THIRD THOMAS J. ROMIG LECTURE IN PRINCIPLED LEGAL PRACTICE*

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It is always an honor to be here at the school. I appreciate you coming down to open this lecture, and I appreciate the invitation from General Martin and everyone at the school for having me here. It always feels like coming home. I am delighted to be here, and it is an honor to be here with the 70th Graduate Course. I want to thank you and all the people who are watching, as well, for your service to our country. I am very proud of my service, but I have to say, I do not think it was as difficult as some of the challenges that you face today.

When I was a captain back at Fort Bliss, I never gave a thought to whether some piece of advice or action that I was taking might have any consequences or be heard of beyond the borders of the installation. Today, even the tiniest issue can go viral, and so the pressure on everyone is just greater. With the complexity of the law and the operations that the military is engaged in now, there is just more pressure on you. Heaven knows we need people like you advising commanders and supporting Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen, so they can do the tough

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things that they do. It is really an honor to be here with all of you. It is also an honor, of course, to deliver a lecture named for someone whom I think very highly of—Tom Romig. I know personally that he represents principled legal practice. Long before he was The Judge Advocate General, he and I served together in the personnel, plans and training office. I got to see every day what kind of a person he is. The finest officer, lawyer, and human being. I am truly honored to be able to give a talk in his name. Tom, I do not know if you can hear me at this point, but I want to extend my very best to you and Pam. I am sorry we could not see each other in person, but I look forward to the day when we can.

I want to unpack the title of this talk a bit more. It is the Thomas J. Romig lecture. I have already talked about him in principled legal practice. Let me take the word lecture first, because that suggests you all came here anticipating that I would talk, and you would listen; I won't let you down. I know you did not come expecting to be called on, but I would rather do this as a conversation. Therefore, I ask you to at least mentally engage in a conversation with me. Your experience and knowledge are more recent and more relevant to a lot of the things that I am going to address. As I talk about different things, I hope you will hold them up to your own knowledge and weigh them and engage in a mental conversation with me. My hope is that, at the end of all this, you will walk out of here with some pearls that you picked up from what I said or maybe just a few grains of sand that you can form into your own pearls. I hope you will again challenge what I say as we go through. Of course, there will be time for you to do that verbally later, and I welcome your comments and questions when we get there.

Then, there is the principled legal practice part of this. On one hand, that sounds almost trite. I mean, you are not going to have a lecture on unprincipled legal practice at some point. Who would not believe in principled anything? I am going to digress a little bit a few times, and here is the first digression. Think, if you will, about some event. This happens almost every week. Think over the last few years where some company, organization, or agency went off the rails and was in the news because something bad happened. A product failed, customers were dissatisfied with the service, or people were being abused. Maybe people, who belong to the organization or whom the organization worked with, were spending money on things they should not. All kinds of examples like that. When you look at those situations, typically look at whatever institution it was, and it had a principle, a slogan, a vision, or something that it was trying to accomplish, be it safety, customer service, clean environment, or whatever. If you peel the onion a little further back, you see that whatever it said it valued, that vision was not what it was doing. The principle part

goes with the practice part. Whatever it is that you are attempting to achieve must be done with that practice and that constant attention to it, and not just the talking the talk and walking a different walk.

Now, I have been asked today to talk about principled legal practice in the context of military justice, and I will do that. However, I want to start with another digression. I know some of you have heard this story. It is an old joke, actually, but it is about the captain of a ship who every day upon walking under the bridge would, without saying a word to any of the crew, walk to a cabinet, take a key from a pocket, open the cabinet, open a drawer, pull out a little box, look in the box, close the box up again, replace it, lock the cabinet, and then go grab a coffee mug and talk to the crew about whatever was going on the ship that day. This happened day after day, month after month, for a long time. The members of the crew were obviously quite curious what could be in that little box. Finally, one day, the captain, upon going onto the bridge, put the key in the lock and turned it. Then, alarms went off, and the captain was called down to an emergency below deck and left suddenly, leaving the key in the lock. The crew members looked at each other, seeing their opportunity. Finally, one brave member of the crew walked over, opened the cabinet, pulled out the box, looked inside, and inside was a note that said, "port is left, starboard is right." Now you know, that is a pretty poor captain of any seagoing vessel that does not know port from starboard. But the point of the story is that there are some things so basic and straightforward, you do not want to forget them. You cannot stop and be looking when the seas turn stormy, and the night is dark. You need to remind yourself of those things.

In the military justice context, I think that little box should contain the words discipline and justice. By discipline, I do not simply mean the threat of punishment. I said way back when I was on active duty that true discipline is not fear of punishment for doing something wrong. It is faith in the value of doing something right. True discipline is doing the hard thing, knowing what the right thing is, and doing it when it is very hard to do, or when it may put you at some risk in one way or another. That is discipline, and it is an internal thing. Justice is an external thing. It is a societal thing and it is more than just the military justice system, criminal law, and the procedures for enforcing it. It is an attitude. It is a culture that treats everyone, regardless of where they came from and who they are, with dignity and respect. It holds people accountable, and it accords them certain rights in the process. So, that is justice and discipline as I see it. Now, that has not always been the case, and I am going to talk about that as we proceed.

I am going to make the third digression. How many of you watched the streaming video series Get Back? It is about the Beatles. You have all

heard of the Beatles, right? Okay, I know I am old, but I hope you have at least heard a few songs by the Beatles. It is an eight-hour program that was distilled from hundreds of hours of recordings of the Beatles over a monthlong period in 1969, when they set out to record a record album. A record album is an old thing; it is like a big disc, but a record album, about a dozen songs from scratch. They had to write the songs, develop them, and then record them. As you watch this program over eight hours, you see them showing up in the studio, and you watch the bickering, joking, and just being bored. Through the first five or six hours, you would think they are never going to make a record album out of this. You know, they would plunk a few notes on a piano and then do this and that. In the last hour, they show the actual recording. They are on a rooftop in London, and crowds below are marveling at these wonderful songs. You see them, and it is like they have been playing these songs for years and loving it. They are having fun, and there is lessons from this program on how creativity works, how teamwork works, and how something like that gets accomplished.

Among the subtexts is history because, at idle moments in the course of this program, the Beatles would start strumming a few notes from a Chuck Berry song, a Muddy Waters song, from the blues artists from the Mississippi Delta and the south side of Chicago. These were people, who even before rock and roll became rock and roll, were making great music. The Beatles knew that, and they appreciated the history. They knew that they were building on something that took things in completely different directions, but they understood where their music came from. I think that is important to one of the poles on your compass—mastery of the law. I think if you are going to master anything, you need to understand its history. How did we get where we are now? You can know where we are now, but, if you do not understand how we got there, it is hard to really appreciate how it all works. That is the lesson I draw from the Beatles.

As I talk about justice and discipline, I want to trace back to the beginning of our country, back to 1775, when the Second Continental Congress adopted the Articles of War two weeks after creating the Army. The Articles of War were drawn essentially verbatim from the British Articles of War, which had their own roots in Roman law and other things. The bottom line was the Articles of War essentially made courts-martial an extension of the commander. They were instruments of the command, and they were designed to impose discipline. George Washington said discipline is the soul of an Army, and that is true. That was true then, and it is true today. The Articles of War also reflected British society, which was very stratified. You had aristocrats and the moneyed classes, and that is where the officers were drawn from. The enlisted soldiers were drawn

from other parts of society. They were uneducated and poor. They were often drawn from people who were frequented borrowers, and they were not enlisted in the sense that they walked down and signed up with a recruiting sergeant. They were often pressured into service. So those are the Articles of War, and how they began. As I said, they were largely designed to impose a form of discipline.

Washington was great a leader. He asked Congress during the Revolutionary War to increase the number of lashes that a court-martial could impose from 39 to 500. I guess Congress thought how much additional learning are we going to get out of the 400th lash? If they have not gotten it by the 100th, then that is enough. So, they imposed the limit of one hundred. Physical punishment was part of the system. The Articles of War remained in effect, and the Navy had its own articles, which were adopted shortly after and essentially were the same as the Articles of the War. We fought World War II under the Articles of War. Those articles were changed very little for 175 years. Whipping went out in the nineteenth century, but the structure of courts-martial as an extension of commanders remained essentially the same. There were a few changes made in the wake of World War I, but not many. About six million people served in the military in World War I, sixteen million Americans in World War II, better than one in eight members of our whole society. There were a lot of people exposed to the military justice system. There were over two million courts-martial in World War II. That exposure was wide, and these people came from all walks of life. Some were lawyers, bankers, and other professionals. They came away from the whole experience not being very pleased with the court-martial process. The system was not deemed to be fair and was punitive.

In the wake of World War II, reforms were proposed and, of course, a lot of other things were happening. The Department of Defense was formed, and the Army and the Navy were rolled into that. Then, the Air Force was created and rolled into that. We had a peacetime draft for the first time in our history. Congress felt that this anachronistic system had to change, and in the late forties, it held extensive hearings. The House held over three weeks of hearings, where witnesses from all walks of life testified about the military justice system. The end product was the UCMJ, which made a number of changes basically designed to change the commander's role with respect to the justice system. Obviously, the commander retained the power to invoke the system, to convene a court and to refer charges to it, and post-trial responsibilities. However, the idea was to try to insulate the court-martial itself and give it more of the trappings that a civilian criminal court would have. Now, in general courts-

martial, the accused was to be represented by a lawyer, which was not the case before. So, that is how we got the UCMJ in 1950.

I am going to take it decade by decade, and we are going to walk fairly quickly through this. The UCMJ was passed in May of 1950 with an effective date of May 31, 1951. By the time it became effective, we had been at war in Korea for eleven months. Seoul, Korea, had changed hands four times in that eleven-month period between the enactment of the UCMJ and its effective date. There was a lot going on by the time the UCMJ went into effect. However, there remained a lot of controversy about it during those hearings that I referred to. There were people who were opposed to making the several changes that Congress ultimately made, including the judge advocates general. One of the things that judge advocates general were most concerned about was the establishment of what was then called, as General Risch mentioned, the Court of Military Appeals. It was the precursor to the Court of Appeals for the Armed Forces. The judge advocates general thought that the court would interfere with their own supervisory role with respect to the military justice system, and those controversies continued during the fifties. The court did, in effect, interfere. It made some rulings throughout some of the manual for courts-martial provisions that it found were contrary to the code. The judge advocates general and others criticized that to the point where the judge advocates general tried several times in the 1950s to get Congress to abolish the Court of Military Appeals. Congress never did, and the system continued throughout the fifties. Basically, things sort of settled down by the 1960s. Yet, there was still interest in Congress in reforming the system because there was still a lot of criticism of the military justice system.

One of the books about military justice written in the 1960s titled *Military Justice System is to Justice as Military Music is to Music* is the impression that people had. The Supreme Court in the *O'Callahan* decision said courts-martial are singularly inept at the niceties of constitutional law. The perception of military justice was not that great in a lot of quarters, and there were some internal initiatives to improve the system. Major General Ken Hodson, The Judge Advocate General of the Army in the late sixties, was instrumental in helping to shepherd through Congress the Military Justice Act of 1968, which made some significant changes in the system. It changed the law officer to a military judge and gave the military judge more of the authority that a civilian judge would have, to include the authority to hold Article 39(a) sessions. Before that, when a court-martial convened, all the members had to be present for any hearing. The judge could not decide something on their own. The judge had to have the members there, and even when the judge decided something, that decision was subject to a vote most of the time by the

members on whether the judge's ruling would be upheld. Not to mention that the commander who convened the court could also overrule the court's rulings on several things. As a result, the Military Justice Act of 1968 was designed to fix that and to further insulate the court-martial process from outside influence, the command, the convening authority, and to give lawyers and judges more of the authority to conduct the proceedings in order to ensure that insulation. Another right that was established there was the right of the accused to be represented by legally qualified counsel in special courts-martial, as well as general courts-martial changes in the Military Justice Act of 1968 and the Manual for Courts Martial 1969. It is worth noting that, when the act was passed in October of 1968, our presence in Vietnam was at its peak. Half a million troops were serving in and around Vietnam at that time when the war was raging. As many as 500 service people were killed every week in Vietnam during that time. By August 1, 1969, when the act went into effect, we still had over 400,000 troops in Vietnam. I served with people who served in Vietnam during that time, and one of the common things in a court-martial record back then was to say, "trial suspended due to incoming rocket fire." This went into effect when we were busy with other things. That was the sixties.

We are not going to go all the way to the 2000s because my memory runs out in the eighties. So, in the seventies, things are a lot different. The big change here was that the Vietnam War ended, the draft ended, and the services converted to all volunteer, which was a disaster. I came on active duty in the seventies, and the Army was broken. The court-martial rates were through the roof with drugs and indiscipline type offenses. General Risch mentioned that I started out at Fort Bliss, Texas. I was a defense counsel for the first two years. We would not do that to people now. We would not insert somebody right out of the basic course as defense counsel, I hope. I also hope they are better than I was. In two years as a defense counsel, I represented almost 300 Soldiers in courts-martial. This was a little bit like night court or the equivalent of MASH. We were in and out and some cases would take a couple of hours to just run through. It was not like the sophisticated practice that you see nowadays, but that is a reflection of what the Army was like back then, and it had not changed by the late seventies. I was a trial judge in Germany from 1978 to 1980. In my two years there, I again presided over about 300 cases. The Army was in deep trouble. The other services also had trouble during that time because of the quality of the recruiting, morale, and everything else in the wake of Vietnam. Meanwhile, from 1974 to 1975, the Court of Military Appeals, which at that time consisted of three judges in about an eighteen-month period, took the Court in a very different direction. They started striking down several practices that had existed for a long time, curtailing

the powers of commanders, pushing military judges to be more assertive, and exercising more control over courts-martial. It was very controversial. By 1978, the judge advocates general, at least a couple of them, particularly the TJAG of the Navy, were very outspoken in their criticism of the court. By 1979, the Department of Defense general counsel even floated the idea of abolishing the Court of Military Appeals and transferring its jurisdiction to the U.S. Court of Appeals for the Fourth Circuit. A rather radical concept, but the point is there was this period of turbulence both in the services and in the court-martial process itself.

By the 1980s, things had sort of flipped back once again. In the late seventies, the smartest guy in the JAG Corps, a guy named Wayne Alley who had been a judge in several places, was the chief of criminal law for the Army in the Pentagon. At about that time, the federal courts had adopted the federal rules of evidence. The biggest change in evidentiary rules in the federal courts in a longtime, and then Colonel Alley thought the military needed to adopt something similar. He persuaded the Army leadership, as well as the other services, to adopt the military rules of evidence. They became effective in 1980 and that effort was so successful that the judge advocates general and the Department of Defense decided to go ahead and revise the rest of the manual, which in its form had not changed in over one hundred years. It had basically always been sort of a narrative of the court-martial process and was really written so that line officers could conduct courts-martial because, for most of that history that I described earlier, lawyers were not involved. Now that they were involved, it seemed appropriate to shift to a more rule-based approach. As General Risch said, I had the good fortune to be involved in that process and to see it from the inside. The end product was the Manual for Courts-Martial 1984, and part of that was also the Military Justice Act of 1983, which made some of the legislative changes that we could not seek through the manual process, including review of some cases by the Supreme Court. Again, these changes altered the commander's role. Most of the changes at this time did not really curtail powers that the commander had so much as just relieved the commander of some of the details, like detailing a military judge to a court-martial, which was really a ministerial act at that point. It helped to streamline the process. While all that was going on, good changes were happening in the military. One of the Reagan administration’s big initiatives was to build up the Armed Forces and to fund them. We saw a lot more money and resources being devoted to the service. Recruiting practices were changed significantly to make sure that we were getting the kind of quality people we needed, and by the mid-eighties we had gone from an Army that was broken to one that was getting pretty good. The proof is in the first Iraq War in the early nineties when

the services performed quite well. I am going to stop the history at this point and talk a bit about some of the themes and lessons that we can draw from it.

The first one goes back to what I talked about before, justice and discipline. Discipline had gone from something imposed on unwilling or recalcitrant people to something that is instilled and inspired by the court-martial system and by society in its approach to people and recognizing their dignity and autonomy and trying to foster that. William Tecumseh Sherman, a lawyer in the 1800s, said that justice and discipline are polar opposites. That may have been the case when all this started, but now they are joined. You cannot have one without the other. You need them both. To me, that is the overarching change that occurred throughout this time. It has happened in the court-martial process through some changes in the rules, but more in the changes in our attitudes and approach to what we are trying to get out of people and accomplish. Recognizing that courts-martial are important, it is a much broader approach to accomplish the justice and discipline that we want. Obviously, one trend has been the curtailment of the broad authority that commanders had under the original Articles of War. Their powers have been restricted at almost every step of this change. It is noteworthy that, for the most part during the period that I have talked about up through the eighties, the power of commanders were restricted because it was perceived that commanders had a thumb on the scale in favor of the prosecution, that they had a tendency to be too harsh, and that the imposition of discipline was given too much weight.

The changes that you are going to confront were made for a different reason. They were made because commanders were perceived rightly or wrongly, to be too lenient or too lax in exercising the prosecutorial function. That is a big change. I do not know the implications that really has going forward, but I think it is something that needs to be thought about. As commanders' roles and authorities were restricted, lawyers stepped in and gained more authority and responsibility throughout this whole process. Sometimes it was done through regulation, rule, statute, or by default. Somebody had to do it. Commanders were not allowed to do it or did not want to do it. Lawyers stepped in and, as we have seen, they did so under some difficult circumstances, including the Korean War, the Vietnam War, and the turbulence of the seventies. Each time lawyers stepped up and did it, they did it while controversy may have continued at higher levels. The Pentagon, politicians, and others may have continued to fight and argue over whether this was a good change or a bad change. The lawyers on the ground, the company grades and the field grades, were out there making it work and doing it the best they could. It did work, and the system has improved throughout that process. It has not always been a

straight linear line up. There has been bumps, but it has worked because people like you made it work. You put your head down and said, this is what we have got to do to get this done, and that is the broad history of it.

Let me widen the aperture for a minute, and then I am going to give you all a break, and we will come back and talk about all this. It is obvious that I have been around the track and have done a few more laps than most people. One thing I have learned is the value of listening and thinking. It sounds again so simple, but again, you go back to those companies and think about the people who go off the rails. We live in such a fast-paced world, and there is so much pressure to act. It is so much faster than when I started. Again, this is the old guy talking war stories. When I was first practicing law and you wrote something, it would be typed on a typewriter, and you had to actually think about what you were writing rather carefully because it was so clunky to make corrections that you wanted to get it right the first time. It took a while to compose a letter, legal document, or anything like that. You made sure it was right when you actually put your name on it. Oftentimes you would send it by mail to somebody or you would put it in distribution. You would put it in an envelope that got carried by a messenger somewhere, and then and it would be off your desk for a little while. Then, maybe a week later, you would get the response, and you would work on it. That all happens in an hour or less today. As a result, the reflective process is missing from a lot of things that we do.

We, as lawyers, get paid to think and that is what we are supposed to do. To the extent that you possibly can, I recommend stopping and thinking. I have been around when some of the folks at the center come into my office and look at me staring kind of blankly. I think they are a little worried and ask me, "are you-all right?" I tell them, "yes, I'm just thinking." You need to stop, stare out the window, and think sometimes. Then, to the extent you possibly can, find somebody who you trust and bounce things off them. Nine times out of ten, they are going to confirm pretty much what you are already thinking, and that is reassuring. They may add a little touch here and there, and that is very helpful. Every now and then, they are going to keep you from doing something dumb. So, when you've got a tough problem, stop and think about it.

When you talk about principal legal practice, it requires thought. What is the principle here? What are we trying to accomplish as we are all racing around to get something done? What are we trying to achieve? What principles are at stake? Are the principles consistent? Because sometimes you have a couple of principles, and they may be in tension with each other. How do we resolve that? How can we make this thing happen? So, that is what it is all about. It is going back to that cabin and taking out the little box to look inside and remind yourself what you know, what is really

important here, and what do I need to do to make sure that we are doing the right thing. I will stop there. I thank you again for your service and for your attention.