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The Reporter

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FROM THE EDITOR

This very special issue commemorates the 50th Anniversary of the Uniform Code of Military Justice. It features an excellent reflection on the roots of the UCMJ by U.S. Court of Appeals for the Armed Forces Judge, The Honorable Andrew S. Effron. The second article is a rare piece with reflections from eight former TJAGs on the evolution of the JAG Department and our military justice system. The third article by BGen Jack L. Rives and Col Bradley Grant urges practitioners to understand the protections of individual rights provided under the UCMJ and to be prepared to carry the message forward. The final article by Col Lee D. Schinasi, noted author and evidentiary matters expert, presents a thought provoking call for changes in our current military justice system.

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Contributions from all readers are invited. Items are welcome on any area of the law, legal practice or procedure that would be of interest to members of The Air Force Judge Advocate General's Department. Items or inquiries should be directed to The Air Force Judge Advocate General School, CPD/JAR (150 Chennault Circle, Maxwell AFB AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802)

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THE FIFTIETH ANNIVERSARY OF THE UCMJ: THE LEGACY OF THE 1948 AMENDMENTS

The Honorable Andrew S. Effron

This article is adapted from remarks delivered at the Interservice Military Judges' Seminar, Maxwell Air Force Base, Alabama, on 14 April 2000.

General Moorman, thank you for the privilege of participating in this commemoration of the 50th Anniversary of the Uniform Code of Military Justice (UCMJ).[1] It is fitting that today's program is being held in conjunction with the annual Interservice Military Judges' Seminar, one of the premier events in the military legal calendar. The presence of many military judges from each of the services reflects the full flowering of what was a distant vision at the end of World War II - the transformation of courts-martial from instruments of command into judicial tribunals. In the brief time I have with you today, I would like to highlight one element of the enactment period that merits careful consideration by practitioners and scholars: the foundation for the UCMJ established by the 1948 amendments to the Articles of War.[2]

HISTORICAL CONTEXT

History placed the responsibility for military justice reform upon the broad shoulders of the veterans of World War II.[3] During that epic conflict, active duty strength of the armed forces expanded to more than 12 million. At that time, and during the succeeding decades of the Cold War, military service was the norm rather than the exception, at least among younger men. Veterans, as well as their families and neighbors, were familiar - either from personal experiences or first hand accounts - with the challenges of global deployments and the harsh realities of combat. They were also quite familiar with military justice. Over 1.7 million courts-martial were conducted during the war, and 45,000 service members remained in prison at the end of the war.

Judge, United States Court of Appeals for the Armed Forces. This article is adapted from remarks delivered at the Interservice Military Judges' Seminar, Maxwell Air Force Base, Alabama, April 14, 2000.

"By the end of World War II, there was widespread dissatisfaction with military justice."

In that environment, most veterans had at least a general understanding of the court-martial process, and their exposure was both positive and negative. On one hand, there was considerable appreciation for the relationship between discipline and the conduct of combat operations, as well as the need to deal with the wide range of criminal behavior likely to occur in any group of 12 million people. On the other hand, there was deep concern because many presiding officers and counsel had little or no legal training. There was also significant concern about the authority of the command to take actions, which could have significant impact on the outcome of proceedings.

By the end of World War II, there was widespread dissatisfaction with military justice. The Secretary of War and the Secretary of the Navy each initiated investigations by committees of prominent civilians, which documented deficiencies and abuses and recommended a variety of reforms. From today's perspective, in which the UCMJ is part of the fabric of military life, it is easy to assume that enactment of the Code was inevitable in view of this high-level attention, coupled with strong public concern. The legislative record, however, indicates that the outcome was far from certain.

LEGISLATION IN THE HOUSE OF REPRESENTATIVES

Shortly after the war, a subcommittee of the House Military Affairs Committee prepared a report on military justice.[4] In the next session, a subcommittee of the newly formed House Armed Services Committee conducted hearings chaired by Representative Charles H. Elston.[5] Testimony was received from military witnesses and veterans and the members posed detailed questions based upon their own military service or their congressional experiences with military

justice issues during the war. The end result was a bill amending the Articles of War, which came to be known as the Elston Act, which was approved by the House of Representatives in January 1948.[6]

SENATE ACTION

Despite broad public interest in reform, the Elston Act languished in the Senate, largely due to reservations on the part of the military leadership and questions as to whether action should await further studies concerning the court-martial system in the Navy.[7] Renewed momentum was engendered when increasingly aggressive actions by the Soviet Union, culminating in the Berlin blockade, led the Truman administration to request legislation authorizing peacetime conscription. The selective service proposal was very controversial, coming at a time when many citizens simply wanted a return to peace.

Senator James Kem of Missouri viewed the conscription debate as an opportunity for military justice reform, and he proposed an amendment attaching the text of the House-passed Elston Act to the pending selective service legislation.[8] In one of the most significant speeches in the annals of military justice, Senator Kem declared:

> The Congress has a duty to the young men of the United States when they are inducted into a peacetime army, and also it has a duty to the parents of these young men to provide a system of military justice that will guarantee a fair trial and assure the judicial safeguards cherished in the American system of jurisprudence. It is not enough to say we will get to this later. We have had investigations. We have had reports. The proposals contained in this amendment are the result of the most extensive study of military justice ever made in the history of the Senate. If the Congress has time to pass legislation to take these young men from their homes and bring them into the Army, it has time ... to pass legislation to give them a square deal.[9]

The legislation was opposed by the Secretary of Defense and the leadership of the Senate Armed Services Committee on the ground that more study was needed, particularly in view of the proposed limits on command control and the fact that the legislation did not cover the Navy.[10] After a vigorous debate, the amendment was adopted by a mere 5 votes.[11] The House, which had previously passed the Elston Act as a freestanding bill, readily agreed to include it in the conference report on the selective service legislation. In that form, the Elston Act was approved by the President.[12]

THE 1948 LEGISLATION IN PERSPECTIVE

Passage of the Elston Act was of critical importance for three reasons. First, it fundamentally altered the Army's military justice system by enacting many reforms that were later incorporated into the UCMJ, including: (1) the eligibility of enlisted members and warrant officers to serve on courts-martial; (2) the requirement for a pretrial investigation, at which the accused would be represented by counsel, as a precondition for referral of a case to a general court-martial; (3) minimum legal qualifications for the "law member," the predecessor of today's military judge; (4) making the law member responsible for ruling on virtually all issues of law; (5) protections against self-incrimination, including an exclusionary rule and a rights warning requirement; (6) a complete record in cases involving a bad-conduct discharge; (7) appellate review prior to execution of a punitive discharge; (8) a prohibition against unlawful command influence; (9) minimum qualifications for counsel; and (10) authorization for the boards of review (currently denominated as the Courts of Criminal Appeals) to weigh the evidence and consider matters of fact and credibility.[13]

These provisions have considerable contemporary relevance. For many provisions of the UCMJ, an authoritative legislative history cannot be based solely on the UCMJ hearings and debates. For these issues, the essential decisions are reflected in the hearings, reports, and debates about the Elston Act that took place two years prior to passage of the UCMJ.

Second, the Elston Act was pivotal because it fueled the appetite for reform by focusing attention on the significant differences between the revised Articles of War and the unchanged Articles for the Government of the Navy. Continuing public interest in the Navy's court-martial system, as well as unification of the armed forces in the newly established Department of Defense, led the Secretary of Defense to appoint the Morgan Committee, whose work provided the basis for the UCMJ.[14]

The third key influence of the Elston Act was that it established the balanced approach to military justice that Congress would employ thereafter - recognizing

the disciplinary needs of commanders by retaining unique military offenses and procedures, while simultaneously providing service members with a number of rights more expansive than those available in the civilian sector, such as the right to counsel at trial and on appeal regardless of indigence, automatic appeal of felony-type cases, expansive appellate powers, and self-incrimination rights and warnings, even for persons not in custody.

"The military justice system has evolved over the last 50 years and will continue to evolve as changes occur in the armed forces, our society, and the world at large. The basic structure, however, has not changed. The fundamental balance of disciplinary power and individual rights remains."

Two years later, in 1950, the UCMJ refined the Elston Act, extended reform to the Navy, and established our Court to provide civilian appellate review, thereby creating the modern structure of military justice.

CONCLUSION

The military justice system has evolved over the last 50 years and will continue to evolve as changes occur in the armed forces, our society, and the world at large. The basic structure, however, has not changed. The fundamental balance of disciplinary power and individual rights remains. The ability of the system to accommodate change while maintaining its basic integrity is a tribute to the wisdom and foresight of the citizens of the World War II generation. They diligently applied the lessons of their personal experiences and provided the men and women of the armed forces with a military justice system worthy of their generation's sacrifices in the cause of freedom.

[1] Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 108 (1950).

[2] Act of June 24, 1948, Pub. L. No. 80-759, ch. 625, tit. II, 62 Stat. 627 (1948).

[3] For a description of the impact of the World War II experience on the post-War military justice debates, *see, e.g.* JONATHAN LURIE, ARMING MILITARY JUSTICE ch. 6 (1992); WILLIAM T. GENEROUS, SWORDS AND SCALES ch. 4 (1973). *See also* 94 Cong.

[4] H.R. Rep. No. 79-2722 (1946).

[5] Hearings on H.R. 2575, to Amend the Articles of War, Before a Subcomm. of the House Comm. on Armed Services, 80th Cong. (1947).

[6] *See* H.R. Rep. No. 80-1034 (1947); 94 Cong. Rec. 217 (1948) (passage of H.R. 2575).

[7] Articles for the Government of the Navy, Rev. Stat. § 1624. *See* H.R. Rep. No. 81-491, 64-76 (1949).

[8] 94 Cong. Rec. 7510.

[9] 94 Cong. Rec. 7518 (1948).

[10] *See id.* at 7520-21 (remarks of Sen. Gurney, including correspondence from Secretary of Defense Forrestal).

[11] *Id.* at 7525.

[12] Act of June 24, 1948, Pub. L. No. 80-759, ch. 625, tit. II, 62 Stat. 627 (1948).

[13] *Id*. Arts. 3, 4, 8, 11, 13, 24, 46, 50, 88.

[14] *See, e.g.,* Lurie, *supra* note 4, ch. 7.

REFLECTIONS ON THE CODE: Eight Former Air Force TJAGs Look Back at Significant Developments in Military Justice Since 1951

On 14 April 2000, six former Air Force Judge Advocates General attended the 50th Anniversary of the UCMJ Symposium, at Maxwell Air Force Base, Alabama. They held a panel discussion, with Colonel James Van Orsdol acting as moderator, to discuss their reflections on significant developments in military justice during their careers and tenures as TJAG. The panel discussion, along with the rest of the Symposium, was videotaped. Copies of these tapes are available for loan from the AFJAG School. Major Generals Vague and Nelson were unable to attend the Symposium, but generously made contributions to this article, which summarizes the comments and insights of all eight surviving Air Force TJAGs. Their combined military careers span the entire 50-year history of the UCMJ and more. We hope you find these comments interesting and thought provoking as we approach the 50th Anniversary of the UCMJ's effective date on 31 May 2001. Text in italics summarizes the introductory comments of Colonel Van Orsdol and indicates notes by the editor.

MAJOR GENERAL HAROLD R. VAGUE

General Vague enlisted in the Army Air Corps in March 1942. He attended aviation cadet training, and was commissioned in June 1943. He Flew 25 combat missions as a B-17 navigator in the European Theater of Operations during WW II. After the war, he returned to the University of Colorado to finish his law degree. After graduation, he reentered active duty as a navigator, and later became a judge advocate. He served as TJAG from October 1973 to October 1977.

The most significant change in the military justice system during my tenure as TJAG occurred on 12 December 1973, when I signed a letter establishing the Area Defense Counsel (ADC) program on a worldwide basis for the Air Force. This was the culmination of some two years of work, including a six-month trial in one judicial circuit and an evaluation board consisting of both senior commanders and JAGs that recommended the final action. Due credit for much of this must be given to my predecessor TJAG, Major General James S. Cheney (TJAG from September 1969 to September 1973*)*. Both he and I had, as combat flying officers and non-lawyers during World War II (General Cheney flew 57 combat bombing missions), tried cases under the Army 1928 Manual for Courts-Martial, and as lawyers we tried them under the 1949 Elston Act (reforms to the Articles of War, which directly preceded adoption of the UCMJ).

We were well aware of the negative perception held by some during that era regarding the quality, loyalty, and independence of appointed Defense Counsel. General Cheney was also a member of a DoD task force charged with investigating possible racial bias in the military justice system, but which also recommended consideration of an independent defense counsel concept. As his Assistant TJAG (*now known as the Deputy Judge Advocate General*) from 1970 to 1973, and with the able assistance of such JAG staff members as Colonels Bill Kenney and Bill Burch, we hammered out the details of the Area Defense Counsel program, and put it in motion.

"The most significant change in the military justice system during my tenure as TJAG occurred on 12 December 1973, when I signed a letter establishing the Area Defense Counsel (ADC) program on a worldwide basis for the Air Force."

I have always been extremely proud that the Air Force was the leader in this program, which was eventually adopted by the other services. In addition, I truly believe that the ADC program has been successful, as have many other aspects of the Air Force's military justice system, because the command structure of the Air Force wholeheartedly supported it in every detail recommended by the JAG Department.

MAJOR GENERAL WALTER D. REED

General Reed enlisted in the Army Air Corps in August 1943, and later entered the aviation cadet program. He was commissioned and assigned to a B-29 Bombardment Group at Salinas, Kansas. He was re-

leased from active duty in 1946, and entered Drake University, where he graduated from the College of Commerce and the School of Law. He was recalled to active duty as a judge advocate in 1951, just as the UCMJ took effect. He was TJAG from October 1977 through August 1980.

I was at Randolph Air Force Base a few months before the act of May 5, 1950, became effective, so I served through the transition from the old blue book (the 1949 Manual for Courts Martial) and the Articles of War to the new Uniform Code of Military Justice. The implementation of the UCMJ was a truly great event in providing some sweeping changes that ensured fundamental safeguards for the rights of individuals and for judicial fairness. I would even rank it as one of the most important historical events of any kind in the area of individual liberties.

> *"The enactment of the UCMJ ... provided the same safeguards to military personnel that civilians were provided by the Constitution. In fact, the rights afforded to military members are actually far superior to those rights upon which civilians may rely in virtually any civilian jurisdiction."*

The UCMJ has the character of providing individual safeguards that were sometimes treated in a cavalier manner before its adoption. When the Bill of Rights was established in 1791, the population of the United States was about four million people. When the UCMJ went into effect, the Armed Forces were building up to 5.7 million members. So, the enactment of the UCMJ had an impact on more people at the time it took effect than did the Bill of Rights. An opinion of a military court prior to the effective date of the UCMJ held that military personnel were not entitled to many of the protections afforded by the Bill of Rights. The enactment of the UCMJ was an important milestone in restoring to military members the rights that civilians enjoy under the Constitution and the Bill of Rights. Commanders now had to deal with the UCMJ, and commanders found it just a little bit different from what they were used to. In many ways commanders did have a difficult time adjusting to the new environment under the UCMJ.

Prior to the enactment of the UCMJ, commanders could unfairly railroad military members if they were so inclined. The enactment of the UCMJ effectively put an end to such practices, and provided the same safeguards to military personnel that civilians were provided by the Constitution. In fact, the rights afforded to military members are actually far superior to those rights upon which civilians may rely in virtually any civilian jurisdiction. The right against self-incrimination, the right to counsel, the right to present evidence before charges are referred to trial, are just a few of the individual rights that are more jealously guarded by the UCMJ. For these reasons, the creation of the UCMJ really does rank among the greatest historical achievements in the advancement of individual liberties.

MAJOR GENERAL THOMAS B. BRUTON

General Bruton earned both his undergraduate and law degrees at the University of Colorado, and later took masters degrees from both George Washington University and Auburn University. He was commissioned though the Air Force ROTC program, and entered active duty as a judge advocate in September 1954. He was TJAG from September 1980 to September 1985.

My tenure as The Judge Advocate General included passage of the Military Justice Acts of 1981 and 1983 (which made a number of significant changes, including the addition of Article 112a, for drug abuse), as well as the 1984 changes to the Manual for Courts-Martial. Most of these changes sprang from recommendations made by the Code Committee. The Committee got most of its input from the Air Force and Colonel Dick James, an expert in military law. When Colonel James would brief me on the Committee's progress, I had one item that I emphasized, and that was that we wanted to keep the 'military' in the military justice system. We didn't want the military justice system to be a system run by lawyers for lawyers, dispensing their military justice wisdom on the great unwashed. We wanted commanders to play a significant role; we wanted someone who was punished to know that it was a commander who imposed the punishment. In short, we wanted commanders to dispense justice.

I'd also like to discuss another area of the military justice arena that required my attention while I was TJAG. Military judges (whose statutory position was created by the Military Justice Act of 1968) began to perceive that they were not among 'the anointed' in the JAG Department. They did not consider themselves second-class citizens, but seemed to feel they were on a career track that went nowhere. Their con-

cerns had less to do with getting promoted than with a sense that what they did for the Air Force simply wasn't appreciated. As is often the case, perception became reality. We sought to enhance the prestige, respect and deference accorded military trial judges, and we sought to do this not just among fellow judge advocates, but among the rest of the Air Force as well. We made sure that Career Management (now known as Professional Development) assigned those officers with the greatest potential to the trial judiciary. We also sought to assign successful base SJAs to the judiciary. SJAs had a wealth of experience to draw upon and basic knowledge of the day-to-day workings of the Air Force. In my view, their worldly wisdom makes them excellent trial judges. Ultimately, we wanted observers to see that an assignment as a judge was not a negative career move. I believe we were successful in dispelling that negative image and restoring a positive image to the judiciary.

"We sought to enhance the prestige, respect and deference accorded military trial judges, and we sought to do this not just among fellow judge advocates, but among the rest of the Air Force as well."

MAJOR GENERAL ROBERT W. NORRIS

General Norris earned both his undergraduate and law degrees at the University of Alabama. He was commissioned though the Air Force ROTC program, and entered active duty as a judge advocate in March 1955. He was released from active duty in 1957, and recalled to active duty in 1959. He was TJAG from September 1985 to June 1988.

When you look back over the events of fifty years, it's like looking out over the tops of trees. Just as some of the trees are taller than others, some of the events loom larger than others. The event I would like to discuss is the formation of the Area Defense Counsel program.

I had the privilege of working for Major General James S. Cheney. General Cheney was a visionary. He was a navigator who flew out of England in WWII. He had a year and a half of law school, but he was not a lawyer. When his combat tour was over, he was assigned to JAG responsibilities. He tried a large number of courts-martial even though he was not a lawyer. After the war, he returned to law school and became a JAG. He became TJAG in 1969. I worked for General Cheney in Career Management. One of his greatest thrills was his assignment as a member of the DOD Task Force for the Administration of the Military Justice System. It was a very disruptive time in the civilian community (the Vietnam War, and the draft to support it, were both in full swing, and there were many antiwar protests), and we were experiencing a lot of military justice problems we didn't have during WWII or the Korean War. It was a very divisive time. General Cheney had already seen the separation of military judges from command, and through his experience as a member of the Task Force, he became convinced that an ADC program was likewise necessary to eliminate the perception that the military justice system was unfair. He told me he didn't see any abuses of command influence, but his experience on the Task Force revealed that the perception among the troops was that the system was not fair. General Cheney was instrumental in getting the Task Force to recommend a separate defense counsel program, and the Secretary of Defense approved that recommendation immediately.

General Cheney directed that a plan be put together and implemented immediately. We in Career Management were tasked to draft a seven-month plan and to put the plan into action. It was a daunting task and there was a lot of hand wringing. The military justice experts determined how many defense positions were needed and where they would be located. We at career management were then charged with securing the manpower positions to accommodate the newly created defense slots and with identifying the judge advocates that would fill them. It was a massive undertaking. Many base SJAs were not happy, and with good reason. When we identified a base that needed a defense counsel, that position came from the base office, and, in most cases, so did the attorney to fill the slot. After General Cheney retired in 1973, his successor, Major General Harold R. Vague, put the ADC plan into action just three months later. There were bumps along the road, but it worked. We assured the defense counsel that they were independent. Some took it a little too much to heart, and thought they would demonstrate their independence by not wearing the uniform. One ADC even wrote an underground newspaper out of his office! Despite these growing pains, the ADC program has proven to be an overwhelming success.

MAJOR GENERAL KEITHE E. NELSON

General Nelson earned both his undergraduate and law degrees at the University of North Dakota. He was commissioned though the Air Force ROTC program, and entered active duty as a judge advocate in August 1959. He was TJAG from June 1988 to May 1991.

I entered active duty at Chennault Air Force Base, Louisiana: a base which now exists only in memories and history books. The day I arrived, in 1959, however, I had five court-martial cases waiting for me. Over the next two plus years, I tried over 300 cases. The decline in the number of courts-martial causes me concern. My view on this is summed up by a simple rule: "The more you do, the better you get at doing things." The lack of courts-martial Air Force-wide is depriving new counsel of the opportunity to learn and perfect their litigation skills on the job. As an SJA, I was neither concerned about the complexity of a case, nor the chances of losing a case. Every time a case properly proceeded to trial, my attorneys were provided an opportunity to litigate.

As others in this article have noted, the significance and impact of establishing an independent defense arm within the Judge Advocate General's Department was a significant development in the way we administer the UCMJ. I was serving as Staff Judge Advocate at Royal Air Force Station, Bentwaters, England, when survey teams were dispatched Air Force-wide to inquire into the feasibility of the proposed defense counsel program. Interestingly enough, this initiative fell on the heels of the establishment of the judiciary and the introduction of military judges to replace law officers (judge advocates who served a function similar to that of military judge, on an ad hoc basis, prior to 1969). Initially, I was not in favor of losing the ability to train and mentor the young judge advocates who would be Area Defense Counsels (ADCs). I was actively involved in training my attorneys from both sides of the bar. Trial counsel were required to have their trial brief on my desk three days prior to trial and defense counsel had to make their trial brief available to me immediately following the case. If issues arose during trial, I would do my best to answer the defense counsel's questions, but only if counsel requested assistance. After trial, in addition to reviewing the trial brief, all legal issues that arose during the trial were discussed. I took great pride in developing and nurturing these attorneys. Although I did not like the idea, I understood the perceptions upon which the ADC program was based and, in hindsight, I believe it was the right decision and the right time to create an independent defense function.

When the ADC program was established in 1974, I found myself as the Chief of Career Management, responsible for assigning judge advocates to these newly created positions. I had to establish a viable assignment process, including the concept of moving counsel from the legal office to defense counsel billets (permanent change of assignments) and then making PCS assignments for ADCs to other installations at the end of their tours as defense counsel. The one miscalculation in the process was the impact of making this change at the end of the Vietnam Era. Some of the Department's malcontents saw the move to an ADC as an opportunity to wreak havoc within the system. The number was few, but it was enough to create some embarrassing incidents within the Department. At a minimum, it certainly established the need for ensuring that the most experienced attorneys, mature, and best-qualified officers were selected to be ADCs.

The nuances of the UCMJ and its impact on our Department are not limited to the active duty side of the house. I was stationed in Europe during the Berlin Blockade and saw first hand the importance of involving our Reserve judge advocates in the process. I recognized that we were calling attorneys to active duty and forcing them into situations that they were not competent to handle. Reservists, who traditionally only handled legal assistance and administrative duties, were thrust into the arena of military justice. Many were unable to adequately draft specifications or advise commanders. This was a function of training, not ability. As Staff Judge Advocate for Tactical Air Command and later Strategic Air Command, I focused my sights on properly training Reserve judge advocates in all areas of the law. As the Deputy Judge Advocate General, I continued my commitment to the Reserves and initiated further programs to properly equip Air Force reservists with the tools they would need in the field. This included training requirements and checklists designed to ensure reservists maintained a level of proficiency commensurate with their duties at home and abroad. This issue was so significant to me that I continued to oversee the program's development after becoming TJAG.

Another important aspect of the history of the UCMJ has been the steady development of an independent and respected appellate function. I became a part of that history in 1988, when I acquired the distinction of being the only Air Force TJAG to file an *amicus curiae* brief with the, then, United States Court of Military Appeals (COMA), in the case of *U.S.*

Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (CMA 1988). The brief was filed on behalf of the United States Navy-Marine Corps Court of Military Review, and addressed whether judges of that court could be ordered by the Navy TJAG to appear for interviews by the DoD Inspector General amidst allegations of bribery and improper influence. COMA was concerned with protecting the independence and impartiality of military tribunals, and ultimately granted relief by appointing a Special Master to oversee the investigation. The court praised the quality and usefulness of the *amicus* briefs in its opinion, which was a proud moment for the Department.

In closing, I offer a word of advice to new judge advocates: If you ever doubt your choice to become a JAG, look around at, and talk to, civilian attorneys. The Air Force offers its attorneys responsibility, a sense of purpose, and growth. Best of all, judge advocates enjoy a teamwork approach in their profession, a commodity unheard of in the civilian sector.

MAJOR GENERAL DAVID C. MOREHOUSE

General Morehouse is a graduate of the University of Nebraska, Lincoln, and Creighton Law School. He received a direct commission as a judge advocate and entered active duty in August 1960. He was TJAG from May 1991 to July 1993.

I'd like to discuss something that's very important to me, the role of commanders in the administration of military justice. Five of my assignments and 11 of my 33 years were as a staff judge advocate. My first SJA assignment was at Bin Hoa Air Base, Vietnam, in 1968. It was quite an exciting time in Vietnam. We tried 52 courts-martial in one year. The records of trial were not things of beauty. They were banged out on typewriters, and we didn't have time to correct many of the typographical errors. The legal staff worked hard, the commanders worked hard, and the court members worked hard. There was no trial by judge alone in those days, and judges did not preside at special courts-martial. It was a great difficulty to get court members under those circumstances. Everyone was very busy, and no one wanted to tear themselves away from their duties to serve as court members. While that frustrated me, I always considered that healthy. I always worried (especially as a defense counsel) about having a member on the court who wanted to be there. I am a firm believer that military justice, properly run, responsive, timely, and very visible, is absolutely indispensable to the mission. And the mission is readiness--readiness to fight and to win. Major General Harold R. Vague had a sign painted on the front of his office that said: "The mission of the United States Air Force is to fly and to fight and to win, and don't you ever forget it." And I never will.

Discipline doesn't mean depriving people of their rights, it means unit cohesion, it means morale and *esprit de corps*, and it means the willingness to go fight and maybe die. It requires high standards of personal and professional conduct. It means preparing people to accomplish the mission. When we run a military justice system that enforces discipline, everybody is watching. We have a responsibility to all those observers to make sure that the system works. I can assure you that commanders are just as attuned to that necessity as any JAG. We have a responsibility to those commanders to make sure the military justice system works so they can accomplish the mission.

"I am a firm believer that military justice, properly run, responsive, timely, and very visible, is absolutely indispensable to the mission. And the mission is readiness--readiness to fight and to win."

Historically, special court-martial authority wasn't exercised by the wing commander, but by the combat support group commander. Military justice wasn't perceived as important enough to warrant the time and attention of the wing commander, even though wing commanders are responsible for unit cohesion, morale and readiness. With that responsibility should come the authority for making decisions in the military justice arena. That perception began to change in Europe in the early 1980s. Special court-martial authority started to be moved to the wing commander where it belonged, to the person who was responsible for the readiness of the wing. I saw to it that we made that change at Strategic Air Command (SAC) about 1985. I had to work at it for quite some time with the SAC Commander-in-Chief before he agreed to implement the change. Wing commanders were happy with the status quo, but once they took on the responsibility of special court-martial convening authority, you couldn't have taken it back without a war. They quickly realized just how important a good military justice system was to their mission. Commanders must be involved in the military justice decision-making process. JAGs must make sure the military justice system is run absolutely fairly. Military justice is still "Job One" for base SJAs, and they must also see to it that the commander's involvement assures due process. If due process isn't assured today, in this very visible society,

discipline will suffer.

MAJOR GENERAL NOLAN SKLUTE

General Sklute is a graduate of Union College, New York, and Cornell University School of Law. He was commissioned through Air Force ROTC, and entered active duty as a judge advocate in January 1966. He was TJAG from August 1993 to February 1996.

I came on active duty in January 1966. I arrived at Luke AFB, Arizona, and my boss, who was then a major, welcomed me to the base and handed me a copy of the 1951 Manual for Courts-Martial, the old red book, and said: "Could you be ready to try a case as assistant trial counsel next week?" I had just graduated from law school, had been clerking for a firm in Ithica, New York, and had never been west of Buffalo, New York, before. Now, my first day on the job, way out in the land of Arizona, I was being asked to try a court-martial within a week. I think of that incident, and then I think about where we are today with training our counsel: our defense counsel, trial counsel, and judges--it is just unbelievable where we've been over the last 30 years. The great strides that have been made in military justice are phenomenal: The Area Defense Counsel program that General Norris talked about, the various amendments to the Code and MCM that occurred during the careers of these panelists (e.g., the advent of military judges, direct appeal from military courts to the US Supreme Court, expanded jurisdiction over Reservists, adoption of the Military Rules of Evidence), and the role of commanders in the system--how that has progressed over the years.

I was going to discuss the Blackhawk case exclusively (a friendly fire incident in April 1994, in which two F-15s accidentally shot down a US helicopter over Iraq, killing 26 people), and accountability, but instead I'd like to discuss two broader concerns I have about our military justice system - problems that I have seen developing over the last several years. One is the recent politicization of the system in certain cases, and the other is, not unlawful command influence as the UCMJ defines it, but rather certain cases that are <u>not</u> sent to trial by commanders. You may say, "that's the role of the commander; he's in charge of the system," and he is, as he should be, but we judge advocates ought to be concerned about such cases. I'm not going to talk about the Lieutenant Kelly Flynn case. I'll leave that up to General Hawley, since that was on his watch, but there are a number of cases that have sent terrible messages across the Air Force and the country. The Navy experienced their share of that, as did the Army; we've all had our share of that, but we as judge advocates must be concerned about those cases.

If only the role of Washington was to set the system up and let it run, it would be marvelous, but, unfortunately, it doesn't always work that way. Extensive media coverage has caused some cases to go the wrong way. Now, I'm not talking about cases that could go either way--close call cases--but obvious cases, the result of which no reasonable person would disagree, which do not go forward to trial. I have seen cases where retirements have been accepted in lieu of court-martial, that should have gone forward to trial. I have seen cases, one of which occurred in USAFE several years back, in which an individual was not sent to trial because of influence coming from Washington, all on the political side. How do you deal with that on the military justice side? How do you deal with avoiding politicization of the system? How do you avoid individuals exercising their prerogatives to ensure a case doesn’t go to trial because of media coverage or congressional concerns? I don’t know what the answer to that is. How do you avoid situations that occurred, for example, in the Blackhawk case?

In that case, 26 people were killed in a very, very serious friendly fire tragedy. General Fogleman (*then AF Chief of Staff*) went back and reviewed the records of the officers directly involved in the incident, and found that some of those people received the highest ratings possible in every block on their officer performance reports. How do you respond to that? His response was to go to the Secretary of the Air Force, and ask her allow him to review each and every case. He was not trying to determine whether judicial action should be taken. He obviously couldn’t do that, nor did he want to, because he thought the military justice system had worked fine. He wanted to see whether the overall disciplinary system, which is what the young airman is looking at, had sent the right message.

He reviewed the case and those records, and took action on his own: letters of reprimand and other administrative actions, to ensure that the records of those individuals were documented appropriately. There was then a lot of media coverage about General Fogleman’s actions, and some thought the pendulum of accountability had swung too far the other way. Maybe it had. When General Ryan became Chief of Staff, he reviewed the accountability system in the Air Force and the changes that were made by General Fogleman, and he determined that the pendulum should be brought back toward the center, and certain instructions were again revised.

How do judge advocates play in this system when it comes to accountability? Is that something that belongs to the personnel community, or when judge ad-

vocates look at discipline, should they be looking at discipline in a bigger box? I suggest we should and that we as a whole do. So, in closing, let me say that while we've had some wonderful successes in the military justice system, as judge advocates we need to be ever-vigilant for politicization and be prepared to express to commanders, in no uncertain terms, where we think cases ought to go regardless of those outside pressures. We may have to fall on our swords, or at least spill a little blood in the commander's office, to make our views known, and I have seen our JAGs do that many, many times. Having done that, if a commander decides he's not going forward with a case, our job is to salute and carry on.

MAJOR GENERAL BRYAN G. HAWLEY

General Hawley earned both his undergraduate and law degrees at the University of North Dakota. He received a direct commission as a judge advocate and entered active duty in October 1967. He was TJAG from February 1996 to January 1999.

During my tenure, two statutory changes to the UCMJ were made. One was strictly a technical amendment of the provisions for automatic forfeitures of allowances (under Articles 57(a) and 58b, UCMJ) that exceeded the jurisdiction of a special court-martial. So, they said you could not longer have automatic forfeitures of allowances in a special court-martial. The second change to the Code was more interesting, and hit home immediately. It provided for a sentence of confinement for life without the possibility of parole as a punishment for certain serious offenses as an alternative to capital punishment.

I'll discuss the Flynn case in a moment, but wanted to highlight one of the other interesting things that happened in the National Defense Authorization Act of 1998, and that is the little-known story of how we got the Blair Commission (the ten member "Commission on Military Training and Gender-Related Issues," established by Congress in 1998, and chaired by Virginia attorney Anita K. Blair. Their mission was to review cross-gender relationships of members of the Armed Forces, especially in basic training programs, and to make recommendations on improvements to those programs, requirements, and restrictions. This included an assessment of the laws, regulations, policies, directives, and practices governing personal relationships between men and women in the Armed Forces, and an assessment of the consistency with which they were applied relative to the service, sex, and rank of those involved).

You may recall that the Blair Commission came on the heals of the Kassebaum-Baker Commission, which also had to do with training. (They specifically studied gender-integrated basic training, and recommended that the services adopt the Marine approach of gender-separate basic training; the Army, Air Force, and Navy all declined to do so.) We also had the DoD Under Secretaries, General Counsel, and IG, along with the Vice Chiefs of Staff of all the services, working on "good order and discipline" issues that arose out of the Flynn case. The Good Order and Discipline Group came to be fondly known in the Pentagon as "GOD," and the question was: "What's GOD going to do with all these different service policies?" Of course, the big one they ultimately dealt with was fraternization. At the same time, apart from those things going on, we also had the DoD General Counsel looking at the guidance in the Manual for Courts-Martial on the factors commanders should consider in the disposition of adultery cases.

So, I can say, without question, that for the last year and a half that I was in Washington, most of my time was spent dealing with these committees and commissions and all the different levies they put on our Military Justice Division. That division worked 18 hours a day gathering historic data about adultery and fraternization cases (numbers of cases, gender of the accused, rank, whether they were handled by general or special courts-martial, Article 15s, etc.), to the point where they began to refer to themselves as "Stats-R-Us," like the toy store chain, Toys-R-Us. It was a very interesting time, and it all started with Lieutenant Kelly Flynn (a female B-52 pilot who was charged with disobeying orders, false official statements, and adultery, all stemming from an affair she had with the spouse of an enlisted woman assigned to her installation).

During my career, I had the opportunity to see the three best things to happen to our military justice system in its entire history, excluding the adoption of the UCMJ and the 1951 Manual of Courts-Martial itself. The first of these was the Military Justice Act of 1968, which gave us the position of military judge, starting in 1969. I wish General Vague could have been here today. My first duty assignment was at Castle Air Force Base, California, and, then Colonel Vague was the Staff Judge Advocate at 15th Air Force, which was our general court-martial convening authority. Back then, Strategic Air Command (SAC) and 15th Air Force had an airplane that flew to all their bases every week in a big circle. You could catch it on Monday and usually get back home by Friday. All of our law officers (precursors to military judges) in general

courts-martial were sitting SJAs at 15th Air Force bases. They would hop on a plane and show up to do courts at other bases in the NAF. Of course, those of you who have been SJAs know that is about the last thing you have time to do--go out and be a military judge while still trying to keep things running back at your own office. But that's how we did it prior to 1969.

In special courts-martial we had an even more interesting experience. Today, we worry about the "commander's unspoken presence in the courtroom." Well, in those days, it wasn't unspoken--he was quite literally there, running the show. Castle was the only training base in SAC, and we did a lot of special courts. The president of a special court-martial did not have to be a JAG, and he was often a battle-tested, Korean War pilot--usually a lieutenant colonel, who was now an instructor pilot or navigator. Typically, these officers had been members of 60 or 70 courts-martial. Then as trial counsel we were was supposed to advise the president how to rule on evidence and objections, and often we were bluntly told "sit down, I think I understand that!" It was a different time, and a completely different experience than JAGs get today.

General Vague did something else that leads me to discuss what I see as another significant improvement in military justice. Our SJA at Castle was unfortunately relieved after I had been there for about a month. That left four first-term captains to do about 40 to 50 courts a year, along with lots of administrative discharges and Article 15s, and everything else it takes to run a legal office. Our SJA was not replaced for eight months, and we ran the office by ourselves in the interim. Colonel Vague would call and check on us all the time, and with good reason, but he would never let any of us get off the phone until he asked an evidence question. If you got the answer wrong, you had to go look it up and call him back. That caused me to learn my rules of evidence thoroughly, so I could avoid those callbacks to the boss at the NAF. In retrospect, it was wonderful of him to do that. That appreciation for the importance of the rules of evidence is what makes me view the adoption of the Military Rules of Evidence (MREs), in 1980, as one of the most significant improvements in the system.

Not only did the MREs improve our daily practice, they helped to further legitimize our system in the eyes of our civilian counterparts. As a military judge, I had the good fortune to attend the National Judicial College as a student on more than one occasion. I met judges from all over the country, and as we talked and discussed problems in seminar, they were astounded at how well organized our system is and how much like them we are--that our rules of evidence are very similar to the Federal Rules of Evidence, etc. That recognition of our professionalism by the civilian judiciary goes a long way toward raising public awareness of what an outstanding system of justice we have in the military today.

Finally, I would echo those who have named the Area Defense Counsel system as a significant change. In my view, it made a huge difference. I had two assignments before the program came into being, and I didn't notice a big problem with the existing system. Judge advocates by nature are competitive, and were not afraid to zealously defend their clients. The program was adopted while I was teaching at the Air Force Academy. I left there to become an SJA in 1976, and it struck me that when young airmen learned I was a JAG, they would want to talk about the ADC program. So, it really did make a big difference in the perception of the troops that they were getting a better shake under the ADC system.

Getting now to Kelly Flinn. That was the worst three months (it seemed like three years!) of my career. Two things about it were difficult. First, there was the media, who developed a set story line fraught with inaccuracies, and then refused to budge from that story line regardless of the facts, data, etc. (the media focused on the adultery charge, and not the more serious integrity offenses). Despite the best efforts of the Department in Washington, and down the line to the MAJCOM, NAF, and base, to correct the inaccurate factual scenario, the media would not change their slant. Virtually none of the so called "facts" put out by the media about how we deal with cases and how we treat people were true. Apart from giving them raw numbers, we offered to let them look at any case they wanted, and to the extent that we had the information, we would give it to them. Absolutely no member of the media took us up on that offer. They'd ask for data, we would give it to them, and the next day the Washington Post would publish something that had nothing to do with what they had asked for, or the numbers would be wrong or mixed up. It was very frustrating.

The other factor in Flinn was politics. I can't explain why the case was ultimate disposed of the way it was (the Secretary of the Air Force approved Lt Flinn's request to resign in lieu of court-martial (RILO) and she was given a general discharge*)*. I simply don't know why it was resolved that way. I certainly have my suspicions. I can tell you this: We went from a situation where, in 1996, we had seven tendered RILOs that involved adultery or fraternization, and the Secretary did not accept any of them. She had been accepting about 10 percent of the 30 to 35 total RILOs submitted each year prior to that. Flinn's case was

decided in April of 1997. For the rest of 1997, in cases involving adultery and fraternization, she accepted about 50 percent of the tendered RILOs in cases involving males, and 75 percent of those submitted by females. This raised the acceptance rate of all RILOs submitted that year to nearly 60 percent. It became very difficult to provide guidance to the Chief of Staff and the field on what to expect and how to handle these cases. We did the best we could. It was a very gloomy period in my career, and I certainly would not wish it on anyone else. Nevertheless, I had a wonderful 31 years in the Air Force.

Explaining the UCMJ

Brigadier General Jack L. Rives
Colonel Bradley P. Grant

"It has been said that democracy is the worst form of government except all the others that have been tried." - Winston Churchill

"It is not the critic who counts ..." - Theodore Roosevelt

No system of criminal law is perfect. Each invites criticism for being too cumbersome or too prolonged, too harsh or too lenient. The Uniform Code of Military Justice provides a remarkably fair and effective system for the men and women of the United States military. It serves the special needs of the military to assure discipline, always within the framework of due process and justice that Americans expect. Much of the criticism of the UCMJ is unfair and unfounded, based on a lack of understanding of the current law or on inaccurate portrayals of the system. Practitioners under the UCMJ have an obligation to explain the system to both our internal and external audiences. Our celebration of the 50th anniversary of the UCMJ provides a great opportunity to focus on this issue. Those who have studied the UCMJ and worked under it recognize that it provides the basis for an incredibly fair and effective system of discipline in the military. With special application and a few exceptions that can be easily understood and accepted, the full range of protections that Americans expect from the criminal justice system apply to those in the military. But too often the media inaccurately reports on military justice and therefore, the American public fails to appreciate how the process really works. Those who practice in the system, both judge advocates and paralegals, best understand it and should speak and write on the subject to educate and reassure others.

After more than a quarter century of an all-volunteer military force, America's armed forces are largely unknown to the American public. In contrast to prior generations, fewer Americans have personal experience with the military and fewer of them have family members, friends or neighbors who have served in the military. While the American public is generally unaware of military matters, they are especially uninformed about the military justice system - they know little of how criminal law and disciplinary matters are handled in today's military.

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The Need for a Separate Criminal Justice System

Any explanation of military justice must begin with an appreciation of the need for a separate system of discipline in the military. Nations around the world recognize the unique responsibilities of military members and many countries have developed separate systems to handle disciplinary issues and criminal matters for the military. The United States is no exception. The United States military is deployed worldwide, but most criminal laws do not have extraterritorial application. It is important to have a system of criminal justice that can go where our troops go.

Furthermore, there are some "unique military offenses," or in other words, conduct that need not be made "criminal" in civilian life but can cut to the heart of military duties. For example, in civilian life people can opt to be disrespectful to a civilian boss or they can choose not to go to work or even to quit their job for any reason and with minimal notice. Those decisions are between the employee and the boss whereby any disagreement is a private matter that certainly would not rise to the level of a crime.

However, military members have profoundly important responsibilities for national security and commanders depend on them to live up to those responsibilities. These military duties require a disciplinary system that enables commanders to respond to misconduct as forcibly as may be necessary, including the possibility of criminal charges. While the consequences of a person choosing not to perform a civilian job are likely to be minimal, the consequences can be critical when a military member does not properly perform his or her duties.

The Proud History of Our Justice System

Our military justice system has a proud and ancient lineage. The military code of the Roman armies was a precursor to the British Articles of War, which led to the first Articles of War, enacted by the Continental Congress in 1775. Over the next century and three-quarters, the American military criminal code underwent only occasional and modest revisions. Those who entered the military understood that they would fall under a different system of justice than that in civilian life. As such, there was no grave concern over a severe system of discipline for the relatively few who chose to serve in the military.

Through the turn of the twentieth century, the separate, harsh system of military justice was substantially accepted. Then came the First World War with its requirement for a tremendous number of citizen-soldiers. Millions were exposed to military justice and many were very disturbed by the system. But after the Great War and the return to peacetime's massive downsizing of the military, there was no great push to make significant changes for the few who chose to serve in the military. World War I was viewed as an aberration as the United States quickly returned to a small standing army and, therefore, felt that there was no great need to change the military justice system. Then came the Second World War.

In World War II, 16 million American men and women served in the armed forces. There were an average of 60 general courts-martial a day during the war. Many people had very bad experiences with the military justice system, which, at that time, did not offer the protections Americans understood and expected from their civilian counterparts.[1]

Following the war, many organizations made proposals to improve the military criminal legal system. Leaders in this area were the American Bar Association, the American Legion, the Judge Advocate Association, and the New York Bar Association. Negative wartime disciplinary experiences generated great pressure on Congress to revise the Articles of War. It was clear that Americans in uniform needed a system that accommodated exigencies of the military but still conformed with American mores for justice.

James Forrestal, the first Secretary of Defense, did not want separate criminal law rules for the different branches of service. He wanted to have a uniform code that would apply in all services. Congressional deliberations ultimately produced the UCMJ, which was signed into law by President Truman on May 5, 1950. The UCMJ provided the substantial protections that Americans expected from their system of justice, and it did so in a framework that enabled military commanders to have the effective tool they needed to ensure discipline and readiness.

Few people understand the application of constitutional safeguards for military personnel. The Supreme Court decided in *Burns* v. *Wilson,* 346 U.S. 137 (1953), that constitutional protections apply to military members, except to the extent they are overridden by the demands of military duty and discipline. For example, the Fifth Amendment to the Constitution provides for grand juries, but by its own terms it does not apply to military cases. Consider how civilian grand juries sometimes continue in session for several years. Such a process could not work in the military.[2] Consider also how the Fourth Amendment protections against "unreasonable searches and seizures" is defined and applied differently in the military context.

When evaluating constitutional protections, the Court in *Miranda v. Arizona*[3] established certain rights and safeguards for suspects who face interrogation by police authorities. In comparison, Article 31 of the UCMJ established protections similar to *Miranda* for all military personnel only 15 years earlier. In fact, the safeguards for military personnel under Article 31 actually extend beyond those promulgated in *Miranda.* It was these protections and safeguards that Congress had in mind when it specifically provided for direct application of many constitutional protections when the UCMJ was enacted.

When a person commits a crime in civilian life, the authorities have two basic choices: either prosecute or ignore the criminal behavior. Those limited choices often cause the response to be too severe or too lenient. Yet, when a military person violates the UCMJ, commanders have substantial discretion to decide the best response and often consider a full range of actions from doing nothing to preferring criminal charges. For example, if a person is late to work, the commander's response can vary from no action to an oral counseling or letter of counseling, to an offer of nonjudicial punishment, or even to a trial by court-martial.

Comparing Military and Civilian Systems of Justice

One effective way to tell the story of the UCMJ and explain the fairness and effectiveness of military justice is to contrast the handling of an act of misconduct in the civilian and military sectors. The following scenario best depicts these differences.

After consuming too many alcoholic beverages, Haynes Johnson got in his car and began to drive home. Unfortunately, he crashed into a van, badly injuring the driver and several children. When authori-

ties arrived on the scene, they found an unregistered hand-gun and a pound of marijuana on the floorboard of Johnson's car.

What happens next? Assume that the accident occurs on Anywhere Air Force Base, which has concurrent state and federal jurisdiction. Now, consider what will happen based on whether we're dealing with *"Mr.* Haynes Johnson" or *"Sergeant* Haynes Johnson."

Rights Advisements and Right to Counsel

Mr. Johnson will be detained by the Security Forces only long enough to be turned over to the civilian authorities. Since there was a major accident involving an intoxicated driver possessing a large amount of drugs and an illegal weapon, Mr. Johnson will be on his way to the local jail. Prior to locking him in a cell, the civilian investigators will read Mr. Johnson the *Miranda* warning. For purposes of this scenario, assume that he will exercise those rights and request an attorney. Mr. Johnson will then be escorted to his cell and left to wait for his hearing to determine if and when he should be released.

> *Much of the criticism of the UCMJ is unfair and unfounded, based on a lack of understanding of the current law or on inaccurate portrayals of the system. Practitioners under the UCMJ have an obligation to explain the system to both our internal and external audiences.*

Sergeant Johnson, on the other hand, will be read his rights pursuant to Article 31 of the UCMJ. Again, assume he will exercise those rights and ask for an attorney. For the Air Force NCO, the attorney is the Area Defense Counsel (ADC). The ADC will be called and advised he has a client waiting to talk to him. In most cases the ADC will tell Sgt Johnson to exercise his right to remain silent and advise the investigators to terminate the interview. Rather than being escorted to his cell, Sgt Johnson's commander will be called and briefed on the situation. The commander must then make the decision, that night, whether to place Sgt Johnson into pretrial confinement or release him under some lesser form of restriction or no restriction at all.

Back to *Mr.* Johnson and his right to an attorney. If he is not indigent, he must provide his own attorney or represent himself. If he is indigent, he will either be represented by an attorney from the public defender's office or, in some jurisdictions, an attorney may be appointed from a list available to defend indigent defendants. These attorneys will frequently not be criminal law specialists. They are often paid very little for public defense work where it is not unusual for the defendant to meet the attorney for the first time just before a courtroom appearance.

Contrast this with *Sgt* Johnson's military counsel. Military defense counsels are well qualified and completely independent. Their sworn duty is to defend an accused to the best of their professional abilities. In the Air Force, an ADC is chosen from a base legal office. After gaining experience prosecuting cases, candidates are chosen to serve as ADC. The ADC then independently manages an office including a Defense Paralegal and other support staff. The ADC office is physically separate from the base legal office, and the ADC does not fall in the base chain-of-command. She or he reports to a Chief Circuit Defense Counsel, who reports in a judge advocate chain of supervision. Military defense counsels have full access to evidence on a worldwide basis, including all witnesses and experts/consultants. All of this is provided at no cost to the accused.[4]

Pre-Trial Confinement

The day after the accident (or as soon as possible), *Mr.* Johnson will meet with a magistrate to determine if he should be released from jail. If it is determined that Mr. Johnson may be released under bail, he must either produce that bail or utilize the services of a bail bondsman. This service costs upwards from 5% of the bail amount depending on the bail bondsman, and the money is not reimbursed to Mr. Johnson even if charges are dropped - it is the "cost of freedom."

If *Sgt* Johnson is ordered into confinement, his commander has 48 hours from this order to decide whether to continue the confinement. This decision must be in writing including an explanation of the reason for continued confinement. That decision is provided to Sgt Johnson and a reviewing officer. The reviewing officer then examines the decision of the commander within seven days of Sgt Johnson being ordered into confinement and, if it is determined Sgt Johnson should be released, that decision may not be reversed.

If *Mr.* Johnson is unable to "make bail" he remains in jail. His job may be in jeopardy should he fail to go to work. If he does get out of jail and needs to work with his attorney to prepare for his defense and he can only hope his employer will allow him the time to meet those appointments. There is no obligation for the employer to give Mr. Johnson time off for such appointments, and there is normally nothing to prohibit the employer from firing Mr. Johnson for failing to work.

Quite the contrary, *Sgt* Johnson continues to receive full pay and allowances whether he is in pretrial

confinement or not, and unless court martialed, his employment with the military will not be terminated. When he is released from confinement, he is given ample time to meet with his defense counsel to prepare his defense.

Pre-Trial Investigation

If *Mr.* Johnson is in a jurisdiction that utilizes the grand jury process, the grand jury must consider allegations against him before an indictment can be issued and a felony trial convened. Mr. Johnson's grand jury process is a closed proceeding conducted outside the presence of Mr. Johnson and his attorney. Neither will be there to cross-examine witnesses or produce defense evidence or witnesses. If there is an indictment it will probably be sealed. In civilian life, individuals may first learn of allegations against them when they are informed they have been indicted by a grand jury and ordered to stand trial.

While *Sgt* Johnson does not have the right to the grand jury process, the requirements of Article 32 of the UCMJ provide him broader and substantially better benefits. After charges are preferred against Sgt Johnson, and if command is considering a general court-martial, the government is required to run an Article 32 investigation which is similar in purpose to the grand jury. Under Article 32, however, Sgt Johnson is present throughout the hearing. He is also represented by counsel who has had the opportunity to fully prepare for the investigation. He has the right to present evidence. The defense can choose to "litigate" the case at the Article 32 and show either that the accused is not guilty or that his case should not be disposed of by general court-martial (i.e., a felony trial). He has the right to testify or to present any evidence he desires. The accused has the extremely important benefit of "discovering" the prosecution's case against him; that is, he can learn all about the government's evidence in the Article 32 investigation. The defense counsel can cross-examine all the prosecution witnesses and, should the case be referred to a court-martial, the information developed at the Article 32 hearing may be used court.

Jury Qualifications

In the event *Mr.* Johnson's case goes to trial, he will be tried by a "jury of his peers" randomly selected from the community. But most jurisdictions allow very liberal release from jury duty, which can mean under-representation by the better educated and more affluent. Most courts allow multiple peremptory defense challenges of prospective jurors and unlimited challenges for cause.

In the military system, a statutory responsibility of the convening authority under Article 25(d) of the UCMJ is to select court members. This law requires a convening authority to choose members who are best qualified to serve on courts based on their age, education, training, experience, length of service, and judicial temperament. Although the defense is allowed only one peremptory challenge, unlimited challenges for cause are permitted.

Command influence is frequently discussed. It is an important part of military justice because commanders are responsible for administering the military justice system. Positive involvement by commanders is necessary to maintain discipline within the system. Commanders are very interested in making sure the disciplinary process is both open and fair, and also that it is perceived to be fair. Although throughout military history there have been problems of unlawful command influence, the law specifically requires commanders to avoid certain types of activity and it is a violation of the UCMJ for commanders to cross the line into unlawful command influence.[5]

Trial Procedure and Expenses

In the event there is a trial, both Mr. Johnson's and Sgt Johnson's trial will be governed by very similar rules of procedure and evidence. However, as a general rule, *Mr.* Johnson will have to pay for witness costs (e.g., travel costs, expert witnesses), while *Sgt* Johnson will be provided witnesses at government expense.

Guilty Plea Inquiry

Depending upon the jurisdiction, should *Mr.* Johnson decide to plead guilty, he might be adjudged guilty based on his plea alone. However, should *Sgt* Johnson decide to plead guilty, the trial judge conducts an exhaustive inquiry to ensure that the accused understands his full range of rights and is only pleading guilty because he is guilty and understands that, absent the guilty plea, the government would be forced to prove guilt beyond a reasonable doubt.

Non-Unanimous Verdicts

The randomly selected jury in *Mr.* Johnson's case will need to vote unanimously to convict or acquit Mr. Johnson. In the event they cannot reach unanimity, they become a "hung jury." Most jurisdictions provide for a retrial of Mr. Johnson, during which new evidence can be presented against him, and thereby, better assuring a conviction. *Sgt* Johnson's court members must usually vote to convict by a two-thirds majority. Any vote less will result in an acquittal. There is no hung jury or retrial in the military.

Automatic Appeal

When convicted, *Mr.* Johnson normally will not receive an automatic appeal. Most civilian trial defense counsel have little experience handling cases on appeal. However, *Sgt* Johnson receives an automatic review, first by the convening authority and then, de-

pending on the approved sentence, by a service appellate court. He will be provided an officer who is an experienced trial advocate currently assigned to full-time duties as an appellate defense counsel.

The service Courts of Criminal Appeals are required by the UCMJ to determine if the record of trial supports both the findings and sentence as approved by the convening authority. Very few appellate courts, other than the military Courts of Criminal Appeals, are able to reverse convictions if the appellate judges, based on the trial record, are not convinced of guilt beyond a reasonable doubt. If the service court rules against an individual, the appellant can appeal to the United States Court of Appeals for the Armed Forces (USCAAF). USCAAF is comprised of five civilian judges, appointed to 15-year terms. Adverse decisions from USCAAF may be appealed directly to the United States Supreme Court on a writ of *certiorari.*

Costs of Appeal

Throughout the appellate process *Mr.* Johnson will have to pay for the expenses associated with the appeal if he is not indigent, including payment for required copies of transcripts of his trial. *Sgt* Johnson, on the other hand, receives all those services free of charge including his own personal copy of the transcript.

During this entire process, from the time Haynes Johnson was apprehended on base, *Mr*. Johnson was paying expenses out of his pocket, juggling his schedule to meet his attorney and attend court dates, and trying to keep up at work. If he was not released from confinement or was attending many defense meetings and court dates, he may have been terminated from work because he wasn't available for the job. *Sgt* Johnson's defense was free and he was not required to report for duty when it conflicted with the preparation of his defense or a court date. Even if Sgt Johnson had been required to go to a civilian court, his job and his pay would be secure through the time he was convicted.

This quick overview demonstrates the safeguards and fairness that are built into today' s military justice system. It also highlights the clear benefits to the accused in the military system. It is a separate and unique system but nonetheless meets the expectations for fairness and the protections of individual rights. Americans, now firmly ensconced in the era of an all volunteer military force, would not send their fellow citizens into a system that did not comport with notions of due process and a fair trial. Such safeguards are vital to the system designed by Congress and implemented by the President for today's military.

The Legacy of the *Flinn* Case

A few years ago, the case of Air Force Lt Kelly Flinn engendered a lot of criticism for the military justice system. But much of that criticism was unfounded and unfair.[6] In *Flinn,* the defense had a case that was hard to win and resorted to trying the facts before the national media and before an uninformed public. The government took the high ground refusing to "try the case in the media," and instead waited to tell its case in court.

The government's case alleged that Lt Flinn made false official statements under oath, willfully disobeyed the orders of her commander, knowingly violated Air Force regulations prohibiting unprofessional relationships, and engaged in an adulterous relationship with the husband of an airman basic. The latter charge of adultery became a lightning rod for media criticism, which tended to tell the story in these terms: Lt Flinn' s "only mistake" was falling in love with the wrong man. The accused was painted as the victim, inexperienced youngster who was called to task by an out-of-touch military bent on ending her promising career as a pilot.

As an institution, the Air Force carefully respected the privacy interests of the accused. The *Flinn* case was ultimately resolved by approval of a general discharge (under honorable conditions) as a resignation in lieu of court-martial. The Air Force never had the public forum of a court-martial to tell its story fully. Unfortunately, military justice was portrayed as unfair and outdated.

Public interest in the military justice system can be expected to remain high. However, the days of a *Flinn* approach to such cases is over. The government has learned lessons to help assure that commanders maintain discretion for the proper disposition of disciplinary cases. When an accused or defense counsel opts to go public with misleading or erroneous information, the government can and should immediately correct the record. Reporters should be provided detailed information about the military justice system in general along with appropriate tailored information, in a timely manner, about the particular case being considered.

The more light we shine on the military justice system, the better it looks. Our appellate courts have assisted in this area. For example, in *McKinney* v. *Jarvis*[7] the USCAAF made it clear that only in exceptional circumstances can an Article 32 hearing be closed to the public. In that highly-charged and widely-publicized case involving the former Sergeant Major of the Army, the Article 32 hearing was closed to the public by the special court martial convening authority in order to, "(1) to maintain the integrity of the military justice system and ensure due process to

SMA McKinney; (2) to prevent dissemination of evidence or testimony that would be admissible at an Article 32 investigation, but might not be admissible at trial, in order to prevent contamination of the 'potential pool of panel members'; and (3) to protect the alleged victims who would be testifying as witnesses against SMA McKinney ….”[8] The USCAAF found these arguments insufficient and ordered the Article 32 hearing open to the public and the media. We should understand that an open Article 32 hearing normally provides a superb opportunity to demonstrate the fairness of our system.

Some defense attorneys will undoubtedly continue and try to move cases that are hopeless out of the courtroom and into the court of public opinion, whereby they will seek to apply political and public pressure. Furthermore, certain types of cases will be lightning rods for media attention, including those that involve sex, adultery, homosexual conduct, anthrax vaccinations, fraternization, or any case appearing to create disparate treatment of a junior member as contrasted with a senior officer. We need to recognize that these cases have tabloid-type news potential; they can help sell newspapers and television shows. While resisting any effort to "try it in the press," the military must engage in a meaningful and effective manner.

The military justice system provides a compelling story - one that begs to be told. Judge advocates are the functional experts who should be telling that story. An effective campaign to educate the media and the general public must begin before a controversial case catches the media's attention. We must overcome years of apathy, misinformation and misunderstanding. Aggressively pursuing opportunities to inform the public about military justice will eliminate much of the need for quick and often inadequate explanations after a contentious case has arisen.

Our military justice system can be explained effectively in the media. Judge advocates must be actively engaged in this effort. The public needs to understand that our system accommodates exigencies of the military while providing the safeguards expected by all Americans. We should be able to counter allegations of double standards, loss of rights or unfair treatment. When the fairness and protections of the system are revealed, the tabloid media will often lose interest in our cases and they will no longer be sensationalized.

The Air Force has taken steps to overcome its historic reluctance to speak about on-going criminal proceedings. AFI 51-201 now makes it clear that information may only be released so long as it does not have a "substantial likelihood of prejudicing a criminal proceeding"[9] and provided that it is permitted by other directives. Practitioners must become familiar with those rules and limitations on the release of information. We need to be prepared to respond to misinformation in specific cases without raising the specter of unlawful command influence. All judge advocates should examine the practical guide to "Media Relations in High Visibility Court-Martial Cases" produced in 1998 by the HQ USAF, Military Justice Division.[10]

The UCMJ provided the substantial protections that Americans expected from their system of justice, and it did so in a framework that enabled military commanders to have the effective tool they needed to ensure discipline and readiness.

Any information that has already been revealed in a public forum (such as an Article 32 hearing) should be identified and made ready for release as needed. Judge advocates and public affairs officers must be prepared and a media plan should be ready. That plan might include provisions for a media center, media escorts, press kits, background briefings and courtroom arrangements. The plan must anticipate what information can be released, how it can be released and who should release it. This must be coordinated with the command, judge advocate and public affairs chains of command through the general court-martial convening authority level, to the major command, and to Headquarters Air Force.

Timely and effective responses to media interest in military justice must be a priority for commanders and their public affairs office and/or judge advocate team. The government's representatives must be prepared to counter false or misleading attacks on the military justice system while respecting such matters as the accused's right to a fair trial, the privacy interests of the accused, victims and witnesses, and the public's right to attend and receive information about criminal proceedings.

The Privacy Act complicates releasing information to the media. Responses to Freedom of Information Act requests can be cumbersome, and they often fail to inform the media in a timely manner. The public affairs office and/or judge advocate team must wade through these issues and be prepared to provide quick and accurate information about criminal proceedings consistent with ethical rules and the law.

Potentially high profile disciplinary cases can be handled effectively. Allegations of misconduct should be examined thoroughly and promptly, and then resolved at the lowest level of discipline consistent with the interests of justice. When a case seems to be headed for court, charges should be very carefully

drafted to ensure that they are legally sufficient and reflect the institutional values that were offended. By the time of preferral of charges, a detailed media plan should be fully developed.

Our audiences should be informed *before* the spotlight shines on a controversial case. A huge array of internal audiences are available through active preventive law programs, commanders' calls, meetings of on-base private organizations and clubs, on base radio and television stations, brochures, pamphlets, base newspapers, posters, and Law Day celebrations. When we educate internal audiences, they can help educate others. Most communities have speakers' bureaus in search of topics and speakers and judge advocates should make themselves available. There are many opportunities to write for local publications, from newspapers to a county bar journal. Judge advocates should develop relationships with the local media before a high interest case arises and take advantage of opportunities to educate and explain. The media should be invited to the legal office and every aspect of the office should be explained and compared to its civilian counterparts. This effort can be developed with the assistance of the public affairs office.

Those of us who understand military justice recognize it as a superb disciplinary system, which is constantly being evaluated and improved. Today's system reflects the full range of protections that Americans expect from their criminal justice system and it assures that military discipline work within the framework of due process and justice. While no system is perfect, most of the criticism of military justice is simply unfounded.

Military justice has been enhanced by its half-century of experience under the Uniform Code of Military Justice. Members of the Judge Advocate General's Department need to more effectively explain our military justice system.

[1] One particularly egregious experience was that of former Vermont Governor Ernest W. Gibson:
"I was dismissed as a Law Officer and Member of a General Court-Martial because our General Court acquitted a colored man on a morals charge when the Commanding General wanted him convicted, yet the evidence didn't warrant it. I was called down and told that if I didn't convict in a greater number of cases I would be marked down in my Efficiency Rating; and I squared right off and said that wasn't my conception of justice and that they had better remove me, which was done forthwith." Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future,* 55 Mil. L. Rev. 39, n.3 (1972). A second frequently cited episode involved Second Lieutenant Sidney Shapiro:

> "Shapiro was an army officer appointed to defend at a general court-martial a soldier charged with assault with intent to commit rape. Thinking that his client could not be identified as the attacker, he substituted another person for his client at counsel's table. The substitute accused was identified as the perpetrator and indeed was "convicted" by the court-martial. Shapiro then revealed his scheme. Not only was his real client thereafter brought to trial and convicted, but several days later Shapiro himself was put on trial for violating the 96th Article of War by "delaying the orderly progress" of his client's court-martial. He was served with the charge at 1240 hours on September 3, 1943, and notified that he would be tried at 1400 that same day. By 1730 that afternoon he had been convicted and sentenced to a dismissal from the service. After being dismissed, he was promptly drafted back into the Army as a private." *(Id.* at 41-42).

[2] As discussed later in this article, the protections of Article 32, UCMJ, are for the most part substantially broader and better than the grand jury process for the accused civilian.

[3] 384 U.S. 436 (1966).

[4] The military accused retains the right to request another military defense counsel (other than the detailed ADC) or to obtain a civilian attorney at his own expense.

[5] Article 37, UCMJ (10 U.S.C. 837); *see* R.C.M. 104.

[6] For information on the factual background of the Flinn case, see Colonel Jack L. Rives, *The Case Against Lieutenant Ke//y F/inn,* The Reporter, December 1997 at 5-6.

[7] 47 M.J. 363 (1997).

[8] *Id* at 364.

[9] AFI 51-201, paragraph 12.5.

[10] Copies of this excellent publication can be obtained on the AFLSA/JAJM homepage under "Policy and Precedents."

The United States Supreme Court & The Culture of Courts-Martial: The Need for Structural Changes

Colonel Lee D. Schinasi, USAFR

INTRODUCTION: WHY THIS TOPIC?

If we are truly the product of our past experiences, then this article is the sum of an almost 30-year study of court-martial practice, society's view of it, and the judge advocates who dedicate their professional careers to it. During this period, I had the opportunity to observe military justice from many vantage points, both civilian and military. In 1975, after three years as a trial counsel and a defense counsel, I was assigned to the United States Army Government Appellate Division, then at Falls Church, Virginia. For the ensuing three years, I had the luxury of examining the law to see not only how it affected the legal issues I was litigating, but how it defined the social and political climate within which our court-martial system operated. From Government Appellate Division (GAD), I went to Charlottesville and the Army's Graduate Legal Program. Thereafter, I remained on the JAG School Criminal Law Faculty and continued my study and writing about these topics.

In its essence, this short article is about the United States Supreme Court and Court of Appeals for the Armed Forces cases I first encountered during my endeavors at GAD and the Army JAG School, and what those cases say about our military justice system. More precisely, this article looks at the very negative view the Supreme Court had of our system, and what we have done and can do in the future to improve upon that view.

At the outset, let me say I am aware that some military lawyers are unconcerned with civilian opinions on these topics. It is enough for them that our own culture supports and respects military justice. It is enough for them to know how capable and effective military criminal justice is. Those military lawyers are not attentive to the criticisms our system receives. Their positions have never been sufficient for me. They were not sufficient when I was trying cases; they became increasingly less sufficient when I began managing young military lawyers who were prosecuting or defending courts-martial; and they make absolutely no sense to me now that I have had the opportunity to observe and compare the civilian model in some detail. It is the theme of this paper that our military justice system, the accused who come before it, and the lawyers who practice in it deserve the best legal structure possible, and most importantly, the fix to make it the best would be simple and incredibly healthy for all concerned.

The *arguments* made here are taken from my presentation at the Air Force JAG School's 50th Anniversary Symposium on the Uniform Code of Military Justice (UCMJ). Those comments focused on 50 years of Supreme Court and Court of Appeals for the Armed Forces (CAAF) opinions which discussed military law and military lawyers, and on what can and should be structurally done to eliminate the three areas of court-martial practice which stimulate the legitimate criticism of our system:

1. Articles 22 and 23,[1] which locate all prosecutorial discretionary powers in commanders,[2] and

2. Article 25(d)(2)[3] which requires those same commanders to hand-pick court members who will sit as finders of fact in the same cases they have decided should go to trial, and

3. Article 32,[4] which takes the place of grand jury proceedings.[5]

Particularly today, in this time of change, when the Services are encountering recruiting and retention

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challenges, when our criminal justice system is receiving increased scrutiny by the United States Supreme Court and other civilian institutions, and when all the definitions and preconceived opinions concerning national security are being recalculated, it is important that military lawyers and the court-marital system in general be evaluated accurately and fairly so that our credibility as lawyers within the military and within the legal professions will continue to grow, and as a result, the level of our contribution to national security will also be allowed to grow.[6]

PREDICATES FOR CHANGE[7]

The end of the cold war and the end of the divisive Vietnam era have provided the vehicles for making the changes suggested in this article. Gone is the fear that our nation's way of life may be terminated by a hostile Soviet military. Gone also should be the long-suffering concept that unique military justice procedures, expedients really, are still necessary for national security purposes.

Today's world, including today's legal world, is totally different than the late 1940's world that produced those military justice expedients.[8] Unfortunately, today's military criminal law practice has not meaningfully and structurally evolved since that time. Court-martial practice still does not reflect new post cold war political and economic realities which allow military lawyers to more effectively control the judicial processes we are charged to implement. Ask yourself these two questions: Would you be satisfied being treated by a dentist who used 50-year-old tools, or a doctor whose surgical skills had last been enhanced during World War II? If the answer to these questions is no, then why is it that we are satisfied today with commander referrals and commander court-martial member selection processes which are inextricably linked to our fears of national survival and the cold war?

While the fate of the Western World no longer hinges on the Fulda Gap or a potential adversary's air, sea, or land capabilities, the current terrorist threat and limited conventional military threats to the United States do require sophisticated legal skills and resources to manage an increasingly complex though less threatening national security picture. In this mix, shouldn't today's military lawyers be allowed to control the criminal justice system they are required to operate in the same way United States Attorneys and state court prosecutors control their systems? What realistic command responsibilities do the current commander "judicial" powers mentioned above foster today? Military doctors are not required to obtain the convening authority's permission to operate on a soldier. Why must military lawyers obtain the commander's approval to court-martial the same soldier? Are we less competent at military justice and the need for discipline and law and order than the surgeon is at the physical and mental health of the command?

Articles 22, 23, 25, and 32 contribute very little to today's complex military posture. They encumber the commander with responsibilities and obligations (s)he is not trained to exercise, which more often than not are simply pro-forma approvals for what the command's senior legal advisor has recommended. Today's court-martial practice, with commander "judicial" involvement, is in many ways a subterfuge for what really happens, a subterfuge that service members, civilian courts, Congressmen, and our critics clearly understand.

Over the years I have heard arguments favoring change frustrated by those who argue that the system must remain the same because the commander is responsible for the morale and discipline of his/her organization.[9] The argument goes that as a result of these obligations, the commander alone must decide who goes to trial, what the charges will be, and who will sit in judgment of the accused. Although I have never been able to see the justification for compromising our judicial processes in the name of commander control, I can understand how General Eisenhower, in the late 1940s, was able to convince a very skeptical Congress that this "commander judicial power" was needed to protect us on the battle field – that only a commander could determine who should go to trail because only the commander knows what is necessary to win in combat.

To have any merit at all today, this position must assume that a staff judge advocate would be taking legal actions harmful to his/her command's fighting capabilities, and even if that occurred that there would be no legal/personnel remedy to the abuse. It appears that these skeptical arguments fall of their own weight when measured against the reality of military practice and not the emotion of maintaining the commander's judicial powers.

Even if commander involvement had some merit in a cold war environment (as an SJA for two deployed tactical units during that period, I never observed the connection), the basis for that argument no longer exists. The cold war is long over.[10] War[11] as we have known it is long over. The United States' is not threatened by invasions or attacks. If it is threatened at all it will be threatened by political, economic, social, cultural, and technological inroads, not by brigades, bombers, and boats.[12]

It is time for military lawyers to have the same

responsibilities and obligations that their civilian counterparts have. It is time for military prosecutors to indict those who have been alleged to have committed a crime, and it is time for such persons to be tried by randomly selected fact finders. It is time for the United States' military justice system to become an equal member of the American legal community. Most importantly, it is time for us to stop making excuses for a system, which never made any legal sense, but has been tolerated because of our dedication to illusory concerns about national security and commander responsibilities.

THE CASES IN QUESTION

Over the years I have read, often with great pain, the United States' Supreme Court's negative characterization of our judicial process and of us as its operators. Initially their words made me wonder about the organization to which I planned on dedicating my professional life. As a result, it is their words, which are most important here because those words provide an objective criterion for evaluating ourselves as an American criminal law jurisdiction, and not simply as a tool for command discipline, morale, and control.

The cases discussed below have a great deal to tell us about the health, effectiveness, and weaknesses of court-martial practice. They have a great deal to tell us about ourselves. Unless we are willing to consider and accept the Supreme Court's view, we will be unable to progress as a criminal law *judicial* system.

I realize that many other cases could be added to the list we will discuss. However, the cited cases have been selected for several reasons. First, I believe they are representative of how our system evolved during the last half century. Second, for many personal reasons, these cases are important to me. Over the years I have had the opportunity to write and lecture about them. In some settings I found myself defending our system against the language set out below. In other settings I felt the import and wisdom of the decisions were not being appreciated. More than anything however, these are the cases I spent a career thinking about and in many instances wishing I could rectify. Unfortunately, space does not allow me here to discuss all the cases raised in my 50th Anniversary presentation. I have selected the most representative ones however.

THE COURT OF MILITARY APPEALS' FIRST WORDS

When I arrived at Government Appellate Division I was taken with the responsibility and tradition of the organization. The fact that we represented the government on appeal, and that we had been doing so for many years was important to me. I was interested in the history and legacy of our mission and thought the best place to begin my education about these issues was with the first decision the then Court of Military Appeals had written, *United States v. McCrary*.[13] As might be expected, *McCrary's* value resided pretty much in establishing the approach COMA would take in evaluating records of trial and trial outcomes. The language which appealed to me most in those days, and still does, is Judge Latimer's guidance on how our cases should be tried:

> Counsel for the government and accused should not be content to barely get by. They should strive to paint a fair factual picture so that substantial justice is afforded to all parties.[14]

One of the motivations for this article and my position on the need to change Articles 22, 23, 25, and 32 is that I believe military lawyers have followed Judge Latimer's advice. Over the years I have had the opportunity to observe lawyers from many American and non-American jurisdictions try cases. I believe our expertise and dedication to litigation is second to none, and I resent the fact that so many civilian lawyers and judges still view court-martial practice as an inferior brand of criminal litigation.

THE SUPREME COURT CASES

Burns v. Wilson[15] was the first "modern" and relevant Supreme Court case I encountered which cast a pale on military practice. *Burns* is a habeas corpus proceeding brought by courts-martial prisoners. The United States District Court for the District of Columbia initially denied the relief sought. The United States Court of Appeals for the District of Columbia Circuit affirmed that decision as did the Supreme Court. However, it was not the resolution or substantive legal issues in *Burns*, which concerned me, it was the language the court used in getting to those questions. For example, Justice Vinson wrote:

> [T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment.[16]

I have often wondered what the Court thought of our system when it distinguished it from mainstream American jurisprudence. What do the overriding demands of discipline and duty have to do with the fairness of a criminal judicial proceeding? Did the Court simply see us as a functionary of the commander's ability to impose discipline? If that was the case, then no matter what we did as a judicial system, we would never be respected.

Toth v. Quarels,[17] in many instances, was the most disappointing case I read in those early years, but again, not because of the holding, because of the Court's characterization of our practice. *Toth* is a habeas corpus proceeding which ultimately addressed the military's ability to court-martial ex-service members. Justice Black held that Congress cannot subject civilians to trial by court-martial and that civilians are entitled to benefit from the same safeguards afforded those tried in the "regular courts authorized by Article III of the constitution."[18] The language Justice Black used in reaching this result is demonstrative of the problem, which has caused me to write this article:

> We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of life, liberty or property.... And conceding to military personnel, that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualification that the Constitution has deemed essential to fair trials of civilians in federal courts [*i.e,* juries, life tenure, etc.].[19]

As a young JAG Captain, I now wondered about courts-martial and what I had been doing. I wondered whether I had turned a blind eye to its problems, whether I had been captured by system. Justice Black's words made me see us in a different and unpleasant light:

> But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than [military personnel] to perform this task. The idea is inherent in the institution of trial by jury.[20]

There it was, the difference, the crucial difference between what I had been doing as a JAG Captain and what federal prosecutors were doing centered on a Uniform Code of Military Justice provision that allowed finders of fact to be hand-picked by the same person who sent the case to trial. It wasn't that the finders of fact were soldiers, it was that they had not been selected in the same constitutional manner every other American citizen faces. This reality was enough for Justice Black to finally opine:

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.[21]

What an incredible price we had paid for a procedural "expedient;" an expedient and a legal difference that was incomprehensible to civilian lawyers and judges.

Reid v. Covert[22] is another habeas corpus case concerning the question of court-martial jurisdiction over civilians. Here the issue concerned "dependents" of military personnel who had accompanied the service member to an overseas command and while there committed an offense. In Ms. Covert's case it was killing her service-member husband. The series of cases referred to under *Reid v. Covert* have a fascinating appellate history, which culminated in the Supreme Court reversing its own published opinion originally finding court-martial jurisdiction over civilians under these circumstances. On rehearing, the Supreme Court held that the provisions of the Uniform Code of Military Justice extending court-martial jurisdiction to persons accompanying the armed forces outside the continental limits of the United States could not be constitutionally applied to the trial of civilian dependents of members of the armed forces overseas, in times of peace, for capital offenses. The Court's language here is particularly biting:

> It must be emphasized that every person who comes within the juris-

> diction of courts-martial is subject to military law--law that is substantially different from the law, which governs civilian society. Military law is, in many respects, harsh law, which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice.[23]

Justice Douglas' decision in *O'Callahan v. Parker*[24] is, in my opinion, the watershed for the Supreme Court's highly critical opinion of military justice. In this habeas corpus proceeding concerning military jurisdiction over off-post service-member offenses, the Supreme Court held that such crimes were not service connected and as a result the accused could not properly be tried thereafter by courts-martial because he was entitled to a trial by the civilian courts. In reaching this result, Justice Douglas said:

> A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice... None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice.[25]

I still remember the feeling I had reading Justice Douglas' words for the first time. "Travesties of justice" and the UCMJ had been used in the same sentence by one of the Supreme Court's legendary justices. Why, because courts-martial were still "retributive justice" and not convened in an "atmosphere conducive to the protection of individual rights?" Is that what I had been doing? What was different about the cases I prosecuted in the military and the ones I participated in as a civilian before coming on active duty? Substantively, Articles 22, 23, 25, and 32. Otherwise, they were structurally similar. Actually, ours are better because military counsel are more dedicated, better resourced, and more thoroughly trained than any of their civilian counterparts. Justice Douglas' negative view could only be the product of the UCMJ's unique mechanisms to create a military trial, mechanisms which are so different from civilian practice that they ultimately led Justice Douglas to say:

> [H]istory teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty....While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law.[26]

It remains inconceivable to me that courts-martial could be viewed under any light as a threat to liberty. It was more than inconceivable to me then that the senior officers I had worked for, many of whom served in both World War II and Korea, and the mid-grade officers who supervised me, virtually all of whom had served in Vietnam, could ever be seen as anything other than patriots, and that any activity they lent their professional reputations to could be viewed in such a negative light by even the most skeptical judge. Yet, there it was in black and white, a Supreme Court decision that would forever be a monument to the expedient of commander referrals and commander hand-picked finders of fact.

Over the next several years, the Supreme Court had ample opportunity to examine our evolving system of justice and modify its opinion of it and those who practice military law. In *Parker v. Levy*,[27] *Schlesinger v. Councilman,*[28] and *Middendorf v. Henry,*[29] the court upheld challenges to the general lawfulness of the Uniform Code of Military Justice. In *Solorio v. United States,*[30] the Supreme Court reversed its previous substantive position in *O'Callahan,* holding that the court-martial in question was properly convened to try a serviceman who was a member of the armed forces at the time of his criminal conduct notwithstanding the alleged lack of "service connection." Despite the majority's opinion, the following dissent by Justices Marshall, Brennan and Blackman indicated that lingering skepticism about courts-martial still remained:

> The power to authorize trial by court-martial should be limited to the least possible power adequate to the end proposed....The Court's willingness to overturn precedent may reflect in part its conviction, frequently expressed this Term, that members of the Armed Forces may be subjected virtually without limit to the vagaries of military control.[31]

Disparaging comments like the “vagaries of military control” continued to demonstrate that the Supreme Court, even in cases where the government apparently won, clearly viewed us as something significantly less valid than state and federal prosecutorial systems. While we may have been winning more individual case battles now, we were still losing the overall legal, philosophical, and systemic war.

In *Weiss v. United States,*[32] the Supreme Court had another opportunity to examine not only an accused’s challenge to his conviction, but the vitality and merit of our court-martial system. Affirming appellant’s conviction and the appropriateness of military judge selection procedures, Chief Justice Rehnquist opined that military judges who had already been commissioned officers before being assigned to serve as judges did not have to receive a second appointment before assuming their judicial duties, and that the lack of fixed terms of office for military judges did not violate due process considerations. In large part, Chief Justice Rehnquist based his decision, as the Supreme Court had so many times in the past, on “the entire system...[being] overseen by the Court of Military Appeals, which is composed entirely of civilian judges....”[33]

Justice Ginsburg’s concurring opinion finally begins to discuss court-martial litigation in favorable, even positive terms, particularly when compared with its past treatment:

> 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. 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. Nevertheless, there has been no peremptory rejection of petitioners' pleas. Instead, the close inspection reflected in the Court's opinion confirms:
>
> > [I]t is the function of the courts to make sure, in cases properly coming before them, that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander.... A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution....[34]

Unfortunately, in their concurring opinions, Justices Scalia and Thomas reminded us that while the Supreme Court may finally have come to accept that the overall system of justice imposed by courts-martial, that system was by no means the equal of criminal law practiced in civilian courts. To make these points Justices Scalia and Thomas first established the minimal acceptability they perceive in how military judges are selected:

> Today's opinion finds "an acceptable balance between independence and accountability" because the Uniform Code of Military Justice "protects against unlawful command influence by precluding a convening authority or any commanding officer from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge relating to his judicial duties;” because it "prohibits convening authorities from censuring, reprimanding, or admonishing a military judge '... with respect to any ... exercise of ... his functions in the conduct of the proceeding' "; and because a Judge Advocate General cannot decertify or transfer a military judge "based on the General's opinion of the appropriateness of the judge's findings and sentences.[35]

However, the concurring opinion is quick to make the same telling point about court-martial practice that earlier Supreme Court opinions have centered on:

> But no one can suppose that similar protections against improper influence would suffice to validate a state

> criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive....I am confident that we would not be satisfied with mere formal prohibitions in the civilian context, but would hold that due process demands the structural protection of tenure in office, which has been provided in England since 1700, was provided in almost all the former English colonies from the time of the Revolution, and is provided in all the States today.... (It is noteworthy that one of the grievances recited against King George III in the Declaration of Independence was that "[h]e has made Judges dependent on his Will alone, for the tenure of their offices.")[36]

Since I first read this case, what has bothered me about the Supreme Court's language is not that it is inaccurate, or even unfair. The Court's concerns and points in support of its language are objectively demonstrable in the applicable law and the record of trial. They clearly establish that the military has a different system, and the Court was willing to allow that system to continue for at least historical and traditional purposes. What bothers me are the Court's gratuities, needless caveats and limitations which have the effect of categorizing the wonderful military lawyers and judges who work so hard to make our system fair and efficient as second team professionals. Anyone not familiar with court-martial practice would have to read the Supreme Court's words as indicating that the military does the best it can with an anomalous criminal justice system, and that the lawyers who toil there do not have to meet the same legal and constitutional standards as their civilian counterparts. I read those conclusions as making us second-class citizens – a result that is both unfair and inaccurate, and one we will never change without reforming the system to comply with Article 36.

Even more frustrating is the thought that some service member who has been convicted and sentenced by a court-martial would read the Supreme Court's evaluation of the process that led to his/her incarceration and come to the conclusion that had (s)he been tried in a civilian forum, the result may have been different and that his/her rights were not satisfactorily protected by the Uniform Code of Military Justice. It has always seemed to me that because we as judge advocates are so interested in the welfare and morale of the service members we are here to protect, we would strenuously and uniformly argue in favor of providing them with a system of justice that did not allow for second guessing, *sub rosa* manipulation of events, real and potential conflicts of interest, and unfavorable critical evaluation by our civilian counterparts.[37] A system without the structural and artificial limitations discussed here would encourage service members to have more confidence in their commanders, to believe that our system of justice was as fair and honorable as any in the world, and that whatever happened in our military courtrooms was at least the equal of what would have happened in a civilian courtroom in their hometown.

I believe that military lawyers are the gatekeepers of the military judicial process and that commanders are not. If that is not the case, then military lawyers have wasted three years of legal education, and the Department of Defense is currently wasting thousands of personnel spaces that could be better allocated to officers in other specialties. If we are not responsible for military justice, if we are not in control of the system, then the numbers of judge advocates can be significantly reduced, and those that remained on active duty can be allowed to focus their substantial legal talents on areas of the law where non-lawyers would be demonstrably unable to function (i.e., procurement law, environmental law, fiscal law, or international law).

Similarly, I believe judge advocates view military criminal law and its ramifications as being so complex that it cannot be mastered by laymen, even commanders, no matter how smart or insightful the commander might be.[38] As a result, as applied every day, all over the world, the military criminal justice process is conducted upside down, with the historical and tradition-laden commander tail waging the substantive and judicially trained dog, a result every civilian court that has looked at the system recognizes immediately. *Judicial* processes in the military should be controlled, from beginning to end, by those who have been trained for the mission, judge advocates, not by those who OJT[39] for it. Positions of command, flag officer status, and military experience do not substitute for legal training, experience, supervision, and ethics.

THE LAST & MAYBE MOST IMPORTANT SUPREME COURT PIECE

Had it not been for the Supreme Court's decision in *United States v. Scheffer,*[40] I would not have written this article. *Scheffer* deals with the constitutionality of Military Rule of Evidence 707,[41] which categorically

prohibits the admission of evidence dealing with polygraph examinations whether it is offered by the accused or by the government. While the Supreme Court's evidentiary resolution of the case is interesting and significant, it is again the Court's philosophical view of the military and court-martial practice which most appealed to me.

Thematically and substantively, both the majority and the dissent in *Scheffer* make the same philosophical points I have alluded to throughout this article: (a) That the judge advocates who run the court-martial system are the equal of any criminal lawyers in American jurisprudence, (b) that the substantive law of evidence which we litigate should be applied and interpreted in courts-martial just as it is federal court, and (c) that there is no identifiable reason why court-martial practice should not comply with the Article 36 (a), Uniform Code of Military Justice mandate that states:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.[42]

Again, an examination of the Court's own words best makes the points here under discussion. In their concurring opinion, Justices Kennedy, Ginsburg, and Breyer say of their holding on the evidentiary question that:

> If we were to accept respondent's position [admitting polygraph testimony], of course, our holding would bind state courts, as well as military and federal courts...Neither in the federal system nor in the military courts, then, is it convincing to say that polygraph test results should be excluded because of some lingering concern about usurping the jury's responsibility to decide ultimate issues.[43]

Finally, the Court looked at a military legal issue and held that its resolution binds all courts, state and federal, and that there is no special command, discipline, or unique procedural issue requiring a special approach. In the Court's eyes, at least on an evidence plane, courts-martial are just like every other criminal law fora.

As helpful as the concurring opinion is to military practice and particularly military practitioners, the dissent by Justice Stevens is even more helpful. First, Justice Stevens goes out of his way to say that military courts, particularly the Court of Appeals for the Armed Forces, appears to be more protective of individual rights than is the Supreme Court:

> This Court's contrary holding rests on a serious undervaluation of the importance of the citizen's constitutional right to present a defense to a criminal charge and an unrealistic appraisal of the importance of the governmental interests that under gird the Rule.[44]

CAAF in its opinion finding Military Rule of Evidence 707 unconstitutional as applied, held that an accused has a sixth amendment right to introduce such evidence. On both policy and evidentiary grounds, the Supreme Court took a much more conservative and restrictive view. Justice Stevens goes on to evaluate the evidentiary issue in terms that highlight our legal application of Rule 707, and he refuses to evaluate courts-martial as a special or uniquely different legal system. His words are clear and direct on these points:

> The stated reasons for the adoption of Rule 707 do not rely on any special military concern. They merely invoke three interests: (1) the interest in excluding unreliable evidence; (2) the interest in protecting the trier of fact from being misled by an unwarranted assumption that the polygraph evidence has an aura of near infallibility; and (3) the interest in avoiding collateral debates about the admissibility of particular test results.[45]

As helpful as these words are to military practitioners and our legal culture, they will be even more important to our critics and to those who are unfamiliar with courts-martial and judge advocates. However, it

is Justice Stevens' categorization of military personnel, particularly military fact-finders which is the essence of his opinion and this article. Justice Stevens recognizes that those who sit on courts-martial are at least as qualified as their civilian counterparts. The criticisms that our system has previously endured had nothing to do with the caliber of its participants, but only with the value of our now clearly aberrant referral and court-member selection processes. Justice Stevens' words should really be music to our collective ears:

> It seems clear that those interests pose less serious concerns in the military than in the civilian context. Disputes about the qualifications of the examiners, the equipment, and the testing procedures should seldom arise with respect to the tests conducted by the military.... Moreover, there surely is no reason to assume that military personnel who perform the fact-finding function are less competent than ordinary jurors to assess the reliability of particular results, or their relevance to the issues....When the members of the court-martial are officers, as was true in this case, they typically have at least a college degree as well as significant military service.[46]

CONCLUSION

I want to leave you with the series of questions I asked the audience at Maxwell to consider as they listened to my presentation. There is nothing particularly complex or innovative about this collection. It simply embraces the policy topics and jurisprudential logic we have been discussing. I do not ask these as rhetorical questions.

1. What "kind" of criminal justice system do you want the military to have? (Maybe just how similar to the civilian model would you like it to be?)

2. How "independent" (from non-lawyers) do you want it to be?

3. How "professional" do you want it to be?

4. How "respected" (both within and outside of the military) do you want it to be?

5. How do you want to be viewed as a lawyer (again both within and outside of the military)?

6. How do you want your legal work to be viewed (same qualification)?

7. What do you want the larger legal and non-legal community we serve to think about the quality of :

    A. The wonderful young judge advocates who work for us, and
    B. Their legal work?

After 23 years of active duty, I know there are no uniformly acceptable answers to these questions. I also know some military lawyers will be at least opposed to if not offended by my suggestions and reasons for change. However, since I came on active duty I have been unable to get out of my mind the thought that we are as good as any criminal law jurisdiction in this country, and that it was unfair and inaccurate for civilian courts, particularly the Supreme Court, and civilian practitioners to view us as somehow inferior to or different than state and federal criminal court systems.

But, what has unremittingly concerned me the most is that the military's most important judicial functions, the creation and implementation of its criminal justice jurisdiction, were controlled by laymen, commanders, and not by lawyers. For five consecutive years as a staff judge advocate to commanders in tactical units with real-world cold war missions, I observed and participated in the use of the current court-martial system. While the commanders and I together operated the system in a manner I believe was 100% consistent with the letter and spirit of the law, I always felt that the processes we actually used were, at least from a policy and conception standpoint, inconsistent with what Congress and General Eisenhower contemplated. At least in my experience, in 99.9% of the cases being tried in a busy general court-martial jurisdiction, the convening authority had no real appreciation for what was happening in any case at any time. Their "action" was in virtually every sense "pro-forma." In fact, that is how I wanted it to be. If the commander knew more details about any case, I would worry about how he got that information and what he said to subordinate commanders and others along the way.

I can think of no occurrence where I went to the convening authority to ask for his guidance on how to proceed in a court-martial. How could that reality exist? Particularly today, when commanders have not had the experience of being trial counsel or defense

counsel as they did in the past, what non-anecdotal experience could they have concerning the complexity of modern criminal litigation? What advice could they provide on the admissibility of evidence or procedural problems? Even more importantly, could there be any real-world command policy issues about sending a felony to trial? What specific disciplinary or readiness issue could ever be connected to that question in today's military?

Similarly, if I had to learn about the commander's morale or disciplinary problems from the commander himself as we discussed each case, I should have been relieved as a staff judge advocate. Particularly in a deployed tactical unit, those issues were my first and major concern. Was I any less competent to resolve them than a United States Attorney or a State Court Prosecutor? Even worse, would you really want the commander intimately involved in each case so that (s) he could bring the depth of knowledge to the table necessary to meaningfully contribute to the conversation? What level of unlawful command influence, or simply its perception, would you have to fight in order to make that process work?

In a busy trial jurisdiction like the 3d Infantry Division in Germany during the middle 1980s, the average appointment with the commanding general on pending and completed general courts-martial might take several hours. While my respect and admiration for the two Major Generals I served in that assignment knows no bounds, that is precisely because they had a very fine appreciation for the value of judge advocates and the work we did. They were never concerned with legal technicalities or our ability to execute the mission we were assigned. Each was 100% focused on the responsibilities Congress had given him in the Code, responsibilities they had to perform even though each had asked me at the beginning of our relationship, how much of those responsibilities could be legally delegated to me so that their very limited time could be focused on the important national defense mission they had. The reality of their having to sign a piece of paper 15 people in my office spent hundreds of hours compiling was never lost on those outstanding officers. However, I have never been able to understand why it remains lost on Congress, and equally important, lost on the minds of so many of my colleagues and friends.[47]

[1] I have omitted Article 24, which concerns summary courts-martial from this discussion because they are properly viewed as disciplinary tools of command. Summary courts-martial are not judicial proceedings in any legal sense. See *Middendorf v. Henry*, 425 U.S. 25 (1976) discussed infra. See also Article 15, which also deals with uniquely commander oriented non-judicial punishment tools.

[2] Along with commanders, Articles 22 and 23 provide that the President of the United States, the Secretary of Defense, and the Service Secretaries may also convene courts-martial. Of the nine choices listed in Article 22 which apply only to general courts-martial, and the seven choices listed in Article 23 which apply only to special courts-martial, none include individuals serving in positions requiring a law degree.

[3] Article 25(d)(2)'s language is interesting in itself:

> When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of the armed forces is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

Although my current topic does not really lend itself to a thorough discussion of Article 25(d)(2) issues, it is worth noting that very often members of the court-martial panel picked by the convening authority will either be rated by that convening authority or be in a position where the convening authority can significantly affect that member's career. Elimination of Article 25(d)(2) and replacing it with an applicable random jury selection procedure would not only eliminate the obvious conflict of interest issues attendant to this situation, but it would also go a very long way to minimizing allegations of unlawful command influence. See Article 37. Viewed in this light, it is suggested that the price we pay for Article 25 is well beyond any conceivable benefit the court-martial system, command discipline and morale, and certainly individual service members might receive in exchange.

[4] Article 32(a) provides:

> No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matter set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and *discipline. (Emphasis provided)*

While Article 32 is often thought of as being superior to the civilian grand jury process because it provides the accused with an opportunity to be present with counsel and to examine or cross-examine witnesses, Article 32 suffers from the same liabilities as the other provisions mentioned here, it is a tool of command (discipline) as Article 32(a) itself states. For commanders burdened with referrals, investigations, and court-member selections, the list of potential and real conflicts of interest present in the amalgamation of these procedures leading to trial are both obvious and significant. Certainly, the Supreme Court's decisions discussed *infra,* have uniformly pointed this out.

[5] I am aware of the Fifth Amendment foundation for Article 32. However, as discussed at endnote 33, Congress' direction in UCMJ Article 36 for courts-martial to adopt the procedures utilized in

federal district courts suggests that employing Constitutional Article III procedures to military trials would be viewed as increasing an accused's rights, and thus not objectionable.

[6] For interesting discussions on these topics see, Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000), Robinson O. Everett, *Did Military Justice Fail or Prevail? Son Thang: An American War Crime, 96 MICH. L. REV. 1421* (1998), Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, 1997 ARMY LAW. 4 (Dec. 1997), and Mark S. Martins, *National Forums for Punishing Offenses Against International Law: Might U.S. Soldiers Have Their Day in the Same Court?,* 36 VA. J. INT'L L. 659 (1996).

[7] For a wonderful and very contemporary discussion of this area see William Bradford, What American Has Written: Washington Our Hands in the Balkans with the Dayton and Kosovo Peace Plan, ___COLUMB. J. E. EUR. L. ___(2001, Forthcoming)

[8] Joseph W. Bishop Jr., Justice Under Fire: A study of Military Law (1974).

[9] At the risk of being redundant, I would again like to make the point that Congress provided commanders with Articles 15 and 24 for the specific purpose of establishing command discipline and morale. These non-judicial punishment tools, when properly employed, allow commanders to affect the daily conduct of service members and units. Criminal trials do not fall within the same legal or policy framework. Judicial proceedings do not lend any part of their existence to these commander prerogatives in the same way Articles 15 and 24 do. How could it be otherwise? Is there any legal or policy argument that would justify a service member being convicted in a general or special court-martial if that conviction could not be upheld on 100% judicial/legal grounds? Could the government ever argue that the accused's conviction was necessary for command morale or disciplinary purposes irrespective of the law? Is it possible to envision in today's world a situation where a service member has committed an offense serious enough to justify a general or special court-martial and a commander saying that the service member was so important to the mission that trial would not be possible? In almost 30 years now of closely observing military criminal justice operations, I have never seen such a case. Of course that does not mean none has occurred, but it does mean that the occurrence factor would have to be so small as to be of no import in formulating the type of court-martial system that would be best for America's military. The logical extension of this thought means that if in fact the law is the basis for initiating a criminal judicial proceeding, than how could someone not trained in the law be better at using these complex tools than a lawyer, particularly a staff judge advocate who must endure rigorous training, selection, and review processes?

[10] *See* generally, Kul B. Rai, America in the 21st Century: Challenges and Opportunities in Foreign Policy (1997).

[11] War is defined here as a conflict or hostilities which threaten the continuity of the United States and its form of government.

[12] *See* generally, Craig Eisendrath, National Security: U.S. Intelligence After the Cold War (2000).

[13] 1 U.S.C.M.A. 1 (1951)(The accused left his station at Camp Stoneman, California, on October 23, 1950, and surrendered to the Air Police, Brookley Air Force Base, Alabama, on December 22, 1950. He was tried at Keesler Air Force Base, Mississippi, found guilty of desertion and sentenced to a dishonorable discharge, to forfeit all pay and allowances, and to be confined for one year and six months. The Board of Review sustained the finding and approved the sentence. The Judge Advocate General of the Air Force certified the case for determination whether as a matter of law, the facts are sufficient to sustain the conviction).

[14] *Id*. at 6.

[15] 346 U.S. 137 (1953)(A habeas corpus proceedings brought by courts-martial convicts. The United States District Court for the District of Columbia, denied the relief sought, and the petitioners appealed. The United States Court of Appeals for the District of Columbia Circuit affirmed, and certiorari was granted. The United States Supreme Court held that it was the limited function of federal civil courts to determine whether military had given fair consideration to military habeas corpus applicants' claims that they had been imprisoned and sentenced as a result of proceedings denying them basic rights guaranteed by the Constitution; and that the record made it plain that the military courts had heard the applicants out on every significant allegation now urged.)

[16] *Id*. at 140.

[17] 350 U.S. 11 (1955)(A habeas corpus proceeding instituted by sister of ex-serviceman arrested after discharge from Air Force and taken to Korea for trial by court-martial on charges of murder and conspiracy to murder allegedly committed in Korea during term of military service. The United States District Court for the District of Columbia issued a writ, and ordered the ex-serviceman discharged. The Court of Appeals, District of Columbia Circuit, reversed, and the case came to the Supreme Court on certiorari. The Supreme Court, Justice Black, held that Congress cannot subject civilians like the ex-serviceman in question to trial by court-martial and that such ex-servicemen, like other civilians, are entitled to benefits of safeguards afforded those tried in the regular federal constitutional courts.)

[18] *Id*. at 23.

[19] *Id*. at 17.

[20] *Id*. at 18.

[21] *Id*. at 22.

[22] 354 U.S. 1 (1957)(Habeas corpus proceedings involving question of court-martial jurisdiction over civilian dependents of armed services personnel to prosecute them for alleged murder of members of the armed services. In one case, the United States District Court for the District of Columbia issued the writ, and the Government appealed directly to the Supreme Court which reversed. In the other case, the United States District Court for the Southern District of West Virginia, discharged the writ and, while appeal was pending to the United States Court of Appeals for the Fourth Circuit, certiorari was granted. On rehearing of both cases, the Supreme Court held that the provisions of the Uniform Code of Military Justice extending court-martial jurisdiction to persons accompanying the armed forces outside the continental limits of the United States could not be constitutionally applied to trial of civilian dependents of members of the armed forces overseas, in times of peace, for capital offenses).

[23] *Id*. at 1241.

[24] 395 U.S. 258 (1969)(Habeas corpus proceeding brought by prisoner who had been convicted in court-martial. The United States District Court for the Middle District of Pennsylvania denied relief and prisoner appealed. The United States Court of Appeals, Third Circuit, affirmed and certiorari was granted. The Supreme Court, Justice Douglas, held that crimes of petitioner, a soldier, who while on evening pass entered residential part of Honolulu hotel where he allegedly broke into room of young girl and assaulted and attempted to rape her were not service connected and soldier could not properly be tried therefore by court-martial, but was entitled to trial by civilian courts.

[25] *Id*. at 266.

[26] *Id*. at 265.

[27] 417 U.S. 733 (1974) (Court-martialed army captain brought habeas corpus proceeding seeking discharge from confinement in federal penitentiary. The United States District Court for the Middle District of Pennsylvania denied relief, and the captain appealed. The Court of Appeals reversed and remanded, and the warden and Secretary of the Army appealed. The Supreme Court, Justice Rehnquist, held that articles of Uniform Code of Military Justice authorizing court-martial for conduct unbecoming an officer and a gentleman and court-martial for disorders and neglects to prejudice of good order and discipline were not unconstitutionally vague nor were they facially invalid because of overbreadth; that the proper standard for review for a vagueness challenge to Code articles is the standard that applies to criminal statutes regulating economic affairs; and that the captain's conduct in publicly urging enlisted personnel to refuse to obey orders which might send them into combat was unprotected under the most expansive notions of the First Amendment).

[28] 420 U.S. 738 (1975)(Appeal was taken from an order of the United States District Court enjoining defendants from continuing with court-martial proceedings against Army captain. The United States Court of Appeals affirmed, and certiorari was granted. The Supreme Court, Justice Powell, held that provision of the Uniform Code of Military Justice that findings and sentences in court-martial proceedings are 'final and conclusive' did not deprive District Court of jurisdiction under federal question jurisdictional statute, despite contention that such provision was intended to limit collateral attack in civilian courts on court-martial convictions to proceedings for writs of habeas corpus and to remove any jurisdiction to intervene before court-martial has taken place; but that when a serviceman charged with crimes by military authorities has shown no harm other than that attendant to resolution of his case in the military court system, federal district courts must refrain from intervention, by way of injunction or otherwise; and that there was no injustice in requiring serviceman in instant case, involving alleged off-post sale and gift of marijuana to another serviceman, to submit to the military court system).

[29] 425 U.S. 25 (1976)(Persons who had been convicted at summary courts-martial or who had been ordered to stand trial at summary courts-martial brought action against the Secretary of the Navy and others. The United States District Court granted relief, but its orders and judgment were vacated by the Court of Appeals. On grant of certiorari, the Supreme Court, Justice Rehnquist, held that a summary court-martial is not a "criminal prosecution" within the meaning of the Sixth Amendment. In view of distinctive qualities and necessities of the military community, and in view of the option of refusing trial by summary court-martial and proceeding to trial by special court-martial at which there is a right to counsel, factors militating in favor of counsel are not so extraordinarily weighty as to overcome the balance struck by Congress. Thus accused personnel accepting summary court-martial were not entitled, under the due process clause of the Fifth Amendment, to counsel even if they made timely and colorable claim of defense or of mitigating circumstances and even if assistance of counsel was necessary to adequately present such defense or mitigating circumstances).

[30] 483 U.S. 435 (1987).

[31] *Id*. at 456.

[32] 510 U.S. 163 (1994)(Accused was convicted by special court-martial, and the United States Navy Marine Corps Court of Military Review affirmed. Review was granted. The United States Court of Military Appeals affirmed. Based on that decision, the United States Court of Military Appeals, 37 M.J. 252, affirmed the conviction of another accused. The accuseds jointly petitioned for review, and certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) military judges who had already been commissioned officers before being assigned to serve as judges did not have to receive a second appointment before assuming their judicial duties, and (2) lack of fixed term of office for military judges did not violate due process clause).

[33] *Id*. at 181.

[34] *Id*. at 194.

[35] *Id*. at 198.

[36] *Id*. at 198.

[37] It wasn't until midway through my first assignment as a staff judge advocate that I began to appreciate why some military lawyers were so strenuously in favor of maintaining the current system. In any hierarchical structure, access to the leader provides power, influence, and professional success. A staff judge advocate often forms a "special relationship" with the commanding general not simply because the SJA-commander relationship warrants it, but because of the access and the amount of time they spend together. If the current system were altered in the ways I have suggested in this article, what would also be altered is the basic nature of the JA-commander relationship. Time together would shrink, as would the SJA's stature on the staff. The ramifications of these changes are easy to see – so is the potential conflict of interest.

[38] If you doubt this, give your commander a copy of the latest opinions from the Court of Appeals for the Armed Forces, or any other appellate court, and see what they glean from the decision.

[39] "On the job training." As a brand new judge advocate in 1972, I once got a call from a commander who whimsically asked me: "Hey, you got any non-OJT-trained lawyers down there?" It took me many years to realize that his question may not have been whimsical.

[40] 523 U.S. 303 (1998)(The accused was convicted by general court-martial of uttering bad checks, wrongfully using metamphetamine, failing to go to his appointed place of duty, and absenting himself from his unit without authority. The United States Air Force Court of Criminal Appeals, affirmed as modified. Review was granted. The United States Court of Appeals for the Armed Forces, reversed. On certiorari, the United States Supreme Court, Justice Thomas, held that the military rule of evidence per se rule against admission of polygraph evidence in court martial proceedings did not violate the Fifth or Sixth Amendment rights of accused to present a defense).

41 Rule 707. Polygraph examinations:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

[42] 10 U.S.C. § 836(a).

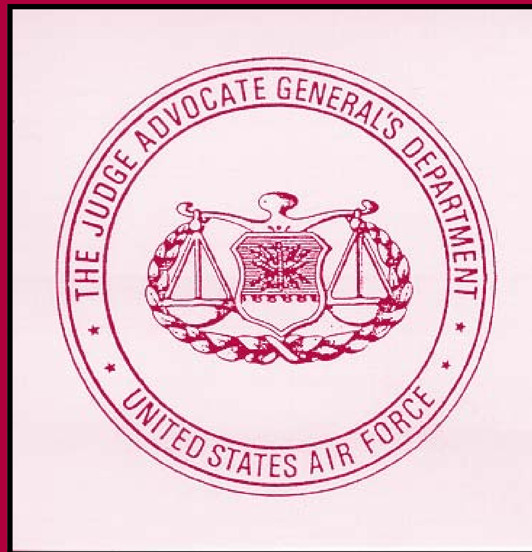
[43] 523 U.S. at 318.

[44] *Id*. at 320.

[45] *Id*. at 325.

[46] *Id*. at 325.

[47] One of the highlights of the JAG School's 50th Anniversary Symposium on the UCMJ was a panel discussion by retired Air Force Judge Advocate Generals. Toward the end of that very enlightening session, MG (Ret.) David C. Morehouse said, as best I can recall now: "The last thing I want is the criminal law business being run by lawyers."


THE JUDGE ADVOCATE GENERAL'S DEPARTMENT
UNITED STATES AIR FORCE