evaluation may be made unless the Secretary of Defense has so provided and promulgated a judicial fitness/efficiency report. When so authorized, the Judge Advocate General concerned, and any authorized Judicial Appointment Commission, may consider such reports when appointing permanent trial and appellate judges and the Chief Judge of each Department; and

9. Members of the permanent judiciary shall be entitled to remain in service until the completion of thirty years time in service.[136]

[136] Lederer & Hundley, *supra* note 10, at 675–76.

Professor Lederer and Lieutenant Hundley argue that this plan would leave the military judiciary "military," as the judges will continue to be appointed from experienced military lawyers.[137] While the proposed automatic promotion to O-6 plan bypasses the ordinary promotion system, they argued that it is necessary to make the military judiciary attractive to high quality applicants.[138] The plan also protects interested applicants from loss of competitive advantage by choosing the judiciary instead of more mainstream assignments.[139] At the same time, they argue, this plan ensures that those who choose to join the permanent judiciary must give up any ambition of being promoted beyond O-6 and/or being selected to become TJAG.[140]

While the proposal for a permanent judiciary seems appealing for professional development reasons, several weaknesses exist. First and foremost, the plan goes too far in proposing a solution to a problem that concrete evidence does not support. Unless there is concrete evidence to support a threat to the military judiciary's independence, Congress will likely not amend the UCMJ to create a special promotion system and separate O-6 allocations on mere allegations of "command influence in the air."[141] Second, the plan does not address the type and amount of experience a Judge Advocate may require before becoming part of the permanent judiciary. If Judge Advocates become judges for life (at least for one's military life span) at the grade of O-4, the Judge Advocates may not have had sufficient military, or nonjudicial, experience to allow them to pass judgment on the military population that they serve.

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[137] *Id.* at 677.

[138] *Id.* (stating also that as the judges would be outside the traditional promotion system, it would not be appropriate to count permanent judges for purposes of the grade limitation ceilings that limit how many officers of each grade may exist).

[139] *Id.*

[140] *Id.* ("Otherwise, the very same problem of dependence on command favor is created.").

[141] This phrase is generally used in the context of allegations of unlawful command influence. *See, e.g.*, United States v. Harvey, 64 M.J. 13, 18 (CA.A.F. 2006) (stating that defense must carry the initial burden of showing some facts that constitute unlawful command influence, and that "command influence in the air," or speculation, will not suffice). As noted in Section III.A., *supra*, the argument for an independence threat essentially boils down to the possibility or speculation of improper command attempts to influence the judiciary based on the mere fact that as commissioned officers, military judges may be subject to the non-judicial interests of their superiors. Even in cases where improper command action was found, the courts have consistently held that remedial actions were normally available and that the UCMJ contains provisions that sufficiently protect the judiciary against those actions.

More importantly, this proposal leaves too little flexibility to each of the services to manage its respective military personnel. For instance, it takes two key aspects of personnel management out of each of the services' hands and puts them in the Secretary of Defense's hands—reassignment and fitness evaluation. Under the proposal, the Secretary of Defense's consent is required for every contemplated nonjudicial assignment for a military judge.[142] The Secretary of Defense's consent is also required before a military judge may be evaluated.[143] It is simply impractical and inefficient to require the Secretary of Defense's involvement in the minutiae of day to day personnel management. Servicemembers need to remain mobile. To deprive, in the name of judicial independence, the services' current flexibility to reassign and evaluate its personnel according to its mission requirements is a disservice to the ends judicial independence is supposed to promote—"efficiency and effectiveness in the military establishment."[144]

Lastly, if Congress creates a permanent judiciary where judges are available for nonjudicial duties only with the Secretary of Defense's consent, Judge Advocates arguably now need a second appointment by the President before assuming permanent judiciary duties. A second appointment also means the potential politicization of judicial selection. In *Weiss v. United States*, the Supreme Court held that the military's current method of appointing military judges does not violate the Appointments Clause of the Constitution.[145] Underlying the Supreme Court's decision is the basic premise that military judges remain military officers with judicial duties.[146] Military judgeship does not constitute a separate office,[147] as TJAG assigns officers to the position of military judge for a period of time that he deems necessary or appropriate.[148] Moreover, these officers may be assigned to perform nonjudicial duties.[149] Thus, the Supreme Court noted that "[w]hatever might be the case in civilian society, we think that the role of military judge is 'germane'" to that of military officer."[150]

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[142] Lederer & Hundley, *supra* note 10, at 675.
[143] *Id.* at 676.
[144] MCM, *supra* note 11, pt. I, ¶ 3.
[145] Weiss v. United States, 510 U.S. 163, 165 (1994).
[146] *Id.* at 174–76.
[147] *Id.* at 171.
[148] *Id.* at 176.
[149] *Id.* (citing UCMJ art. 26(c)).
[150] *Id.* at 176.

The legislative proposal for a permanent judiciary, however, in effect creates a separate office. That is in fact the idea behind the plan—to create a judiciary where, by congressional mandate, the personnel policies that normally apply to all military officers no longer apply to judiciary members.[151] Members of this permanent judiciary also cannot be reassigned to perform nonjudicial duties without the consent of the Secretary of Defense.[152] The Supreme Court noted in *Weiss v. United States* that while Congress has changed the military justice system over the years to resemble the civilian justice system, the military remains a "specialized society separate from civilian society."[153] The permanent judiciary's design, however, makes it its own "specialized society," one that operates under its own rules. Thus, the proposal's adoption would make it likely that a second appointment for military judicial candidates, and the politics involved, may become necessary. Giving up the independence the military currently has to appoint Judge Advocates to the bench without a political appointee's consent may merely obtain a false independence. Obtaining such consent may in fact limit independence. [154]

In conclusion, the proposal for a permanent judiciary has appeal. It promotes the professional development of the people that the military relies on to maintain military justice as a core competency.[155] It provides a career path that comes with rank and prestige, one that can certainly do much to attract (and retain) quality people to the judiciary and the Judge Advocate General's Corps. Nonetheless, as designed, it raises concerns that need to be addressed before the goals of the proposal can be realized.

IV. Judicial Independence—Looking Ahead

"[T]he path to judicial independence is judicial reform: the continuous improvement of how we do business— our individual and

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[151] Lederer & Hundley, *supra* note 10, at 674–78.
[152] *Id.* at 675.
[153] *Weiss*, 510 U.S. at 175.
[154] *See, e.g.*, Charlie Savage, *Control Sought on Military Lawyers: Bush Wants Power over Promotions*, BOSTON.COM, Dec. 15, 2007, http://www.boston.com/news/nation/washington/articles/2007/12/15/control_sought_on_military_lawyers/ (describing the uproar that was created when the Bush administration proposed a regulation that requires "coordination" with politically-appointed members of the administration before any member of the Judge Advocate General's Corps can be appointed.)
[155] Military justice as our core competency comes from the fact that it is the only area that requires a Judge Advocate. *See* UCMJ art. 27 (2008).

collective performance as judges."[156] While legislative action creating a permanent judiciary is unnecessary to achieve judicial independence, we should nonetheless examine ways to build on how the military judiciary conducts business so that its independence, and the ends it promotes (justice and discipline) can continue to thrive.[157] This section will evaluate the initiatives recently instituted by two of the services within their respective trial judiciaries,[158] examine a proposal by the Code Committee to expand military judges' contempt powers, and lastly, recommend a non-legislative proposal for consideration.

A. Army's Initiatives

1. Tenure

"We won the constitutional battle over appointment of and tenure for military judges in *Weiss v. United States*. Now it is time to recognize that tenure for judges, as a matter of policy, is appropriate."[159] Ten years ago, Brigadier General (BG) John S. Cooke[160] noted that as a practical matter, Army military judges effectively have tenure anyway as they are assigned to a judicial position for a standard tour of three to four years and would not be reassigned because of their judicial decisions in particular cases.[161] Nonetheless, BG Cooke argued that because of a possible perception that military judges serve at the pleasure of TJAG, a policy should exist that military judges be assigned to a judicial position for a set period (i.e., three years), and not be reassigned during that period without their consent except for good cause.[162] Shortly

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[156] Roger K. Warren, President, *The Importance of Judicial Independence and Accountability*, NATIONAL CENTER FOR STATE COURTS, http://www.ncsconline.org/WC/Publications/KIS_JudIndSpeechScript.pdf (last visited Jan. 22, 2009).
[157] *See* MCM, *supra* note 11, pt. I, ¶ 3.
[158] The Air Force Judge Advocate General's Corps is in the midst of a major transformational effort. Many of the dynamics and ideas discussed in this section are under consideration as the Air Force Judge Advocate General's Corps reshapes itself for the future. E-mail from Lieutenant Colonel James H. Dapper, U.S. Air Force, Executive to The Judge Advocate General, to author (Mar. 19, 2008, 17:26 EST) (on file with author).
[159] Cooke, *supra* note 17, at 18.
[160] Brigadier General John S. Cooke was the Commander of the U.S. Army Legal Services Agency and the Chief Judge of the U.S. Army Court of Criminal Appeals.
[161] Cooke, *supra* note 17, at 18 ("[O]ur judges effectively have tenure now[;] [w]e just don't get credit for it.").
[162] *Id.*

afterwards, the Army established a fixed term of three years for Judge Advocates certified as military judges by TJAG.[163] Under this policy, Judge Advocates who are certified as military judges by TJAG are assigned to the trial judiciary for a minimum of three years and will not be reassigned except under limited circumstances such as retirement, national emergency, or personal requests.[164] None of the other services currently provide for tenure or a fixed term of office for their judiciary. However, like the Army before it implemented a regulatory fixed term of office, the Navy effectively has a fixed term of office for its judges as well— three years.[165] Barring extraordinary circumstances, the Navy is unlikely to move its judges before the three years are up to avoid even the appearance that the change in duty was due to "unpopular" decisions.[166]

Tenure or some fixed term of office is certainly appropriate as a matter of policy because it may allay some possible perception that military judges serve at the whim of TJAG. As currently implemented, however, the protection it gives is arguably limited. As noted by a former CAAF judge, "Obviously though, when you get to the two year nine month mark, you're going to feel a little bit ill at ease, and one of the concerns has been that the [judge] who is hanging on may favor the government in order to be reappointed."[167] More importantly perhaps, the protection a fixed term of office gives may be limited for more practical reasons. As some have pointed out, if we have men and women of good character and integrity as judges, they will not be concerned with the impact their court decisions may have on their careers.[168] "If

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[163] AR 27-10, *supra* note 101, para. 8-1g. "This regulation implements UCMJ, Art. 26, which provides for an independent judiciary within the U.S. Army." *Id.* para. 8-1a; *see also* JAG PUB 1-1, *supra* note 99, app. VIII, para. 8-6.

[164] AR 27-10, *supra* note 101, para. 8-1g.

[165] Reismeier Feb. E-mail, *supra* note 104.

[166] *Id.*

[167] Hudson, *supra* note 97, at 78 (Senior Judge Everett noting the limitations of the three-year fixed term of office the Army gives to its military judges). Commentators like Professor Lederer and Lieutenant Hundley echoed this view. *See* Lederer & Hundley, *supra* note 10, at 666 ("The degree of protection afforded a judge by fixed tenure is de minimis."); *see also* GILLIGAN & LEDERER, *supra* note 30, at 14-8 ("So long as the judge knows that his or her future is in the hands of those who have non-judicial interests, both the perception and reality of possible tampering will exist.").

[168] *See* United States v. Mabe, 33 M.J. 200, 208 (C.M.A. 1991) (Cox, J., dissenting) ("The solution [to unlawful influence of military judges] is found in selecting men and women of good character and integrity, persons who want to learn to do a good job, who want to make fair and just decisions, persons with sound judgment."); e-mail from Colonel (Retired) Denise Vowell, former Chief Trial Judge of the Army, to author (Mar.

someone will make the right call when he has tenure, but the wrong call when he doesn't, that says a lot about his integrity."[169]

While tenure or a fixed term of office may be limited in terms of the actual protection it gives against unlawful command influence, it does allow military judges time to learn their job and to do it well. Currently, those below the grade of O-6 in the Army will generally not receive consecutive trial judge assignments.[170] If judges below the grade of O-6 have shown promise during their three-year tour, policy should encourage consecutive trial judge assignments, not the opposite. The position of military judge carries great responsibility, one that takes time to learn and appreciate. To take judges out of their judicial positions and rotate them into non-judicial assignments just when they become comfortable is counterproductive. Judges knowledgeable and competent in their duties and responsibilities are the best protection against possible encroachments on judicial independence. This does not mean that we need to give military judges life tenure. It can simply mean that military judges have an opportunity to reacquire another term of office at the end of each term, assuming competence and personal desire for another tour.[171]

2. Judicial Apprenticeship Program

The Judge Advocate General selects and certifies Judge Advocates to serve as military trial judges.[172] In the Army, judicial candidates will have normally met the following criteria:

> (1) Have at least two years of trial experience as a court-martial trial or defense counsel; one year of court-martial trial experience and at least one year as chief of criminal law, regional defense counsel, or criminal law instructor;

11, 2008, 10:28 EST) [hereinafter Vowell E-mail] (on file with author) (stating that if we pick good people to be judges, they will not be concerned with the career implications of their decisions).

[169] Vowell E-mail, *supra* note 168.

[170] JAG PUB 1-1, *supra* note 99, app. VIII, para. 8-4b.

[171] *See* Vowell E-mail, *supra* note 168 (recommending an explicit provision in AR 27-10 that military judges reacquire tenure each time they are reassigned as military judges and that tenure guarantees that they are not moved earlier than the normal tour length).

[172] UCMJ art. 26(c) (2008) ("The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member.").

> or two years as a Staff Judge Advocate in an active criminal law jurisdiction;
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> (2) Are serving in the grade of colonel, lieutenant colonel or promotable major;
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> (3) Have completed CGSC/ILE[173] or the equivalent, or are willing to enroll and complete such a course;
>
> (4) Have demonstrated mature judgment and high moral character;
>
> (5) Have been nominated for selection by the Chief Trial Judge or a designee, in coordination with the Chief, PP&TO;[174] and
>
> (6) Are able to graduate and attain at least a grade of C (77 points) in the Military Judge Course, at the LCS.[175]

While the trial experience requirement is not high, and is in fact rather modest, the trial experience level of many Judge Advocates has gone down over the years, especially with a high operational tempo and the increasing emphasis on other areas of practice.[176] Multiple assignments in trial slots have become the exception rather than the rule.[177] Thus, given the limited trial experience level of Army Judge Advocates, the pool of potential candidates for military judges is equally

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[173] "Intermediate Level Education (ILE) provides a standard educational experience across all career fields and functional areas and replaces the Command and General Staff Course [CGSC]." JAG PUB 1-1, *supra* note 99, app. VII, para. 7-7. "ILE establishes a universal Army operational warfighting culture to prepare field grade officers for service in division, corps, echelons above corps, and joint staffs." *Id.*

[174] The Army's Personnel, Plans, and Training Office (PP&TO) assists TJAG in "fulfilling his responsibilities to recruit individuals to serve as Judge Advocate Officers and to manage the careers of Judge Advocates." *Id.* para. 1-4b.

[175] *Id.* para. 8-1. The LCS refers to The Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Va.

[176] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103; Telephone Interview with Colonel James L. Pohl, Second Judicial Circuit Judge, in Fort Benning, Ga. (Jan. 8, 2008) [hereinafter Pohl Interview]; Telephone Interview with Colonel (Ret.) Dwight H. Sullivan, U.S. Marine Corps, in Washington, D.C. (Jan. 8, 2008) [hereinafter Sullivan Interview]; Telephone Interview with Captain Christian L. Reismeier, U.S. Navy, Office of the Judge Advocate General, Criminal Law Division (Code 20), in Washington, D.C. (Jan. 10, 2008) [hereinafter Reismeier Interview].

[177] Pohl Interview, *supra* note 176.

limited.[178] The Judicial Apprenticeship Program is designed to increase the military justice experience level of Judge Advocates so that there can be a bigger pool of judicial candidates.[179] It is a one-year program[180] where select Army Judge Advocates will first attend the Military Judge's Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.[181] Upon graduating from the course and obtaining at least a grade of C (or 77 points), these Judge Advocates will be certified as qualified to preside over courts-martial, including general courts-martial.[182] These Judge Advocates will then work under the supervision of more senior military judges at various installations.[183] At the end of the year, these Judge Advocates will be reassigned to a non-judicial assignment and may apply at a later time for a regular tour in the trial judiciary, not as an apprentice.[184] As these Judge Advocates return to field assignments after the apprenticeship, it is hoped and expected that they will share their experience on the bench with younger Judge Advocates, train them on how to become better trial advocates, and thus increase the pool of future judicial candidates.[185] Two Judge Advocates were selected to participate in the apprenticeship program beginning summer of 2008 and two more have been selected to participate in the apprenticeship program beginning summer of 2009.[186]

As the program is new, it is too early to evaluate whether the program will meet its intended goals. It undoubtedly has the potential to build and distribute military justice experience to younger Judge

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[178] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[179] *Id.*

[180] It is designed as a one-year program so as to increase the number of Judge Advocates that can participate. Henley January Interview, *supra* note 103.

[181] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[182] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[183] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[184] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[185] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[186] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103; e-mail from Colonel Stephen R. Henley, Chief Trial Judge of the Army, to author (Jan. 23, 2009, 11:17 EST) [hereinafter Henley E-mail] (on file with author).

Advocates, preparing them for possible judicial duties at a later time.[187] Building and distributing military justice experience in turn builds knowledge about judicial independence and the ends it promotes—justice and discipline in the armed forces.[188] The reach of the program, however, is limited, as so few Judge Advocates are allowed to participate in the program.[189] Those allowed to participate will subsequently move to a non-judicial assignment at the end of their one-year assignment.[190] As noted above, regarding the policy against consecutive judicial assignments for those below the grade of O-6, the position of military judge carries with it great responsibility, one that takes time to learn.[191] A one-year tour as a military judge is barely sufficient time for a Judge Advocate to learn the intricacies of the job before moving to a nonjudicial assignment. Understandably, it is currently difficult to ask for extra personnel to be assigned to a practice area that may not carry the immediate urgency of other practice areas.[192] Nonetheless, judicial independence and the ends it promotes require personnel knowledgeable about the military justice system.

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[187] Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103.

[188] *See* MCM, *supra* note 11, pt. I, ¶ 3 (stating that the purpose of military law is to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

[189] Two Judge Advocates are currently participating in this program and two more Judge Advocates have been selected to participate in the coming year. Henley November Interview, *supra* note 103; Henley January Interview, *supra* note 103; Henley E-mail, *supra* note 186.

[190] *Id.*

[191] *See supra* Section IV.A.1 (discussing Army's tenure for its military judges).

[192] *But see* Lieutenant General Scott C. Black, *Changes in Military Justice*, TJAG SENDS vol. 37-16 (Apr. 2008) (modifying existing rating schemes for Brigade Combat Team "Trial Counsel" to provide them with more training and mentoring in military justice in order "to secure the foundation of our practice of military justice and preserve the integrity of our statutory mission").

B. Navy's Initiatives

1. Military Justice Litigation Career Track[193]

As with the Army, the Navy also shares concerns about the decreasing level of military justice experience and its likely impact on the pool of qualified judicial candidates.[194] "Although the number of Navy courts-martial has decreased in recent years, the complexity of the cases has dramatically increased. The [Navy] JAG Corps must identify those judge advocates with the requisite education, training, and aptitude to litigate complex cases and to continue to cultivate their development."[195] To this end, the Navy recently established a military justice litigation career track designed to identify, develop, and retain Judge Advocates who can effectively and efficiently handle complex cases, including high-visibility courts-martial.[196] The military justice litigation career track establishes two qualifications that a Navy Judge Advocate may be designated with: (1) Specialist Military Justice Litigation Qualification; and (2) Expert Military Justice Litigation Qualification.[197] To receive a specialist qualification, one must demonstrate "acceptable quantitative and qualitative experience in military justice litigation."[198] To receive an expert qualification, one must have "significant experience and demonstrated leadership in military justice litigation."[199] Judge Advocates with either qualification

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[193] On 1 October 2008, the Army implemented four additional skill identifiers (ASIs) for military justice: Basic, Senior, Expert, and Master. TJAG Policy Memorandum 08-2, Military Justice Additional Skill Identifiers (21 July 2008) [hereinafter TJAG Policy Memorandum 08-2]. The stated intent of this initiative is to "capture experience for use in the assignments process." *Id*. It is not a specialization or a career track, but part of a larger effort to capture and document experience in the various practice areas Judge Advocates can expect to encounter in their career. Lieutenant General Scott C. Black, *Additional Skill Identifiers in Military Justice*, TJAG SENDS vol. 37-17 (July 2008). In addition, "no particular ASI will be dispositive to any specific position." TJAG Policy Memorandum 08-2, *supra*. As the focus of this article is judicial independence and reforms directed at promoting judicial independence, further discussion of the Army's ASIs for military justice is beyond the confines of this article.

[194] Reismeier Interview, *supra* note 176.

[195] U.S. DEP'T OF NAVY, JAG INSTR. 1150.2, MILITARY JUSTICE LITIGATION CAREER TRACK para. 2a (3 May 2007) [hereinafter NJI 1150.2].

[196] Memorandum, Frequently Asked Questions about the Military Justice Litigation Career Track (2007) [hereinafter Military Justice Litigation Career Track FAQs] (on file with author).

[197] NJI 1150.2, *supra* note 195, para. 2d.

[198] *Id.*

[199] *Id.*

may be considered for special billets, or positions requiring significant litigation experience or supervision of junior officers performing military justice litigation.[200]

Navy Judge Advocates interested in being designated with one of these qualifications submit a detailed application to a semi-annual selection board convened by TJAG.[201] Besides filling special positions, the officers selected for this career path must agree to identify, train, and mentor junior Judge Advocates to be litigators.[202] In addition, the Navy may also send Judge Advocates with these qualifications to recruit at law schools and job fairs to attract potential litigators to the Navy JAG Corps.[203] Finally, "to counter any lingering perceptions or concerns that those who specialize in military justice will be at a competitive disadvantage before promotion boards,"[204] TJAG will determine the anticipated needs for promotion of these Judge Advocates and recommend language for inclusion in Secretary of the Navy selection board precepts.[205] Precept language for O-4 to O-6 promotion boards will include specific language, consistent with application of the best and fully qualified standard, directing the promotion boards to consider the Navy's need for senior officers with demonstrated superior performance in litigation.[206]

2. Judicial Screening Board

In conjunction with its Military Justice Litigation Career Track, the Navy also recently revised its process for selecting military judges to highlight the position's central role in the fair and effective

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[200] *Id.* paras. 2d, 5 (noting that Judge Advocates in either qualification may be assigned to positions outside the litigation career path to "ensure a depth of experience beneficial to both the officer and the Navy").
[201] *Id.* para. 3a(5).
[202] *Id.* para. 6.
[203] *Id.* para. 4a.
[204] Military Justice Litigation Career Track FAQs, *supra* note 196.
[205] Precepts are guidance provided to promotion boards. Sullivan Interview, *supra* note 176.
[206] NJI 1150.2, *supra* note 195, para. 7; *see also* Military Justice Litigation Career Track FAQs, *supra* note 196 ("While particular selection board precept language changes from year to year, one thing remains constant: the need for the best and fully-qualified officers eligible for promotion. During this last year, precept language was developed discussing the Navy's need for senior officers with significant military justice litigation experience.").

administration of military justice.[207] Under the current instruction, Judge Advocates interested in a judicial appointment should have: (1) at least three years of active duty criminal or civil litigation; (2) a leadership tour in litigation; and (3) some broader military justice experience, such as appellate litigation or significant military justice experience as a Staff Judge Advocate.[208] The current procedure also allows all interested Judge Advocates to apply by submitting a detailed application packet to the Judicial Screening Board.[209] The Board will screen all applications and make its recommendations to TJAG.[210] "Combining the career path for litigation with the judicial screening board, we would hope to create a system whereby judges are selected from a cadre of people who have considerable trial experience, and hopefully, independence as a result."[211]

Like the Army's Judicial Apprenticeship Program, the Navy's Military Justice Litigation Career Track and the revamped Judicial Screening Board are still in their beginning stages. Therefore, it is difficult to gauge how successful their implementation will be. As

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[207] U.S. DEP'T OF NAVY, JAG INSTR. 5817.1C, JUDICIAL SCREENING BOARD para. 3 (22 Oct. 2007) [hereinafter NJI 5817.1C]. The panel report that led to the creation of the military justice litigation career track and revised procedures for the Judicial Screening Board noted the following about the need to select good people to the bench:

> Military judges wield a degree of power and influence unlike that of any other officer—power that is largely unimpeded except in the due course of appellate review. Even a new judge has the authority to issue lawful orders to the most senior departmental officers and officials in government. Selection to the bench needs to reflect great respect for that awesome plenary power, and the process must ensure that those entrusted with such power have demonstrated the experience, character, judgment and temperament necessary to wisely and honorably perform judicial duties.

See e-mail from Captain Christian L. Reismeier, U.S. Navy, Office of the Judge Advocate General, Criminal Law Division (Code 20), to author (Oct. 23, 2007, 12:41 EST) [hereinafter Reismeier Oct. E-mail] (on file with author) (quoting report from the Navy's "Sea Enterprise," a panel that studied possible realignment of the judiciary).

[208] NJI 5817.1C, *supra* note 207, para. 5a.

[209] *Id.* Previously, the Judicial Screening Board will only screen those officers whose names have been provided to them by a detailer with the Navy or a nominating officer with the Marine Corps. *See* Reismeier Oct. E-mail, *supra* note 207 (quoting report from the Navy's "Sea Enterprise," a panel that studied possible realignment of the judiciary).

[210] NJI 5817.1C, *supra* note 207, para. 5d-f ("The Board report is advisory in nature and does not restrict in any manner the statutory authority of the JAG to make judicial appointments, nor does it confer any rights or entitlements to an officer recommended for judicial assignment.").

[211] Reismeier Oct. E-mail, *supra* note 207.

designed though, the two initiatives have tremendous potential to strengthen judicial independence and the ends it promotes. It allows those with demonstrated potential in military justice the opportunity to specialize in military justice while remaining competitive before promotion boards. Cultivating seasoned military justice practitioners in turn populates the military justice system with people who understand how the system operates and what it is designed to do. Judicial independence and the ends it promotes are better served as a result.

Some may contend that since military justice is our core competency, all Judge Advocates should be able to practice it, thus eliminating the need for a formal specialization program. Ideally, that would be the case. However, with the high operational tempo and a corresponding emphasis on other areas of law, the supposition that all Judge Advocates know how to effectively practice military justice may no longer be valid.[212] Specialization and a judicial selection process that emphasizes skills developed from specialization is not the only method through which judicial independence and the ends it promotes can flourish. It is nonetheless one huge step in the right direction.

3. Chief Judge of the Navy

In addition to creating a Military Justice Litigation Career Track and revising the procedures for selecting military judges, the Secretary of the Navy recently approved a new Assistant Judge Advocate General of the Navy (AJAG) position, Chief Judge of the Navy, who will act as the supervisory judge for all trial and appellate judges.[213] The Chief Judge of the Navy's duties will include:

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[212] *See, e.g.*, Pohl Interview, *supra* note 176 (noting that the current emphasis on brigade combat team operations is making it more challenging to train Judge Advocates in military justice); Sullivan Interview (noting that while military lawyers generally do a good job in routine "stand-up, sit-down" type of cases, their inexperience comes across in more complex cases); Reismeier Interview, *supra* note 176 (noting that records of trial and published decisions reflect that cases in general are not well-tried, even if they survive appellate review). Trial experience level is further reflected in the reversal rate of military death penalty cases. *See* Colonel Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 2 (2006) (stating that the military death sentence has been overturned on appeal 3.5 times more often than it has been affirmed (7 to 2)).

[213] Memorandum from The Judge Advocate General and Deputy Judge Advocate General of the Navy, Announcement of New Assistant Judge Advocate General Position (Feb. 26,

> Overseeing the Navy judicial enterprise of 42 trial and 27 appellate judges, overseeing judicial training, coordinating with state, federal, and other services' chief judges, establishing standards and oversight regarding courthouse security, coordinating of reserve judiciary assets, and other duties required for the administration of the Navy and Marine Corps judicial system.[214]

A board to select AJAG, Chief Judge of the Navy, will convene in either 2009 or 2010.[215]

There will now be three AJAG positions: AJAG, Civil Law; AJAG, Operations and Management; and AJAG, Chief Judge of the Navy. [216] With this new position, all AJAGs will serve a three-year tour, with the third year of service as the statutory AJAG of the Navy.[217] After serving as the statutory AJAG of the Navy for one full year, the person can retire in the grade of O-7.[218]

The Navy created this position to complement its other reform efforts in military justice litigation practice.[219] It began as part of a panel study to realign the judiciary, to include the advancement of judicial independence, real and perceived.[220] The panel recommended the creation of a one-star active duty position to lead the trial judiciary, and a "tombstone" flag position[221] as an alternative.[222] The panel reasoned that an independent judiciary needs to be able attract the best and brightest of the Judge Advocate profession.[223] To attract the best and brightest to the

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2008) [hereinafter Announcement of New Assistant Judge Advocate General Position] (on file with author).

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*; *see also* 10 U.S.C. § 5149(b) (2006); e-mail from Captain Christian L. Reismeier, U.S. Navy, Office of the Judge Advocate General, Criminal Law Division (Code 20), to author (Mar. 10, 2008, 17:20 EST) [hereinafter Reismeier Mar. E-mail] (on file with author). This is also referred to as a "tombstone" position, as flag rank is assumed only upon retirement. *Id.*

[219] Announcement of New Assistant Judge Advocate General Position, *supra* note 213.

[220] Reismeier Oct. E-mail, *supra* note 207.

[221] "Tombstone" position is a position where the flag rank is assumed only upon retirement. Reismeier Mar. E-mail, *supra* note 218.

[222] Reismeier Oct. E-mail, *supra* note 207 (containing report from the Navy's "Sea Enterprise," a panel that studied possible realignment of the judiciary).

[223] *Id.*

judiciary, it is necessary to create a meaningful career path and thus a reason to join the bench.[224] The panel further reasoned that Judge Advocates need assurance that they can and should remain in military justice for a sufficient period of time with positive career implications.[225]

As with the Navy's other transformation efforts, it is too early to tell how successful this latest effort will be in fostering judicial independence and the importance of military justice as a core competency. Recognizing the importance of fostering judicial independence and military justice as a core competency, however, is a significant step in itself. It is a step toward meeting the ends of military law—"to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[226] Some may argue that absent hard evidence of problems within the military justice system, one should defend the status quo rather than contemplate change.[227] However, it "presumes too much to suggest that we have arrived at a perfect instrument."[228] Military law should not remain static for fear that one may simply be creating a solution in search of a problem.

C. Proposal to Expand Military Judge's Contempt Powers

Article 48, UCMJ, currently provides that a "court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder."[229] Critics like Professor Lederer noted that despite military judges' wide range of responsibilities and powers in a courtroom, they lack the authority to hold personnel outside the courtroom in contempt for defying court orders.[230] As an example,

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[224] *Id.*
[225] *Id.*
[226] MCM, *supra* note 11, pt. I, ¶ 3.
[227] *See, e.g.*, Lieutenant Colonel Theodore Essex & Major Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice*, 52 A.F. L. REV. 233, 258 (2002) (arguing that we should defend a system that has served as a model for other justice systems rather than contemplate change because other systems have needed change).
[228] Cooke, *supra* note 16, at 19.
[229] UCMJ art. 48 (2008).
[230] GILLIGAN & LEDERER, *supra* note 30, at 14-4, 14-6.

they cited the case of *United States v. Tilghman*,[231] where the accused's commander placed the accused in confinement after findings, but before sentencing, despite the military judge's specific order to the contrary.[232] While the accused ultimately received over eighteen months of confinement credit for spending less than twenty-four hours in confinement,[233] the military judge was without authority to hold the commander who flouted his orders in contempt. This, the critics contend, is problematic and an indicia of the lack of judicial independence as "[a]n independent judiciary arguably would include the power to ensure compliance with the law."[234]

Currently, the Code Committee[235] is considering a proposal to expand military judges' contempt powers under Article 48, UCMJ. Under this proposal, contempt now includes "[w]illful disobedience or refusal to comply by any person subject to this chapter . . . of any ruling, writ, process, order, rule, decree, or command issued by a military judge or the presiding officer of a military commission, military tribunal, or provost court."[236] If adopted, this proposal should eliminate at least one aspect of the critics' concerns about the independence of the military trial judiciary. Under the proposed Article 48, UCMJ, military judges will have the power to ensure compliance with their orders. While this proposal does not address the critics' main concern about military judges being part of the traditional military personnel system, it provides

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[231] United States v. Tilghman, 44 M.J. 493 (C.A.A.F. 1996).
[232] *Id.* at 494.
[233] *Id.* The military judge whose order was defied ordered twenty days of confinement credit against Tilghman's sentence for the illegal pretrial confinement. Two months later, the Chief Circuit Military Judge detailed himself to the case for a post-trial session pursuant to Article 39(a), UCMJ. After finding a "cavalier disregard for due process and the rule of law," the judge ordered an additional eighteen months of confinement credit against Tilghman's sentence. *Id.*
[234] GILLIGAN & LEDERER, *supra* note 30, at 14-6 n.27 (noting that commanders generally resist the idea that non-superior officers, even if they are military judges, should be allowed to interfere with their actions).
[235] Article 146, UCMJ, requires a committee composed of members of the different services and certain members of the public to meet annually to survey the operation of the UCMJ. UCMJ art. 146 (2008).
[236] Proposal 5, Revision and Expansion of Military Judge Contempt Powers, Alternative A, Draft Article 48, UCMJ (on file with author). Under this proposal, however, the military judge does not have the authority to hold a convening authority in contempt for his or her actions on a matter that is committed to that convening authority's discretion by the UCMJ. *Id.*

another step in the direction of improving the way the military judiciary conducts business in the twenty-first century.[237]

D. Proposal for Judicial Career Path

Ten years ago, BG Cooke encouraged recognition of tenure for military judges as appropriate policy even if not constitutionally required.[238] He recommended that the Army start by including a tenure policy for military judges in its regulations;[239] the Army implemented such a policy shortly thereafter.[240] Ten years later, the time has come to consider another of BG Cooke's proposals to further cultivate the reality and perception of judicial independence.

Beyond the current tenure policy, BG Cooke suggests implementation of a more robust career path for military judges.[241] A more robust career path means that Judge Advocates who have demonstrated potential should receive assurance that if they come to and remain on the bench, they will be promoted to the grade of O-6, barring misconduct and/or incompetence.[242] However this career path is implemented, the key is to attract and maintain the best officers on the bench.[243] Attracting and maintaining the very best will, in turn, further advance judicial independence and the ends it promotes.

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[237] As of the submission of this article, the Joint Service Committee has proposed that Congress amend Article 48. The proposal is currently undergoing review by the Executive Branch before submission to Congress. E-mail from Lieutenant Colonel Eric Krauss, Policy Branch Chief, Office of The Judge Advocate General, Criminal Law Division, to author (Feb. 9, 2009, 14:04 EST) (on file with author).

[238] Cooke, *supra* note 17, at 18.

[239] *Id.*

[240] AR 27-10, *supra* note 101, para. 8-1g. "This regulation implements UCMJ, Art. 26, which provides for an independent judiciary within the U.S. Army." *Id.* para. 8-1a; *see also* JAG PUB 1-1, *supra* note 99, app. VIII, para. 8-6.

[241] Interview with Brigadier General (Retired) John S. Cooke, in Washington, D.C. (Feb. 15, 2008).

[242] *Id.*

[243] *Id.*; *see also* Cooke, *supra* note 17, at 19 (examining methods of structuring our judiciary to ensure that we continue to attract the best to the bench); Brigadier General John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, at 6.

Currently, other than the general guidelines set out in the JAGC Personnel and Activity Directory and Personnel Policies,[244] the Army has no formal program or track for the selection of military judges. Judge Advocates are selected to be judges as an outgrowth of the personnel detailing process. The path to a judgeship is random and unpredictable. No systematic effort exists to attract the best and brightest to the bench, or to convince young Judge Advocates that they can and should remain in military justice for a sufficient period of time with positive career implications. While a formal career path or track to attract and retain qualified judicial candidates does not hold the key to an independent judiciary, it provides a good starting point for discussion. Some may contend that any such path or track is risky as it encourages Judge Advocates to think that checking certain assignment blocks assures a judgeship. Such thinking is not new. Judge Advocates often accept certain assignments with the hope that other "plum" assignments will follow. Such hopes are often dashed for the simple reason that these Judge Advocates may not be the best qualified, or the needs of the Army may dictate otherwise. Similarly, a formal career path or track for judicial candidates may provide false hope that a judgeship will follow at the end of the path or track. That hope, nonetheless, is tempered with the reality that judicial candidates, as with all other assignments, are expected to compete with the best of the best, and abide by the needs of the Army.

It is also understandably hard in the current wartime environment to dedicate personnel and efforts to a practice area that may not carry the same short-term urgency of other practice areas. The military justice system works reasonably well and the world certainly does not revolve around military justice. Nonetheless, military justice is our statutory mission and military judges directly influence the fair and effective administration of the military justice system. It is thus crucial to structure the military judiciary in such a way as to attract quality candidates to the bench. Quality judicial candidates, in turn, ensure the reality and perception of judicial independence and the ends it promotes in the military—discipline and justice.

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[244] JAG PUB 1-1, *supra* note 99, app. VIII; *see also supra* Section IV.A.2 (discussing the Army's Judicial Apprenticeship Program).

V. Conclusion

Congress has taken tremendous strides to create in the military a judiciary independent of command control.[245] "Of course, not every suggestion is necessarily a good idea, but judge advocates and others should not shy from critically examining the system. Even if the status quo is the best alternative, it is better defended after penetrating analysis than with knee-jerk reaction."[246] Currently, the judicial structure Congress has set up works reasonably well. It has withstood legal challenges.[247] There are no major malfunctions. The military justice system, however, should not remain static.

Numerous initiatives have been put forth to cultivate judicial independence in the twenty-first century. Professor Lederer and Lieutenant Hundley's proposal to amend the UCMJ to create a permanent judiciary certainly goes far in promoting judicial independence.[248] Its problem, however, is that it goes so far in its reach as to be impracticable. Initiatives the Army and the Navy recently implemented are more promising in their ability to promote judicial independence. In addition, the Judge Advocate General's Corps should consider BG Cooke's suggestion for a more defined career path in order to attract some of the best Judge Advocates to the bench. Together, these initiatives can advance the reality and the perception of judicial independence.

The military justice system is designed to be dynamic.[249] Looking ahead, we should remind ourselves of how far the military justice system has come and that for the best days to be ahead, we need to continually examine how we carry out our statutory mission.

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[245] *But see* Lederer and Hundley, *supra* note 10, at 669–73 (arguing that the military judiciary is not sufficiently independent and that legislative action creating a permanent judiciary is necessary to achieve the "best balance" between judicial independence and accountability).

[246] Cooke, *supra* note 16, at 19.

[247] *See* Weiss v. United States, 510 U.S. 163, 180 (1994) (declaring that "Congress has achieved an acceptable balance between independence and accountability" where the military judiciary is concerned).

[248] *See* Lederer and Hundley, *supra* note 10, at 675–76 (detailing elements of the proposal for a permanent judiciary).

[249] *See, e.g.*, UCMJ art. 146 (2008) (requiring a committee composed of members of the different services and certain members of the public to meet annually to survey the operation of the UCMJ).

> As we engage in such a process, I urge you to always keep in mind our system's constitutional roots, its accountability to the American people, its role in ensuring morale and discipline, and its relationship to the eternal truth—that the young men and women upon whom we depend for success in any endeavor must have faith in the value of doing things the right way.[250]

The judiciary, as stewards of the military justice system, must reinforce that faith.

[250] Cooke, *supra* note 17, at 29.