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THE TWENTY-SIXTH ANNUAL KENNETH J. HODSON LECTURE: MANUAL FOR COURTS-MARTIAL 20X[1]

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I. Introduction

It is truly a privilege to be here today. Major General Hodson was a real giant in our business, and a great gentleman. No one played a more important role than he did in shaping the military justice system we enjoy today, and few have equaled him in leadership and vision. I commend to you Major General Nardotti's superb exposition of General Hodson's career, given at this lecture two years ago, and published in volume 151 of the *Military Law Review*.[3] I view the opportunity to speak as the Hodson lecturer as one of the high points in my career.

Almost twenty-six years ago, on 12 April 1972, General Hodson delivered the first Hodson lecture. I arrived in Charlottesville three days later to begin Phase II of the sixty-fourth Basic Course. At the time, I did not appreciate, or even know, what I missed, but I have since come to regret that I was not present for that address which is published in volume

1. This article is an edited transcript of a lecture delivered on 10 March 1998 by Brigadier General John S. Cooke to members of the staff and faculty, distinguished guests, and officers attending the 46th Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia. The Kenneth J. Hodson Chair of Criminal Law was established at The Judge Advocate General's School on 24 June 1971. The chair was named after Major General Hodson who served as The Judge Advocate General, United States Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

2. Commander, United States Army Legal Services Agency, and Chief Judge, United States Army Court of Criminal Appeals.

3. Major General Michael J. Nardotti, *The Twenty-Fifth Annual Hodson Lecture: General Ken Hodson—A Thoroughly Remarkable Man*, 151 MIL. L. REV. 202 (1996).

57 of the *Military Law Review*.[4] I commend it to you as well. The title of that address was "The Manual for Courts-Martial, 1984."

Remember that this was 1972. The 1969 *Manual*—which to the majority of people on active duty today is as ancient as the Dead Sea Scrolls—was less than three years old at that point. That *Manual* implemented the Military Justice Act of 1968, and included changes at least as far reaching as those instituted by the Uniform Code of Military Justice (UCMJ) in 1951. General Hodson was a prime mover in bringing about the 1968 changes. Nevertheless, he was already talking about additional changes.

Many of the changes General Hodson suggested that day have since come into effect: a separate chain of supervision for defense counsel; eliminating the requirement for the convening authority to detail military judges; reducing the convening authority's post-trial role to one of clemency; authority for interlocutory appeals by the Government; and direct review by the Supreme Court of decisions of the Court of Military Appeals, just to mention a few. Some others have not been adopted, such as: selecting court-martial panels by jury wheel; judge alone sentencing; and a system of standing courts-martial, known as "Magistrates Courts" and "District Courts." Many of these suggestions are still worth considering today.

In his article, General Hodson discussed how he came up with the name for his speech:

> When I started to prepare these remarks, the title of my talk was to be, "The Manual for Courts-Martial—2001." After reading Alvin Toffler's *Future Shock*, I decided that I could not predict what is going to be here in 2001. I was encouraged to shorten my sights by a recent address by the Commanding General of the Combat Developments Command, entitled "The Army of the Seventies." I concluded that if the command that is charged with planning the Army of the future can't go any further than the Army of the 70's, which is now, it would be ridiculous for me to try to go out to 2001. So I settled for 1984.[5]

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4. Major General Kenneth J. Hodson, *The Manual for Courts-Martial—1984,* 57 MIL. L. REV. 1 (1972). General Hodson published another discussion of the future of military justice in 1974. Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1974), *reprinted at* MIL. L. REV. BICENT. ISSUE 579 (1975).

5. Hodson, *supra* note 4, at 5.

By incredible prescience or a remarkable coincidence, when the 1969 Manual was replaced, it was with the *Manual for Courts-Martial, 1984*. Today, I am not going to try to compete with that. I chose the somewhat cryptic title "Manual for Courts-Martial, 20X" in order to avoid pinning myself to a specific date. The Army has used "Force XXI" and the Joint Chiefs have used "Joint Vision 2010" to describe the forces of the future. The abbreviation "20X" is a hybrid of those, with enough ambiguity that I cannot be wrong.

As General Hodson did a quarter century ago, I do want to talk about how military justice might change over the next decade or so. The only unqualified prediction I will make is that military justice will change. As Thomas Jefferson said:

> [L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.[6]

These words of Mr. Jefferson, which appear prominently on a wall at The Judge Advocate General's School, express more eloquently than I can, the necessity for military justice to change if it is to survive and thrive. The only question is how.

To address that question, I would like to do four things. First, I want to remind us of those basic principles which we must always keep in mind when addressing military justice. Second, I will briefly recount the history of military justice; I think it is essential to know where you have been and how you got where you are before setting off in new directions. Third, I will examine some of the trends and forces at work that will affect the military justice system. Fourth, and finally, I will discuss several specific changes I would make in our system, and some other areas that warrant careful study.

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6. RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 56 (1973) (quoting Thomas Jefferson).

II. Basic Principles

As with most legal questions, a good place to begin is the Constitution. I know you are all familiar with the powers of Congress[7] and the President[8] over the armed forces and military justice, but I would like to begin with an even more fundamental point, the Preamble:

> We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[9]

It is important to recall two things when you consider those words. First, as lawyers and as military officers, we have as large a role as any members of our society in helping to meet those goals that the Framers adopted. That is something of which we can be proud.

Second, those words remind us that all power flows from the people and that, through the genius of our constitutional structure, there is a direct bond between the people and the men and women in the armed forces. Every soldier, sailor, airman, and marine takes the following oath:

> I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.[10]

That oath is not to the President, the Congress, the Government, or to the fatherland or motherland; it's to the Constitution, and thereby to the people. At the same time, the people, through Congress and the President, assume responsibility for the men and women of the armed forces, and a

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7. "The Congress shall have the Power . . . To Make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.

8. "The President shall be Comander in Chief of the Army and the Navy of the United States." U.S. CONST., art. II, § 2.

9. U.S. CONST. preamble.

10. 10 U.S.C. § 502 (1994).

primary means by which they have exercised that responsibility is mentioned in that oath—the UCMJ.

As those charged with the administration of the UCMJ, we must bear in mind our responsibility and accountability to the people and their elected representatives. This is our system; but in a greater sense it is theirs. We are simply the trustees.

The American people care very much about their soldiers, sailors, airmen, and marines. Although we can express concern that a preoccupation with casualties sometimes limits our country's freedom to act on the world stage, we can hardly deem it unhealthy that the people value highly the lives of their men and women in uniform. Think how sad it would be if they did not. At the same time, the people care greatly about how the military performs its missions. They expect it to fight and win our nation's wars, and to execute other missions flawlessly, and to do so in accordance with our country's values. They expect it to protect noncombatants, to treat the enemy humanely, and, above all, to take care of its own. Thus, they care very much how servicemembers are treated by our justice system—just witness the number of articles in the news about military justice in recent years. The American people want and expect an effective, disciplined force in which the rights of each servicemember are protected.

This concern for soldiers, sailors, airmen, and marines reflects another fundamental truth—what I call the eternal truth. Success in any military mission depends on many things: the equipment, the doctrine, the plan, the supplies, the weather, and so on. Such factors have varied greatly through history, but ultimately the success of every military mission depends on a group of relatively young men and women doing their jobs well under difficult, demanding, often dangerous circumstances. That success, their success, does not just happen; it is the product of a system of individual and group development which builds competence, confidence, cohesion, morale, and discipline. George Washington stated it best: "Discipline is the soul of an Army."[11]

By discipline I mean not fear of punishment for doing something wrong, but faith in the value of doing something right. This aspect of military justice is often misunderstood. When we say we want a disciplined force, we do not mean we want people cringing in fear of the lash. This is not to deny the coercive power of the law or to suggest that it is unimpor-

11. D. S. FREEMAN, WASHINGTON 116 (1968).

tant; clearly it is. After all, at George Washington's request, in 1776 the Continental Congress increased the maximum number of lashes from 39 to 100.[12] But the coercive power of the law requires only the minimum, the lowest common denominator: it impels the lazy, the indifferent, and the cowardly to do what is specifically required of them on the battlefield, in order to avoid defeat and disaster. It does not, by itself, provide the motivation, the morale, to do the utmost necessary to encourage valor and to ensure victory. General George Marshall stated, "[i]t is not enough to fight. It is the spirit which we bring to the fight that decides the issue. It is morale that wins the victory."[13]

When we say we want a disciplined force, we mean we want people who will do the right thing when the chips are down. That discipline, ultimately, flows from within—it is that quality which motivates an individual and an organization to do the right thing even when the right thing is very, very hard to do.

> The unfailing formula for production of morale is patriotism, self-respect, discipline, and self-confidence within a military unit, joined with fair treatment and merited appreciation from without . . . . It will quickly wither and die if soldiers come to believe themselves the victims of indifference or injustice.[14]

Military justice is critical to the process of developing that kind of discipline—self-discipline coupled with high morale. Military justice establishes the basic standards of conduct for all men and women who wear the uniform, and it establishes the procedures by which those standards are enforced. Military justice does not simply impose discipline through deterrence and punishment. Military justice inculcates and reinforces discipline by consistently applying two fundamental principles: each person, regardless of rank, is responsible and accountable for his or her actions; and each person, regardless of circumstances, is entitled to be treated fairly and with dignity and respect.

Any critical analysis of our system must never lose sight of these basic truths. The military justice system is accountable to the American people and their elected representatives. The military justice system must

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12. THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 11 (Government Printing Office 1975) [hereinafter JAGC HISTORY].

13. BARTLETT'S FAMILIAR QUOTATIONS 771 (1980) (quoting General George Marshall).

14. *Id.* (quoting General Douglas MacArthur).

ensure that requirements are consistently applied and that established standards of conduct are met. The military justice system must protect the rights of all men and women who wear the uniform.

III. History: The Evolution of our Military Justice System

I would like to turn now to the history of military justice. This will, of necessity, be brief and therefore oversimplified, but I think it is important to remind ourselves of a few key points. General Sherman stated:

> I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practices in the civil courts, which belong to a totally different system of jurisprudence.[15]

For the first 175 years of its history, military justice largely reflected General Sherman's view, and changed only slowly. It is not exaggerating to say that the criminal procedures which we used in World War II had more in common with those used in the Revolutionary War than the ones we used for most of the Korean War. Some important changes were made in the nineteenth century, and several more, including the first rather limited forms of appellate review, were established at the end of World War I.[16] Nevertheless, for most of this period, the military was viewed as a separate society; our country's isolationism and its inbred distaste for standing armies (and a large navy) helped insulate the military justice system from outside pressure to change.

World War II and its aftermath changed all that. The war and the world situation in its wake led the United States to adopt a strategy of global engagement and to maintain large military forces to carry it out. This,

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15. JAGC HISTORY, *supra* note 12, at 87 (quoting General William T. Sherman).

16. General Samuel Ansell, the acting Judge Advocate General at the end of World War I, proposed more sweeping changes. *See* Samuel Ansell, *Military Justice*, 5 CORNELL L.Q. (1919), *reprinted at* MIL. L. REV. BICENT. ISSUE 53 (1975). *See also* JAGC HISTORY, *supra* note 12, at 127-37; Major Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell,* 35 MIL. L. REV. 1 (1967). Although most of General Ansell's proposals withered as the post-World War I Army shrank, many of his ideas were adopted in the Uniform Code of Military Justice three decades later.

along with evolving public attitudes about individual rights[17] had a major and continuing effect on the military justice system.

During World War II, millions of citizens were exposed to the military justice system and many left believing that it was harsh, arbitrary, and, above all, far too subject to command manipulation.[18] Following the war, the Department of Defense was established in order to meet the challenges of new global commitments.

As you know, dissatisfaction with military justice during World War II and the reformation of the defense establishment led to the enactment of the Uniform Code of Military Justice in 1950. The UCMJ was clearly an effort to limit the control of commanders over courts-martial; it increased the role of lawyers and it established a number of important rights for servicemembers, including extensive appellate rights. Among its most important features, it created the Court of Military Appeals which was intended to play, and has played, a critical role in protecting the integrity of the system. At the same time, it preserved many unique features of the old system, including a still very substantial role for commanders, in order to ensure that it would remain responsive to the special needs and exigencies of the military. Professor Edmund G. Morgan stated that "[w]e were convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate but we were equally determined that it must be designated to administer justice."[19]

In essence, enacting the UCMJ was the beginning of an effort to erect a true judicial system within the body of the military organization. This marked a radical shift. Instead of asserting, as General Sherman and many others did,[20] that civilian forms and principles of justice are incompatible

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17. The era from 1945 to 1974 has been characterized as a "rights revolution" in the United States. JAMES T. PATTERSON, GRAND EXPECTATIONS—THE UNITED STATES, 1945–1974, at vii (1996).

18. *See Hearings on H.R. 2575 Before the Subcomm. of the House Comm. On Military Affairs,* 80th Cong., 1st Sess., at 2166-75 (1947). Approximately 16,000,000 men and women served in the United States armed forces during World War II. Over 2,000,000 courts-martial were convened. *See* Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation, and Future,* 55 MIL. L. REV. 39 (1972).

19. *Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm.,* 81st Cong., 1st Sess., at 606 (1949) (statement of Professor Edmund G. Morgan, Jr., Chairman, UCMJ drafting committee).

20. *See, e.g.*, Professor Henry Wigmore: "The prime object of military organization is Victory not Justice . . . . If it can do justice to its men, well and good. But Justice is always secondary and Victory always primary." JAGC HISTORY, *supra* note 12, at 87.

with military effectiveness, this effort rested on the largely untested precept that military effectiveness depends on justice and that, by and large, civilian forms and principles are necessary to ensure justice.

Since the UCMJ was established, the evolution of the system has been more rapid. The Military Justice Acts of 1968 and 1983 may be seen as the continuation of the process begun by the enactment of the UCMJ. They greatly expanded the role of lawyers, and the powers and responsibilities of judges, and further limited the role of commanders. Changes to the *Manual for Courts-Martial* have paralleled this process, and drawn our rules of procedure and evidence closer to those followed in federal courts. As mentioned, the Court of Military Appeals, now the Court of Appeals for the Armed Forces, has played a critical role as both an instrument and a catalyst for change. Finally, the services themselves have helped tailor changes to the UCMJ and the *Manual*, and have implemented internal changes, such as establishing structures to safeguard the independence of defense counsel.[21]

Thus, when the *Manual for Courts-Martial, 1984*, became effective, courts-martial looked a lot like their civilian counterparts. The biggest differences were not what happened in the courtroom, but in the role of commanders in bringing cases to trial and in acting on cases after trial.

The progress of the military justice system can be measured by its treatment in decisions of the Supreme Court. In the 1950s and 60s, the Court, in *Reid v. Covert*[22] and in *O'Callahan v. Parker,*[23] rejected the notion that courts-martial were true instruments of justice and severely limited the jurisdiction of courts-martial. The Court described the military justice system in most unflattering terms.[24] In *O'Callahan*, the Court said:

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21. This is not to suggest that the services and the Court of Military Appeals always acted in unison. Serious disagreements arose between the services and the court more than once. For example, in 1960, the Army issued what is known as the "Powell Report," so named for Lieutenant General Powell who headed the committee which drafted it. This report was blunt in its criticism of the Court of Military Appeals and its recommendations to undo some of the court's decisions. That year the Judge Advocates General and the court failed to produce a combined Annual Report, as was called for by Article 67(g) (now provided for in Article 146(a)). The late 1970s saw a similar period of division between the court and the Defense Department. *See generally* JONATHAN LURIE, PURSUING MILITARY JUSTICE (1998).

22. 354 U.S. 1 (1957).

23. 395 U.S. 258 (1969).

"[C]ourts-martial are singularly inept in dealing with the nice subtleties of constitutional law."[25]

By 1987, the pendulum had swung the other way, and in *Solorio v. United States*,[26] the Court overturned *O'Callahan*, with little comment about the merits of the military justice system. More recently, in *Weiss v. United States*, the Court upheld our system of appointing military judges, with generally favorable comments about the military justice system. Justice Ginsburg's concurring opinion was especially positive:

> The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards behind when they enter military service. Today's decision upholds a system 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.[27]

The evolution of the modern military justice system, from the enactment of the UCMJ to its maturation, confirmed in *Weiss*, roughly coincides with the period of the Cold War. This period saw courts-martial become real courts—independent judicial bodies, with procedures that have many more similarities than differences with civilian courts. At the same time, the system has been, as it must be, responsive to the needs of the armed forces. Our system works well, very well. In many ways, it is a model of fairness, although it does not get the recognition for fairness it perhaps

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24. In *Reid* the Court said, "[t]raditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks." 354 U.S. at 36-37.

25. *O'Callahan*, 395 U.S. at 265.

26. 483 U.S. 435 (1987).

27. Weiss v. United States, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring).

deserves.[28] Nevertheless, it is not perfect, and we can never stop looking for ways to improve it.

Of course, the Cold War is over, and we are in a period of transition**,** some say even revolution. Next, I would like to look at some of the forces at work today that may affect how our system may change in the future.

IV. Trends

The first trend is that the size, organization, and missions of our armed forces will continue to change. This is a function of a turbulent world and a limited pocketbook. The disappearance of the Soviet threat and the need to reduce defense spending have, over the last decade, resulted in large reductions in the size, and some reshaping, of our armed forces. Most of the downsizing may be behind us, but more radical restructuring probably lies ahead. At the same time, the number of operations our forces have engaged in has grown exponentially. The nature of these operations has been as varied as their number, and the organizations conducting them have been distinctly ad hoc. We have used task forces specifically tailored for each operation, drawing on elements from many different units, and from all services and components. We have also relied increasingly on civilian employees and contractors as a key part of the force, as well as on allies and nongovernmental organizations. More of the same lies ahead. This has significant implications for military justice.

The second trend, which also affects the first, is one we hear about every day—the so-called information revolution. This ranges from fax machines to CNN to, of course, the Internet. For all its benefits, this also poses some problems. The speed with which information is moved depersonalizes and compresses the decision cycle—at a cost of the leavening effect on decision-making of old fashioned conversation and contemplation. Related to this is the phenomenon that what once might have been only a matter of local interest can now become an international incident in a matter of minutes. Aggravating these problems is the fact that the information is not always accurate; satellites and computers simply mean that one person's bad idea, or bad facts, can now be shared with millions, rather than dozens, almost instantly. Altogether, the availability and immediacy of so much data, good or bad, often imposes its own demands on or attrac-

28. *See* David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990s—A Legal System Looking for Respect*, 133 MIL. L. REV. 1 (1991).

tion to decision-makers to step in more readily and to decide more quickly than they would have otherwise.

The net effect of all this is to put decision-makers under much greater pressure. The judicial process is not immune from this—indeed it has become a major focal point of public interest in recent years. Witness O.J. Simpson, Louise Woodward, Monica Lewinsky, and our own Kelly Flinn. Greta Van Susteren has replaced Christiana Amanpour as the most frequently seen face on CNN. We now seem to approach criminal trials much the same way we do the Super Bowl, with hours of analysis, and with people choosing sides and gathering at the nearest watering hole to cheer, or boo, the results. Lawyers have also contributed to this process. Intentional leaks, public food fights between counsel, and scorched earth trial tactics are all too common. This is not conducive to calm, deliberative, dispassionate decision-making. We cannot expect judges to be monks, but neither should they be pollsters. This is also true of prosecutors and other decision-makers in the judicial process.

Our society's attitudes about crime and criminal justice are also changing. Although we still cherish our freedoms, our attitudes about crime have hardened. This has been particularly true of sentencing. Trends here have widened, not narrowed, the gap between us and our civilian counterparts. In many civilian jurisdictions, the erstwhile discretion of judges and parole boards has been curtailed, if not eliminated. The Federal Sentencing Guidelines[29] and "three strikes rules"[30] are but two examples of this.

We also see an increase in attacks on judicial independence.[31] Such attacks are not really new—they have been with us since the beginning of the Republic.[32] Nevertheless, there has been a recent upsurge in efforts by those who should really know better to call judges to account for their actions. Given the increased scrutiny of judicial decisions, even in seemingly routine cases, it is important that we ensure that judges are, and are

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29. 18 U.S.C.A. (West 1996).

30. *See, e.g.*, CAL. PENAL CODE § 1385 (West 1998).

31. *See, e.g.*, *Impeachment Threats Decried*, WASH. POST, Feb. 2, 1998 at A5 (describing speech by the President of the American Bar Association).

32. *See, e.g.*, JEAN E. SMITH, JOHN MARSHALL, DEFINER OF A NATION 456 (1996); JOSEPH J. ELLIS, AMERICAN SPHINX, THE CHARACTER OF THOMAS JEFFERSON 222-23, 276-77 (1996) (describing Thomas Jefferson's scathing criticism of the judiciary and its independence).

seen to be, independent of the public furor which can rise as suddenly as a Midwest thunderstorm.

Looking directly at military justice, some other trends emerge. Caseloads remain well below where they were ten or twenty years ago, on both per capita and absolute bases. This has been a function of downsizing, and of higher recruiting standards, more aggressive use of administrative sanctions, including separation, and an effective urinalysis and anti-drug program. Caseloads seem to have leveled off in the last couple of years, and a tighter recruiting market may reduce standards slightly, but we are unlikely to see a huge increase in caseloads any time soon.

While the number of cases is down, however, the nature of what we do try is significant. We seem to see more crimes of an assaultive or sexual nature than before, and barracks larcenies have given way to thefts and frauds with checks, ATMs and computers. Moreover, our practice has grown much more sophisticated. When old guys like me brag about how many cases we tried—and the raw numbers were large—we usually fail to mention that a lot of it was like the surgery on MASH—competent, but mostly repetitive and uncomplicated. Today, on the other hand, a contested case that does not involve multiple motions, some tough evidentiary questions, and at least one expert is relatively rare. In military as in civilian courts, the role of science and experts has become more significant and more difficult for courts to deal with. In sum, we may be trying fewer cases today, but what we do try is relatively serious and tends to be more complex.

A side effect of this trend is often noted, namely the lack of trial experience of many of our counsel. The reduced caseload means that fewer opportunities arise for counsel to learn the basics, and the serious nature of the cases we do try means they are thrown into the deep end of the pool before they are really good swimmers. This is a problem, but it is exacerbated by more subtle problems. First, many commanders today lack in-depth knowledge of and experience with the military justice process. Second, many of our mid- and senior-level managers, chiefs of criminal law and Staff Judge Advocates (SJA), are stretched thin and lack the time or the experience to manage prosecutions and to guide these younger counsel as well as we would like. The result, too often, is mischarging or overcharging and going to court without a clear rationale or theory for what is brought to trial, as well as elementary procedural errors in the pretrial and post-trial processing. These deficiencies diffuse focus and divert attention from guilt or innocence and sentencing—no wonder young counsel strug-

gle. The shortcomings of counsel, commanders, and SJAs also lead to expedience and to disparities in disposition; for example, willingness to accept a negotiated plea or a request for discharge in lieu of court-martial, where, maybe, that is not in the best interest of the command, or of society—and I note those interests may not be identical.

Finally, the public's attitude about military justice should be considered. The public's, and more specifically the Congress' and our civilian leadership's increasing lack of familiarity with our legal system cannot be ignored. Fewer members of Congress have military experience than any time since World War II. Any initiative to secure changes, particularly legislation, must be undertaken with this in mind. This lack of familiarity increases the risk of changes that will do more harm than good.

When public attention has focused on the military justice system recently, most often it has centered on the question who decides how cases are disposed of and how the decision is made. The issue has not really been so clearly framed as that, but if you look at most of the recent well-publicized cases, the issue has not been whether someone can get a fair trial in a court-martial, but why someone was or was not going to trial at all. Tailhook, the Black Hawk shoot-down, Kelly Flinn, Khobar Towers—in all these cases and others, the focus has been whether the military was protecting people by not prosecuting them or was unfairly singling them out for prosecution.

Embedded in the questions that have been raised about these and other cases is a misperception—what I call the "myth of the monolithic Pentagon." The media contribute to this by reporting that "The Pentagon" has decided to prosecute someone. We all know that neither the building itself nor any actual person in it exercises that function. Although people in the Pentagon must often live with or explain someone else's decision to

prosecute or not to prosecute, their power to influence such decisions is severely limited.[33]

In fact, our system is almost the opposite: a classic "power-down" model. Decisions on the disposition of offenses begin, and often end, at the lowest levels. The discretion of higher level commanders can be constrained by the prior decisions of lower commanders. This is a product of our hierarchical system, and of rules against unlawful command influence especially designed to protect servicemembers from certain effects of this system. Because of our history, a number of rules operate as "default mechanisms" in favor of the accused. Consequently, power is diffused, resulting in the increased likelihood of disparity of decisions concerning disposition. Our rules against unlawful command influence prohibit issuing general guidelines, exacerbating the disparity problem.

This diffusion of power, especially when viewed through the myth of the monolithic Pentagon, sometimes leads the public to believe that the power to prosecute is exercised arbitrarily. Recent criticisms often suggest that we circle the wagons to protect favorites and that we throw scapegoats to the wolves. I don't think this is an accurate criticism, but our diffused decision-making structure may provide some fuel for this fire.

Most of us are quite comfortable with the commander's prerogative to determine the disposition of cases. When we look at cases like those I have mentioned, we appreciate and for the most part agree with the judgment calls that commanders made with advice from their lawyers. We see this process as a natural function of command; the commander is responsible for the performance of his or her unit, including the morale and discipline of its members. Therefore, the commander should decide whether to invoke the judicial process or whether some other action is appropriate. Many of us would view turning this function over to lawyers or someone else to be a usurpation of command authority.

A closer look at how our system works, however, reveals that this rationale for command authority does not apply so purely in practice as it

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33. Of course, the Secretary of Defense and the service secretaries can convene courts-martial under Article 22, but this would be unprecedented. The service secretaries do exercise some powers that may affect whether a servicemember is court-martialed. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 21-3c (24 June 1996) (concerning secretarial approval to activate a reserve component soldier for the purpose of court-martial); U.S. DEP'T OF ARMY, REG. 635-120, OFFICER TRANSFERS AND DISCHARGES, para. 3-13 (21 July 1995) (concerning discharge of an officer in lieu of court-martial).

does in theory. First, more often than we like to think, we have separated operational and disciplinary authority. Area jurisdiction overseas and local jurisdiction over tenant units on installations are two examples. High profile or unusual cases also sometimes warrant special procedures. The Navy and Marine Corps each appointed a specific convening authority to handle the "Tailhook" cases.

Moreover, the increasing use of ad hoc organizations in contingency operations typically gives rise to convoluted command lines; the most frequent solution as far as court-martial jurisdiction is concerned is to leave disciplinary authority with the parent unit and farm actions back to it as necessary. Indeed, the operational commander is not always staffed for UCMJ actions and does not want to be saddled with it.

The same is true in joint operations. We usually keep court-martial jurisdiction along service lines, even when the service convening authorities have no operational responsibility. This is true even in long standing joint operations. For example, Operation Provide Comfort had existed under European Command for several years when two Air Force F-15s shot down two Army Black Hawk helicopters, yet jurisdiction was exercised by service commanders who had no responsibility for the operation.

We should also recognize that the commander's interest in morale and discipline in the unit, important as it is, is not the only consideration in deciding how to dispose of a case. Especially as our caseload involves more common law crimes, the civilian society's interest in disposition becomes greater.[34] Society has an interest in how we dispose of an accused child molester, for example, beyond its general interest in how we maintain discipline and safety in our own community; it wants to know if we are going to allow such a person to come back and live in the community without appropriate punishment. Most commanders genuinely try to consider such interests when making disposition decisions. Nevertheless, a tension sometimes exists between getting a miscreant out of our ranks and society's broader interests in punishment and rehabilitation—a tension aggravated by the fact that the convening authority may have to expend substantial money on such a prosecution—money which could otherwise fund training or community welfare activities. Again, in most cases, I am

34. The elimination of the "service-connection" requirement in *Solorio v. United States*, 483 U.S. 435 (1987), not only expands court-martial jurisdiction; it also increases the number of cases tried by courts-martial in which civilian society may have a greater interest.

confident that we do the right thing. However, at the margins, that may not always be the case, and citizens may reasonably ask how and why such decisions are made.

Don't get me wrong. The current system works well. Very good reasons exist for our power down model and for the flexibility and discretion it provides.

My point is twofold: we cannot ignore the public's perception of how we exercise prosecutorial discretion, even if we think the perception is wrong. We should also recognize that, in practice, our basic line of defense for reposing this power in commanders—that responsibility for mission is coterminous with responsibility for the criminal process—is not as pure and impregnable as we would like to think. Although I believe in the current system, I think command discretion and our power-down model will be a point of criticism and vulnerability.

All these trends—our changing missions and force structure, the information revolution, attitudes about crime and developments in the civilian justice system, and our own court-martial workloads and public perceptions about military justice—will affect how our system operates and evolves in the coming years. At the same time, we must remember the fundamental truths I addressed earlier. With all this in mind, I turn next to some possible areas of change.

V. Proposals and Possibilities

I divide this portion of my remarks into two parts. First are some changes I would make if I were king. Some are more feasible than others in today's climate; I devote more attention to those I think are most important and more feasible. After discussing these, I will address several areas in which I think, based on trends mentioned earlier, we should be prepared either to defend the status quo or to advance acceptable alternatives. In other words, these are areas in which I think our system will be tested and questioned and it behooves us to think now about why we should or should not change, as well as how we might change.

A. Proposals

1. Tenure for Military Judges

We won the constitutional battle over appointment of and tenure for military judges in *Weiss v. United States*.[35] Now it is time to recognize that tenure for judges, as a matter of policy, is appropriate. At the outset, let me emphasize that I have no doubts about the actual independence of our judges today. The Judge Advocates General I have worked with and for have had great respect for the independence of our judges, and none would think of removing or otherwise penalizing a judge because of a judge's ruling. Moreover, I am confident our judges make their decisions based on the law and their conscience, without fear of second guessing.

Nevertheless, our current rules do little to allay the perception that our judges serve at the pleasure of the Judge Advocate General. In fact, that is not true; our judges effectively have tenure now. We just don't get credit for it. That's because it is in unwritten and therefore not clearly defined form. As a practical matter, our trial and appellate judges are normally assigned to a judicial position for a standard tour, typically three or four years, and we would not reassign a judge because of his or her decisions.

We should begin by including a tenure policy for trial and appellate judges in our regulations. This is a little more complicated than I have made it sound, but basically it would provide that each judge would be assigned for a set period, normally three years, and could not be reassigned without his or her consent, except for good cause. Good cause would be defined to include commission of a serious offense or violation of the Code of Judicial Conduct.[36] A removal process would be established, consistent with Rule for Courts-Martial 109. This should involve either the chief judge of a service or a panel of judges who would make recommendations to TJAG; TJAG could not remove a judge absent a recommendation to do so. I note, however, that Article 66 (g)[37] would preclude appellate judges,

35. 510 U.S. 163 (1994)

36. A carefully crafted provision allowing reassignment under well-defined military exigencies could also be included. This could be tied, for example, to periods in which the President has authorized activation of Reserve units or individuals. *See* 10 U.S.C. §§ 12301–304 (1994).

including the chief judge, from participating in such review in the case of another appellate judge.

Such provisions would significantly reduce the perception that military judges serve at the pleasure of The Judge Advocate General and are, therefore, subject to pressure from him. Ultimately, I would like to see us go further and establish such tenure in the UCMJ. This could also include a more formal selection process, and some longer term benefits. I have in mind here a provision that an officer completing at least one tour as a military judge would enjoy the same retirement benefits as a colonel with thirty years service, at that officer's thirty year point, even if he or she retired sooner and at a lower rank.[38] This would ensure we continue to attract some of our best to the bench and would further ensure the reality and the perception of their independence.

I should also mention here the possibility of a joint judiciary, both trial and appellate. I see advantages and disadvantages to this. On the plus side, a "purple" judiciary might be viewed as even more independent, and it would probably result in some slight savings in manpower. On the other hand, lack of familiarity with the unique aspects of each service could be a problem in a few cases, and, more significantly, could be perceived as a problem by commanders, accuseds, and other servicemembers, undermining the prestige of and respect for the judiciary. I see a "purple" judiciary as somewhat dependent on the continued evolution of jointness in general; we will probably have it someday, but I do not think we are quite ready yet.

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37. Article 66(g), UCMJ, provides as follows:
> No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report documents used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces shall be retained on active duty.

38. For example, a lieutenant colonel who had completed a prescribed tour as a military judge and who retired after twenty-five years of service would receive the retired pay of a retired lieutenant colonel with twenty-five years of service for five years. Once this officer reached the date at which he or she would have had thirty years of service, the retired pay would increase to that of a colonel who had served for thirty years. The delay in the higher pay is designed to reduce the attraction of retiring early.

2. Judge Alone Sentencing

We studied the question of judge alone sentencing twelve years ago and concluded that sentencing by members, in members trials, should be retained.[39] Since then, however, we have seen the movement in civilian courts toward greater uniformity in sentencing, and the nature of our caseload has continued to swing toward crimes against society, not just against the military. Also, I think court members are less familiar with military justice generally; while this is not so important on findings, where, in effect, a structured yes or no question must be answered, it is important to the much more discretionary and unstructured question of an appropriate sentence. So I think it is time for another look.

In its favor, judge alone sentencing would bring, I am confident, greater uniformity and consistency. It would also make it easier to present more information at the sentencing phase, without fear that it would be used improperly. Certainly, it would be more efficient, both in terms of the court-martial itself, and by freeing the members for other duties.

On the other hand, the system would lose something. Members bring a 'sense of the community' that judges cannot entirely duplicate. Although that 'sense' sometimes includes considerations that some of us would think came from left field, it also includes appreciation of unique aspects of military life that can be very important, especially when dealing with certain military type offenses. This often works in the accused's favor and could be considered an important protection.

Although I have no great problem with the current system, if I could, I would go to judge alone sentencing in all except capital cases.

3. Fix the Jurisdictional Void Over Civilians Overseas

The absence of criminal U.S. jurisdiction over civilians accompanying our armed forces overseas, except in time of declared war, has existed for several decades now and has been the subject of much debate and concern, and frequent proposed remedies.[40] I will not retrace that history here; it is sufficient to recognize that civilian family members, employees, and

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39. *See* Advisory Commission to the Military Justice Act of 1983 Report (copy on file with Criminal Law Division, OTJAG); *see also* Pub. L. No. 98-209, § 9(b), 94 Stat. 1404 (1983). *See also* Major Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military,* 142 MIL. L. REV. 1 (1993).

contractors accompanying our armed forces overseas who commit offenses overseas are generally subject to prosecution, if at all, only in the courts of the host country.

Last year I participated in a congressionally directed study[41] by the Defense and Justice Departments to look at this issue. Our study, which reviewed the law on the subject, and which gathered data and comments from each of the services and from the combatant commands, confirmed the view that this is a serious problem in need of a solution.

For years the attention has focused on family members and civilian employees who commit crimes in foreign countries where U.S. forces are permanently based. There have been occasional horror stories of murderers or child molesters who have returned to the United States unpunished because we had no jurisdiction and the host country could not or would not prosecute. Nevertheless, these cases have been relatively rare because the host nation often has taken jurisdiction in serious cases; indeed, we have occasionally encouraged such exercise.[42] Most frequently, these cases have arisen in countries in whose justice systems we have confidence.

The problem could get much worse, however. In recent years we have engaged in exercises and operations in countries with no effective government—indeed, the reason we go is often because of some breakdown in law and order—or in countries whose justice systems are so different from ours that we would be most reluctant to submit one of our citizens—even one who apparently committed a serious crime—to their jurisdiction. We are also taking more civilians with us as key participants in these operations. It is not hard to imagine the problem if a U.S. civilian employee murders an allied soldier or rapes a local national, or is plausibly accused of such offenses, and we cannot prosecute the individual. This is not only a question of justice, it is a question of national security, for if we fail to

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40. *See* U.S. Dep't of Defense, General Counsel's Office, Overseas Jurisdiction Advisory Committee, Section 1151, Pub. L. No. 104-106, Report to The Secretary of Defense, The Attorney General, The Congress of the United States.

41. *Id.*

42. Generally, our policy is to exercise U.S. jurisdiction when possible. *See* U.S. DEP'T OF ARMY, REG. 27-50, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION (15 Dec. 1989); U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5820.4G, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION (14 Jan. 1990).

take appropriate action the adverse impact on the morale and safety of our forces and the success of the mission is obvious.

Our study group recommended two courses of action. First, expand the jurisdiction of federal courts to allow them to try offenses committed by civilians accompanying the armed forces overseas.[43] Expense and logistical hurdles will ensure that this vehicle would be used only infrequently, but it would provide a needed avenue for addressing serious offenses which might otherwise go unpunished.

Second, expand court-martial jurisdiction to cover civilians accompanying the armed forces during certain contingency operations. The President or the Secretary of Defense would specifically designate such operations, the geographic area covered, and the civilian employees or contractors would be notified of their subjection to such jurisdiction. There is, of course, a substantial constitutional question concerning such jurisdiction, but I believe an appropriately tailored and narrow statute could pass constitutional muster.

4. Other Suggestions

In addition to the three proposals I have just made, I list some other changes I would like to see.

a. Codify the offenses now listed under Article 134 in paragraphs 61 through 113 of Part IV of the Manual

There is no good reason why some of our most serious and common crimes, like indecent assault, kidnapping, obstructing justice, and communicating a threat should not be the subject of specific punitive articles.

As part of this, a common definition for the offense of fraternization should be established for all the services. I like the Army's, but, whatever it is, it should be uniform.

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43. Specifically, the Overseas Jurisdiction Committee recommended extending jurisdiction to federal (Article III) courts to try such offenses which are punishable by imprisonment for more than one year if committed within the special maritime and territorial jurisdiction of the United States. *See* 18 U.S.C. § 7 (1994).

b. Abolish summary courts-martial

General Hodson recommended this in 1972. To hold that these are really courts-martial applying rules of evidence and so forth is to ignore reality.

c. Make Article 15 more flexible

We should provide (by statute, if necessary) that, except when a reduction in grade is imposed, the imposing commander decides whether a record of nonjudicial punishment will be filed in the servicemember's permanent record. This would give commanders more latitude to use Article 15, without the career implications for the soldier we have now. I would also like to see correctional custody more widely available and used.

d. Provide that Article 32 Investigating Officers be lawyers

The complexity of our practice calls for this. The Article 32 Investigation is primarily a probable cause and discovery hearing. Its function as a means of determining level of disposition is far less significant in most cases. Lawyers can better and more efficiently serve the purpose of Article 32.

e. Improve court facilities

Our court facilities range widely in quality. We must always retain the ability to try a court-martial in a tent, but our permanent facilities should all reflect a set standard in terms of furnishings, configuration—including access by the judge and members, deliberation rooms, and witness waiting areas—and wiring (for use of advanced technologies). They do not have to be the Taj Mahal, but well laid out and dignified courtroom complexes lend themselves to professionalism by the participants and enhances the very important perception of justice. Central funding may be needed for this.

B. Possibilities

Apart from the above areas that I would change if I could, I wish to address several others which I think warrant critical examination. I think these areas will come under scrutiny because of one or more of the trends I mentioned earlier. We need to examine the status quo and whether there

may be better ways of doing things. I do not think I would change some of these areas; others I would be more willing to modify though I am not certain how.

1. Prosecutorial Discretion and the Role of the Convening Authority

I described how public attention has tended to focus on prosecutorial discretion—and, therefore, on the role of the convening authority. I am not suggesting our system is wrong or broken, but I believe we must be prepared to demonstrate that our prosecutorial decisions are not based on favoritism, parochialism, or other inappropriate considerations.

We need to look hard at the role of convening authorities. What training and guidance do commanders get and what should they receive? Do we need to promote more uniformity? If so, how? Can we, and should we, issue guidelines or establish other mechanisms in pursuit of greater uniformity? In this regard, I note that the Department of Justice (DOJ) issues guidelines on prosecution for its U.S. Attorneys, and that before they can proceed with certain types of cases, such as capital cases and organized crime cases, U.S. Attorneys must coordinate with the DOJ.

Would it be more efficient and effective to vest court-martial referral authority, at least for general courts-martial, in a relatively few commanders? This issue becomes even more significant if we radically reorganize and if the trend toward ad hoc task organization continues. On the other hand, should we more rigorously follow operational command lines, including joint lines, in exercising disciplinary authority? Another alternative, which I do not advocate but which should be studied, is to turn the authority to prosecute over to lawyers altogether. This was seriously proposed in the 1970s.[44] This might promote uniformity and efficiency, but I think the price is too high in terms of command authority and commanders' responsibility for discipline.

We should not, we cannot, take the status quo for granted. It may be the best way to do things, but I predict it will come under much closer scrutiny. We had best prepare to defend it or to submit our own proposals for revising it or it may take a form we find hard to accomodate.

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44. *See* Hodson, *supra* note 4.

2. Selection of Court Members

Our system of selecting court members has long been a subject of criticism and is vulnerable to the perception of unfairness.[45] General Hodson called for replacing it with a jury wheel system in 1972. If we significantly change the powers of commanders, as I have discussed above, then, of course, this process would also have to change. Otherwise, I would not change it. Granted, the current system leaves open the potential for and the perception of abuse, more than a "random" selection process would. Nevertheless, in my experience I have been impressed with the dedication and fairness of our panels. I believe our system provides us with better educated and more conscientious panels, on average, than any other system would. Careful enforcement of rules concerning unlawful command influence and the availability of penetrating voir dire and a liberal challenge philosophy have protected the integrity of the process.[46] Furthermore, a system of random selection of members could be administratively cumbersome and disruptive of military operations, and it would not necessarily eliminate perceptions that members, who would in most cases come from the convening authority's command, are not truly independent.

I am not unalterably opposed to changing the system of selecting court members; I think the perception problem is a real one. I just do not have a better idea, and I am satisfied the current system is in fact fair. This is a subject which warrants continued study.

3. Sentencing

As I mentioned before, the trend in civilian jurisdictions has been strongly in the direction of tougher sentences and, more importantly, of mandatory sentences—meaning less discretion for the sentencer, the trial judge in most jurisdictions. Our system, by contrast, affords the court-martial almost total discretion in sentencing. Except for a very few offenses, like premeditated murder, which have a prescribed mandatory minimum, the members or the judge are free to adjudge any sentence, from

45. *See generally Findlay v. United Kingdom*, 24 Eur. H.R. Rep. 221 (1997) in which the European Court of Human Rights held that a process of appointing court-martial members by the commander (very similar to the U.S. system) in the United Kingdom violated the European Convention on Human Rights.

46. *Cf.* Weiss v. United States, 510 U.S. 163, 181-82 (1994).

no punishment to the maximum authorized, and, no matter how lenient the sentence they adjudge, their sentence cannot be increased.

This results not only in occasionally very light sentences, but in less consistency overall. While our system of clemency review by the convening authority and sentence appropriateness review by the Courts of Criminal Appeals can ameliorate truly harsh sentences, there is no mechanism to correct aberrations at the other end.

Aggravating the problems with sentencing are our current rules—and I use the term "rules" loosely here—on multiplicity. Recent efforts by the Court of Appeals for the Armed Forces, intended to simplify the law in this area, have only muddled it further.[47] In the process, they have had the effect of encouraging multiple charging—to avoid losing closely related but not technically included offenses—while treating fewer offenses as multiplicious. The result has been to increase maximum punishments, and therefore the range of discretion for the sentencer.[48] I agree with Judge Effron and Professor Barto that the President should act, using his authority under Article 56, to clarify the area.[49] I am thinking along the lines of providing the trial judge express authority to group offenses for sentencing purposes, even when they are technically separate, in accordance with certain guidelines. Most civilian systems allow for concurrent sentencing for multiple offenses.[50]

My proposal on judge alone sentencing also has relevance here. How you decide this issue may affect whether there should be other changes in our sentencing procedures. The issue of broad discretion on sentencing is a real one. Congress recently reacted to one aspect of this by enacting rules requiring forfeiture of pay in certain circumstances.[51] In effect, this estab-

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47. *See, e.g.*, United States v. Neblock, 45 M.J. 191 (1996); United States v. Oatney, 45 M.J. 185 (1996); United States v. Weymouth, 43 M.J. 349 (1993); United States v. Morrison, 41 M.J. 482 (1995); United States v. Foster, 40 M.J. 140 (1994); United States v. Teters, 37 M.J. 370 (1993).

48. Many trial judges have tried to mitigate the harshness of this effect by continuing to hold offenses multiplicious for sentencing, even though this is technically error. United States v. Morrison, 41 M.J. 482 (1995). *But see* United States v. Criffield, 47 M.J. 419 (1998) ("Although the judge was within his discretion to treat these offenses as multiplicious for sentencing, we hold that the judge did not err as a matter of law by finding that the offenses were not multiplicious for findings.").

49. *See* United States v. Britton, 47 M.J. 195, 202 (1997) (Effron, J., concurring); Major William T. Barto, *Alexander the Great, the Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1 (1996).

50. *See, e.g.*, 18 U.S.C. § 3584(a) (1994); 18 U.S.C. app. 3D1.1, 5G1.1 (1994).

lished a form of mandatory minimum sentence; was this only the first step? Should it be? I do not advocate anything as comprehensive and cumbersome as the Federal Sentencing Guidelines for our system, but we should look at whether we should provide more guidance to sentencers and to promote greater uniformity in sentencing, and, if so, how.

4. Technology

I cannot begin to imagine all the ways technology will affect our system over the next decade, but a few developments are pretty obvious, even to a technologically impaired person like me. First, we should be able to initiate charges and track a case, and prepare and forward all documents, including the record of trial, electronically. Indeed, if someone will produce a more reader friendly computer screen that you can hold in your lap like a book, we will not need paper, or at least as much paper. This will change habits and administration more than it will change substance, but it has the potential to improve processing times which have become alarmingly slow at the trial and appellate levels. Anything we can do to speed things along will be beneficial.

Second, videoteleconferencing (VTC) capabilities now permit remote access to witnesses and perhaps even to the parties. Recently, the Army Court of Criminal Appeals condemned the practice of holding telephonic arraignments, with the judge in one location and the counsel and accused in another, at least under most circumstances.[52] That opinion points out some UCMJ provisions which could preclude even videoteleconferencing sessions,[53] although this remains subject to interpretation. Certainly, there are some constitutional requirements which must be met, but in a community as mobile and as far-flung as our military society, VTC offers great promise for increased efficiency.

Obviously, the drafters of the Code and the Manual never considered these technological possibilities when the rules were written. Rather than

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51. *See* UCMJ art. 58b (West Supp. 1997); Pub. L. No. 104-106, § 1122(a)(1), 110 Stat. 463 (1996).

52. United States v. Reynolds, 44 M.J. 726 (Army Ct. Crim. App. 1996)

53. *See, e.g.*, UCMJ art. 39(a): "These proceedings [at which the military judge presides] shall be conducted in the presence of the accused, the defense counsel, and the trial counsel . . . ." Query: does "presence" mean physical presence, or is virtual presence enough?

leave some important policy questions to the courts, I submit that consideration be given to revising the rules to expressly address this issue.

Third, the increasing significance of scientific evidence and expert testimony has important implications. These include not only what is or is not admissible, and how to help factfinders rather than confuse them—I think courts will work that out under our current rules, albeit with some difficulty. A less noticed but no less important systemic issue is the cost associated with this evidence which carries the real risk of making some courts-martial too expensive to handle out of a command operating budget. A single case can easily run up bills in the six figures. Equally important is ensuring that the defense has fair access to pursue and present such evidence. Again, I do not know the answer, but I am sure we will face the problem.

5. Judge Advocates and the Administration of Justice

I mentioned earlier the concerns that are often expressed about the advocacy skills of counsel, and my concern about the degree of attention and experience which SJAs and Chiefs of Criminal Law often bring to the administration of military justice. I do not have a simple solution to this problem. We have expanded and improved on training, especially advocacy training, and our leadership has put special emphasis on the importance of our military justice mission. Clearly, we need to continue to do this.

With respect to counsel, along with teaching them the techniques of advocacy, we must provide a strong foundation in ethical rules and ensure they understand and respect the judicial process. They must understand the difference between the dogged pursuit of justice and a dogfight. We need them to help preserve the dignity of the deliberative process. This is one area where we really do not want to follow the civilian trend.

More attention also needs to be paid to the role and responsibility of staff judge advocates. My sense is that many SJAs do not pay a lot of attention to the details in most cases. Unfortunately, when SJAs do become involved in the details, sometimes it is with a zeal that creates its own problems. I do not want to be interpreted as suggesting that SJAs must become trial counsel. It is the SJA's job to see that the system works fairly—this includes, but is not limited to, ensuring that cases are prosecuted effectively. More often, though, the problem is too little attention, not too much. Many SJAs now do not have extensive backgrounds in

criminal law, and there are many competing demands for an SJA's time, but if we fail in this area, we might as well turn in our crests.

Failure here could lead to radical change. One alternative may be specialization; some JAs have suggested it in informal polls taken by the JAG School. Whatever the merits of such a system in its own right, we are much more likely to see pressure to move in that or some other radical direction if we fail to advise convening authorities and to administer the system properly. We must continue to emphasize the importance of this mission, and include military justice training in SJA courses and CLEs.

VI. Conclusion

"The older I grow, the more apt I am to doubt my own judgement."
—Benjamin Franklin[54]

In conclusion, if I have done nothing else, I hope I have stirred some thought. I certainly do not claim to have all the answers. Of this I am sure. We have a great system. We can all be proud of it. I am very proud, and grateful, to have served this system for most of my adult life. I am confident that it will continue to be a great system. It will change, and it is important that we give serious thought to how it should change.

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

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54. *See* SMITH, *supra* note 32, at 111.