THE FIFTIETH KENNETH J. HODSON LECTURE ON CRIMINAL LAW*

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Introduction

Our military justice system has always been evolving. That evolution has not necessarily moved at a steady pace and never with the volatility of the last fifteen years or so. So, when I was asked to talk about military justice in transition, it prompted me to think about the nature of change in our system, how practitioners adapted, and what it might tell us about our practice as judge advocates as we move from an almost exclusively supporting role to a decision-making role in many aspects of good order and discipline.

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Now, over the years, most of the changes to the Uniform Code of Military Justice (UCMJ) and the *Manual for Courts-Martial* (MCM)[1] ratcheted toward greater due process. Many changes came from the civilian justice system, which yielded what some have used as a sort of pejorative, "civilianization." But, it might more accurately be called "judicialization." The changes that are now coming about were brought on largely by us: military leaders and lawyers. There were just enough anomalous cases to create a string of anecdotes that suggested to a critical observer or a badly treated victim that the system was too capricious, too uncertain, and too unsteady to be trusted to continue operating with the same rules and assumptions that have characterized military justice for decades. I do not agree with those assumptions in many respects, but I want to talk today mainly about what is in front of the justice system for leaders, lawyers, and, most importantly, for those facing discipline. We should also consider the impact on complainants, victims, and participants in the process.

Now, the change from a command-driven or command-dominant justice system *is* a big change, and, in some respects, it is more demanding on practitioners than prior changes because it is less about changes in the rules of evidence or procedure. As lawyers, we can learn the law and at least as much about the assumptions on which the system is built. The greater challenge for judge advocates is accomplishing what is expected of them to make the system work. When defining military courses of action, we find operators using the phrase that a plan might "create conditions for" whatever the mission is: taking the hill, bombing an outpost, or providing security transit for refugees. While commanders adjust to a radically different concept of authority and leadership in light of losing or dulling some of the tools of discipline, it is the lawyers' turn to create conditions for successfully implementing a foundational change. Before we finish, I will offer some of the challenges facing practitioners, suggest some approaches, and conclude with some recommendations and observations on the military justice system, as we are a couple of years away from the seventy-fifth birthday of the UCMJ.

[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019) [hereinafter MCM].

The Development of Military Justice

So first, let us walk briskly through some of the key points in the development of military justice that are pertinent, either to the changes that are coming or how the system adapted to prior changes. The military justice system predates our country; that is the reason for the "1775" on our regimental crest. Speaking of transition, we can see how the concept of deterrence may have evolved since George Washington, in 1776, approved the execution of Thomas Hickey, one of his guards, for a conspiracy to assassinate him. Washington stated the following in a general order: "The unhappy Fate of Thomas Hickey, executed this day for Mutiny, Sedition, and Treachery; the general hopes will be a warning to every Soldier, in the Army, to avoid these crimes, . . . [so] pernicious to his country, whose pay he receives and Bread he eats . . . ."[2] It goes on, but we always have been cautioned about the limitations of general deterrence as a concept, and here is a case of an execution in front of 20,000 other Soldiers in a pretty summary fashion. It was rough justice, which was not unusual in its time.

More than a century later, the most significant changes to military justice occurred in 1920 with the fifth revision of the British-influenced Articles of War[3] and then in 1950, with the adoption of the UCMJ.[4] The military justice practices of 1920 would look familiar to today in many respects, though, in general, the rules were less detailed. Commanders were convening the same three levels of courts with membership similar to today's courts.

As practitioners, we have often debated the optimal composition of courts-martial. Most of us operated in a 1-3-5 framework, with summary courts-martial initially having just one summary court officer, then a minimum of three, and now five members for special courts and eight for

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[2] Headquarters, Continental Army, Gen. Orders, 28 June 1776, *reprinted in* 5 THE PAPERS OF GEORGE WASHINGTON, REVOLUTIONARY WAR SERIES 129-30 (Philander D. Chase ed. 1993) (original style and grammar retained).

[3] 1920 Articles of War, Pub. L. No. 66-242, 41 Stat. 749.

[4] An Act to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

noncapital general courts-martial. Interestingly, the 1920 articles deleted a provision from the 1916 version that provided five to thirteen members in a general court-martial and at least thirteen when that number could be convened without manifest injury to the Service.

After the most intensive war in our history, we took a hard look at the military justice system. The 1950 law enacting the UCMJ and publication of the *Manual for Courts-Martial*[5] in 1951 represent a BC-to-AD hinge in our system. It was not just a total discarding of the legacy system, but the "U" in the UCMJ brought in the Navy, which historically operated its own statutory justice system via the Articles for the Government of the Navy.[6] The UCMJ brought the Navy into full conformity and into a system that covered all Services. There can be value in uniformity for uniformity's sake. Still, the universal reach of the UCMJ also meant a more mature and coherent system with other salutary effects, including all cases coming through the appellate process, which was also new. Uniformity and equity were the main themes in President Truman's 154-word signing statement on May 6, 1950. He signed it the day after Congress passed it. In his signing statement, he wrote, "The code is one of the outstanding examples of unification in the Armed Forces and is tangible evidence of the achievements possible by the coordinated teamwork of [all the Services]."[7] He went on to say that "the democratic ideal of equality is further advanced,"[8] and it was immediately battle-tested. Remember, President Truman signed the bill on May 6, 1950, the thirty-eighth parallel was breached on June 25, 1950, and the *Manual for Courts-Martial* took effect the following May.

The UCMJ came about after extensive scholarly—and occasionally spicy—debate and study. We are all military justice nerds to some degree, so it is safe to surmise that if you picked up a random section of the volumes of testimony from those years, you would find it fascinating. The hearings started less than five years after the end of World War II,

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[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951).
[6] *See, e.g.*, 34 U.S.C. § 1200 (1940).
[7] *Statement by the President Upon Signing Bill Establishing a Uniform Code of Military Justice*, HARRY S. TRUMAN LIB. & MUSEUM: NAT'L ARCHIVES, https://www.trumanlibrary.gov/library/public-papers/108/statement-president-upon-signing-bill-establishing-uniform-code-military (last visited Mar. 18, 2024).
[8] *Id.*

when many members of Congress were veterans, and some of them had at least some experience with the 2 million courts-martial conducted among the 18 million Americans who served in uniform during that war. As a result, there was considerable concern about command influence and capriciousness, concerns that were reflected in key aspects of the UCMJ. To be fair, about 800,000 of those courts were summary courts-martial, but they still collectively served as one giant test of and stress on the system. Truman was serving his only full term as President, and he had some pretty salty words about the command-heavy military justice system he saw in action as an artillery captain in France during World War I. So, one of the innovations of the UCMJ was the institution of the civilian, (then) three-judge Court of Military Appeals, which is now the five-person Court of Appeals for the Armed Forces (C.A.A.F.). In a process we would be unlikely to see today, President Truman personally interviewed the three candidates for the Court of Military Appeals before he nominated them to the Senate.

A heavy wartime experience made it clear that the military justice system had limitations, especially its sometimes-summary nature, uneven availability of qualified counsel, and the persistent specter of command control. Still, the UCMJ was becoming not just a tool but a system with a coherent set of protections not available in the civilian world. I suggest this formula for talking about what is distinctive about the system—what we in the military have that the civilian system does not have equivalently. Article 31[9] precedes *Miranda*[10] by more than a dozen years and is still broader than *Miranda*. You do not have to be in custody to qualify for your Article 31 protection, and, of course, you have to be told the offense you are suspected of committing—both protections that the civilians would love. Article 32[11] provided for a robust pretrial process wherein the client is present with counsel and can cross-examine, see substantial amounts of the Government's case, and use it, to some degree, as discovery. Article 27,[12] of course, provides for qualified counsel. Article 37[13] covers command control. When used at its best,

[9] UCMJ art. 31 (2022).
[10] Miranda v. Arizona, 384 U.S. 436 (1966).
[11] UCMJ art. 32 (2022).
[12] UCMJ art. 27 (2022).
[13] UCMJ art. 37 (2022).

nonjudicial punishment (NJP) is an ideal mechanism to attack precursor misconduct at a lower level under the blanket of the Sixth Amendment.[14]

The most disruptive year in America between Pearl Harbor and September 11, 2001, was 1968. We were fighting an increasingly bloody and unpopular war in Vietnam with a largely draftee Army, significant racial issues, and increased problems with the sale and use of illegal drugs in a combat zone. Imagine the daily impact on American families: an average of 325 Service members died every week of that year in Vietnam. About six times as many were wounded. There were urban riots all summer long, and we came to learn of the My Lai massacre. Once again, a major change to the military justice system was immediately battle-tested. In signing the Military Justice Act of 1968,[15] before his successor was elected President, Johnson said that the addition of the military judge and the provision of defense counsel for accused facing special courts kept a promise to Americans that Service members would not only receive excellent medical care, training, and equipment but "first class legal services as well."[16]

Johnson's remarks also remind us that the military justice system is not just an internal matter. It is not our system as practitioners and litigants; it represents society's pact with the Soldier. The non-military members of society still have a proper interest in the justice system that disciplines Service members. So, the 1968 act removed the lawyer from the jury box—who was called the law member[17]—who advised the panel and joined them to deliberate but not to vote. It gave the accused the option of a judge-alone trial, which we now know was about to become the norm. There was, however, no guarantee that it would work. Think of those first military judges, often junior in rank to some members of the

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[14] U.S. CONST. amend. VI.

[15] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[16] *Lyndon B. Johnson: October 24, 1968, Remarks Upon Signing the Military Justice Act of 1968*, AM. PRESIDENCY PROJ., https://www.presidency.ucsb.edu/documents/remarks-upon-signing-the-military-justice-act-1968 (last visited Jan. 18, 2024).

[17] The law member was the predecessor to the military judge. *See* 1920 Articles of War, Pub. L. No. 66-242, sec. II.B, art. 8, 41 Stat. 749, 788; *see also* JUDGE ADVOC. GEN.'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775—1975, at 136-37 (1975).

panel, making final and binding rulings. The *Care*[18] inquiry grew over time: again, a defense-protective process of acknowledging guilt in open court. That the trial judiciary was fielded immediately in a combat zone might have accelerated its acceptance; there was a war to fight and cases to try. Few seem to have clung to the law-member model, though it would briefly appear forty-five years later, right after September 11.

President Johnson was extolling a still-better military justice system. In the fall of 1968, the Supreme Court was deliberating the decision that it would issue the following June, in which it ruled that the military could not prosecute Service members for offenses that were not what they called "service-connected."[19] That case, *O'Callahan v. Parker*,[20] had to do with an off-post, off-duty sexual assault of a civilian in Hawaii by an Army noncommissioned officer (NCO) who was on leave. The opinion, by Justice William O. Douglas, harshly portrayed the military justice system and constricted the military's authority to try such cases while also injecting massive confusion into what constituted service connection and how to establish it. Justice Douglas hit the system hard. He said that "[a] court-martial is not yet an independent instrument of justice," adding that the system was, in general, "less favorable to defendants," and "history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty."[21] He continued,

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of the 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. . . . [C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law.[22]

It was clear right away that the vagueness of this service connection rubric was consuming the court-martial system. Justice John Marshall Harlan II's *O'Callahan* dissent accurately forecasted that "the infinite

[18] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).
[19] O'Callahan v. Parker, 395 U.S. 258, 272 (1969).
[20] *Id.*
[21] *Id.* at 265.
[22] *Id.*

permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the [court-martial] jurisdiction issue."[23] The Court hustled to impose an interim fix in *Relford v. Commandant*,[24] issued in 1971 just twenty-one months after *O'Callahan*. Not often do we see the Supreme Court jump in to try to fix its own work with that speed. In *Relford*, the Court, in an opinion by Justice Harry Blackmun, created a nonexclusive list of twelve non-binding factors that would come to bear on the issue of jurisdiction. Like most compromises, it was even more unsatisfactory.

In practicing under this rubric early in my time on active duty, I found that we all disregarded the Court's caution that you could not just count up the factors and decide whether there was jurisdiction under the circumstances. Naturally, it triggered significant motion practice, uncertainty, and unpredictability. Trial judges would reiterate that the *Relford* factors were advisory and nonexclusive, and counsel would try to tote them up to persuade the military judge on the issue of jurisdiction. But the jurisdiction issue was so fraught and so confusing that contradictory rulings were made all the time at the trial level. As a defense counsel, I brought a writ to the Army court, later known as the Army Court of Criminal Appeals. I lost, learned, and developed a record in a case, futilely or not. Significant time and energy were consumed on litigating the service-connection issue before trial, which frustrated commanders and led to resource consumption, unpredictability, and commanders looking for alternative ways of speedily addressing Service member misconduct—one of the reasons for an increase in administrative separations. Then, as now, commanders were prone to the sentiment of "just get him out of my unit." As we move to the new system, judge advocates will be expected to credibly buttress leader confidence in the full range of disciplinary options still available to them in the many circumstances they still own.

O'Callahan was, as Justice Harlan observed, confusing and difficult to apply, and *Relford* was not much better. Justice Blackmun set out these twelve factors to describe aspects of the analysis that led to the conclusion. And though he was careful—futilely, I think—to warn

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[23] *Id.* at 284 (Harlan, J., dissenting).
[24] Relford v. Commandant, 401 U.S. 355 (1971).

practitioners that the application of the factors was not an arithmetical or mechanical process, this was a feast for lawyers: an invitation to advocacy, an explicit list onto which to craft a theory of why the Government did or did not have jurisdiction.

A couple of years later, in the Supreme Court's landmark abortion decision,[25] we came to see that Justice Blackmun was attracted to legal reasoning that proposed analytical rubrics—twelve factors in *Relford*, three trimesters in *Roe*—and that these themselves were seen to be sufficient to further analysis, scrutiny, and ambiguity. Some of those twelve *Relford* factors are quite specific.[26] To be fair, the Justice seemed to want to tease out information that might give a set of facts sufficient military color to quantify the narrow opening that Justice Douglas left in *O'Callahan* for non-military offenses. You can see how they might have been more simply clustered so those relating to location are combined, those relating to the victim's status are combined, and so on. It was a bit of a jumble.

Unhelpfully, Justice Blackmun gave his own box score in the *Relford* case, as he wrote:

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[25] Roe v. Wade, 410 U.S. 113 (1973).

[26] The *Relford* factors include:

1. The [Service member's] proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offense's being among those traditionally prosecuted in civilian courts.

Relford, 401 U.S. at 365.

> It is at once apparent that elements four, six, eight, eleven, and twelve, and perhaps five and nine, operate in Relford's favor as they did in O'Callahan's. . . . Just as clearly, however, the other elements present and relied upon in O'Callahan's case, are not at hand in Relford's case. These are elements one, two, three, seven, and ten.[27]

So, you know what you would be doing out there: trying to count them up, divide by something, and persuade a judge that you did or did not have jurisdiction, depending on what side of the courtroom you were working. As a result, counsel prosecuting cases over those years worked hard to assert jurisdiction, which led to pretrial motions and disputes on the smallest of factors.

The case for which I took my writ up involved a male Soldier who met a female Soldier on the installation. She followed him on her own accord to a motel in town, where the two engaged in sexual activity. The company commander testified that the encounter did not directly impact good order and discipline. But, as I saw later, as the law crystallized, there were other substantial jurisdictional ties: both were Soldiers, they met initially on the installation, there was a rank disparity (although they were in civilian clothes), they were in different units, and they did not have any sufficient duty ties. So, there was no military involvement in the case. You may be thinking, "Yeah, but the course of action started in a military setting, even if they were not in uniform or showing ID to each other, and there's a certain level of trust in a fellow Soldier." Herein lies the *Relford* problem. The debatable and inexact dozen factors were endlessly debated, shaped, and asserted by counsel who excel in debating but who also have leaders to advise and take care of. Remembering that judge advocates were not the center of the system, it introduced uncertainty to the command, investing resources in cases they were not sure of, and in all respects was not reflecting a highly functioning military justice system.

The jurisdictional tangle came to a definite end in 1987 with the *Solorio*[28] decision, wherein the 6-3 Supreme Court declared simply that

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[27] *Id.* at 366.
[28] Solorio v. United States, 483 U.S. 435 (1987).

the military has jurisdiction in any case in which the Service member was in the military—no balancing, no collateral factors to weigh, just a singular criterion: the accused's status as a military member. *Solorio* was followed seven years later by the Supreme Court's *Weiss*[29] decision: a more technical case that upheld the structure, independence, and processes regarding the military judiciary. As a witness to how far perceptions and processes had come since O*'Callahan*, Justice Ruth Bader Ginsburg offered an unexpected endorsement in her *Weiss* concurrence. She wrote, "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."[30]

The Current Changes

Presently, there are two main features of this year's changes: one seismic and the other a product of gradualness. The seismic change, of course, is that commanders soon will forfeit the authority to make prosecutorial decisions regarding sexual assault, murder, and a select chunk of other felony offenses in the UCMJ. The independent special trial counsel (STC), a judge advocate at the rank of brigadier general, will refer these offenses at his sole discretion, and the STC will report directly to the Service Secretary. Judge-alone sentencing has been discussed for the fifty-five years we have had military judges. Brigadier General (Retired) John Cooke, probably the most esteemed contemporary expert in military justice, called for this change on this stage about twenty-five years ago. Sentencing guidelines are also coming around the bend with the new Military Sentencing Parameters and Criteria Board. It is worth considering whether the system can now move closer to the truth in sentencing movement that has been afoot in civilian practice for more than a quarter-century. Some include informing the sentencing authority of factors, such as current clemency opportunities, corrections system clemency, parole options, and good-time calculations that we trust a judge to make. Should these same authorities not have

[29] Weiss v. United States, 510 U.S. 163 (1994).
[30] *Id.* at 194 (Ginsburg, R., concurring).

access to such information when they are making sentencing decisions? The corrections system may change along the way. And, we cannot predict when a Service member might be sent to the Federal system, which calculates sentences differently; nonetheless, that question arises anew under a judge-driven system.

Third is a serious analysis of the fundamental change in concept and protections provided by Article 32.[31] The investigation (now called a preliminary hearing) has become judicialized by requiring a judge advocate to conduct it whenever possible and removing some protections, rights, and advantages that were available to the accused. That person is now the preliminary hearing officer rather than the investigating officer—the title itself reflects the change in the role. As is most often the case, a legislative or procedural change comes about from some misuse of the process, and there were several cases and a growing perception that complainants in sexual assault cases were intimidated by harsh questioning at the Article 32 hearing. This would sometimes result in the witness withdrawing cooperation, undermining the pursuit of justice. Therefore, key Article 32 provisions have yielded a greatly changed process. Now, the victim cannot be compelled to testify. The Government need not present any witnesses. The decision of whether a witness is unavailable is exclusively that of the command. Discovery is no longer a recognized collateral purpose of the proceeding, and the preliminary hearing officer may consider witness statements and the like, regardless of whether the declarant is available.

What to take away from all this? Victims may be spared insulting or degrading cross-examination, but the corollary is that the witness loses an opportunity to prepare for the cross-examination that will occur at trial when the Sixth Amendment[32] is surely in play. The defense loses an opportunity to probe the Government's case and obtain testimony that can pry open access to information or leads not fully explored by investigators or counsel. It is harder to help prepare a client under these circumstances. Granted, a civilian attorney would think nothing of this because he cannot accompany his client into the grand jury room, much less have access to the government's witnesses or information.

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[31] UCMJ, art. 32 (2022).
[32] U.S. CONST. amend. VI.

The requirement for a judge advocate hearing officer inserts into the proceeding an individual with legal training, but it deprives both parties and the hearing officer of gaining the perspective of a smart lay officer who might sense the case in a different manner (more like a prospective juror than a career lawyer). Advocates of this change seem not to have had the confidence, based on anecdotal evidence, that a trained and advised investigating officer could maintain enough control of the proceedings to minimize the opportunities for unethical intimidation as opposed to probing-but-fair questioning. Still, this is the first time that, in any significant way, a defense-oriented, justice-oriented protection has been ratcheted in the other direction. As a result, a paper Article 32 may become the norm: undoubtedly more efficient and potentially less just.

It all comes back to the role of the commander. It is a philosophical or jurisprudential question as much as a procedural one. The issue of how separate a society the military is has been well settled. You would not likely hear sentiments expressed today the way they were by General Dwight D. Eisenhower or General William Sherman, who served about eighty years apart and were contemporary critics of the system. However, they have argued that leaders are integral to operating the military justice system. General Sherman, despite being the son of a lawyer and the brother to two lawyers, said, "[I]t will be a grave error if, by negligence, we permit the military law to become emasculated by allowing lawyers to inject into it principles derived from their practices in the civil courts . . . ."[33]

One of my heroes, General Eisenhower, gave a speech to a group of lawyers in New York about efforts to remove command control from the justice system. He delivered his remarks in November 1948 while president of Columbia University—about two years before his election as President and while the UCMJ was taking shape. He said the armed forces were "never set up to ensure justice. It is set up as your servant . . . to do a particular job, . . . and that function . . . demands within the Army

[33] WILLIAM T. SHERMAN, MILITARY LAW 130 (W.C. & F.P. Church 1880) (1879).

somewhat, almost of a violation of the very concepts upon which our government is established . . . ."[34]

About seven years before General Sherman's declaration, another general saw it differently. Closer to our contemporary view, then-Major General John Schofield, later to become Commandant and Commanding General of the Army, gave a speech to West Point's graduating class in 1879. He said, "The discipline which makes the soldiers of a free country reliable in battle is not to be gained by harsh or tyrannical treatment. On the contrary, such treatment is far more likely to destroy than to make an army."[35]

Our current flux has different roots, but we cannot underestimate the nature of the change. Nonetheless, it would be short-sighted and inaccurate to characterize the change as removing the commander from the process. On the contrary, the commander remains a key part of the process. Sexual assault is a scourge that robs readiness. However, it is still paradoxical that commanders have been judged inefficient and ineffective in sufficiently addressing sexual assault, while the presumed remedy is to take away a key tool that helps them maintain combat readiness and then give that authority to the people who provided legal advice to commanders when commanders had those responsibilities. The commanders must still select members and make a host of disposition decisions and recommendations. The greatest percentage of military justice actions are other than courts-martial, of course. There are at least eighty-five instances of NJP for every general court-martial in a typical year in the Army.

Most of all, the commander can and should advise the lawyer—speaking of role reversal—because the judge advocate needs the perspective of an accused's military leadership to properly gauge a disposition decision. Advocates of the change, however, are willing to exchange that now-indirect input for a sense that sexual offenses are dealt with less indulgently. Shapers of the system will have to entertain

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[34] Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 35 (1970) (quoting November 17, 1948 address).

[35] John M. Schofield, Major General, U.S. Army, Address to the Corps of Cadets, U.S. Military Academy (Aug. 11, 1879).

the question of why certain offenses will go to the STC and why others will go to the legacy system. Why is kidnapping moving to the STC, but burglary, robbery, larceny, and selling crack cocaine still go through the old system? It is important to think about, talk about, and train about what authority remains to exercise in this area with more creativity and imagination.

The military's rich continuum of corrective and judicial activity runs from on-the-spot correction to admonition, to counseling, to material put in writing, to more formal actions, to NJP, to various levels of court-martial, and on. The greatest disciplinary tool in the world—and one that is not duplicated anywhere—is the ability to ensure that continuum is in your and the commander's heads as you consider the available options. It also includes, of course, administrative separations. I noticed that these separations are receiving renewed scrutiny for how enduring some of the disabilities that come with some administrative discharges can be. An interesting, recent article by former judge advocate John Brooker and Reserve judge advocate Eleanor Morales prompts some thinking about the balance of the impacts of administrative separations.[36] In many ways, the military practiced restorative justice before it became a popular term.

Speaking again of commanders, about ten years ago, Democratic Congresswoman Loretta Sanchez delivered a lecture with a resounding affirmation of command control.[37] She believed it involved accountability for the military's poor record on sexual assault but kept disciplinary tools in the hands of commander. She said, "I am suspicious of any broad structural changes to the UCMJ as the solution to enhance prosecution of one category of offenses."[38] She worried that rhetoric and change could have a chilling effect on the appropriate exercise of discretion and clemency and about unlawful command influence writ large. I still believe the commander is and must be the principal authority of military justice. If good order and discipline are not a primary command mission and responsibility, a lawyer-driven justice program

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[36] Eleanor T. Morales & John W. Brooker, *Restoring Faith in Military Justice*, 55 CONN. L. REV. 77 (2022).
[37] Loretta Sanchez, *The Forty-First Kenneth J. Hodson Lecture in Criminal Law*, 218 MIL. L. REV. 265 (2013).
[38] *Id.*

will not flourish in the military. Removing commanders from the disposition decision will undermine the quality of those decisions. I doubt that if we strip commanders of that responsibility, we can effectively hold them accountable for good order and discipline in other matters.

Clearly, Congress came to a different conclusion. Further energy should not be burned lamenting the reduced role of the commander. The effort is better put into making the restructured system work. I will offer some observations on how to get to that point.

Moving Forward

We know where the law has landed, and it is a given that practitioners in the broader force will train, prepare, and adapt accordingly. Applying these changes involves not just the letter of the law but also how it is implemented, respected, or undermined—the norms that evolve from practitioners practicing. At the threshold, we have to candidly understand the limits of any justice system to correct behavior. It is not that behavior reform cannot or should not be done or that it is futile; but such efforts remind us of how limited the criminal justice process is alone.

Successful collaborations between social awareness and intensified prosecution have occurred in recent decades in, for example, drunk driving, child abuse, domestic violence, and crack cocaine. The military's singular success was the urinalysis program that started in the 1980s. A combination of advanced science, precise nanogram counts that eliminated claims of passive inhalation, and a rule of evidence that permitted unit sweeps without probable cause contributed to such success. The hookup culture, on the contrary, seems to have been intractable. Is there something different about this set of crimes that has proved to be difficult to handle in the military as it has? It is relevant—though insufficient—to observe that society, including higher education, has not been much better at combatting the issue. That said, a set of proven social fixes are not available in this issue as they were for the glamorization of alcohol and the seriousness of domestic violence. Some inherencies exist. For instance, the military is still only 17 percent women in the fifth decade of women attending the Service academies.

Moreover, we know from college dormitories as well as military barracks that we are taking on quite a challenge in providing almost unsupervised billeting, no charge of quarters, no curfew, easy access to alcohol, and a more than five-to-one ratio of men to women. The law intersects deeply with policy in these areas.

Training and Acculturation from the Defense Side

The military trains better than anyone else, especially in speed and comprehensiveness. The closer the problem is to a purely legal issue, the easier it might be to solve. One of the best examples of successful integration was not guaranteed to work: the introduction of the independent uniformed defense counsel. The Services implemented them in different ways and on different dates, with the Army doing so in the late 1970s. Traditionally, counsel went from prosecution to the defense on a case-by-case basis. Sometimes, a young officer would work as a defense counsel for several months before switching back to prosecution (everybody has heard stories of counsel serving as defense counsel until they started to win and then became prosecutors).

The key elements of a credible and effective defense service remain, in my opinion, competence and independence. The independence required underwriting by commanders and senior military lawyers during that time of flux. It meant access to resources and commanders. Only the sustained practices by commanders and opposing counsel enabled Trial Defense Service (TDS) to root itself in military structure and culture. Still, the resource entanglements were ongoing. Only in recent years did warrant officers become available to TDS, and there was no Defense Counsel Assistance Program until the Trial Counsel Assistance Program was more than twenty years old.

Still, the change to institutionally independent defense counsel was not new in all respects, because so many commanders had that opportunity to serve as counsel. As a result, they related to the fight to some degree, and it was not launched cold. There was a three-year prep test in select U.S. Army Training and Doctrine Command units before Army-wide implementation. This provided a natural opportunity to respond to the concerns of leaders, lawyers, and the rank and file. Practitioners watched closely, gradually gaining confidence that serving

as a defense counsel—an ethical, prepared, and aggressive defense counsel—did not disqualify progression in rank and responsibility. As the organization matured, people witnessed defense counsel get promoted and a couple of individuals with significant defense experience rise to the rank of Judge Advocate General.

For those two main reasons, independence and competence, we obtained permission to design a new insignia. We had a worldwide contest to design the new patch to signify that TDS counsel are distinct from the rest of the Judge Advocate General's (JAG) Corps and the command in which they served, and to help clients know that they come from an independent organization, even if the rest of the uniform was the same one the client was wearing.

The first chief of TDS told a story at its twenty-fifth-anniversary symposium in this room about visiting the heraldry office in search of a patch. The clerk in the office pulled out a Tupperware container containing a bunch of old patches and said, "Let's look through here and see what you think might work." They landed on a pretty generic patch. It was an esteemed patch that goes back to service units in World War II, but it did not scream defense counsel. So, in deference to Lieutenant Colonel Shaun Lister and some of his griping pals, we got permission to incorporate part of the old patch into the new patch. Of course, there are regulations for everything, including the dimension of a prior patch that can be grafted onto a new patch. It was not an easy process, but it had a point. In the military, we are like NASCAR drivers; our uniforms are covered in items that identify us and our roles. You can learn a lot about a person before they open their mouth, and TDS clients now have some sense that their TDS attorney is on their side and works for them.

Article 32, UCMJ

Returning to Article 32, the coming changes to the provision are among the most significant and far-reaching. Almost every change in military justice has moved the ratchet in one direction, and as I mentioned, this one is moving the other way. The conversion and the shrinkage of Article 32 to remove the components that were most favorable to the defense and justice, in my perception, is a step back. The original Article 32 was a nutrient-rich broth of due process and

protections. The new Article 32 is comparatively sterile. It is a summary of limited value, and as practitioners, we may have brought it on ourselves, but the changes are here to deal with.

One of the ways we brought it on was by finding the need for speed in courts-martial. It was common during the many years I practiced for the Government to work out plea agreements in special courts-martial, and they kept moving the cases. This was sometimes a change in forum that a negotiated plea brought about. Since most general courts-martial also were negotiated pleas—a far smaller ratio than in the Federal system—but sometimes more than was healthy, the Government typically insisted on a waiver of Article 32. This was another unanticipated consequence of a justice-distorting factor. For some years, processing time was an overwhelming concern in the system. It was reinforced by a practice in which standings showing every general court-martial jurisdiction and the relative processing time were widely published in *The Army Lawyer*.

As a result, it was common for defense counsel to happily "eat" processing time in exchange for other sweeteners regarding dropped charges or a sentence cap. To be fair, a persistent backlog of cases threatened due process and discipline. However, there were enough cases with colossal processing times that the strict accounting requirement sparked competition in achieving the lowest processing time. This led to much statistical manipulation but not much improvement in justice. Most of all, the Government often portrayed Article 32 as an obstacle to avoid in a sprint to trial to improve processing time, and defense counsel were so eager to get better deals that they did not always adequately appreciate the protections and insights they forfeited in waiving the Article 32.

The ultimate unintended consequence of these reforms could be—and I think you will ensure it is not—a loss of command interest. The new changes, at least initially, are likely to be dispiriting in some ways to some serious leaders who want to exercise all disciplinary tools available to them. It is the judge advocate's job, bolstered by the best of command leadership, first, to continue to address the majority of the military's disciplinary issues over which they will still be the primary actors and second, to refute and guard against any sentiment of abdication ("That's the JA's problem now"). I think Congress never fully appreciated the complementarity of command and counsel. If so, they might have

recognized that they were making a change based on perceived poor performance and now entrusting responsibility to the people who advised the underperforming commanders.

Therefore, judge advocates, rather than reveling in a sort of uber status, should embrace the command tighter than ever, seek their advice, and keep them involved as much as humanly possible. It seems unlikely, but it is not inconceivable that leaders' perceived marginalization could give rise to underground military justice—returning us to the days of informal punishment that some commanders and senior enlisted winked at. I suggest that you be careful to guard your cynicism and be careful with your language. Prosecutors do not use society's lazy and belittling slang, like "he said, she said" to describe a sexual assault case. This phrase telegraphs that the victim is on equal footing with the accused. In other words, you might believe him, or you might believe her. This makes them equal in credibility, undermines proof beyond a reasonable doubt, and could lead to an unmerited acquittal. Defense counsel, on the other hand, look insensitive and might further undermine their case if their client does not take the stand. So, if you have to address this phenomenon, use different words.

The JAG Corps Itself

By any measure, the military is in an era of sustained low in discipline, whether it is measured by looking at courts-martial per thousand Soldiers or the rate just for general courts-martial (factoring in administrative separations). There has not been such a low rate for decades. This means there are fewer cases to try, which should be objectively good news. We should be alert to how it affects the professional development of military justice practitioners.

One constructive critic of our system has argued that there is a bloat in several sectors of the military justice system, to include the individual Service courts, and that the D.C. Circuit could absorb C.A.A.F.'s comparatively low caseload. That is an arguable point, though it also represents one more pebble of civilianization of military justice. More pertinent to the quality of justice is the impact on counsel and our corporate expertise. The reduced caseload means that a typical counsel tries far fewer cases than his predecessors did closer to the turn of the

twenty-first century. This creates the risk of a fixed number of judge advocates handling a much smaller caseload.

The most likely explanation for the reduction in case numbers is less indiscipline in the force, which is good. It is important for reasons of discipline and sociology to know what we have done right. A relentless and credible urinalysis program, sustained emphasis on sexual misconduct, and that pretty well-educated volunteers make up the present force are all explanations. Without that perspective, we cannot adjust how we train, advise, and develop counsel or the way we advise commanders, which is no less a critical skill in our transformed system. Note that the new rules specifically call for the option of second-chair counsel. I would suggest that no case tried anywhere, no matter how seemingly routine, that does not have two defense counsel and two prosecutors assigned. Even the most ordinary cases have to be prepared as though they are going to be contests. It is never a waste of time to hold fielding or batting practice, and there is never a case in which both counsel will not learn something or build courtroom muscle memory.

The introduction of the special victim's prosecutor over the last decade has institutionally moved the JAG Corps from strictly territorial-based criminal law operations, where prosecutors mainly try cases at their installation or ship, which may make this less of a lurch, but it still has an impact on military justice leaders at all levels (and more so for those who head out to be STC or chiefs of justice). Further, leaders will have to manage counsel rotations and developments to avoid the possibility of two JAG Corps: one of elite military justice practitioners and another of those who do everything else. That "everything else" is crucial work, and plenty of judge advocates would be content to take it on as a career path. Still, we have to develop a diverse set of talents, and commanders need to be able to rely on us in many areas beyond military justice. Thus, everybody's trial expertise must be developed in a way that does not forfeit the expertise of the entire organization. It will take careful management and imagination to maximize leaders' training and development obligations and not just grab slivers of a static or shrinking pie.

Time to Pause and Review

The system also needs a way to think. In recent years, Article 146[39] was added to the UCMJ to establish the Military Justice Review Panel. The Secretary of Defense appoints members to eight-year terms who are called on, in the words of the statute, "to conduct independent periodic reviews and assessments" of the military justice system.[40] This panel seems to be a successor of the Code Committee, which was not widely seen as effective. The first iteration of the panel commenced operations last fall. I sit on that panel with twelve colleagues. My opinions today are my own, as are any mistakes.

We need a rest. The last few years in justice have been everything, everywhere, all at once. So much change has happened in such a short time. We can only have so much confidence in what statistics and anecdotes tell us. We are about to make the most fundamental change since 1950: lawyers swapping roles with the commanders. Imagine if policymakers and politicians were to commit to a moratorium on any additional significant changes for ten years. Then, a calm analysis might give Soldiers and politicians a basis for deciding what to tweak or revise. Who knows which of the many changes is producing what outcomes? It would be wise to figure out some useful metrics to gather data while also letting the system pause for some period of time so we can disaggregate all of the changes in inputs that have been flooding in.

We can always find a lesson in baseball. This season, they have instituted a pitch clock, banned the shift, put a ghost-runner on second in extra innings, and made the bases bigger—they look like king-sized beds now—all in the interest of a better pace of play. They might not have foreseen the number of jammed ankles and snapped tibias that will come from more stolen base attempts. Similarly, unanticipated second-order effects are what we need to be alert for as this host of changes floods into the system. How will we know which of them has brought about changes and how do we then evaluate those changes? How do you count them, measure them, assess them, and move forward? I suggest that you are the individuals best-positioned to defend the system and make it work. There

[39] UCMJ art. 146 (2022).
[40] *Id.*

is probably no factor more precious to the military justice system than legitimacy. The shrewdest observers and critics have made a similar point. The military's practices are different from those of the civilian world for a good reason. But, the system must perform in a trusted, truth-seeking, due-process-based manner so the outcomes can be trusted. The military is a metric-heavy organization, and while I have discussed the limited value of metrics in the military justice system, they are necessary in certain respects and should be decided and tracked from the outset. Among the useful metrics will be cases convened by the STC, cases sent to trial despite the hearing officer's recommendation to the contrary, and all related ones.

Metrics, however, can be a vector of unlawful influence, including congressional influence. The great Justice Robert H. Jackson, when he was U.S. Attorney General, inspired and cautioned prosecutors with these words: "Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character."[41] Now, the Heisenberg Principle from the world of science tells us that the very act of observing something alters what is being observed or measured. The fact that military justice practitioners know that their processes, decisions, and outcomes are being tracked, and that reports will be made and congressional testimony sought, can alter their behavior. Does a person with prosecutorial discretion make different recommendations or decisions knowing the data about cases are being sliced and analyzed in all manner and that conclusions will be drawn and decisions made in light of that? Will a higher-than-normal number of acquittals mean that too many borderline cases were sent to trial or too many Soldiers' reputations and liberties were put at risk? Or does it mean that the defense counsel was especially strong? Or will a high rate of convictions reflect stellar prosecutorial advocacy or a risk-averse convening authority hesitant to take the close case to trial? The metrics will start immediately; the norms and interpretations of them will evolve over time.

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[41] Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Second Annual Conference of United States Attorneys, Washington, D.C. (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

Future Changes

So, how should we think about what's next? If you wanted a further judicialized system, what is the next set of changes you would seek? Critics of the American Military justice system would like us to have our own *Findlay* case[42]: the United Kingdom case that came before the European Court of Human Rights about twenty-five years ago, which pretty much ended traditional military justice in the United Kingdom. Critics would argue that non-deployment felonies should be sent to Federal courts. This would represent, in a way, a return to the disputatious and fragmented justice system of the Supreme Court's *O'Callahan v. Parker*[43] era, which reigned from 1969 until the Court's corrective opinion in 1987, *Solorio*.[44]

Solorio is thirty-six years old, and I expect that commanders find the unity of effort that comes from universal jurisdiction as giving them the maximum ability to affect order and discipline. Ceding that authority to the civilian system introduces variables, including the incarceration, trial, and corrections process, which undermine a leader's ability to affect as many aspects of justice and, therefore, a unit's discipline. It is worth preparing to engage the argument that we might at some point see regulation or new legislation intended to bring back the service-connection analysis in fancier threads to demarcate the line between the military and civilian systems.

While I believe it wise to resist the urge to implement additional reform to a justice system that is undergoing its most fundamental change since 1950, so long as we are on the operating table, let me suggest what else may be coming.

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[42] Case of Findlay v. The United Kingdom, App. No. 22107/93 (Feb. 25, 1997), https://hudoc.echr.coe.int/eng?i=001-58016.

[43] O'Callahan v. Parker, 395 U.S. 258 (1969) (portraying the military justice system in a harsh light, constricting the military's authority to try certain cases, and injecting massive confusion into what constituted service connection).

[44] Solorio v. United States, 483 U.S. 435 (1987).

Professional Purple Judiciary

Henry Kissinger is said to have said "whatever must happen ultimately should happen immediately."[45] With the move to judge-alone sentencing and the sentencing committee, it seems near inevitable that the military judiciaries will merge into a single purple (joint) judiciary, even as we forfeit the community's involvement in administering sentences. The arguments against it get thinner as time goes by, primarily the need to educate judges on service, customs, and traditions when they hear cases from other Services. But this probably underestimates judges' brains and adaptability and counsels' ability to articulate these kinds of differences. Judges will be even more consequential under the new revisions, giving rise to a discussion about whether it is time for a board-selected cadre of judicial professionals. And these differences are probably small enough anyway. Does the Marine Corps view unauthorized absences *that* differently from the Air Force that a judge from one or the other Service could not hear a case? We also have to remember to trust counsel to educate the judges, and the judges to judge with some humility. This likely would have the collateral impact of fewer, busier, and more selectively appointed judges.

Panel Selection

As for member selection, with all the changes that have happened, does it almost seem odd that convening authority selection of panel members has survived this long? Are the arguments as strong as they ever were for our kind of blue-ribbon panels with judicial temperament? And with diminished command control, is it important to preserve this as a leader's function? It seems to be the change that drew a lot of scholarly attention over the years, and Major General Kenneth J. Hodson[46] and

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[45] *Who Was Betrayed?*, TIME, Dec. 8, 1986 at 17, 26 (quoting Henry Kissinger).

[46] Major General Hodson, for whom this lecture is named, served as: The Judge Advocate General, U.S. Army, from 1967 to 1971, the first Chief Judge of the Army Court of Military Review, and a principal architect of the Military Justice Act of 1968. Major General Michael J. Nardotti, Jr., *The Twenty-Fifth Annual Kenneth J. Hodson Lecture: General Ken Hodson—A Thoroughly Remarkable Man*, 151 MIL. L. REV. 202, 202 (1996).

Brigadier General (Retired) John Cooke[47] both embraced it. It might be worth thinking about revisions short of random selection that would serve the interests that have kept Article 25[48] in play for all these years.

Command Influence

I would like to say a couple of words on command influence. First, on old-school command influence, my argument would be to redefine it, legalize it, tax it. Why do we not do with undue command influence (UCI) what so many jurisdictions have done with cannabis: legalize it and regulate it? Any form of command influence remains uniquely corrupting. We never can declare victory over UCI because each new wave of practitioners has the opportunity to corrupt the system anew and become too personally involved or biased. The arc of the legal universe does not automatically bend toward justice. So, we need measures in place to guard the integrity of the system. Commanders really *will* have less authority and, therefore, less direct opportunity to exert influence. We drill commanders to "nest" their judgment on operational matters with that of senior leaders all the time, but in the area where they are least competent and least experienced—military justice—we expect them to ignore their senior leaders, whose counsel is more important in this area (because of junior leaders' inexperience) than in the operational space where they normally live.

As a result, some of the old-school constraints on UCI were marginal and unrealistic. Reduced command authority calls for a refreshed rubric for evaluating command influence. Then, there is new-school UCI: UCI in a flannel suit. While one set of command influence fades, there is a need to address the new set of potential command influence in the new structure. The lead special trial counsel will report directly to the Secretary of the Army, an official nominated by the President and

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[47] Brigadier General Cooke served in the U.S. Army Judge Advocate General's Corps from 1972 to 1998. His last assignment was as Chief Judge, U.S. Army Court of Criminal Appeals. *BG (Ret) John Cooke,* JAGCNET, https://www.jagcnet.army.mil/Sites/acca.nsf/xsp/.ibmmodres/domino/OpenAttachment/sites/acca.nsf/55F5C0CE7E3F70A2852584500069EDF3/Attachments/Bio%20-%20BG(R)%20Cooke.docx (last visited Oct. 31, 2023).

[48] UCMJ art. 25 (2021).

confirmed by the Senate; this process is obviously susceptible to political and interest group pressure, no matter how subtly asserted, which affects a class of cases rather than a particular one. The Court of Appeals for the Armed Forces has said for years that there is no such thing as "command influence in the air,"[49] but this is an inaccurate statement. What they meant to say was that most of the command influence in the air was not sufficiently detectable or traceable to warrant judicial relief. It was always in the air, but we had carbon monoxide detectors in place to reduce its reach and its lethality. We need a new term to describe unlawful influence under the new scheme.

These changes to the system have come from Congress, and properly so. Congress is responsible for the rules governing the land and naval forces; however, placing a political appointee at the apex of the system risks seeping into the judgment of those who have to make referral decisions. A recent article in the *Yale Law Journal* talked about the pressures Congress can place directly or otherwise on military practitioners, and it was published even before the move to STC.[50] The author considers the *Bergdahl* case[51] and others in which Congress delved deeply into particular military justice matters—there really was a bill introduced in Congress called the No Back Pay for Bergdahl Act.[52] So, as we are preparing to implement the new rules, we should think about how to respect Congress's legitimate oversight while guarding against dispositive decisions that tilt one way or another because of a perceived congressional preference.

The Death Penalty

Next, I would suggest that serious thought be given to rescinding the death penalty. It is hard to justify retaining a desuetudinal practice on the books for symbolic reasons. It is hard to imagine a scenario that would plausibly result in an actual execution. The last military execution was

[49] *See, e.g.*, United States v. Shea, 76 M.J. 277, 282 (C.A.A.F. 2017).
[50] Max Jesse Goldberg, *Congressional Influence on Military Justice*, 130 YALE L.J. 2110 (2021).
[51] United States v. Bergdahl, 80 M.J. 230 (C.A.A.F. 2020).
[52] Goldberg, *supra* note 50, at 2145-46; *see also* No Back Pay for Bergdahl Act, H.R. 4413, 115th Cong. (2017).

approved by President Kennedy, and the accused was hanged at Fort Leavenworth in April 1961. Sixty-two years and twelve commanders-in-chief later, there have been no further executions, despite cases being tried with great sophistication, exactitude, and integrity and despite multiple court decisions upholding the military death penalty. Regardless of anybody's personal philosophy, there are secondary impacts as well. At the height of the military commission effort, we negotiated with various foreign judicial officials about access to important terrorism evidence around the world. Several countries refused to provide us with timely and high-quality evidence because we refused to rule out the possibility of a death verdict in those cases. Just the fact that it was on the books—not even that it had been used—had an impact.

Military Corrections

I would also suggest reexamining military corrections to revise the mission or close the facilities. Our lassitude regarding the death penalty naturally prompts the question of why we continue to operate a corrections system when we do not revive legitimate opportunity for some number of those who serve their sentences to return to duty. There is less reason than ever to keep a boutique corrections system functioning where nearly zero accused are returned to duty. Keeping corrections facilities operating so that we have a warm pipeline of corrections professionals in the event of a major deployment is insufficient reason alone to keep open a set of facilities that are distinguished only by the prior profession of its confinees. Abu Ghraib prison did not do much to validate that model.

Trial Defense Service

We must continue to strengthen our TDS. It is one of the hallmarks of our system, along with the competence and independence that are indispensable to its value for our Service members. Here is something from the old days that I hope you cannot relate to anymore. Many of you know of or read the book *Fatal Vision*.[53] If not, you should put it on your

[53] JOE MCGINNISS, FATAL VISION (Signet 2012) (1983).

list. It is about a 1970 case at Fort Bragg[54] where a lieutenant was on trial for murdering his wife and children. He was in a room with his TDS attorney and on the phone with his civilian defense counsel, who was going through a very strict law-based inquiry.[55] The civilian attorney then asked the lieutenant to check and see if his military defense counsel's shoes were shined. The lieutenant looked down, confused and incredulous, and responded that no, they were not shined and were "kind of scruffy."[56] The civilian defense counsel said, "Okay, in that case, trust him. Cooperate with him until I can get down there myself."[57]

The civilian defense counsel's point was that if an Army lawyer keeps his shoes shined, he is trying to impress the system. And if he was trying to impress the system—one which had a vested interest in seeing the accused convicted—then he was not going to do any good. The scruffy shoes meant that maybe he cared more about being a lawyer. Well, to us, that is probably partly amusing, partly insulting, and definitely way out of date. But there cannot be any compromise on the institutional commitment to competence and independence. It will be truer than ever as we implement this new system.

It does not hurt to remind ourselves that it is not at all a defense counsel's job to serve as a sort of test pilot in improving or validating the new system. Every defense counsel has only one job: defend the person they are assigned to defend ethically, for sure, but with a wide band of tolerance for techniques. This high-quality advocacy might well lead to improvements in the system, but that is not their goal. Their goal is to defend the Soldier next to them. And Justice Byron White, who tilted jurisprudentially toward the prosecution, gave the following endorsement to the defense function, which defense counsel should consider if they are contemplating a sleeve tattoo. He said:

Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the

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[54] Now Fort Liberty.
[55] MCGINNISS, *supra* note 53, at 223.
[56] *Id.* at 224.
[57] *Id.*

prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the state to its proof, to put the state's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.[58]

And, therefore, it is okay to shine your shoes.

Military Commissions

I would like to briefly discuss military commissions as one last example of transition. At the end of the Reagan administration, in December 1988, a Libyan bomb detonated on a plane over Lockerbie, Scotland, murdering all 259 passengers, who were mainly Americans returning from their studies in Europe for Christmas, and 11 individuals on the ground. A then-young Department of Justice official, William Barr, suggested that the murderers should be tried by military commissions—which had last been used in World War II—because it was not just a crime in his view. It was not just 270 discrete murders but an attack on America by noncitizen unlawful combatants. His memo advocating this move was incisive and creative, but it was probably just too novel for an event that occurred on the seam between two Presidential administrations.

President George W. Bush did revive military commissions, but at some cost and with results still pending. The Army led a team of talented lawyers from all Services in the preparation of the military order putting commissions into place for certain cases of terrorism. For several weeks,

[58] United States v. Wade, 388 U.S. 218, 257-58 (White, B., concurring in part).

we briefed the Secretary of the Army every morning. We researched commissions and assisted with drafting the President's order, which was published in November 2001.[59] The administration showed imagination and audacity in dusting off a mechanism last used before the court-driven criminal law revolution of the middle of the century. The Army leadership endorsed the concept of military commissions and joined in the effort to bring a historically rooted mechanism back to life. Our sense was to look at the changes in military justice and criminal law since 1942, the date of the *Quirin* decision,[60] and to recommend which to adopt, which to modify, and which to not incorporate at all.

Military counsel from all the Services had an acute concern for the legitimacy and integrity of the military justice system and the impact on the reputation of the justice system and its practitioners. Several key members of the civilian Department of Defense leadership, however, exhibited a lack of confidence in judge advocates, which was helpful in revealing an unfamiliarity with military justice and dated assumptions about practitioners. Some critical differences emerged, and several in the civilian leadership operated on an assumption that we did not share: that the closer they stuck to *Quirin*, the more likely it was that commissions would be successful.

There were a couple of key differences. The civilians wanted to bring back the law member, since it was the law in 1942, out of a worry that—in their terms—rogue military judges would unduly "judicialize" the commission's process. Our sense was that the military judge had become a fundamental, deeply rooted legislative change in effect since 1968: a rudiment of due process. Some key policy professionals did not understand the idea of totally independent military defense counsel. By 2001, it was the norm for all Services, but some civilian officials, lawyers and not, assumed a pliability on the part of uniformed military defense counsel that would generate easy guilty pleas. They did not understand sufficiently that a military defense counsel who sought a plea agreement would have his work carefully scrutinized. They also did not

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[59] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

[60] *Ex parte* Quirin, 317 U.S. 1 (1942) (upholding a U.S. military tribunal's jurisdiction over the World War II trial of eight German saboteurs).

want to permit civilian counsel to participate in the process, though that perspective changed over time. And, the administration wanted to use this process as part of its effort to reassert executive primacy. At that time, debates surrounded the "unitary executive,"[61] which was a paramount motivation of this senior official who was the theoretical brains behind resuscitating commissions. This factor distorted the judgment of those analyzing this flexible, constitutional mechanism of justice.

Preparation

One of the tools of well-prepared ethical advocacy is Appendix 2.1 of the *Manual for Courts-Martial*,[62] which is the successor to the discussion that used to be after Rule for Courts-Martial 306.[63] As a young prosecutor, I blew that up, photocopied it, and put it under the glass on my desk so that when I was talking to a commander, I could remember to prompt them with questions that I should have known to be asking. Appendix 2.1 is an exemplary analytic rubric for commanders and, therefore, for those who advise them. It lists factors that boil down to an assessment of the military impact and the human impact of an offense. It helps you sharpen and expand your thinking process.

Concluding Thoughts

We are all talking about how significant the change in referral authority is and it is. But in some respects, it is pretty close to what we have already done. Judge advocates have been the trusted gatekeepers for information and perspective about cases as they are developed and litigated. Here are the strengths. Here are the weaknesses. Here are the

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[61] The unitary executive theory, which the Bush administration adopted with Vice President Richard (Dick) Cheney credited as its major proponent, describes the theory that "the [P]resident, given 'the executive power' under the Constitution, has virtually all of that power, unchecked by Congress or the courts, especially in critical realms of authority." Mark J. Rozell & Mitchel A. Sollenberger, *The Unitary Executive Theory and the Bush Legacy*, *in* TAKING THE MEASURE: THE PRESIDENCY OF GEORGE W. BUSH 36 (Donald R. Kelley & Todd G. Shields eds., 2013).

[62] MCM, *supra* note 1, app. 2.1 (Non-Binding Disposition Guidance).

[63] *Id.* R.C.M. 306.

variables. Here is a sense of how we have treated similar cases in the past. Now, judge advocates will have the opportunity to be the deciders at the very top of the pyramid. But, most judge advocates will still be preparing cases and making recommendations, although in certain circumstances to the STC.

So, as I conclude, I cannot imagine a better time to be a judge advocate. I do not think that we who have worked in the system get nostalgic about what we did. But we can relate to this period in your careers where the system is in ferment. It needs smart, ethical counsel to give advice and, soon, to make decisions regarding matters of justice. I would suggest you wear your authority confidently but lightly. In some ways, you can keep commanders closer than ever because they are allowed to influence you. What a tremendous opportunity and responsibility for those who teach the Senior Officer Legal Orientation (SOLO) course here at The Judge Advocate General's Legal Center and School or who are out in the field talking to Soldiers and leaders. The commanders are not your bosses, but you are their emancipated servants, informed by those leaders' perspectives while managing the disposition of significant offenses. Vacuum up that perspective, remain open to hearing—not obeying, but hearing—what is on their minds: why one offense is really serious, why some we think are serious might not be in their eyes, and all that goes into forming and maintaining a combat-ready force.

Georges Clémenceau is said to have originated the phrase "military justice is to justice as military music is to music"[64]—not intended as a compliment. But Clémenceau and John Philip Sousa[65] were more or less

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[64] *See, e.g.*, UNITED NATIONS EDUC., SCI., AND CULTURAL ORG., LES DROITS CULTURELS AU MAGHREB ET EN EGYPTE [CULTURAL RIGHTS IN MAGHREB AND EGYPT] 237 (Souri Saad-Zoy & Johanne Bouchard eds., 2010) (Fr.) ("Il suffit d'ajouter 'militaire' à un mot pour lui faire perdre sa signification. Ainsi la justice militaire n'est pas la justice, la musique militaire n'est pas la musique." ["Just adding 'military' to a word can make it lose its meaning. Thus military justice is not justice, military music is not music."]) (quoting Georges Clémenceau).

[65] John Phillip Sousa, who composed the national march, *Stars and Stripes Forever*, served as the 17th Director of "The President's Own" U.S. Marine Band from 1880-1882. *John Philip Sousa,* U.S. MARINE CORPS, https://www.marineband.marines.mil/About/Our-History/John-Philip-Sousa (last visited Oct. 11, 2023).

contemporaries. The Frenchman likely did not know Sousa because if he did, he would know that the best military music can get your toes tapping and your left foot hitting the ground on the strike of the bass drum. You are the custodians who can continue to show that the French need better martial music or Clémenceau needs a new metaphor. And when you are listening as hard as you can and figuring out the advice to give to those who trust your judgment, sneak another peek at those factors under the glass on your desk.