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INTRODUCTION:

FIFTIETH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE SYMPOSIUM EDITION

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This introductory article to the symposium issue of the *Military Law Review*, which celebrates the Fiftieth Anniversary of the Uniform Code of Military Justice, discusses the history of military justice, why we have the Uniform Code of Military Justice (UCMJ), and how the UCMJ has developed. Finally, this article discusses some of the issues and challenges ahead.

It is appropriate and important to commemorate the enactment of the Uniform Code of Military Justice, the most important development in military justice since our country's founding. The UCMJ's Fiftieth Anniversary should serve as an occasion to remind ourselves of the essential

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contribution the Code has made to military justice, and the value of military justice to the effectiveness of our armed forces. It should be a time to consider how and why the system has developed as it has and, for judge advocates, military justice's central place in their mission.

Military justice is judge advocates' historical reason for being—it is why William Tudor was appointed the first Judge Advocate on 29 July 1775, and from Tudor to Major General Walter B. Huffman it has been judge advocates' core mission. For most of the time it is been the predominant mission and, even today, with so many other missions and tasks for judge advocates, none is more important than military justice. That is because military justice is vital to morale and discipline in the armed forces and to public confidence in the armed forces. These are essential to winning in war and to success in any mission—that is not going to change.

As we look at the Code and the military justice system, it is worth remembering the important role judge advocates have played in their evolution. While Congress, the President, civilians in the executive branch, and others have played pivotal roles, judge advocates can be proud of the role they have played in the development of the military justice system. Judge advocates have sometimes been the identifiers and initiators of needed change. At other times they have resisted suggested changes. More often they have refined and revised proposed changes and made them more workable. But always, they have been the implementers of change, whatever the source, and the faithful stewards of the system prescribed by the people's representatives. With rare exceptions, they have served that role with distinction.

I. Before the Uniform Code of Military Justice

To understand the UCMJ and why we have it, one must understand what preceded it. The Code both built upon and broke with the past. What was retained, and why? What was discarded, and why? A brief look at the longer history of military justice is needed.

The 225-year history of military justice can be divided into two parts, which are defined by the operation under the Articles of War and the UCMJ. The Army operated under the Articles of War for the first 175-plus years, from 30 June 1775, when they were adopted by the Second Continental Congress, until 31 May 1951, when the UCMJ went into effect. The Navy, during this period, operated under the Articles for the

Government of the Navy.² For the last fifty years the military justice system in all the armed services has operated under the UCMJ.

Under the Articles of War military justice was a command-dominated system. The system was designed to secure obedience to the commander, and to serve the commander's will. Courts-martial were not viewed as independent, but as tools to serve the commander.³ They did a form of justice, but it was a different justice than that afforded in civilian criminal trials. Military justice had few of the procedures and protections of civilian criminal justice, and protecting the rights of the individual was not a primary purpose of the system.⁴

2. The Continental Congress adopted the "Rules for the Regulation of the Navy of the United Colonies" on 28 November 1775. The title was changed to "Articles for the Government of the Navy" in 1799. This article generally refers to the Articles of War and practice in the Army. Naval justice under the Articles for the Government of the Navy was in fundamental respects similar to the practice in the Army. If anything, it was probably more severe, and underwent even less change over its 175-year history.

3. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 49 (2d ed. 1920).

Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.

Id. (footnote omitted).

4. See *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 87-88 (1975) [hereinafter *JAGC HISTORY*]. Quoting General William T. Sherman:

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 practice in the civil courts, which belong to a totally different system of jurisprudence.

The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.

These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every

The original Articles of War were directly derived from the British Articles of War.⁵ Over their 175-year history, the American Articles of War changed relatively little. For most of that time, up until World War I, little impetus for change existed. In the nineteenth century, military justice exalted deterrence and punishment and relied heavily on the honor and character of the commander for justice. Unfortunately for many soldiers, the quality of their leaders varied widely. Well into the Nineteenth Century, officers frequently obtained their positions through patronage rather than martial or leadership skills,⁶ and throughout the Nineteenth Century, enlisted soldiers were drawn from the poor, uneducated, and newly immigrated.⁷ Punishment, or the threat of it, was seen as the only way to motivate such men.⁸ Except for the Civil War, during the nineteenth century

4. (continued)

change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by engrafting on our code their deductions from civil practice.

Id.

5. WINTHROP, *supra* note 3, at 21-22. The Rules for the Regulation of the Navy of the United Colonies were likewise derived from the British Naval Articles. See HOMER MOYER, JR., JUSTICE AND THE MILITARY 9 (1972). It is not surprising that the colonists would look to familiar British sources to meet the urgent needs of organizing and governing the fledgling armed forces of the rebellion. It is ironic, however, given the attitudes that animated the revolution. The British Articles of War drew from rules developed in Roman and medieval times. Those rules rested, in large part, on a view of the relationship between leaders and the rank and file that was far different from the egalitarian principles espoused by revolutionary Americans. In earlier times, the common soldier was often a vassal of the lord who led him into battle, and was subject to the lord's rule and sense of justice in peace or war. Early military codes, from which the Articles of War evolved, reflected this relationship. See WINTHROP, *supra* note 3, at 17-18; G.M. TREVELYAN, A SHORTENED HISTORY OF ENGLAND 86-87 (1942). At the time of the Revolution, British officers were typically members of the nobility or upper class, sons of privilege and a special code of honor. Enlisted soldiers were usually drawn (and often impressed into service) from lower classes. This view of officers and enlisted soldiers drawn from different classes remained embedded in the American Articles of War.

6. See generally EDWARD M. COFFMAN, THE OLD ARMY, A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784-1898, at 12, 43(1986). Various efforts, including the establishment of the United States Military Academy at West Point, led to gradual improvement in the professionalism of officers throughout the Nineteenth Century. *Id.* at 96-102, 269-86. This may have contributed to efforts, like that of William Winthrop, to place military justice on a more solid jurisprudential footing, (see *infra* note 11 and accompanying text), but it had little immediate impact on the military justice system. *Id.* at 375-76.

the Army and Navy were tiny.⁹ Operating on the frontiers and the high seas as they did, they were out of sight and mind as far as the American public was concerned. Few questioned, or even cared about, the military justice system.

In the late Nineteenth Century, a few efforts to reform the military justice system arose. Some changes in procedure, such as allowing an accused to have counsel present in the court-martial (and, later, allowing counsel to speak!) developed in the late nineteenth century.¹⁰

For the most part, however, reformers sought not so much to change the system as to establish military justice as a system of jurisprudence. The aim was to codify and explain existing practice, rather than to create new procedures. Modest though this goal may seem, it would eventually have the effect of standardizing of procedures and defining limits (albeit very broad ones) to commander's powers, and of providing a more solid platform for Twentieth Century reforms. William Winthrop's epic, *Military Law and Precedents*, in 1886 was the leading example of such efforts; Winthrop's treatise remains today a treasure of history and Nineteenth Century practice. The precursors to the *Manual for Courts-Martial* also appeared during this period.¹¹

World War I generated greater interest in changing the system. In 1917, thirteen black soldiers were hanged for mutiny in a mass execution conducted one day after their trial ended. The case drew national attention, and in January 1918 the Army established the first system of appellate review in the military. Henceforth, capital and certain other sentences and

7. See COFFMAN, *supra* note 6, at 15, 136, 329, 401. Enlisted men were described by their officers as "the bottom rung of society" and "the refuse of mankind." *Id.* at 16. See also ALLAN R. MILLETT & PETER MASLOWSKI, *FOR THE COMMON DEFENSE* 140, 163, 277 (1994).

8. Even a great leader like George Washington believed that corporal punishment was essential to motivate men; he advocated raising the maximum number of lashes from 39 to 500, but had to settle for a maximum of 100. CHARLES ROYSTER, *A REVOLUTIONARY PEOPLE AT WAR* 216 (1979).

9. See COFFMAN, *supra* note 6, at 3, 40, 162, 222; MILLETT & MASLOWSKI, *supra* note 7, at 655; STEPHAN HOWARTH, *TO SHINING SEA: A HISTORY OF THE UNITED STATES NAVY 1775-1998*, 96-97, 130-131 (1999).

10. See JAGC HISTORY, *supra* note 4, at 90. See also COFFMAN, *supra* note 6, at 377.

11. The first *Manual for Courts-Martial* was written by A. Murray and published in 1993. See *MANUAL FOR COURTS-MARTIAL, UNITED STATES, A21-1* (1998).

could not be executed until after review in the Office of the Judge Advocate General.¹²

The War brought other pressures on the military justice system. The modern Selective Service System was adopted.¹³ This system eliminated many of the inefficiencies and inequities of the Civil War draft and ensured that the large force assembled for the war would more closely resemble a cross-section of America.¹⁴ Because a broader cross-section of America was subject to military justice led to more criticism of it.

The most important critic was Brigadier General Samuel T. Ansell, Acting The Judge Advocate General. Ansell called for a number of reforms, including expanded appellate review and procedures more closely paralleling those in civilian criminal trials. Unfortunately for Ansell, his boss, Major General Enoch Crowder, The Judge Advocate General (but detailed as Provost Marshal General during the war), opposed most of Ansell's suggestions.¹⁵ Given Crowder's opposition, and that of others,¹⁶ Ansell made little headway. With the United States' rapid demobilization and retreat into isolationism after the war, interest in reforming military justice subsided.

World War II rekindled such interest. Over sixteen million men and women served in the armed forces during World War II—nearly one in eight Americans. There were over two million courts-martial.¹⁷ Many people, from all walks of life, were exposed to the military justice system, and many did not like what they saw. The system appeared harsh and arbi-

12. JAGC HISTORY, *supra* note 4, at 129-30.

13. The person given most credit for devising the system is Major General Enoch Crowder, who was Judge Advocate General and acting Provost Marshal during the war. DAVID A. LOCKMILLER, ENOCH H. CROWDER, SOLDIER, LAWYER, AND STATESMAN 152-62 (1955).

14. During the Civil War, the wealthy and privileged were often able to secure commissions as officers or to buy their way out of service altogether, so that even during the war enlisted ranks were predominantly populated with immigrants and the underprivileged. *Id.* See also MILLETT & MASLOWSKI, *supra* note 7, at 163.

15. See JAGC HISTORY, *supra* note 4, at 113-36; JONATHAN LURIE, ARMING MILITARY JUSTICE, THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS 1775-1950, at 113-36 (1992).

16. The eminent law professor, Henry Wigmore, was an outspoken critic of Ansell's proposals. JAGC HISTORY, *supra* note 4, at 130-31. Secretary of War Baker was also solidly in Crowder's corner. LOCKMILLER, *supra* note 13, at 202-06.

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

trary, with too few protections for the individual and too much power for the commander. To Americans who were drafted or who enlisted to defend their own freedoms and protect those of others around the world, this was unacceptable and complaints and criticisms became widespread. Even before the war was over, the Secretary of War and the Secretary of the Navy each commissioned studies of the system, and those studies recommended significant, if not fundamental change.¹⁸

After the war, interest in reforming the system continued, and Congress became involved. In 1948, Congress passed the Elston Act,¹⁹ amending the Articles of War.²⁰ These amendments were based on studies and recommendations made by the Army and foreshadowed some of the changes that would be contained in the UCMJ, including an increased role for lawyers in courts-martial. However, other dynamics led immediately to efforts for further change.

By 1948, it was clear the United States would have to act as guardian of freedom in the world, and that the peacetime size and roles of the armed forces would be unprecedented. The defense infrastructure itself had just been reorganized, with the creation of a separate Air Force, and the establishment of the Department of Defense. This led to a perceived need for greater protections for men and women who would serve in the armed forces, and to a desire for a common system for all the services.

Thus, no sooner had the Elston Act been enacted than Secretary of Defense Forrestal appointed a committee, in the summer of 1948, to draft a uniform code of military justice. As chair of the committee, Secretary Forrestal appointed Harvard Law professor, Edmund Morgan. Professor Morgan had served as a major in the Army's Judge Advocate General's Corps in World War I. He served on the staff of the General Samuel Ansell, whose proposals to reform the military justice system had been rejected. Now, in 1948, General Ansell's protégé, Professor Morgan, would dust off many of those proposals.

18. See LURIE, *supra* note 15, at 130-49.

19. Pub. L. No. 80-759, 62 Stat. 604, 627-44 (1948).

20. The Elston Act, named for its sponsor, Congressman Charles Elston of Ohio, was the subject of considerable debate in the Senate. Some senators objected to amending only the Articles of War and not the Articles for the Government of the Navy. Others, however, refused to support continuation of selective service unless the military justice system was improved and demanded passage of the Elston measures as the best available package at the time. The latter group prevailed and the Elston Act became law when President Truman signed the selective service act. See LURIE, *supra* note 15, at 153-56.

The other three members of the committee were the under or assistant secretaries of the three services. They were assisted by a working group of military and civilian attorneys in the Office of the Secretary of Defense. This group considered the various reports that had been prepared by the services and other groups as it worked. It is interesting, however, in light of modern-day discussions about how open the process of proposing changes should be, that the Morgan committee worked in almost complete secrecy. Its drafts were not circulated outside the Defense Department (with the exception of some consultation with key congressional staff) before the final package was presented to Congress in early 1949. There were, of course disagreements during the drafting process, and not all the services, or all the judge advocates general, supported every provision in the final package. Secretary of Defense Forrestal resolved disputes.²¹

The House of Representatives held about three weeks of hearings in the spring of 1949. These included an article-by-article review of the proposed code. The Senate held a more perfunctory three days of hearings a few weeks later. These hearings form the basis for one of the best and most informative pieces of legislative history anywhere. Congress ultimately passed the proposal with relatively few major changes, and President Truman signed it on 5 May 1950.²² It was to take effect on 31 May 1951. No one knew it when the President signed it, of course, but that meant that the sweeping changes made by the new code would be implemented during the height of the Korean War—a formidable task for the judge advocates of the day.

The UCMJ marked a distinct, but not complete, break with the past. Most significant was its acceptance of the idea that discipline cannot be maintained without justice, and that justice requires, in large measure, the adoption of civilian procedures. The new Code was an effort to combine elements of two competing models: the old command-dominated military justice system and the civilian criminal justice system with its heavy emphasis on due process. The drafters of the Code recognized that the unique purpose and organization of the armed forces necessitate special rules and procedures for dealing with unlawful acts (and, indeed, in defining what is unlawful). The unique authority and responsibilities of commanders, the need for effective and efficient procedures in a wide range of places and circumstances, including combat, and the critical importance of obedience of orders and adherence to standards of conduct all distinguish

21. See LURIE, *supra* note 15, at 150-92.

22. Pub. L. No. 81-506, 64 Stat. 108 (1950).

military society from the society at large. At the same time, the drafters believed that procedures designed to ensure fairness and the perception of fairness are not antithetical, but essential, to discipline in the armed forces. In the words of Edmund Morgan, “We were convinced that a Code of Military Justice cannot ignore the military circumstances in which it must operate but we were equally determined that it must be designated to administer justice.”²³

The new system retained many features of the old, including considerable authority for the commander,²⁴ but attempted to limit the commander’s authority and to balance it with a system of somewhat independent courts and expanded rights for service members. The creation of the Court of Military Appeals was designed to protect the independence of the courts and the rights of individuals. Judge advocates were to play a bigger part in the process. The role of The Judge Advocate General was expanded, including broader responsibility to oversee the system under Article 6. The staff judge advocate had increased responsibilities in advising convening authorities and assisting in the review of cases. The position of law officer—the forerunner to the military judge—was established to act in general courts-martial. The accused was afforded the right to be represented by a qualified attorney—a judge advocate—in general courts-martial. A parallel right would not be recognized in civilian criminal trials until the Supreme Court decided *Gideon v. Wainwright*²⁵ some twelve years later. Similarly, the new code provided protections against self-

23. *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).

24. Under the Code, commanders retained core functions they still exercise today: the power to convene (i.e., call into being) a court-martial and to decide what charges against which accused will be referred to it (i.e., tried by it). They also had, as they do today, the power to select court members (the “jury”), and the power to disapprove findings of guilty and to disapprove, reduce, or suspend an adjudged sentence. Commanders also had many powers that have since been abolished or modified. These included the power to appoint the law officer (later “military judge”) and the trial and defense counsel, the power to decide what witnesses would be produced at government expense and whether deposition testimony might be taken, and the power to rule on interlocutory questions and, in some instances, to overrule the law officer or military judge. In addition to the powers commanders exercised as convening authority, commanders and other officers played a much more expansive role in courts-martial. Special courts-martial were typically conducted entirely by non-lawyer officers, with line officers serving as prosecutor and defense counsel and the members ruling on issues of law. Even in general courts-martial, where counsel were judge advocates and a law officer presided, all sessions had to be held in the presence of the members, and many of the law officer’s rulings were subject to a final decision by the members.

25. 372 U.S. 335 (1963).

incrimination that predated the Supreme Court's decision in *Miranda v. Arizona*²⁶ by over fifteen years.

The UCMJ was a bold step. Perhaps measured against today's standards the Code of 1950 looks somewhat tentative. Measured against what it replaced—after 175 years—the Code of 1950 was a daring leap into uncertain waters. There was substantial consensus that the Articles of War and Articles for the Government of the Navy—products of times when the armed forces were small and insulated—could not meet the needs of large forces in the post-war environment. It remained to be seen how their replacement would actually function.

II. Military Justice Under the Uniform Code of Military Justice.

The history of military justice under the UCMJ can be divided into three periods. In the first, from 1950 to 1969, the system went through a period of “feeling out” and early growth. During this period, the Code's various components were tested for functionality and compatibility. Although the new Code worked well enough, by the late 1960s it needed some major adjustments. These occurred in the Military Justice Act of 1968, leading to the second period, from 1969 to 1987. This period saw considerable turmoil but ultimately resulted in a “reaching of age” for military justice. Since 1987, the system has enjoyed the fruits of that maturity and relative stability.

A. 1951-1969: The Struggle for Definition.

The new Code provided the outlines of a new system, but it left many questions unanswered. How those questions would be answered and, equally important, who would answer them, dominated the early years under the Code. Commanders, the Judge Advocates General, and the Court of Military Appeals endeavored to define their new roles.

The UCMJ did not purport to prescribe a comprehensive set of rules for military justice. The Code authorized, as it does today, the President to fill in many of the gaps.²⁷ Pursuant to these powers, the President issued

26. 384 U.S. 436 (1966).

27. See, e.g., UCMJ arts. 36, 56 (2000).

Executive Order 10,214, prescribing the *Manual for Courts-Martial, 1951*. The *Manual* prescribed rules of evidence and procedure, maximum punishments, and forms. Written in a narrative format, it also provided helpful guidance, because commanders and other non-lawyers frequently had to apply the rules and process cases without benefit of legal advice.²⁸

The *Manual* was drafted within the Defense Department. It drew its format and much of its text from predecessor *Manuals for Courts-Martial*. It modified previous language to conform to the new Code, but in cases of gaps or doubts about the meaning of the Code, the new *Manual* tended to adopt preexisting standards. Whether as a result of intent or natural human inertia, the new *Manual* could be viewed as restraining some of the revolutionary characteristics of the new Code. This set the stage for some early battles.

When the Court of Military Appeals was established, its role was viewed primarily as “error-correction.” The Court, independent from command pressures, would ensure that cases it reviewed had been fairly tried. Nevertheless, inherent in the Court’s functions was law-interpretation and hence, to some degree, lawmaking. More than its error-correction function, this ability to define the rules for military justice was truly unprecedented. It made the system far more dynamic than previously, when change occurred only sporadically by legislation or formal rule making. And, of course, it infringed on the traditional authority of those responsible for such rules: the military departments, and particularly, the Judge Advocates General.

The Court of Military Appeals invalidated a number of *Manual* provisions during the 1950s on grounds they were inconsistent with the UCMJ. Perhaps the most noteworthy of these cases was *United States v. Rinehart*,²⁹ decided in 1957. In *Rinehart*, the court overturned a long-standing practice and invalidated a *Manual* provision authorizing court members to consult the *Manual for Courts-Martial* during their deliberations. In so doing, the court pointed to no specific provision in the Code that prohibited this procedure, but interpolated from several codal provisions in order to strike it down. The court’s action reflected its willingness to attack the status quo in pursuit of its own vision and what it thought Con-

28. It is worth remembering that during this time, only general courts-martial were always conducted with attorneys. See discussion *supra* note 24.

29. 24 C.M.R. 212 (C.M.A. 1957).

gress wanted: a military justice system that more closely mirrored civilian criminal procedure.

The court did not limit itself to interpreting the Code in order to discard old procedures or fashion new ones, but it cast about in search of a doctrine for doing so. In the early 1950s, it relied on the broad (arguably limitless) concept of “military due process.”³⁰ It should be noted, that at this time, no decision of the Supreme Court had ever recognized that service members enjoy constitutional protections, so the Court of Military Appeals’s uncertainty was understandable. Gradually, the court overcame its reluctance to ground protections for accused service members in constitutional rights, however, and in 1960 it expressly recognized that accused service members enjoy constitutional protections.³¹ In so doing, the court was able to establish or extend the rights of service members beyond those expressly recognized in the Code.³²

The court’s decisions casting aside venerable practices and extending the rights of the accused did not meet with universal approval. By the early 1960s the Judge Advocates General were sufficiently dissatisfied with the court that they declined to collaborate on the annual report that is required by the code. More importantly, there were even some calls from the services to abolish or radically alter the court.³³

The services were not always resistant to change, however. In November 1958, The Judge Advocate General of the Army, Major General Hickman, secured approval to create the U.S. Army Field Judiciary. Under this order, Army law officers, judges, were assigned directly to The Judge Advocate General, rather than to local commanders as had been the case.

30. See, e.g., *United States v. Clay*, 1 C.M.R. 74 (C.M.A. 1951).

31. *United States v. Jacoby*, 29 C.M.R. 244 (C.M.A. 1960). During the 1950s the Supreme Court seemed to suggest that at least some constitutional protections extend to service members. See *Burns v. Wilson*, 346 U.S. 137 (1953). See generally Captain John T. Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27 (1972).

32. In *Jacoby*, the Court held that the Sixth Amendment right of confrontation applies in courts-martial; in so doing the Court overruled its own earlier decisions which, construing Article 49 more narrowly, had permitted the admission of written interrogatories taken without opportunity for the accused to confront the witnesses. *Jacoby*, 29 C.M.R. at 244. See *United States v. Tempia*, 37 C.M.R. 249 (C.M.R. 1967) (holding that warning requirements prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966) apply in courts-martial).

33. See JONATHAN LURIE, *PURSuing MILITARY JUSTICE, THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980*, at 154-56 (1998).

This major step toward increased judicial independence occurred more than ten years before Congress required such independence in Article 26.

Although military justice under the UCMJ seemed much improved during this period, it remained significantly different from civilian criminal justice. The Court of Military Appeals weathered the attacks upon it and established its role as the primary interpreter of the Code and the protector of fairness of the system. Despite the court's efforts, the Code itself limited how independent and judicial courts-martial could be.³⁴ Thus, the military justice system was still seen as vastly different—and inferior. This was nowhere better highlighted than in the Supreme Court's decision in *O'Callahan v. Parker*³⁵ in 1969. There the Court limited the jurisdiction of courts-martial over service members by requiring that offenses be “service connected” to be subject to court-martial jurisdiction. Moreover, the Court roundly criticized courts-martial, saying: “courts-martial are singularly inept in dealing with the nice subtleties of constitutional law.”³⁶ *O'Callahan* reflected that, despite many advances, military justice still had far to go if it was to be perceived as a true system of justice.

O'Callahan was decided on 2 June 1969, and brings to a close this first period under the UCMJ. Ironically, the military justice system was already primed to undergo major changes that would do much to dispel such criticisms. The Military Justice Act of 1968,³⁷ was scheduled to go into effect on 1 August 1969. This began the second period in the history of military justice, from 1969 to 1987.

B. 1969-1987: Judicializing the Military Justice System.

The original UCMJ was revolutionary in concept. The Military Justice Act of 1968 was revolutionary in content. The original Code broke with the command-dominated system of the past, but left the commander with many powers and failed to give courts-martial sufficient independence and authority to balance those powers effectively. The Military Jus-

34. See discussion *supra* note 24.

35. 395 U.S. 258 (1969).

36. *Id.* at 265.

37. Pub. L. No. 90-632, 53 Stat. 1335 (1968).

tice Act of 1968 substantially increased the independence of courts-martial and the prestige and authority of the military judiciary.

The Military Justice Act of 1968 was the product of several years of study, debate, and compromise, within the Department of Defense and in Congress. No one was more responsible for securing Department of Defense backing and Congress's approval of the Act than Army The Judge Advocate General Major General Kenneth Hodson. Senator Sam Ervin was a crucial sponsor in Congress. In effect, the Military Justice Act of 1968 pronounced a success the theory of balancing command authority with procedural protections and judicial authority, and adjusted the balance in favor of the latter.

The act provided the foundation for the system of judicial authority and relatively independent courts that we take for granted today. Among other things, the Act made the boards of review "courts" of review and gave them powers to act like true appellate courts. It changed the name of the law officer to military judge and extended more judicial authority to the position. It provided for military judges to preside in special as well as general courts-martial. It provided for trial by military judge alone on request by the accused. And it provided for the Article 39(a) session at which the judge could hear and decide issues outside the presence of the members. Finally, it required that military judges be assigned and directly responsible to the Judge Advocate General or a designee.

It is worth noting that the Military Justice Act of 1968 and the new *Manual for Courts-Martial* that accompanied it became effective while the war in Vietnam was intense. Once again, judge advocates faced and met great challenges in implementing new procedures in a combat environment.

In the 1970s, the services and the military justice system went through a difficult period. The war in Vietnam ended unsuccessfully, the services were drawn down, the draft was terminated, and reductions in force implemented. Morale suffered and the quality of the force was poor; court-martial rates were astronomical by today's standards. In the late 1970s and early 1980s, the services initiated a number of efforts to improve recruiting, quality of life, morale, and discipline—the success of these was demonstrated in Operations Desert Shield and Desert Storm in 1990 and 1991.

Military justice went through a parallel development as it coped with these broader problems and addressed issues of its own.

From 1975 to 1978, the Court of Military Appeals engaged in what was sometimes called the “COMA revolution.” It issued a number of controversial and often criticized decisions that limited the jurisdiction of courts-martial, limited the powers of commanders, expanded individual rights, extended the court’s own authority, and broadened the authority and responsibility of the military judge.³⁸ Some of the more problematic of the court’s initiatives were later reversed, either by Congress or by the court itself.³⁹ Nevertheless, the court left two lasting legacies. First, its decisions enhancing judicial powers have remained effective and have ensured that the goals of judicial authority and independence in the Military Justice Act of 1968 would be realized. Second, the court helped serve as the catalyst for judge advocates and others to examine critically the system and to consider ways to improve it. This led to several important steps.

In 1977, the services began a process culminating in 1980 with the adoption of the Military Rules of Evidence—a slightly modified version of the Federal Rules of Evidence. This was largely the initiative of Army Colonel Wayne Alley, at the time the Chief of the Criminal Law Division in the Office of The Judge Advocate General. In 1979 through 1981, The Judge Advocate Generals Wilton Persons and Alton Harvey tested and adopted an independent defense organization, the Trial Defense Service (TDS). This was quite controversial at the time, but for twenty years TDS has done vital work, serving soldiers and the credibility of the military system superbly.⁴⁰ The Military Justice Act of 1983⁴¹ streamlined pretrial and post-trial processing, and abolished what had become the formalistic (but potentially pernicious) practice of having the convening authority detail judges and counsel to courts-martial. Most importantly, it extended the jurisdiction to the Supreme Court to direct review of Court of Military Appeals decisions on certiorari. The *Manual for Courts-Martial, 1984*, tied all these developments together. The new *Manual* also discarded the narrative structure of previous *Manuals*. Rules, that is, binding requirements, were embodied in numbered rules, while other information and guidance was clearly indicated as such. Although still written so that a

38. See John S. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43 (1977).

39. See generally LURIE, *supra* note 33, at 230-71.

40. The Air Force adopted a separate defense counsel system in 1974. The Navy and Marine Corps adopted similar structures in the mid-1990s.

41. Pub. L. No. 98-209, 97 Stat. 1393 (1983).

non-lawyer could use it, the new *Manual* recognized that the increased sophistication of military justice meant that lawyers would invariably be needed for its administration.

This period concludes with the Supreme Court's decision in 1987 in *Solorio v. United States*.⁴² There the Supreme Court overturned *O'Callahan* and held that courts-martial may exercise jurisdiction over service members without the service connection test. The majority opinion did not rely on the many changes in military justice under the UCMJ as a basis for the decision, citing rather to history and Congress's constitutional powers. Nevertheless, it is likely that the changes in military justice under the UCMJ made it easier for the majority to reach its result, and they surely made it easier for Congress and the public to accept the result in *Solorio*.

The Military Justice Act of 1968, the Court of Military Appeals' activism of the 1970s and its more measured vigilance in the 1980s, Congress' refinements in 1979 and 1983, the President's complete revision of the Manual 1984, and various improvements developed within the Defense Department resulted in a mature military justice system by 1987. It retained a central role for commanders, but more effectively balanced that role with sophisticated procedural rules and a relatively robust and independent judicial system.

C. 1987-Present: Maturity and Stability.

From 1987 to the present, the military justice system has enjoyed a period of stability and incremental change. This is good because the armed forces have undergone their own turbulence during this period following the end of the Cold War. The size of the armed forces was substantially reduced and their missions, organization, and doctrine have undergone almost continual reexamination in order to meet the nation's changing national security requirements. During this period, Congress has engaged only in minor changes—requiring the imposition of forfeitures in most instances,⁴³ the cosmetic changes of the names of our appellate courts,⁴⁴ and the expansion of the jurisdiction of special courts-martial.⁴⁵ The Court

42. 483 U.S. 435 (1987).

43. Pub. L. No. 104-106, Div. A, Title XI, § 1121(a), 110 Stat. 462, 463 (1996).

44. Pub. L. No. 103-337, Div. A, Title IX, § 924(c), 108 Stat. 2831, 2832 (1994).

45. Section 577, National Defense Authorization Act for Fiscal Year 2000 (amending Article 19 of the UCMJ).

of Appeals for the Armed Forces has not undertaken radical redefinition, but has rather engaged in error-correction and in dealing with novel questions facing many courts, such as issues of scientific evidence⁴⁶ and the internet.⁴⁷ One significant change occurred in 1998, when, almost exactly forty years after Major General Hickman established the U.S. Army Field Judiciary, Major General Huffman took the important step of recognizing tenure for Army trial and appellate judges under *Army Regulation 27-10*.

The maturity of the system is reflected in decisions of the Supreme Court. The Supreme Court recognizes that military justice is different from the civilian justice system in important respects.⁴⁸ Nevertheless, the Court's decisions indicate increased respect for military justice as a system of justice. This was especially evident in Justice Ginsburg's concurring opinion in *Weiss v. United States*:

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.⁴⁹

This stability has served the military justice system well because the system has been subject to particular scrutiny in recent years. The Tailhook scandals, terrible accidents like the friendly fire downing of two Army helicopters in Iraq, and the Italian cable car gondola crash caused by a Marine aircraft, and several high-profile sexual harassment and adultery cases have focussed attention on military justice. The system has seemingly fared well in the public's eyes through this period. This is a testament to the UCMJ and the people who administer it.

46. See, e.g., *United States v. Scheffer*, 44 M.J. 442 (1996), *reversed*, 523 U.S. 303 (1998).

47. See *United States v. Maxwell*, 45 M.J. 406 (1996).

48. See, e.g., *United States v. Scheffer*, 523 U.S. 303 (1998); *Loving v. United States*, 517 U.S. 748 (1996).

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

III. Assessing the Uniform Code of Military Justice and Guessing Its Future

The enactment of the UCMJ in 1950 was a seismic event. It occurred because the old system had changed too slowly to meet the requirements of Twentieth Century America and its armed forces. The old system gave too much power to commanders and too little assurance of due process and fairness to America's sons and daughters in service to be acceptable. The new Code responded to these problems by limiting command authority and balancing it with due process and judicial authority.

The Code's development over the last fifty years has centered on refining that balance. The command function of deciding when to invoke the military justice process has been retained, but the commander's ability to affect the workings of that process has been significantly reduced—by legislation, executive order, judicial decisions, and practice. Procedures have become much more sophisticated, and judicial authority and independence has grown.

This process of refinement demonstrates another important difference in military justice before and after the Code. The new system is more dynamic. The creation of the Court of Military Appeals/Court of Appeals for the Armed Forces, the expansion of the role of the Judge Advocates General and other lawyers, and, lately, direct review by the Supreme Court resulted in ongoing interpretation of the rules and more frequent critical examination of military justice, at least from within the armed forces.⁵⁰ The Department of Defense has institutionalized constant review of the system in the form of the Joint Service Committee on Military Justice. Thus, the system under the Code has enjoyed a healthy climate for adjustment and change. The absence of this led to the extinction of the preceding system.

There is cause to celebrate the Code. It has been a huge success. The absence of serious criticism of military justice, the system's apparent acceptance by judges, Congress, and the President, and the success of our

50. In recent years, there has been relatively little interest in military justice in Congress or in the public. In one sense, this may be a healthy sign of satisfaction with the system. Nevertheless, this disinterest is also unfortunate for two reasons. First, outside interest can expand horizons and the dialog, so that possible changes are more fully identified and vetted. Second, it probably also results in less understanding of the system, so that, when the system is scrutinized or questioned, examination of suggested changes is likely to be less well informed and the potential for harmful change increased.

armed forces in a wide range of missions are evidence of that success. We should applaud the vision and courage of those who drafted and enacted the UCMJ, and the dedication and wisdom of those who have amended it, interpreted it, and applied it for fifty years.

Still, it presumes too much to suggest that we have arrived at a perfect instrument. Changes in the world, in our society, and in the armed forces will inexorably pose new questions about the military justice system. If the Code is to continue to serve as the backbone of the system, the Code and the system must continue to evolve. All who are concerned with military justice, especially judge advocates, must take an interest in that evolution. This begins with applying the Code competently and fairly, but does not end there.

I have elsewhere suggested a number of areas of potential change or areas that at least deserve reexamination.⁵¹ Other observers of military justice will no doubt identify other areas of potential improvement. Of course, not every suggestion is necessarily a good idea, but judge advocates and others should not shy from critically examining the system. Even if the status quo is the best alternative, it is better defended after penetrating analysis than with knee-jerk reaction.

Judge advocates must be stewards of the system and true to the principles that have been the foundation of the UCMJ since its creation. The military justice system is about maintaining discipline *and* delivering justice. This is not an either-or proposition. A system that fails to protect adequately the rights of those accused of misconduct will undermine discipline just as will a system that fails to enforce the rules and protect the law abiding. In either case, the system's failure will eat away at morale, at mutual trust, and respect for authority. A system that does not take painstaking care to assess guilt or innocence carefully and to punish fairly and appropriately is a system that is not tied to accountability. Accountability is at the heart of discipline.

The military justice system enforces standards and reinforces values by the consistent application of two basic principles: each soldier, sailor, airman, or Marine, regardless of rank is responsible and accountable for

51. See John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 18-29 (1998); John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, at 1, 4-6.

his actions. And, each soldier, sailor, airman, or Marine, regardless of circumstance, is entitled to be treated fairly and with dignity and respect.

Commanders and judge advocates must appreciate the history and role of military justice if they are to administer it properly and nurture its growth appropriately. If they do, then in 2050 their successors will commemorate the one hundredth anniversary of the UCMJ with the same pride and satisfaction we feel today on its fiftieth anniversary.