THE TWENTY-SEVENTH ANNUAL KENNETH J. HODSON LECTURE:[1] ECHOES AND EXPECTATIONS: ONE JUDGE'S VIEW

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On 5 June 1964, thirty-five years ago, I, then, Second Lieutenant Walter Cox, reported to the Staff Judge Advocate at Fort Jackson, South Carolina. I stood proudly before Colonel Herbert Meeting, a tough World War II infantryman from Oklahoma who had attended law school on the GI Bill after the war. The Army called him to active duty during the Korean War, and he decided to stay. He took one look at me and said, "Why in the hell did those clowns in Washington send me a second lieutenant who has never been to law school. Cox, report to the Courts and Boards Officer at the first brigade. You are now a trial counsel. Maybe something good will rub off on you."

Fort Jackson was at the tail end of what we called the "Gator Run." The local law-enforcement officers in the southeast routinely picked up absentees and deserters, and they sent them to us for processing. At any

1. This article is based on a lecture delivered on 16 November 1998 by Chief Judge Walter T. Cox, III, to members of the staff and faculty, distinguished guests, and officers attending the 22nd Criminal Law New Developments 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 the late Major General Hodson, who served as The Judge Advocate General, United States Army, from 1967 to 1971. 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. I am grateful to the United States Army Judge Advocate General's School for the opportunity to deliver the Hodson Lecture. In the summer of 1970, I had the pleasure of serving as an acting aide-de-camp to Major General Kenneth J. Hodson. In that capacity, I traveled with General and Mrs. Hodson throughout Europe, Iran, Pakistan, Ethiopia, Turkey, and Greece as he visited Army judge advocates stationed in these places. Through that experience, I developed a life-long friendship with the Hodsons. He moved my admission to the Bar of the Court of Military Appeals on 6 September 1984, shortly before I assumed the office as a judge of that court. We were together frequently until his death on 11 November 1995. He would probably be astounded to hear that I was invited to give this prestigious lecture. *See* Tribute to Major General Hodson, 44 M.J. LIX (1996).

given moment, the head count in the local stockade would number two or three hundred soldiers, consisting of both sentenced and pretrial confinees. We would prosecute the soldiers before special courts-martial, five at a time. We would march them in, line them up, arraign them, and accept their guilty pleas. Then we would hear testimony on sentencing, one at a time. There was no military judge, no law officer. The defense counsel were line officers detailed for the duty just as they would be detailed for staff duty officer, pay officer, or the like. Every now and then, someone would plead not guilty and cause a stir in the courtroom, but not often.

As trial counsel, I organized the court-martial, located the members and witnesses, summarized the proceedings, and served the necessary papers on the accused. I would provide the president of the court-martial with the elements of proof and the boilerplate script for the trial. If the soldier had a really bad record, I would recommend to the brigade commander that he consider a general court-martial. The court-martial sentenced almost every accused to six months' confinement, reduction in rank–if he had any rank–and forfeiture of two-thirds of his pay and allowances. His commander would then visit him in the stockade a few days after the court-martial to see if the soldier was ready to train and serve. If so, the sentence was suspended and the soldier returned to duty. The rule was that every soldier was going to serve his two-year obligation to the Army, either as a good soldier or as a prisoner.

In September 1964, I took excess leave from the Army and entered the University of South Carolina to study law. The following June, I once again reported to Colonel Meeting. He said, "Cox, with one year of law school you still can't practice law but you are too experienced as a trial counsel. It would be unfair to send you in against those line officers defending the cases. You are now a defense counsel." I now went from prosecuting ten to fifteen cases a week to defending a like number.

In the summer of 1967, following graduation from law school, I returned for the fourth time to Fort Jackson. Colonel Meeting was still the staff judge advocate, and by this time, he and I had become the "old hands" on the post. He assigned me to assist, as a paralegal, the two judge advocates he had selected to prosecute Captain Howard Levy.[3] One task assigned to me after the trial was to serve Captain Levy with the staff judge advocate review and the record of trial at his place of confinement in a

3. *See* United States v. Levy, 39 C.M.R. 672 (A.B.R. 1968), *petition for review denied*, 18 U.S.C.M.A. 627 (1969); Parker v. Levy, 417 U.S. 733 (1974).

wing of the post hospital.[4] Considering his circumstances, he was most gracious.

I recall these memories to put some perspective into my views about military justice. This was the period that Colonel St. Amand spoke of in his opening reminiscences of Major General Hodson.[5] This was the 1964-1969 period. I was there for the transition occasioned by the Military Justice Act of 1968, of which much has been said.

Before I begin my journey through these thirty-four years of association with military justice, I would make an observation. In 1987, I had the occasion to present a paper at the Army War College as part of a symposium on the Army and the Constitution. This project turned into a seminarian like experience for me as I studied the development of military justice throughout the history of our country.[6] From this experience, I came to realize that military justice has never been a static concept. Rather, it has evolved in tandem with changes in civilian justice.

I have concluded from my studies that there are at least six readily identifiable eras of military justice. The first period, naturally, would be the Continental Army period. One might well imagine what courts-martial looked like in this period.[7] First, there was no defense counsel active in the trial. Second, the court-martial consisted of thirteen members when practicable, presumably a president and twelve members resembling a civil tribunal.[8] Shortly after a court-martial handed down a sentence, the commanding officer approved and executed it.[9] The punishments were often corporal, such as lashes with the cat-o'-nine-tails. There was no appeal.

If you looked at the civilian justice system during that same time-period, you would find that the jurors were all male freeholders. Although

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4. *See* Levy v. Resor, 37 C.M.R. 399, 400 (1967).

5. Colonel Gerard St. Amand, USA, Commandant of the Army Judge Advocate General's School, Opening Remarks to Hodson Lecture, 16 Nov. 1998 (discussing the period 1964-1969 when Major General Hodson reshaped military justice).

6. Walter T. Cox, III, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987).

7. JAMES C. NEAGLES, SUMMER SOLDIERS, A SURVEY AND INDEX OF REVOLUTIONARY WAR COURTS-MARTIAL (1986).

8. COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 77, nn.45-46 (2d ed. 1920 reprint).

9. *See generally id.* at 390-480.

lawyers did appear in the courts of that day, they only appeared if the defendant could afford to pay for one. Many jurors could not read or write and few participants were formally trained in law. In other words, a civilian trial did not differ greatly from a court-martial, and society commonly understood that these were both acceptable methods to judge innocence or guilt and set punishments for the guilty.

The second era might be called the frontier era. The size of the Army diminished greatly after the Revolutionary War. Many of the soldiers were immigrants who were used to living a hard life. They accepted the discipline of the Army. Likewise, life on the frontier was hard, as was the pioneers' justice system.[10]

The next era would be the Civil War era. During this period, there was so much turmoil and so many people involved that there were too many complications for Congress or anyone else to become concerned about courts-martial. Thus, the Articles of War adopted for the Revolutionary War were still in place, with only minor changes.[11]

Military justice in the first one hundred and forty years of our country can be characterized as the period in which the court-martial was an instrumentality of the executive branch of our government. It gave the President and military commanders a tool to assist them in maintaining good order and discipline in the ranks.[12] "The commander was not free to ignore the law but he was free to interpret it and apply it without any institutional checks or balances, legal or otherwise."[13]

The first serious movement to change the military justice system came in the World War I era. An incident in Houston, Texas, sparked a controversy in the office of the judge advocate general of the Army over whether the judge advocate general had the power to revise and review courts-martial proceedings. Brigadier General Samuel T. Ansell, as the senior officer in the office of the judge advocate general, took the position that the power to review and revise existed in that office. At that time, General Crowder was the provost marshal general and was administering the Selective Service Act. He took the position that the review and revision responsibilities of the office were advisory, and not binding on the

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10. GLENN SHIRLEY, LAW WEST OF FORT SMITH (1957).

11. Colonel Robert Rollman, *Of Crimes, Courts-Martial and Punishment–A Short History of Military Justice*, 11 A.F. L. REV. 211 (1969).

12. WINTHROP, *supra* note 8, at 48-53.

13. COX, *supra* note 6, at 10.

field commanders. General Crowder prevailed, at that moment, but as one commentator noted:

> The controversy ultimately caused a nationwide clamor for revision of the Articles of War: bitter newspaper denunciation of military justice as administered during World War I; vitriolic speeches in both Houses of Congress; two independent investigations of the military justice system of the United States Army; a statement by the president of the American Bar Association that the military code was archaic and that it was a "code unworthy of the name of law or justice"; lengthy congressional hearings; and finally revision of the Articles of War and the *Manual for Courts-Martial*.[14]

The clamor for change, however, only produced modest revisions. The Army lapsed back into a peacetime existence. The country focused on, initially, postwar prosperity and, later, the dark days of the depression. There was little interest in military justice during this era; however, World War II soon followed.

After World War II, over sixteen million men and women returned from very difficult service abroad. The incredible facts are that there were over 2,000,000 courts-martial, 80,000 of which were general courts-martial.[15] Many of these veterans became leaders in the Congress and in the various bar associations throughout the country.[16] These veterans wanted changes made in the military justice system, primarily to combat command influence over the proceedings. In response, some major revisions were made to the Articles of War in the late 1940s. These changes, however, were short lived. The newly formed Defense Department opened the door to create the Uniform Code of Military Justice, which was signed into law on 5 May 1950 and took effect on 31 May 1951.[17]

The military operated under this new military justice code throughout the Korean War and into the 1960s without any significant changes. Then came the Military Justice Act of 1968. Congress enacted this during my

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14. Major Terry W. Brown, *The Crowder-Ansell Dispute: the Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 2-3 (1967).

15. Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, n.3 (1972).

16. Cox, *supra* note 6, at 12.

17. *See generally* JONATHAN LURIE, ARMING MILITARY JUSTICE, 1992 (providing an excellent description of the evolution of the Uniform Code of Military Justice).

service as a judge advocate, 1964-1972. To understand how and why this Act came about, it seems important to consider the societal and judicial issues of our nation at the time. My views of military justice were shaped in this social and military environment.

First, this was the era of the great Civil Rights movement in the South. Although President Truman had integrated the military almost two decades earlier,[18] the civilian communities that surrounded some of our most important military bases were completely segregated. Clemson College, where I attended undergraduate school, was not yet integrated. Matthew Perry, later a judge on the Court of Military Appeals, brought suit in the United States District Court of South Carolina and obtained a court order forcing Clemson to accept Harvey Gantt, an African-American architecture student, as its first black student.[19] The University of South Carolina Law School was not integrated until 1965, my second year.[20]

This was the era in which the war in Vietnam was escalating amidst angry protests from some segments of our society. These protesters included military officers such as Captain Howard Levy, who refused orders to train special forces personnel to recognize and treat some tropical skin diseases they might encounter in Vietnam, and Captain Noyd, who refused to train combat aviators in the Air Force.[21]

As a young judge advocate officer assigned to Fort Ord, California, in 1968-1969, I spent considerable time reviewing applications for discharge as a conscientious objector and requests for discharges because of homosexuality. I recall the sensational case of Private First Class Amick and Private Stolte, two members of the Fort Ord band who were convicted by a general court-martial for uttering disloyal statements that encouraged other soldiers to organize a union to protest the war in Vietnam.[22]

In the civilian sector, traditional approaches to constitutional rights were also in flux. For example, in *Mapp v. Ohio*,[23] the rule that evidence

18. Exec. Order 9981, July 26, 1948.

19. Judge Perry is now a senior judge of the United States District Court, District of South Carolina.

20. One of the first African-American law students was The Honorable Jasper Cureton, a judge of the South Carolina Court of Appeals who entered law school following his military service. He is now a retired judge advocate colonel in the U.S. Army Reserves.

21. *See* Parker v. Levy, 417 U.S. 733 (1974); Noyd v. Bond, 395 U.S. 683 (1969).

22. *See* United States v. Amick, 40 C.M.R. 720 (A.B.R. 1969).

23. 367 U.S. 643 (1961).

seized in violation of the 4th Amendment must be excluded from trial was first applied to the states in 1961. This case presaged two landmark decisions. In 1963, *Gideon v. Wainwright*[24] gave indigent defendants the right to counsel in criminal cases. In 1966, *Miranda v. Arizona*[25] required the police to give warnings to suspects being interrogated in custodial settings.

In this environment, there was little wonder that Congress became interested in improving the military justice system. The Military Justice Act of 1968 made some significant changes.[26] First, it established a separate military judiciary and gave powers to the military judge traditionally reserved to the president of a court-martial or to a convening authority. Thus, the military judge could conduct hearings outside the presence of the members of a court-martial, and the military judge could grant or deny continuances. Importantly, a military accused could elect trial by a military judge sitting alone as the court-martial.[27] Second, the Military Justice Act of 1968 required that legally trained counsel represent the military accused in special courts-martial if the accused could be sentenced to a bad-conduct discharge.[28]

Quite naturally, these changes were not met with general enthusiasm in the field. First, the changes resulted in a lessening of influence over the proceedings by both the commander and his staff judge advocate. Second, the changes imposed a manpower burden on the respective legal resources available to the judge advocates general of the services. I recall vividly how the various commands scrambled to get "experienced" Army captains certified as military judges. Indeed, Captain "Sparky" Gierke, now my colleague on the court, was tapped to perform the duties of a military judge–a position he filled with distinction in Vietnam and later at Fort Carson, Colorado, from late 1969 until the spring of 1971. Changes in the law also may have had the unintended result of changing the use of the special court-martial as punishment for misdemeanants without the view that the command was seeking to expel the service member with a punitive discharge.[29]

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24. 372 U.S. 335 (1963).
25. 384 U.S. 436 (1966).
26. Pub. L. 90-632; *see* Remarks by Major General Kenneth J. Hodson, USA (Ret.), June 9, 1987, Celebration of the Bicentennial of the United States Constitution, *in* 25 M.J. CXIX (1987).
27. Pub. L. 90-632.
28. UCMJ art. 27.

The ink had scarcely dried on the significant changes when the Supreme Court had an opportunity to expound upon the system. The Supreme Court reviewed the fairness of the military justice system soon after the changes that purported to bring the system in line with modern thought on criminal trial procedure. In *O'Callahan v. Parker*, the Supreme Court held:

> While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. . . . A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.[30]

Again, the judge advocates general of the services were called upon to re-evaluate the business of military justice. The Supreme Court had now imposed a new, restrictive requirement upon the military before authorizing trial by courts-martial. It was no longer sufficient that the service member had committed an offense under the Uniform Code of Military Justice. Now the military was required to prove that the offense was "service connected," and as is often the case with appellate courts, there was no clear definition as to what offenses might be "service connected."

In 1971, the Supreme Court re-visited the *O'Callahan* decision and provided some guidance in determining whether jurisdiction existed over a particular person and offense.[31] Nonetheless, the question of whether an offense was truly service connected proved to be fertile ground for military litigants. For example, Professors Gilligan and Lederer, in their noted work on military law, *Court-Martial Procedure*, point out that one vexing

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29. Of course there may be many explanations for the falling number of cases referred to non-BCD special courts-martial. I have not taken the time to prove this hypothesis. In 1984, the year I was appointed to the Court of Appeals for the Armed Forces, there were 1442 general courts-martial, 1401 BCD special courts-martial, and 461 non-BCD special courts martial in the Army. In Fiscal Year 1995, there were only 20 non-BCD special courts-martial reported by the Army. *See* Annual Reports of Code Committee 1984 and 1995, 20 M.J. and 44 M.J. The Naval services made substantial use of the non-BCD court-martial in 1984, almost equal to the BCD special. By 1995, the BCD special courts-martial were twice the non-BCD special courts-martial.

30. O'Callahan v. Parker, 395 U.S. 258, 265, 266 (1969) (footnote omitted).

31. *See* Relford v. Commandant, 401 U.S. 355 (1971).

area of service connection was in determining whether drug offenses were service connected.[32]

By the 1970s, the military community was confronted not only with the political problems associated with the Vietnam War (such as demonstrations and anti-war sentiment), but also social unrest in the military. Drug use and disobedience to authority increased. Military justice was not spared these problems, and there were serious critics of military justice.

In 1969, the book, *Military Justice is to Justice as Military Music is to Music*, was published.[33] *Newsweek* magazine featured a cover story captioned, "U.S. Military Justice on Trial."[34] The trial of First Lieutenant William L. Calley, Jr., for the My Lai incident attracted enormous media and public attention.[35]

The military system was also under attack from within. Retired General Howze noted, "The requirements of military law are now so ponderous and obtuse that a unit commander cannot possibly have the time or the means to apply the system . . . ."[36]

Again, to put this era into historical perspective, it is easy to see that the social turmoil in our society was reflected within the military services. In civilian life, we had the Beatles, with their long hair, singing songs that might be construed as glorifying the hedonistic lifestyle of the flower children, the hippies, and the beatniks. Our African-American community was struggling to establish equality and opportunity in our society. Tensions existed among the peaceful efforts of the Reverend Martin Luther King and his followers (such as Andrew Young, the Reverend Roy Abernathy, and the Reverend Jessie Jackson), the militant views of some of the Black Panthers (such as Eldridge Cleaver or Angela Davis), and the approach of Malcom X and his followers. Drug use became commonplace in certain segments of society. It became "cool" to smoke marijuana, burn

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32. 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 74-75 n.202 (1991).

33. ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1969).

34. *U.S. Military Justice on Trial*, NEWSWEEK, Aug. 31, 1970, at 18.

35. KAN. CITY TIMES, May 19, 1971, at 5 (quoting General Hodson that he had received more than 12,000 letters about Lieutenant Calley's conviction).

36. General Hamilton H. Howze, *Military Discipline and National Security*, ARMY MAG., Jan. 1971, at 11, 13.

incense, and meditate. Timothy Leary was on the scene with LSD. The Beatles sang *Lucy in the Sky with Diamonds*.

Against this backdrop, the demands and the needs of the Vietnam War meant that many of our young people were drafted into service. The officer corps was young. An officer who entered service as a second lieutenant in the mid 1960s was promoted to captain in approximately thirty months, which meant that the average age of a company commander was twenty-four years. The military asked these young officers to take civilian draftees from this contentious society and train them to fight, respect authority and discipline, and if necessary, die in battle.

Quite expectedly, many problems arose. Many of the young officers were Caucasian and had not even known personally a black man or woman as a friend or acquaintance. The leadership of the services had grown up in a different era. There was a real chasm between the African-American draftees and the officer corps. To superimpose all of these social issues onto the war effort in Vietnam created an incredible environment for the military lawyer to function in the early 1970s–but function we did.

One important task was to define the problems. One solution used in Germany, where I was stationed at the time, was to create a Race Relations Task Force. Brigadier General George Prugh asked Captain Curt Smothers, an African-American attorney, and me to serve on the U.S. Army Europe task force. We interviewed a large number of soldiers, noncommissioned officers, and officers, and through this process gave the black soldiers an avenue to communicate their concerns and vent their frustrations. Furthermore, lawyers were now involved in administrative proceedings, giving advice on Article 15s, and representing soldiers in courts-martial. All of these processes meant that an individual soldier could and would be heard if he had a grievance. In my judgment, military lawyers played an important role in ensuring success during these troubled times.

In military justice, the 1970s could be characterized as the decade in which military judges became judges "as commonly understood in the American legal tradition."[37] Captain (now Brigadier General) John Cooke, in an article written twenty years ago, identified the date June 1975, with the appointment of Chief Judge Albert Fletcher to the Court of Military Appeals, as the embarking point.[38] I would rather credit the Military Justice Act of 1968, but will not quarrel with General Cooke's con-

37. United States v. Graf, 35 M.J. 450, 465 (C.M.A. 1992).

tentions. For certain, he cites numerous cases that clearly expanded the role of the trial judge in every aspect of the trial, including review of pre-trial confinement issues, production of witnesses, control of the court-room, and the like. From my experience with general courts-martial before the 1968 Act, however, the Army had already begun treating its law officers as de facto judges.[39]

Eugene Fidell, a well-respected civilian practitioner of military law, theorizes that over the last three decades an almost complete "flow of power" to the military trial bench has occurred–a shift of the "center of gravity" from a command-oriented system of justice to a judicially-centered system.[40] This "devolution," Fidell argues, is complete. What remains is for the military or the Congress to decide how to make it work better.

I returned to the military justice scene in September of 1984, when I was appointed to the Court of Military Appeals. At that time, the great anguish that followed the court's decisions of the late 1970's had almost abated. The Military Justice Act of 1983 established a commission to study five questions pertaining to military justice. Three of the five questions involved the military judge. First, should the judge be the sole sentencing authority? Second, should the judge be able to suspend sentences? Third, should military judges have tenure?[41] The advisory commission recommended against giving the sentencing power to judges, against giving judges the power to suspend sentences, and against a guaranteed term of office.

Throughout the 1980s, arguments were advanced that the Court of Military Appeals should be reconstituted as a court under Article III of the United States Constitution. The advisory commission also considered this question. The commission recommended Article III status for the court if jurisdiction could be clearly limited to review of courts-martial.[42]

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38. Captain John S. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 Mil. L. Rev. 43, 44 (1977).

39. I fondly remember some great law officers who became military judges. Jack Crouchet, Reed Kennedy, and Grady Moore were all superior judges and mentors.

40. Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 Wake Forest L. Rev. 1213 (1997).

41. Military Justice Act of 1983, Advisory Commission Report, 14 Dec. 1984.

42. *Id.*

The role and status of the military judiciary continues to be of paramount interest, as we shall see from developments in the late 1980s and early 1990s. Before heading in that direction, however, there were several other significant events in military justice in the 1980s that are worthy of note. First, the Military Rules of Evidence were adopted on 12 March 1980.[43] These rules are taken almost verbatim from the Federal Rules of Evidence. The adoption of the rules is consistent with the requirement in Article 36 that the President adopt procedures and modes of proof "generally recognized in the trial of criminal cases in the United States district courts." [44] Adopting these Rules enhanced the military judge's role as a gatekeeper of evidence before a court-martial.

The Military Justice Act of 1983 initiated direct review of military cases by writ of certiorari to the Supreme Court.[45] The act also granted the government the right to appeal an interlocutory decision "which terminates the proceedings with respect to a charge or specification which excludes evidence that is substantial proof of a fact material in the proceeding."[46] Both of these amendments were soon to have profound meaning for military justice.

In 1985, Yeoman First Class Richard Solorio was brought to trial for numerous specifications of sexual misconduct with minor dependents of fellow coast guardsmen. At trial, Solorio moved to dismiss the charges for want of jurisdiction. The military judge, relying on the *Relford* and *O'Callahan* cases, agreed with Solorio and ordered the charges dismissed for lack of jurisdiction.[47] The government appealed pursuant to its newly created rights under Article 62 of the UCMJ.

The Coast Guard Court of Military Review reversed the military judge and reinstated the charges. Solorio appealed to the Court of Military Appeals. We affirmed the Court of Military Review, finding jurisdiction based upon the *Relford* factors.[48] Solorio appealed to the Supreme Court. The Supreme Court lost little time in affirming the decision of the Court of

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43. Exec. Order No. 12198, dated Mar. 12, 1980; Exec. Order No. 12233, dated Sept. 1, 1980 (effective date).

44. UCMJ art. 36.

45. UCMJ art. 67a.

46. UCMJ art. 62.

47. United States v. Solorio, 21 M.J. 251, 252 (C.M.A. 1986).

48. *Id.* at 256.

Military Appeals, but it did so by overruling the *O'Callahan* case.[49] The question of jurisdiction over service member's was now resolved.

The 1980s also saw much litigation concerning drug abuse. In several important decisions, the Court of Military Appeals recognized three significant principles. First, "drugs coursing through the body of a user" were an incredible threat to military readiness. Thus, there was no question as to jurisdiction over off-post drug use.[50] Second, the court recognized that compulsory urinalysis may be justified by the same considerations that govern other health and welfare inspections.[51] Lastly, but importantly, the court held that evidence of a controlled substance in the urine sample, together with testimony explaining the evidence, would be sufficient to sustain a conviction for the wrongful use of that substance.[52] In my judgment, these cases along with compulsory urinalysis itself, finally gave the commander the tools needed to bring rampant drug use under control in the military service.

Returning to the topic of military judges, 1988 brought a very unusual case before the Court of Military Appeals. The Navy-Marine Corps Court of Military Review issued a controversial decision in the case of *United States v. Billig*.[53] A general court-martial had tried and convicted Dr. Billig for acts and neglects in the performance of his military duties as a surgeon, resulting in the death of several patients. The Navy-Marine Corps Court reversed his conviction.[54]

Following the announcement of the decision, the inspector general of the Department of Defense received an anonymous tip that members of the Court of Military Review had been bribed. The inspector general initiated an investigation. Ultimately, the judge advocate general of the Navy ordered the judges of that court to cooperate in the investigation. The judges of the Navy-Marine Corps Court petitioned the Court of Military Appeals to enjoin the inspector general from investigating their judicial function in the case. The Court of Military Appeals ultimately concluded that investigation of judicial misconduct must be done in a judicial setting. Because there was no formal process in place to conduct a judicial inquiry, I was appointed as a special master to conduct the investigation.[55] The

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49. Solorio v. United States, 483 U.S. 435, 436 (1987).
50. United States v. Trottier, 9 M.J. 337, 349, 350 (C.M.A. 1980).
51. Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).
52. United States v. Harper, 22 M.J. 157 (C.M.A. 1986).
53. 26 M.J. 744 (N.M.C.M.R. 1988).
54. *Id.* at 761.

importance of the case is two-fold. First, the case recognized that appellate judges of the Courts of Military Review were indeed judges, thus subject to the American Bar Association Code of Judicial Conduct. Second, it demonstrated that the military judges were willing to assert their judicial independence, even in the face of direct orders of the judge advocate general of the Navy. This act, which took courage and careful thought, set a standard for judicial independence that has far-reaching meaning for an independent military judiciary.

In the 1980s, Chief Judge Robinson O. Everett became keenly interested in the public having a greater understanding of military justice. Under his leadership, the court allowed the television camera into the courtroom, a practice specifically not allowed at the time in federal trial or appellate courts. C-Span has covered several oral arguments. Chief Judge Everett also initiated Project Outreach, a program designed to take our court on the road. We have averaged five or six cases a year outside of Washington. We held the first such case in Charlottesville, Virginia, on 13 November 1987.[56]

The 1990s began with the retirement of Chief Judge Everett and the expansion of the Court of Military Appeals from three judges to five.[57] President Bush appointed Judges Susan Crawford, "Sparky" Gierke, and Robert Wiss to join Chief Judge Eugene Sullivan and me on the court.

Before the new judges were appointed, however, we heard argument and decided the case of *United States v. Curtis*.[58] This was the first in a series of cases in which a service member received the death sentence. Central to the case was whether Congress could delegate to the President the authority to proscribe the rules and procedures for death sentences in the military. The *Curtis* case was remanded to the Navy-Marine Corps Court of Military Review.[59] Ultimately, in 1997, the five-judge Court of Appeals for the Armed Forces[60] reversed Curtis's death sentence, for other reasons.[61]

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55. Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 341 (C.M.A. 1988).
56. United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988).
57. UCMJ art. 252.
58. 32 M.J. 352 (1991).
59. United States v. Curtis, 33 M.J. 101, 110 (C.M.A. 1991).
60. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the U.S. Court of Military Appeals to the U.S. Court of Appeals for the Armed Forces.

Although the *Curtis* case was the seminal decision by our court regarding constitutional questions of capital punishment, it was the case of *United States v. Loving*, in 1994, that first made its way to the Supreme Court.[62] The Supreme Court affirmed Loving's death sentence and approved the death penalty rules and procedures adopted by the President in the *Manual for Courts-Martial*, recognizing that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian, . . . and the President can be entrusted to determine what limitations and conditions on punishments are best suited to preserve that special discipline."[63]

It is my understanding that the Department of the Army has not yet forwarded Loving's case to the President for a decision on whether or not to execute him. Interesting questions remain as to the procedure for forwarding a death case to the President. For example, at the summer 1995 meeting of the American Bar Association, Major Dwight Sullivan, a Marine Corps attorney at the time, questioned whether a case must first go through the secretary of a military department and be subjected to clemency review prior to being advanced to the President. Likewise, the question remains as to whether a case should be staffed through the Secretary of Defense before it goes to the President. There are also lingering questions about new provisions of the *Manual for Courts-Martial* that provide for a sentence to life without parole. I am certain these questions will be resolved in the future, and I will not speculate here how they should come out.

There are a number of death penalty cases pending in our system. Indeed, two cases await a decision from our court, which we will announce shortly.[64] I should note, however, that the military death penalty practice has been carefully structured by the President "to make sure there is no arbitrary imposition of the death penalty in the military."[65] In her opinion in one of the *Curtis* cases, Judge Crawford listed eight significant protections built into the rules.[66]

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61. United States v. Curtis, 46 M.J. 129, 130 (1997).

62. United States v. Loving, 41 M.J. 213 (1994); Loving v United States, 577 U.S. 748 (1996).

63. *Id.* at 773 (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1953)).

64. United States v. Gray; United States v. Murphy.

65. United States v. Curtis, 44 M.J. 106, 166 (1996).

66. *Id.* at 166-67.

Two other significant cases were decided by the Court of Military Appeals within a year after the new judges took office, both of which were ultimately heard by the Supreme Court. In *United States v. Graf*, the Court decided that a fixed term of office was not constitutionally required to establish judicial independence.[67] In *United States v. Weiss*, a split Court of Military Appeals decided that the appointment of military judges by the judge advocates general did not violate the Appointments Clause of the Constitution.[68] The Supreme Court consolidated these issues on appeal.

The Supreme Court held that the Appointments Clause was not violated by the manner in which military judges were chosen, nor did the lack of a fixed term of office render the judges partial, in contravention of the Due Process Clause.[69] The military judge, established by act of Congress in 1968, had come of age. He was now truly a judge in every sense commonly understood in our nation.

The Supreme Court has considered other cases from the military services. The Supreme Court used an Article 31, UCMJ, issue in *United States v. Davis* to clarify what action a policeman must take if a suspect makes an unclear or ambiguous request for counsel during a custodial interrogation.[70] In the *Sheffer* case, the Supreme Court upheld a Military Rule of Evidence that bans polygraph evidence from the courtroom. The Court held that the ban did not violate an accused's constitutional right to present a defense.[71]

One other very important case is presently pending before the Supreme Court. In *Goldsmith v. Clinton*,[72] a majority of our court found jurisdiction under the All Writs Act[73] to prevent the secretary of the Air Force from dropping Major Goldsmith from the rolls of the Air Force pursuant to a recently enacted provision in Title 10 of the United States Code. The result of this case may profoundly impact service members who seek protection from the various courts of criminal appeals or from the Court of Appeals for the Armed Forces.[74]

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67. 35 M.J. 450, 462-64 (C.M.A. 1992).

68. United States v. Weiss, 36 M.J. 224 (C.M.A. 1992); U.S. Const. art. 2, § 2, para. 2, cl. 2.

69. Weiss v. United States, 510 U.S. 163, 176, 181 (1994).

70. Davis v. United States, 512 U.S. 452 (1994) (presenting an issue arising under Article 31 of the UCMJ).

71. Sheffer v. United States, 118 S. Ct. 1261, 1269 (1998).

72. 48 M.J. 84 (1998).

73. 28 U.S.C.A. § 1651(a) (1999).

There are several other observations I might share with you about this system of justice that we call military justice. I mention these to contrast my years as a civilian judge and practitioner from those involved in military justice. The first observation involves a four-letter word: the *Care* inquiry.[75] When I arrived at the Court of Military Appeals in 1984, one of the earliest issues we addressed was a certified question that challenged the *Care* inquiry.[76] Because certified counsel were now present in every court-martial, the inquiry was under attack principally from the Navy-Marine Corps Court of Military Review.

In a series of opinions, the court attacked the inquiry as "paternalistic," "elevating form over substance," and "an anachronism that should be abolished."[77] I gave careful thought to these lamentations but concluded that there was significant value to our "paternalistic" approach. First, I felt it was important to have a complete record "to insure that our military justice system . . . is a model of justice in the field of criminal law."[78] Second, a careful guilty plea inquiry avoids subsequent and costly collateral litigation about the guilty plea. I am satisfied that the extra time it takes to develop a full and complete record is far shorter than defending the pleas in subsequent post-trial litigation. Thus, I concluded that the *Care* inquiry and its progeny are good for the system.

When I returned to the military justice scene yet another development that impressed me was the establishment of separate trial defense offices. It was difficult for me to imagine how the Army, Marine Corps, and Air Force had become convinced to make this change. Even though it took the Naval service several more years, the reorganized Navy legal service offices have accomplished the same goals–separating the defense function from the prosecution function.

So where do the "echoes" of the past take us? There are several lessons to be learned from my experiences. First, change is constant. It is the nature of our political process. Second, I am convinced that the significant changes in military justice have merely mirrored the changes in civilian society. Separate trial defense offices are not much different from public defender offices you might find in any civilian community. Trained mili-

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74. *See, e.g.*, Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988); Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989).

75. United States v. Care, 40 C.M.R. 247 (1969).

76. United States v. Johnson, 21 M.J. 211 (C.M.A. 1986).

77. *Id.* at 216 (citations omitted).

78. *Id.*

tary judges were inevitable as laws, crimes, and the evidence to prove the crimes increased in complexity.

Of course, aspects of our military justice system continue to subject us to criticism. The role of the commander-convening authority in the process is difficult to justify. Why the person who makes the decision to prosecute must be the same person that hand picks the jury to decide the case is simply difficult to explain. Major General Hodson had a vision of a system that would limit a commander's involvement: "Their authority only exists or extends to filing the case with the court and providing the prosecutor."[79] General Hodson urged us to keep the commander in the clemency function. "The commander provides us with a built in probation and parole system, which I believe, is far preferable to one which might be set up and operated by a court-martial command."[80]

The system that General Hodson envisioned is not unlike the current Navy system. The Navy has separated the trial and defense functions differently than the other services. The Naval legal services offices serve the sailors' personal needs for defense counsel, legal assistance, and claims. A trial command supplies prosecutors and legal advice to the various commands regarding military justice matters. The larger commands also have personal staff judge advocates to deal with many of the legal issues of the command such as environmental law, ethics, and operational law.

I recently learned that by regulation the Army has given its military judges a fixed term of office. Although we held in the *Graf* case that this was not constitutionally mandated, it is, nevertheless, a good idea.[81]

In 1993 at our judicial conference, I urged all of the services to consider something quite revolutionary for military judges. I suggested that they experiment with a board that selected military judges from lieutenant colonels who applied. If after three years the judge wanted to remain in the judiciary then he would apply to the judge advocate general of that service. The judge advocate general would convene a selection board of sitting judges who would recommend for or against the selection of the applicant as a permanent military judge. Those selected would be promoted to colonel and remain judges until retirement.

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79. Major General Kenneth J. Hodson, *Perspective: Manual for Courts-Martial 1984*, 57 MIL. L. REV. 1, 15 (1972).

80. *Id.*

81. United States v. Graf, 35 M.J. 450, 462-64 (C.M.A. 1992).

Others talking about this idea have added some ruffles and flourishes to the idea such as providing for a "tombstone" promotion to brigadier general as part of the attraction to becoming a military judge. Fran Gilligan suggested the law might be changed to permit military judges to serve beyond thirty years, to say age sixty-five. All of these are good ideas, but I am satisfied that the new Army regulation providing for a fixed term is a giant step forward. I am certain that the services will follow that closely before advancing the ball down the field, so to speak.

I also champion the idea of expanding the jurisdiction of the special court-martial from six months confinement to one year. I understand that there are efforts being made to do that so I will predict that will happen.[82]

If we look outside our military justice system, we find that the legislative bodies are becoming increasingly concerned about judges having too much discretion. Sentencing guidelines have been enacted in the federal system and in many states. Mandatory minimum sentences are in vogue. Indeed, the recent changes to the Uniform Code of Military Justice requiring automatic reductions in rank[83] and automatic forfeitures of pay are arguably attacks on the discretion of the sentencing authority.[84] I do not see sentencing guidelines in the foreseeable future, however. In the latest Defense Authorization Act, Congress instructed the services to study random selection of court-members.[85] All of these matters suggest to me that there is interest in our system at the highest levels of government.

Certainly, military justice is again in the headlines. The Tail-Hook cases, the Kelly Flynn matter, the Black Hawk shooting incident, the recent events in Italy, as well as the press coverage of the Sergeant Major McKinney's case,[86] have all contributed to the public curiosity.

It is essential in this environment that the military leadership have a clear vision of the core values of our military justice system. Do we need a military justice system in the next century? What values will it protect? These are not idle questions. History has taught us that we can either lead the charge to improve our system, keep the system totally acceptable to the Congress and to the people we serve, or we can follow and accept those

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82. *See generally* Major James K. Lovejoy, *Abolition of Court Members Sentencing in the Military*, 142 Mil. L. Rev. 1 (1993).

83. UCMJ arts. 58a, 58b.

84. United States v. Gorski, 47 M.J. 370 (1997); UCMJ arts. 58a, 58b.

85. Pub. L. 105-261.

86. ABC, Inc. v. Powell, 47 M.J. 363 (1997).

changes imposed upon us. To me this is the most valuable lesson to be learned from Major General Kenneth Hodson. He was a visionary who could sell his ideas to the military and civilian leadership and accommodate the core values of the system.

What are those core values? Brigadier General John Cooke on several occasions in his last year on active duty made an impressive point. The true value of a military justice system is that it demonstratively rewards those soldiers who obey the law.[87] It proves to them that their obedience is worthwhile. General Cooke concludes the thought as follows:

> 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 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.[88]

To insure this goal however, we must keep the commander, in my judgment, involved. If we are going to hold commanders accountable for the conduct of the troops, they must have the necessary tools to deal with misconduct. How and to what extent Congress and the citizens will continue to give the commander the tools remains always in flux. It is up to us to demonstrate that we have a mature, honorable, and fair system and to strive to make the necessary changes to keep it abreast of modern understanding of criminal justice.

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87. Brigadier General John Cooke, *26th Annual Hodson Lecture*, 156 MIL. L. REV. 1 (1998).

88. *Id.* at 6.