

**TWO SENIOR JUDGES LOOK BACK AND LOOK AHEAD:****AN INTERVIEW WITH SENIOR JUDGE ROBINSON O. EVERETT AND SENIOR JUDGE WALTER T. COX, III<sup>1</sup>**

INTERVIEWED BY MAJOR WALTER M. HUDSON

## I. Introduction

On 21-22 February 2000, two senior judges on the United States Court of Appeals for the Armed Forces (CAAF), Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, were interviewed at their offices at Duke University Law School, where they teach classes in criminal law and national security law. Over the course of several hours, Senior Judge Everett and Senior Judge Cox offered their opinions on and insights into many aspects of the military justice system, spoke of controversies that arose during their tenures on the court, and gave advice and suggestions for the future.

Senior Judge Robinson O. Everett was nominated by President Jimmy Carter to serve on the court, and, after being confirmed by the Senate, assumed his duties in 1980 and served as the Chief Judge until 1990. He served an additional two years on the court before retiring from active judge status in 1992. He received his A.B. (*magna cum laude*) and J.D. (*magna cum laude*) degrees from Harvard University, and an LL.M. from Duke University. He is also the Founder of the Center on Law, Ethics, and National Security at Duke University School of Law, where he now teaches.

Senior Judge Walter T. Cox, III was nominated by President Ronald Reagan to serve on the court and, after confirmation by the Senate, began his term in 1984. He became Chief Judge of the CAAF in October 1995 until he retired from full-time judge status in 1999. He received his B.S. degree from Clemson University, and his J.D. degree from the University of South Carolina, where he graduated first in his class. He also served as

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1. On 21-22 February 2000, Major Walter Hudson, who teaches in the Criminal Law Department at The Judge Advocate General's School, interviewed Judge Everett and Judge Cox. Main questions appear in bold, subquestions appear in bold, italics. Major Hudson would like to thank Master Sergeant Monique Wagner and Sergeant Michael Shaner for transcribing the interviews of Senior Judges Everett and Cox.

an Army judge advocate and, before service on CAAF, was resident judge for the Tenth Judicial Circuit in South Carolina.

## II. Background, Appointment, and Initial Service on the Court

### **What in your background do you think helped you best to serve on the U.S. Court of Military Appeals, to be renamed later as the U.S. Court of Appeals for the Armed Forces?**

*Judge Everett:* I would assume my background as an Air Force judge advocate. I had twenty-eight years in the Air Force Reserve, most of it as a judge advocate. Not a great part of it on active duty; the active duty was primarily during the Korean War, but subsequently I was in the Active Reserves with a mobilization assignment in Headquarters, U.S. Air Force. That, undoubtedly, helped a great deal. I had also been teaching in the field of military law. I conducted seminars beginning back in 1957 when I did one over at the University of North Carolina School of Law. Perhaps also having served as a commissioner for two years on the staff of the court from 1953 to 1955 helped a great deal; it gave me an inside perspective on the court. So, all of those things combined. I had been the Chair of the Standing Committee on Armed Forces Law—I think it had a slightly different title then—for a couple of years in the late 1970s. I had interacted with the armed services at a relatively high level as far as military justice was concerned—I think that all of that played a part.

*Judge Cox:* Well, I guess the obvious answer would be that I had a long tradition with The Judge Advocate General's Corps of the Army, having been in the first class, I believe, to be selected to go to law school on the excess leave program in 1964. I was fortunate to be a Distinguished Military Graduate of the ROTC program at Clemson, which in those days made you eligible for a Regular Army commission, and I took a regular commission originally in the infantry. Then I got branch-transferred to the Chemical Corps for some reason while detailed to The Judge Advocate General's (JAG) Corps on excess leave. From the time I graduated from college until almost nine years later, I was affiliated with the JAG Corps, which certainly gave me an appreciation and understanding of the structure of the military and the structure of the military justice system. I was also there for the transition with the Military Justice Act of 1968.<sup>2</sup>

I think, as far as background to understand the workings of the court, my experience as a JAG definitely would be the main thing. In fact, I

doubt if I would have ever heard of the court had it not been for that experience.

**Could you please explain how you were nominated and appointed to serve on the court?**

*Judge Cox:* It's a wonderful story, how I got selected. I was in a very exciting race in the state legislature for the Supreme Court of South Carolina in the fall of 1983 and the spring of 1984, and I happened to be sitting in the office of Judge Billy Wilkins, who was the first Reagan judicial appointee to the District Court bench. He was also a JAG reservist or National Guardsman. He got a call from Senator Thurmond's home secretary, a gentleman named Warren Abernathy, and the conversation was about the Court of Military Appeals. At the time there was a South Carolinian whom Senator Thurmond was urging the President to appoint to the court. And the gentleman decided not to stand for the appointment, and that was what the conversation was about, and Judge Wilkins turned to me and said, "Hey, Walter, do you want to be on the Court of Military Appeals?", and I laughed, and I said, "Yeah, that would be great."

A couple of days later, I got a telephone call from Senator Thurmond—whom I had known all of my professional life anyway—and he said, "Walter," he said, "I didn't know you were interested in the Court of Military Appeals." He said, "I had already promised that I'd support this other fellow," and he said, "but he's dropped out, and it looks like Senator Tower from Texas, who's Chairman of the Armed Services Committee, has a candidate, and so we're probably not going to be a player in this appointment." I said, "Well, Senator, I'm in the race for the Supreme Court of South Carolina. Thank you very much," and then I got a call a couple of days later from his chief of staff or administrative assistant, Mr. Dennis Shedd, who is now a federal judge in South Carolina. And he said, "Senator Thurmond wonders if he could just submit your name to the President to see what'll happen." He said, "It looks like it wouldn't be any chance you'd be appointed, so how about just sending us a résumé and let him put it in," and I said, "Sure."

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2. 82 Stat. 1335 (1968). The Military Justice Act of 1968 made several important changes to the military justice system. Perhaps most significantly, it provided for a military judge to preside at general courts-martial, and, per service Secretary discretion, at special courts-martial.

I sat down and jotted out a résumé, didn't go to any experts for résumé advice or anything; I just sent one in. About a month or so later, I got another call saying Senator Thurmond would like for me to come to Washington. He had set up appointments with Secretary of Defense Caspar Weinberger and with the Chief of Presidential Personnel, Mr. John Herrington. I interviewed with them and interviewed with some political appointee-type people and when the appointment was over with at the White House, the Chief of Presidential Personnel said, "Well, Walter, you look like the kind of fellow the Reagan administration would like to have serve, but we've already promised this judgeship to somebody else." I told him, I said, "You don't owe me any apology about it." I said, "I'm in an interesting race for the Supreme Court of South Carolina, and Senator Thurmond drafted me; I didn't volunteer for this position."

Later, I had my first personal conversation with the President, in the late spring of 1984, and I'll never forget it. I was holding court in Columbia, South Carolina, and my secretary came in and said, "The President of the United States wants to speak to you." And I said, "Well, put him on." It wasn't quite like that, but President Reagan came on the phone, and I remember the conversation very vividly. He said, "Judge Cox," he said, "I've got a piece of paper on my desk. If I sign it, it will appoint you to the Court of Military Appeals as a judge of that Court. Would you honor the people of this country by accepting that nomination?" I said, "By all means, Mr. President," and I couldn't think of anything else to say, and he said, "Your record is very nice and very impressive, and we're delighted to have you as a member of our administration." And that's how the appointment took place.

After that, though, I was on a list of persons that he had appointed, and regularly, maybe once a month, once every two months, we would be invited to the White House for coffee. The President would come in and explain some policy decisions he was about to announce and ask everyone to support him and things like that. He was quite a gregarious and outgoing President. He got involved with his appointees. I had the chance to meet him on several occasions, but I hadn't had a conversation with him personally prior to the appointment.

I was interviewed by Secretary Weinberger. I was also interviewed by Mr. Herrington, the Chief of Presidential Personnel, who was very knowledgeable about military justice, and he interviewed me for over an hour. He asked a lot of penetrating questions about the role of commanders. With his Navy background, he was particularly interested in the role

of a commander of a vessel. Since I had no Navy experience, I just answered with what I thought was the right answer, and I guess it was.

But there was no particular litmus test. None of the political types of questions was ever asked. And of course there was extensive screening by the Federal Bureau of Investigations and the Armed Services Committee.

I learned later that my competition for the job was Judge Frank Nebeker, who's now the Chief Judge of the Court of Appeals for Veterans Affairs, and Judge Eugene Sullivan, who at the time was General Counsel for the Department of the Air Force.<sup>3</sup> I think I probably was the dark-horse candidate. I don't know that for a fact. Judge Cook<sup>4</sup> got quite frustrated with the length of the nomination and appointment process. He stayed on as a senior judge for at least a period of time after, and then finally got frustrated and told the people in charge that he wanted an appointment; he wanted to retire. I don't remember exactly. I never was conscious of exactly how long that took.

***Judge Everett:*** I first met Jimmy Carter, who was President, a couple of years ago when he spoke at Duke graduation. I told him it was about seventeen years too late, but I wanted to thank him for appointing me. He was the only President, to my knowledge, who used a commission system in choosing federal judges, both Article III judges and the judges of our court. And so I appeared before a commission. The commission made recommendations to the President; the President made the choice. Then, of course, the nomination went to the Armed Services Committee.

I was interviewed at the Pentagon. There were various people who were candidates in one form or another. I was a candidate for what amounted to about a fifteen-month term, and I sort of viewed it as a sabbatical that would be in store for my teaching career. It turned out to be much more extensive because of a change in the law that took place in December of 1980. But, originally, I was just there to serve a short term. There was a technical amendment; that was in December. And, basically, what it did was say that, henceforth, anyone appointed would be appointed for a fifteen-year term.

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3. Judge Eugene R. Sullivan was later appointed to the Court in 1986.

4. Judge William H. Cook, who served on the Court of Military Appeals from 1974 to 1984, and whom Judge Cox replaced.

Anyone who was then serving would have either ten years or the unexpired term, whichever was longer. So that had the effect of extending my term from the spring of 1981 until the spring of 1990, and then there was a further extension by legislation that decided to make all the terms begin and end on October the first. The idea there being that they were going to expand the court from three to five, and it was going to be important to have everything done at the same time, so I got another five or six-month extension. And instead of serving thirteen months, I wound up serving ten and one-half years as chief judge. Then, because of a delay in filling the vacancy my retirement had created, as well as the two vacancies created by the expansion of the court, I served another year and a half.

**What were your expectations of the court before you went on? Did you have any sort of preconceived notions and did working there differ from those notions once you started to sit on the court?**

*Judge Everett:* There had been some administrative problems, internal problems, that I was aware of. There had been, apparently, some friction between the Pentagon and the court. I know that the General Counsel of Department of Defense (DOD), Deanne Siemer, had proposed that the court be abolished and the jurisdiction be transferred to the Fourth Circuit, as I recall.<sup>5</sup> Given that situation, and given that the two judges then remaining, after Judge Perry<sup>6</sup> had resigned to become a district judge in South Carolina, had different philosophies, I knew that there would be some problems to be resolved. It was going to be important to try to develop harmonious relations on all sides. I knew also that the caseload was kicking up due to the war on drugs, and some other problems were carried forward from the Vietnam period. I knew there would be some real administrative challenges and that it would be important to get out in the field and learn what was going on. In any event, there were some major problems to be dealt with.

I wanted to go out in the field, and in 1980, a few months after taking office, I went out to the Far East. In October, I went to Japan, Korea, Okinawa, The Philippines, just visiting different commands, talking to judge

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5. In 1978, when the conflict between the services and the court reached a climax, Ms. Siemer proposed abolishing the court. See JONATHAN LURIE, PURSUING MILITARY JUSTICE, 257-62 (1998).

6. Judge Matthew J. Perry, who served on the Court of Military Appeals from 1976 to 1979.

advocates. A year after that, I did the same thing in Europe. I had a little bit more of a hands-on feel for it than I would have had otherwise. My philosophy was to try to do as much as possible to build the confidence in the court and an understanding of the court.

That's why I took the initiative some years later in instituting "Project Outreach," which started, as I recall, at the JAG School. We went down to hear an actual case, two cases I think, and this had been suggested by Professor Steve Saltzburg,<sup>7</sup> then of the University of Virginia Law School. He had also been on a court committee, which I had helped establish, or had established. Steve thought it would be nice if we came down to the JAG School and let the persons in training to be judge advocates see an argument before the court. Because that was such a success, we replicated it many places thereafter at law schools. I mean, technically, this was done at the University of Virginia Law School; then we did it at Wake Forest; we did it at West Point; subsequently a variety of places. After I had left the court and retired, I believe they went out on an aircraft carrier at one point and heard a case. This type of initiative to build the confidence in the court was something that I tried to do as much as possible to develop.

***Judge Cox:*** When I was either a very junior captain or a first lieutenant, I don't remember anymore, one of the judges, I think it was Judge Ferguson,<sup>8</sup> visited Fort Jackson, where I was stationed. I was involved with a group of young officers hosting him for dinner. We watched the court quite closely in those days. There was a lot of transition; that's when the *Tempia*<sup>9</sup> decision came down. We had a major case at Fort Jackson where the Court of Military Appeals held that the search was incident to a tainted confession because *Tempia* had been violated. It was a very sensational rape and murder case, and we had to suppress the evidence of the rape that was the critical evidence.

I was also involved in the case, *Parker v. Levy*<sup>10</sup>—in the trial of that case as a gopher. I wasn't a lawyer at the time. It was my last year in law

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7. Professor Stephen A. Saltzburg, one of the authors of the *Military Rules of Evidence Manual* and a professor with a long-time interest in military justice.

8. Judge Homer Ferguson, who served on the Court of Military Appeals from 1956 to 1976.

9. Referring to *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967), which applied the rights set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), to military interrogations.

10. *Parker v. Levy*, 417 U.S. 733 (1974). Captain Howard Levy was an Army physician stationed at Fort Jackson, South Carolina during the Vietnam War who was court-

school, and the SJA brought up two attorneys from Fort Gordon, at least one of whom had been a former U.S. prosecutor or state prosecutor, on active duty who were quite good, to prosecute the case. I was assigned to them to run errands, and one of the notable things that I did in that case was I actually served the post-trial review material on Doctor Levy. At the time, he was confined by himself in a large, vacant wing of the old Fort Jackson hospital, and he couldn't have been a nicer, more dignified, intelligent person. *Parker v. Levy* was decided a couple of years later. *O'Callahan*<sup>11</sup> was decided during that era. It was an active period for the court, and I was very aware of the workings of the court.

When I got to the court, it was still a three-judge court. I didn't know Judge Fletcher<sup>12</sup> or Judge Everett personally, and I'd been out of military justice for several years. I'd stayed in the Reserves a couple of years, but the last three or four years I hadn't been involved in military justice at all, so I was not aware of their political philosophies or of the controversy surrounding the court in the 1970s until I got there.<sup>13</sup> I was a conservative, southern Democrat, who grew up in a judicial system where law and order was important—you didn't look for ways to reverse cases. You'd look for ways to affirm them, and I didn't have any preconceived notions about the court at that time that I went. I viewed it as just a good chance to get back involved with the military community. My wife had been very upset that I ever left the military to begin with. She really enjoyed our short-lived career. But I told her that every assignment wasn't Munich.

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10. (continued) martialled after he had disobeyed orders to train Special Forces soldiers and publicly denouncing the United States military and its involvement in the Vietnam War. In an important case in which it set forth the argument that the military is a "separate community," the Supreme Court upheld his conviction for violating UCMJ articles 133 (conduct unbecoming an officer and gentleman) and 134 (conduct prejudicial to the good order and discipline of the service).

11. Referring to *O'Callahan v. Parker*, 395 U.S. 258 (1969), in which the Supreme Court required evidence of a "service connection" before any offense could be tried in a military court-martial. The Supreme Court later overruled *O'Callahan* in *Solorio v. United States*, 483 U.S. 435 (1987).

12. Judge Albert B. Fletcher, Jr., who served on the Court of Military Appeals from 1975 to 1985.

13. Referring to the conflicts the Court of Military Appeals had with the Judge Advocate Generals and the services over the court's "activist" approach during the mid to late 1970s. For a discussion of the conflicts, see LURIE, *supra* note 5, at 231-71 (1998).



## III. Judicial Philosophy

**Do you think someone appointed to the CAAF should have a different judicial philosophy than someone appointed to the Federal Court of Appeals; that is to say, should a person in a military court be more or less of, for example, a strict constructionist? Should a judge come to the CAAF with a sort of philosophy that is more inclined toward one view than another when dealing with military justice?**

*Judge Cox:* Sometimes labels are difficult to deal with. I don't think anyone should come to any court with a preconceived notion of how cases should be decided. Having said that, I don't think we, as judges, receive enough training in the works of our business sometimes, to understand the complex relationship between the role of Congress in prescribing the rules and regulations governing the forces, and the role of the commander in chief of implementing those laws and prescribing the procedures, and the role of the court in trying to interpret those laws and procedures in light of the need for a strong military force.

There's nowhere to go for that kind of training. Whether you're a strict construction fellow or whether you're a judicial liberal—those labels really shouldn't come into play as much as an understanding that the relationship between all the facets of government is very important. There's nothing comparable in the civilian arena that I know of, where you have the power of command and the role of the commander and the structure that has to be considered. And I don't know where you go to get that training.

*What about deference?*

*Judge Cox:* If you start with the premise that the Uniform Code of Military Justice is at least in large part a criminal justice system—and some people don't accept that premise—if you are looking at it from classical criminal law perspectives, construing the statutes, construing the rules, construing the rulings of the judges and so on and so forth, I don't think deference is necessarily required.

On the other hand, if you're looking for deference, I guess the best case example would be the *Scheffer*<sup>14</sup> case. There the Supreme Court deferred to the President's wisdom in whether or not polygraphy should come into the courtroom. A majority of our court did not defer to the President on that, but I don't think that was a matter of judicial philosophy so much.

Let me put it this way. There's probably less tendency on the part of the judges of CAAF, at least in my experience, to defer to the military on any kind of substantive rules or any kind of judicial rulings in the courtroom or Rules of Evidence and things of that nature. I think we've looked at our role in the classical criminal law sense, not as giving complete deference to the military.

***Judge Everett:*** I think there is certainly plenty of room for creative interpretation. For example, the Constitution speaks in terms of in Article I, Section 8, Clause 14, to the government and regulation of the land and naval forces. I think, obviously, the Air Force is part of the land and naval forces, in one sense, at least for constitutional purposes. There is a famous case decided right after World War II, the *Lichter*<sup>15</sup> case, where the justice writing the opinion speaks of a "marching Constitution," a "fighting Constitution." I think when you're dealing with the armed forces, you have to supervise the system, a position manifested in several opinions.

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14. Referring to *United States v. Scheffer*, 523 U.S. 303 (1998) in which the Supreme Court reversed CAAF's decision and held that Military Rule of Evidence 707, which prohibits the use of polygraph evidence, was a reasonable governmental limitation upon the accused's ability to present a defense.

15. Referring to *Lichter v. United States*, 334 U.S. 742 (1948), in which the War Contracts Renegotiation Act was held to be constitutional. Justice Burton stated in the opinion:

It has been said the Constitution marches. That is, there are constantly new applications of unchanged powers, and it is ascertained that in novel and complex situations, the old grants contain, in their general words and true significance, needed and adequate authority. So also, we have a fighting Constitution. We cannot at this time fail to appreciate the wisdom of the fathers . . . as we fight for the freedom of our children and that hereafter the sword of autocrats may never threaten the world.

*Id.* at 781-82.

Most recently, in *Clinton v. Goldsmith*,<sup>16</sup> we were reversed; but there's a line of cases going back, I think, to the *Bevilacqua*<sup>17</sup> case where the court has spoken in terms of having a supervisory role. Given that until 1983 there was no direct appeal from the court,<sup>18</sup> I believe, Congress wants military justice and related matters to be kept internalized as much as possible, that is, not in the district and circuit courts. I think it is important to look at the whole spirit of the system and that leads me to the conclusion that the court has been right in taking a fairly broad view of problems that it was authorized to solve.

One other example is *Unger v. Zemniak*<sup>19</sup> where there was a special court-martial of a Navy officer who could not be given a sentence by that court which would be subject to review by our court and, nonetheless, we considered the special writ that she was asking for and dealt with the legality of the order for her to give a urine sample in the presence of a subordinate, I think a petty officer.

You need to look at the whole system, what's available, how it relates to the civilian justice system, as you interpret the statutes. Now, obviously,

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16. Referring to *Clinton v. Goldsmith*, 526 U.S. 529 (1999), in which the CAAF asserted its authority under the All Writs Act to issue an injunction to prevent the Air Force from dropping Goldsmith, an Air Force major, who had been convicted at court-martial but not dismissed, from dropping him from its rolls. The Supreme Court held that CAAF lacked jurisdiction under the All Writs Act to issue the injunction, and held that CAAF's action was neither in aid of its jurisdiction, nor necessary or appropriate since alternative means of relief were available.

17. Referring to the seminal case *United States v. Bevilacqua*, 18 C.M.A. 10 (1968), in which petitioners sought a writ of error coram nobis after conviction by special court-martial. Although the court denied the petition, it stated:

[T]his court is not powerless to accord relief to an accused who has been palpably been denied constitutional rights in any court-martial; and . . . an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the federal judiciary.

*Bevilacqua*, 18 C.M.A. at 12.

18. The Military Justice Act of 1983 provided for direct review by the Supreme Court of decisions by the Court of Military Appeals for the first time. 97 Stat. 1393 (1983).

19. Referring to *Unger v. Zemniak*, 27 M.J. 349 (C.M.A. 1989), in which the court asserted jurisdiction after the petitioner sought an extraordinary writ to order the dismissal of charges prior to trial by special court-martial. While UCMJ, article 67(b), which provides the statutory basis for the court's jurisdiction, did not provide a basis for the court to do so in the case, the court held that Congress intended the court's supervisory authority to be broad.

you can't go hog wild in interpreting statutes, and I've been fairly literalistic on some occasions, but I would tend to say on many issues I would view our role as the chief appellate court for an entire system of justice as being somewhat different from that of the Fifth Circuit, Sixth Circuit, or so on.

#### IV. Service Members and the Bill of Rights

**In an article, Judge Cox once asked the rhetorical question: "Does the Bill of Rights apply to service members?" The reply was: "I guess the best answer is yes."<sup>20</sup> Is it safer to say that service members enjoy these rights per statutory recognition, rather than inherently by the Constitution? If they do have these rights inherently, how do we derive that from the Constitution?**

*Judge Everett:* I'd say they have some of the rights due to the Constitution itself. There are a few instances where it's excluded: for example, the Fifth Amendment obviously excludes the right of indictment for infamous crimes, which is a right that you possess if you're going to be tried by a federal district court.<sup>21</sup> Now, apparently, as part of that, going back to *Ex parte Milligan*<sup>22</sup> almost a century and a half ago, the same view has been taken on juries, that there is no right to trial by jury. But I think, otherwise, the service member has the right derived from the Constitution.

***So the Fourth Amendment, for example, would apply to service members?***

*Judge Everett:* Sure. What is a reasonable search? Well, the circumstance of the military may play a major role in deciding what is reasonable and what is not. When we got into the drug enforcement area back in the

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20. See Honorable Walter T. Cox, III, *The Army, The Courts, and The Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 23 (1987).

21. Referring to the Fifth Amendment clause which states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger. . .*" U.S. CONST. amend. V (emphasis added).

22. Referring to *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), in which the Supreme Court held that the right to a jury trial does not apply to military members.

early 1980s, late 1970s, the court took the position that requiring persons subject to a unit sweep to give urine specimens was a reasonable search and seizure.<sup>23</sup> We didn't say it wasn't a search and seizure; we didn't say service members have no Fourth Amendment rights, instead, we saw the criterion as a reasonable search. And this is a reasonable search when you take into account all the needs of the military.

In certain areas, the UCMJ provides greater protection than the Constitution. The Eighth Amendment gives constitutional protection against cruel and unusual punishment. The Code gives protection against cruel or unusual punishment.<sup>24</sup> The language of that would seem to imply you get a little bit more protection under the UCMJ than you do under the language of the Constitution, because the Constitution has to be cruel and unusual. Apparently, under the wording of the Code, cruel or unusual would suffice. I don't know whether that has any practical effect or not, so there may be some instances where the Code gives substantially greater protection than is given by the Constitution.

But you have to consider the rights that are given by the Constitution are in turn phrased, in some instances, in terms like "unusual." What is an "unusual" punishment? What is a "reasonable" search? There's a lot of flex in there.

***How do we determine what is and isn't applicable to service members? Where do we look to make that determination?***

***Judge Everett:*** For the most part, you start with the proposition that the Constitution, the Bill of Rights will apply and you find a couple of explicit—or implicit exceptions, like grand jury indictment and right to trial, and then on others you say, "Sure this applies, but how is it conditioned by the situation of the military?" What makes up reasonable or unreasonable? That's sort of my approach to it.

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23. See, e.g., *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).

24. Referring to Article 55, UCMJ, which states: "Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter." UCMJ art. 55 (2000).

*What about the fact that the Supreme Court hasn't ever spoken on whether the Bill of Rights applies? Do you think they ever will, or do you think there's a need for it to address this issue?*

**Judge Everett:** I think they'll sort of handle it the same way they handled the relationship between the Bill of Rights and Fourteenth Amendment Due Process, where there's been a gradual evolution of Fourteenth Amendment Due Process that does not include grand jury indictment. It includes jury trials, but you don't have to have a unanimous verdict in a state trial as you do in a federal trial. You have some of these rights recognized, but some variations between federal and state. And I think the same thing can be true vis-à-vis the military.

**Judge Cox:** The reason I said, "I guess the best answer is yes," is because no one's ever said "No." My view has been—and I think I've stated this publicly—that the Bill of Rights applies to the extent that they're not subsumed by the necessity of military duty. What does that mean? That probably means in the final analysis—it's almost un-American to say this—but in the final analysis, probably the Bill of Rights does not literally apply to the military, and I can show you examples that prove that.

A military member does not have unlimited free speech. A military member does not have unfettered right to practice his or her religious tenets. You can have a search without a detached, neutral magistrate appointed by the Executive Branch over the Judicial Branch rendering a decision. So if you say, "Do they apply?" Those are examples of where they don't apply, but it becomes moot like your question suggested in that the Congress has by statute and the President by rule making have just about superimposed every right except in those very limited categories.

*The response to that is that Congress can simply pull those rights away if it changes the statutes.*

**Judge Cox:** Exactly. And I guess it was the Davis<sup>25</sup> case, in which the Supreme Court came about as close to trying to answer the broad question you pose without answering it, when they used Davis to talk about the limitations on Miranda and Edwards v. Arizona.<sup>26</sup> I still think that probably the American answer is that the Bill of Rights applies except where it doesn't apply.

As long as an appellate court—and I think the Supreme Court would continue to follow this for the foreseeable future—can find some niche short of the Bill of Rights to resolve a military case, they’re going to do that. If you look at cases—if you look at the language that Rehnquist has quoted in case after case after case stating that the military is not a democratic society,<sup>27</sup> that would suggest to me that a current majority would not elevate the Bill of Rights over military necessity, if confronted with a question such as whether the Fourth Amendment applies to a military member. They would say, “Not in the performance of his duty.” Whether he’s on leave and is home off base and all that, I think sure, it applies. I think the Supreme Court would so find, but I don’t think in the military context.

#### V. Post-UCMJ Changes

**In your opinion, after the UCMJ was passed, what stands out in your mind during the past fifty years as the single most influential act, event, or opinion related to military justice?**

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25. Referring to *Davis v. United States*, 512 U.S. 452 (1994), in which the Supreme Court held that, after a knowing and voluntary waiver of rights under *Miranda v. Arizona*, law enforcement officials may continue to question a suspect until he clearly asks for an attorney. Because *Davis* originated in a military court, Justice O’Connor, who wrote the majority opinion, also stated in dictum:

We have never had occasion to consider whether the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military, and we need not do so here. The President, exercising his authority to prescribe procedures for military criminal proceedings . . . has decreed that statements obtained in violation of the Self-Incrimination Clause are generally not admissible at trials by court-martial. . . . Because the Court of Military Appeals has held that our cases construing the Fifth Amendment right to counsel apply to military interrogations and control the admissibility of evidence at trials by court-martial . . . and the parties do not contest this point, we proceed on the assumption that our precedents apply to courts-martial just as they apply to state and federal criminal prosecutions.

*Id.* at 2354 (dictum).

26. Referring to *Edwards v. Arizona*, 451 U.S. 477 (1981), which requires that law enforcement officials immediately cease questioning a suspect who has clearly asserted his right to have counsel during custodial interrogation.

27. The Supreme Court has upheld restrictions on speech, religion and other constitutional rights in the military. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733 (1974); *Greer v. Spock*, 424 U.S. 828 (1976); *Goldman v. Weinberger*, 475 U.S. 503 (1986).

**Judge Cox:** I would really have to say it was the Military Justice Act of 1968,<sup>28</sup> which led to the inevitable modernization of the court-martial and put the military judge in charge. By the way, General John Cooke<sup>29</sup> and I disagree a little bit on this. He attributes the rise of the power of the military judge to some decisions of the then Court of Military Appeals in the 1970s.<sup>30</sup> I don't diminish the court's role, but I think the increase of judicial involvement was inevitable. That's where I differ with him. I think once you create a judge and give the judge the responsibility to run the court, then you've got to give him the tools to administer the court. And once you give the judges the tools to administer, most judges go as far as they can and you have a gradual takeover, so to speak.

**Judge Everett:** To me, one of the most important events was the *Solorio*<sup>31</sup> case in 1987, which clarified that jurisdiction was predicated on military status and removed that particular issue. I suppose that would be the top event. Second would probably be, in 1983, the provision for direct Supreme Court review,<sup>32</sup> because that did have an effect of giving the court recognition and respectability that it may have lacked before. Interestingly, the Supreme Court has taken a number of cases from our court involving significant issues.

## VI. The Status of CAAF

**In Professor Lurie's history of the court from 1951 to 1980,<sup>33</sup> one sees two primary themes: the struggle for respectability that the court was going through, and the conflict that would burst open from time to time between the judges and the military establishment, the JAGs. Did you see a consistent overarching "theme" or trend such as the ones described in Lurie's book during your tenure as a judge and as chief judge on the court?**

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28. 82 Stat. 1335 (1968).

29. Brigadier General (ret.) John S. Cooke, former Commander, United States Army Legal Service Agency and Chief Judge, Army Court of Criminal Appeals. Brigadier General Cooke was also instrumental in the drafting of the 1984 *Manual for Courts-Martial*.

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

31. *Solorio v. United States*, 483 U.S. 435 (1987).

32. Now promulgated in UCMJ, art. 67a.

33. LURIE, *supra* note 5.



**Judge Cox:** When I first arrived at the court, there was a tremendous tension between the court and the service courts. The Judge Advocates General have always been extraordinarily gracious and polite, so there's never been any open schism like there was in the earlier days when the battle was really on what Jon Lurie describes between the power of the JAGs and the power of the court. There was a huge battle in the early days. It was still present when I arrived at the court; it was very subtle and under the surface so to speak, but there was a lot of tension between the service courts and our court.

I wrote a separate opinion in a case called *Johnson*,<sup>34</sup> in 1986, in which I took on the notion of paternalism and the *Care*<sup>35</sup> inquiry. The Navy court particularly had just blasted our court as being overly paternalistic—that we didn't understand the rules of life.<sup>36</sup> I took them on and said, "I was sympathetic to that view having been a trial judge, but now stepping back and taking a look at it, 'paternalism' is a realistic view." And I gave some talks to the Navy people and other people that probably weren't too popular in those days. I said, "You need to get off of this high horse and start thinking about what our real role is here."

And I credit Judge Everett. He probably did more to put to rest any conflict between the courts. He didn't do it by CAAF cowering to the JAGs or writing opinions that everybody loved. He reversed a lot of cases along the way. He didn't roll over for anybody, but he did it in a gentle, subtle way without trying to revolutionize the system or anything.

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34. Referring to his concurring opinion in *United States v. Johnson*, 21 M.J. 211, 216-17 (C.M.A. 1986) (J.Cox, concur) in which Judge Cox wrote:

The [Navy-Marine Corps] Court of Military Review's decisions . . . evince concern that this court is "elevat[ing] form over substance . . . that the Court is "paternalistic" . . . . Initially I, too, was troubled by what seemed to be technical rules . . . . However, my initial view has softened, and I now feel that there are sound reasons to adhere to the so-called paternalistic rules.

*Id.* at 216.

35. Referring to *United States v. Care*, 18 C.M.A. 535 (1969), which set the requirements in the military for guilty plea providence inquiries by the military judge.

36. See, e.g., *United States v. Jerasi*, 20 M.J. 719, 731 (N.M.C.M.R. 1985) ("[W]e do not possess the judicial power to dismantle the relic of paternalism.").

## VII. Political Questions and the Military

**How does the court construe whether something is a “political question” or not, and therefore nonjusticiable, in the context of the military, in which so much is, by its nature, political, since the military deals with executing the will of the President?**

***Judge Everett:*** In *Baker v. Carr*,<sup>37</sup> the opinion by Justice Brennan has a couple of passages that have usually been viewed as determining when something is a political question. There are textual aspects of it in how something is written, and then so-called prudential aspects, the certain situations where if courts meddle in, they’re not going to know enough to do anything but harm, so there is some precedent for drawing lines. I think that precedent can be properly utilized by the Court of Appeals for the Armed Forces when the occasion arises.

***What about the question of separation of powers?***

***Judge Everett:*** As the system separates into powers, this results inevitably in expertise being at certain places and not in others. For example, certain skills, certain knowledge will inevitably be in the Executive Branch because in dealing with issues on a day-to-day basis, the Judicial or even the Congressional Branch may not have the expertise in those particular matters. But I think that you can get enough guidance from reported decisions to at least have a pretty good idea of when political questions have been posed and should be left unanswered by the court. Times change. For

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37. Referring to *Baker v. Carr*, 369 U.S. 186 (1962) in which the Supreme Court held that a state statute that effected an apportionment deprived plaintiffs of equal protection under the Fourteenth Amendment. In distinguishing between “withholding federal judicial relief [based]. . . upon a lack of federal jurisdiction or upon . . . nonjusticiability,” Justice Brennan wrote:

The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather the Court’s inquiry necessarily proceeds to the point of deciding whether the duty assigned can be judicially identified and its breach judicially determined, and whether protection for the right can be judicially molded.

*Id.* at 700.

example, in 1966 it might have been a real question as to whether a war was going on in Vietnam, declared or otherwise. You get up to 1970, and we have a half million troops over there, then it's a lot easier to say that there's a war taking place. Some would not even say that under those circumstances, but certainly as you get more information and circumstances change, you can better delineate what is a political question and what isn't.

There are certain things as to which it is pretty clear. The Constitution intends for the Executive Branch to do its own thing and not to have interference from the Judicial Branch, and I think there's some case law that tends to map that out. So it's not an impossible question.

*Judge Cox:* I'm not sure I can answer that. I guess I go back to the view that I've held that we're somewhat removed from the political question type of situation. Many of those issues have arisen in the administrative separation context.

Do you want to characterize a case like Dr. Levy's<sup>38</sup> as a political question case? Or was it a classic disobedience of orders case? Was *Rockwood*<sup>39</sup> a political question case or a classic disobedience of orders case?

I think our court has been fairly consistent, and you can prove me wrong by showing me some cases, but I think it has been fairly consistent at least in this area, deferring to Congress and the commander in chief once the policy is established, and not looking behind that at the political questions involved.

Having said that, if I were a federal district judge, would I look at the political question doctrine to avoid answering a question? Probably. But I think—and this is my personal view—I think many, many judges today would not view many questions as political questions; they would think of another rationale to get to them. But the Court of Appeals for the Armed Forces, I think, because of its structure and subject-matter jurisdiction, even when we allegedly have ventured outside of it, it hasn't been to jump

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38. Referring to *Parker v. Levy*, 417 U.S. 733 (1974). See *supra* note 10.

39. Referring to *United States v. Rockwood*, 52 M.J. 98 (1999). Captain Rockwood disobeyed orders by entering a Haitian penitentiary to inspect living conditions of prisoners. He was court-martialed and convicted for a variety of military offenses, among them disobeying orders. Captain Rockwood argued that he was justified under international law in his actions. *Id.* The CAAF upheld his conviction.

in to some political-type question. It's been to deal with an individual circumstance.

#### VIII. The UCMJ in Combat

**General Westmoreland and others have complained that the UCMJ and the accompanying sort of modern military justice apparatus are too cumbersome in a conventional war.<sup>40</sup> Do you see potential problems with the current system in a conventional war, or do you think it's a feasible system in that setting?**

*Judge Cox:* If you take a look at the Military Justice Advisory Commission of 1983, 1984, the Hemingway Commission, and look at the dissenting comments of Colonel Mitchell<sup>41</sup> and some others as to a couple of the issues in there, you will see this yearning for something else, but I don't know what it is. I don't know what General Westmoreland had in mind that would have solved that situation in Vietnam—with the national unrest at home, rampant drug use . . . I don't know what he had in mind—whether the World War II model, two million courts-martial, no judges, all of that would have been a better model.

I can't answer that because I wasn't there in World War II, and though I wasn't there, I saw the results of what happened in Vietnam. Today, how-

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40. See William C. Westmoreland & George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice*, 3 HARV. J.L. & PUB. POL'Y 1 (1980).

41. Referring to the Military Justice Act of 1983 Advisory Commission. Colonel Thomas L. Hemingway, USAF was the Chairman of the Commission. As part of the Commission's report, Colonel Charles H. Mitchell, USMC and Captain E.M. Byrne, USN submitted a minority report in which they stated:

There are also pragmatic reasons for caution in civilianizing military law. Not the least of sorrows of military commanders is the amazing facility and speed with which military organizations, given the least opportunity, will grow roots. The most inclined of all to grow them are the administrative and support services. The ever-complicating and burdensome civilian legal machinery has such a facility for bureaucracy and immobilization (amply demonstrated in its own civilian environment) that it is not capable of being implemented in all its glory as far forward in the battle area as the need for legal services does and will exist.

ADVISORY COMMISSION REPORT, MILITARY JUSTICE ACT OF 1983 at 56 (1984) (minority report of Col. Charles H. Mitchell, USMC and Captain E.M. Byrne, USN).

ever, in 2000, the modern courtroom is so easy to take to war. The equipment is available. Scholars should give some thought to ways that we could still ensure soldiers in the field in a major conflict receive due process—to be sure that they are the ones who committed the offense, but minimize the “gray mail” that comes from demanding experts, etc.

I think some compromises could be made in the war zone that would make it work. I can’t articulate a particular one, but from talking to my military judge friends, who held court in Saudi Arabia, who go to Bosnia and hold court, they seem to get along fairly well in kind of makeshift circumstances, but I can see some things that might make it simpler. You might have judge alone sentencing; you might have a lot of things. Maybe expanding the jurisdiction of a special court-martial to one year was a step in the right direction for the wartime situation. But no matter what type of court system—if you go back and read the lamentations of the generals in the Civil War, military justice has always been criticized; it’s always been in the way.

In answer to General Westmoreland, whom I have the highest regard for and know, I think the system would work and work better today than it did in Vietnam because the system’s more mature. The judiciary today—thanks to the JAG School, and thanks to the emphasis that the services have put on—is probably the finest trained judiciary in the world, including the state and federal judiciary.

#### IX. Continued Problems at CAAF?

**At the end of Professor Lurie’s book on the court, he writes:**

**Traditionally and unnecessarily clothed with the reputation for the arcane, contemporary appellate military justice still suffers from a lack of critical civilian scrutiny, constructive interplay with civilian jurisprudence, an effective and functioning bar, and finally, from a jurisprudence that in the post-Fletcher era increasingly has tended to favor the prosecution.<sup>42</sup>**

**What are your responses to this statement?**

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42. LURIE, *supra* note 5, at 276.

**Judge Everett:** We're getting more and more civilian scrutiny. I think groups like the National Institute of Military Justice,<sup>43</sup> which people like Gene Fidell, Kevin Barry, Steve Saltzburg<sup>44</sup> have been involved in have done an excellent job in that regard. I think that programs like the seminars that we're involved in at Duke and elsewhere have helped. For example, Judge Cox and I this past fall had the seminar for law students here at Duke on the fifty years under the UCMJ, and I think that's the sort of thing that encourages outside study by civilian commentators. I think also that the circumstance that some of our cases involving issues not unique to the military, such as the *Scheffer*<sup>45</sup> case, have reached the Supreme Court has led to a recognition in various quarters that the cases we have are parallel to many that arise elsewhere and that they are worthy of comparison.

I think there's been an increased accessibility to the military cases probably as a result of Lexis and changes in key numbers and that sort of thing. So I think there is increased civilian commentary and criticism from various directions. I'm very proud that our "Project Outreach" has been a part of that.

I think we're developing a constructive interplay with civilian jurisprudence, and one other thing we've done is have law students argue cases as amici in our court. Interestingly, we did that some with Georgetown, and Sam Dash<sup>46</sup> was one of those who presented the argument for the student clinic. The students wrote the brief; he presented the argument. More recently, we've had the students prepare the brief with or without some type of faculty consultation, and then the students would argue it. We've

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43. As defined at its website,

The National Institute of Military Justice [NIMJ] is a non-profit organization actively engaged in the promotion of a fair, equitable, and effective U.S. military justice system. Since its incorporation in 1991, NIMJ has undertaken a variety of initiatives in keeping with its overall goals of advancing the administration of military justice within the Armed Services of the United States and fostering improved public understanding of the military justice system.

*The National Institute of Military Justice* (visited Apr. 5, 2000) <<http://www.freeeyel-low.com/members5/upplj/nimj.html>>.

44. Eugene R. Fidell is the president of the NIMJ, Kevin J. Barry is the Secretary-Treasurer, and Stephen A. Saltzburg serves as General Counsel.

45. Referring to *United States v. Scheffer*, 523 U.S. 303 (1998). See *supra* note 14.

46. Attorney, perhaps best known as the former independent ethics advisor to Kenneth Starr.

attempted to bring these issues more in contact with persons in the law school community, which I think is good.

As far as an effective and functioning bar, when I see the argument in our court and then I sit in on other courts, I think the level is good, for the most part. You get variations, but I think there's more of a systematic effort to maintain quality of advocacy in connection with our court.

***Judge Cox:*** In regards to a lack of critical civilian scrutiny, and constructive interplay with civilian jurisprudence, I think I probably understand where Dr. Lurie was coming from with that. I think what he's talking about is that there's not a ground swell of law school professors or others that look at the system, that write about it or criticize it. There is just a very narrow handful of civilians and military practitioners from the various justice schools, but there's not anybody that takes us to task. "Us" being the military justice system. And Congress—and I agree with him on this—has shown, except for a couple of Congressmen here and there, a real lack of interest in military justice, except when they read an article in the Dayton, Ohio, paper about somebody getting a million dollars from the stock market while he's in Fort Leavenworth.

I don't know whether ever in the history of military justice there's been "critical" civilian review or oversight. I think lawyers and others have had knee-jerk reactions to certain situations. They see them, and they comment on them, and they write about them, and then move on, but there's nothing like the judicial council that looks at all the federal courts and how they operate; there's nothing like the state legislatures that are interested in the judicial systems of their states and all that. I don't think it's necessarily good or bad. I think our system is a pretty healthy system and would stand review from almost anyone.

Concerning a functioning bar, there's really no focus group. so to speak, whose interests lie in military justice. In the military itself, military lawyers are assigned and reassigned by the personnel specialists. There's no cohesiveness there. So there's no group, like in the South Carolina Bar, who's always interested in the system. There's nobody there under the system who always has the interest of the system in mind. There's nobody you can turn to. We've talked about this at the court. There's no one you can turn to and say, "Could you champion this cause or that cause," something a judge couldn't do, something the military would be uncomfortable to do, but that a bar association might well do, that kind of thing.

There's been some efforts over the years to form a bar. The Judge Advocates Association has made overtures to our court to become a bar association of the court, but Professor Lurie's probably right on that. I would probably agree with him that an organized bar of people interested in military justice might be a good thing. It also would probably be opposed by the Judge Advocates General, as an effort to oversee the ethics of our practitioners.

All those types of things would be keenly resisted. That was one of the problems that Judge Fletcher had. He tried to promote a judicial council, which would really be the supervisory authority over the judges and lawyers and everyone practicing military justice.<sup>47</sup> I don't think Judge Fletcher ever looked at it as a power grab or anything. He looked at it more as what he had back home in Kansas; this is the way bar associations are organized; this is the way courts are organized.

#### X. The Court's Supervisory Authority

**Another area right now that's getting some interest is the court's supervisory authority, especially supervisory writ authority, in light of the *Clinton v. Goldsmith*<sup>48</sup> case. How far do you think CAAF's supervisory authority extends within the system?**

***Judge Cox:*** I can find no statutory authority to tie jurisdiction of our court to a particular case because of our "supervisory" authority. The closest case we've gotten to exercising such authority since I've been on the

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47. In 1975, Chief Judge Fletcher made many proposals to the service judge advocate generals. Among them, he proposed that "[a] judicial council should be created to undertake 'a continuous study of the organization, practice, procedure, rules and methods of administration and operation of the military justice system.'" LURIE, *supra* note 5, at 236-37. As Lurie states:

What unified most of these proposals was a marked emphasis on expansion of the power both of [the United States Court of Military Appeals], but—to an even greater extent—the military judge. . . . Even as they increased judicial responsibility, it would be at the expense of the convening authority's jurisdiction. Thus, military hostility to such changes is understandable.

*Id.* at 237.

48. Referring to *Clinton v. Goldsmith*, 526 U.S. 529 (1999). See *infra* note 16.



court probably was *Navy-Marine Corps Court of Military Review v. Carlucci*<sup>49</sup> because that really had no nexus to an existing court-martial. It had only a slim, arguable nexus to our Article 67 jurisdiction. It was a simple idea that in order to ensure judicial independence, judges should be judged by judges in the first instance unless there's evidence of criminal misconduct.

That case probably was a real stretch and given *Goldsmith*, had the Supreme Court gotten a hold of that case, I don't know whether they would have just denied certiorari out of sympathy for the facts or whether they would have reached and said, "You have no business in there." I don't know. The Department of Defense Inspector General wanted to appeal it and the Solicitor General didn't, and I think the reason was bad facts sometimes make bad laws, so the powers that be would just rather leave that type of case alone.

That was a supervisory jurisdiction case. I think in *Goldsmith*, the reason the services were concerned was because there has been, at least since I've been on the court, this idea that the Court of Appeals for the Armed Forces wants to expand its jurisdiction; and the TJAGs have been extremely sensitive to any efforts to expand jurisdiction.

I had a meeting once with the TJAGs in which we were talking about this idea: should the court have authority to hear administrative discharges, for example? There was a commission by Congress to look at that, and my idea was that The Judge Advocates General should look at this congressional commission as a blank check to redefine and redesign, if necessary, the delivery of legal services, the use of legal manpower. In reality, we have a commander that's making a decision as to what to do with disciplinary problems. He can decide to prosecute by court-martial or use the administrative discharge route. It goes to a judge advocate either way; it goes to a convening authority either way; and then it just goes off

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49. Referring to *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (1988), in which the Navy-Marine Corps Court of Military Review sought an extraordinary writ to prevent the Department of Defense Inspector General from interrogating members of the Navy-Marine Corps Court about alleged impropriety. The Court of Military Appeals granted the writ, and Judge Cox was appointed as a Special Master to investigate the impropriety instead. Writing for the Court, Judge Evertt stated, "We are convinced that it is within our inherent authority as the highest court within the military justice system and within our supervisory authority under the All Writs Act . . . to create an internal procedure for investigating complaints of judicial misconduct within the system." *Carlucci*, 26 M.J. at 339.

into different directions. You could restructure the whole system to take advantage of that opportunity, but the TJAGs were very reluctant to even want to talk about it.

The TJAGs didn't want CAAF to get in the administrative business. So I think *Goldsmith* was legitimately appealed by the government because the TJAGs saw us reaching out into the administrative law realm. Congress had said, "You can drop people like Goldsmith from the rolls." We said, "You can't drop Goldsmith from the rolls," and they just viewed our jurisdiction as a stretch.

I don't think that was supervisory though. I think in this case that it was really a probable and rational result of his court-martial. It just wasn't argued well; it wasn't articulated well before the Supreme Court. I do not know if I could do better, however.

The only case that I can recall since I've been on the court that we got involved with where Article 67 wouldn't have come clearly into play was *Unger v. Zemniak*,<sup>50</sup> because the case was referred to a special court without power to dismiss Lieutenant Unger or without power to give her a year in prison, so there was no possibility if she lost that she could appeal her conviction to our court. Judge Everett wrote the lead opinion in the case, and if you go back and look at it, found that there was derivative—not supervisory—on the theory that the TJAG could refer it under Article 69.<sup>51</sup>

Article 67 says CAAF may take any case reviewed by the Court of Military Review. Therefore, it doesn't limit it to the automatic appeals. I think I agree with Judge Everett: a strict construction of Article 67 would give us jurisdiction over any case that goes to the Court of Military Review, either on appeal or by recommendation of The Judge Advocate General or referral. Having said that, I'm not so sure how I would have

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50. *Unger v. Zemniak*, 27 M.J. 349 (C.M.A. 1989); *see supra* note 19.

51. UCMJ article 69(d) states:

A Court of Criminal Appeals may review, under section 866 of this title (article 66)—(1) any court-martial case which (A) is subject to action by the Judge Advocate General under this section, and (B) is sent to the Court of Criminal Appeals by order of the Judge Advocate General.

UCMJ article 67(a)(2) (1998) further states: "The Court of Appeals for the Armed Forces shall review the record in (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review . . . ."

come down on the cases that purely involved an Article 15 or a summary court-martial.

But courts traditionally have had inherent powers, under the All Writs Act<sup>52</sup> now, and, prior to that under the common law, to deal with some situations which arise under other articles of the Code. That is the question opened by *Goldsmith*: What are the limits now on that power? What if we have a soldier who's being held in a stockade somewhere, and no charges are preferred and are contemplated. You've got evidence, testimony, from the commanding officer, and he says, "I don't care if he ever gets tried. I'm not letting him out." If the soldier asks for a writ of habeas corpus. What's our jurisdiction?

We don't have any clear jurisdiction, but I think under circumstances like that, the courts—not only our court but courts everywhere—have had inherent jurisdiction to deal with obvious violations of the rights of the people under its jurisdiction. But I don't think that's supervisory. I think it's something else, and I don't know what it is, but I don't think it's supervisory. I think supervisory is saying that we're not going to entertain any cases where a defense counsel hasn't gone through The Judge Advocate General's School and been certified by the TJAG.

I think the use of the term "supervisory jurisdiction" in *Goldsmith* was a poor choice of words in hindsight. At the time I didn't think much one way or the other, but probably in *Goldsmith*, if we really wanted to try to make a better case with jurisdiction, we should have treated it as a petition for reconsideration or something like that, and then said this is a direct nexus to the sentence of his court-martial under Article 67.

But we've had a lot of interesting talks around the court about it. Some scholars and others think *Goldsmith* was probably an aberration because the services were so concerned about us reaching into the administrative business of the secretaries of the departments. Others think it was a good left hook to the chin on the court as far as limitations of jurisdiction. We'll just have to wait until the next case and see what the court does.

***Judge Everett:*** Well, it's hard to tell. I think Congress should really look at that issue because there may be a gap there and a lot of service members may not have their rights properly vindicated until some of the uncertainty is resolved. I guess the remedy that is available to Major Gold-

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52. 28 U.S.C. § 1651(a) (2000).

smith under the court's decision is to go through the correction board, and I'm not even sure if they can do that. And then, at some point, get into court somewhere, and I'm not sure exactly where.

The Supreme Court seems to allow some jurisdiction under the All Writs Act, and that applies, as I recall, to any federal court. But, there again, it's supposed to be related to protection of the jurisdiction. And how far exactly you can get with what we have is very unclear to me. They may not be able to get very far at all. The intermediate courts, the courts of criminal appeals, were also beginning to exercise all writs authority, as I recall. And it's rather interesting you have states like California, which use extraordinary writs very extensively as an adjunct to appellate review. And then you have most states that are much more restrictive. And the federal courts are much more restrictive. There are very few opportunities for interlocutory appeal in the federal court system. Should the military be identical in that regard?

I think there's some advantages in having a broader view of supervisory jurisdiction. And I think also the very fact that the CAAF is a civilian court, which, according to its original purpose, was designed to provide for civilian review, creates a little bit of a different situation than that in the federal circuits where there is not the same need for sort of an extraneous body performing the review.

#### XI. The Court and "Article III" Status

**Do you think the court has reached parity with so-called Article III courts<sup>53</sup> now? If not, what's left to be done? And what do you think of the related concept of life tenure for CAAF judges?**

*Judge Everett:* I think giving CAAF Article III status is desirable because I think if the court is an Article III court, it can do some things that it needs to do. One of the chief concerns about the court having review of administrative actions, is that it's not an Article III court. The Court of Appeals for the Federal Circuit is an Article III court and, therefore,

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53. Article III courts are established under Article III of the Constitution and include the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish." These include U.S. District Courts and Courts of Appeal. Article III judges have life tenure. The CAAF is an "Article I" court, established pursuant to Article I of the Constitution. Judges in such courts do not receive life tenure. U.S. CONST. arts. I, III.

reviews administrative actions, even though, I think, our court has a lot more expertise in matters relating to the military. I think for that matter the Court of Appeals for the Federal Circuit will not question that assertion at all. They have plenty of cases to handle. So, to me, the giving of Article III status to the court would make sense.

The caseload is not so heavy that taking on additional responsibilities would be too much of a task. And that would also be the opportunity for judges, if it were an Article III court, to occasionally sit with other Article III courts at the various circuits, and thereby get a little bit better feel for what's happening.

I think Ed Re, who used to be the Chief Judge of the Court of International Trade, a fine legal scholar, sat at one time or another at almost every federal circuit. He was sort of like getting an opportunity to go to these other circuits, and he learned about them, and they, undoubtedly, learned about his particular court.

I think there's some advantages from an Article III status, but, there are a lot of possible disadvantages. I think some of the people who have served on the court are perfectly happy to serve fifteen years and then retire. I'll be honest; I would not have wanted to stay for life. I have plenty of other things I want to do. One thing, as I mentioned to you, I guess I was about fifty at the time. I had no intention or desire to be in Washington the rest of my life. So I think there may be some feeling on the part of those who have served that it's long enough, and they wish to have the retirement. Then they can do some other things.

When I was on the court staff back in the 1953-1955 period, I think, at that point, probably some of those judges were hoping to get Article III status, and I believe either the House or the Senate, I think it was the Senate, initially planned to have a life tenure, which is the key to Article III status.

Congress initially thought, "Well, let's see how it works out before we lock in these judges for life." So, it comes up from time to time. If I were a legislator, I would favor it. In fact, I think someday I will try to talk to some of the staff counsel at the Senate or the House and urge them to at least look into the matter, because I think it would be desirable. I don't think it could do harm, but I don't know whether the other judges sitting on the court now have any interest in it.

*Judge Cox:* The argument can certainly be advanced that service members being citizens of the United States should be entitled to the same judicial status as any other citizen and, therefore, an argument can be made that the civilian court that oversees the system should have life tenure, no diminution of salary, those kinds of things. Congress could abolish our Court tomorrow, and that would be it. There's no constitutional protection there—so that argument can be made. As long as that difference exists, there will never be parity.

The argument could also be made, that military judges should likewise have life tenure and no diminution and so should the Courts of Criminal Appeals. But our American way of doing it has never given that kind of system to the states. State judges' terms are not long, and they are all subject to reappointment, reelection, or something.

So I've never been—even though I supported Judge Everett's efforts to become an Article III court—paranoid about not being an Article III court. I've never felt as an inferior creature. I mean the argument's there. But as far as the reality, I don't know. I don't know what difference it makes.

All that Congress would have to do is say the judges are reconstituted under Article III of the Constitution and then shall serve during their good behavior. A stroke of a pen and there you are, but what would that change? It wouldn't change our jurisdiction. It wouldn't give us any new powers. Even a federal judge can't hear certain cases that they have no jurisdiction over. I don't think the mere fact of becoming an Article III would expand the jurisdiction of the court.

I think if Congress wants to expand the jurisdiction of the court, it has to not only use the magic language, but it would also have to take a look at the jurisdiction and redefine what that would be.

Regarding life tenure, for judges: in recent years, the question of life tenure has come under attack from scholars and others, for example from Dan Meador down at the University of Virginia.<sup>54</sup> I think if our forefathers were rewriting the Constitution today, given the longevity of people and all

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54. For a recent attack on the notion of excessive judicial independence, to include life tenure, see Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397 (1999).

that, there would be something different than that. It would be like appointment for a term of years.

The theory of life tenure and no diminution in pay is that a judge, given that, cannot be compromised by needing to have that office for financial security and so forth. And most judges give up their law practice and all and go in it. But the counter-argument to that is, "Well, gosh. They don't have life tenure in the states, and yet people are wanting to be judges all the time." And so our system survives without it.

But assuming *arguendo* that life tenure is a valid goal, that is to say, let's have life tenure and no diminution of pay so that judges will have financial security and, therefore, be independent. If you take a look at the system Congress has created for our court, we have a fifteen-year term, and then we go into a senior status. Although there's some diminution of pay, there's still financial security. You don't have this compelling need to be reappointed. If you don't have a compelling need to be reappointed, you don't have to compromise yourself. So you have a similar check and balance in the current system.

I'm not opposed to life tenure; I just don't think it's absolutely necessary for the independence of our court. While I was Chief Judge, I never championed it. According to Jon Lurie, I may be the only Chief Judge that never did. And I wasn't opposed to it; I just thought it was an idea that Congress was not willing to swallow. I don't think they would create any new courts today with life tenure.

## XII. Specified Issue Power

**A power of CAAF that is criticized (and cited as an obstruction to gaining Article III status) is the specified issue power.<sup>55</sup> Eugene Fidell co-authored an article in which three basic criticisms were cited.<sup>56</sup> First, it diverts a limited number of appellate counsel resources that are already spread**

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55. "Specified issue" power refers to the ability of CAAF to grant review of an issue that has not been mentioned by counsel in their supplements to petitions for review. Although not explicitly set forth in the UCMJ, CAAF has "traditionally reviewed meritorious issues which were not assigned by an appellant or his counsel." *United States v. Ortiz*, 24 M.J.323, 325 (C.M.A. 1987).

56. Eugene R. Fidell & Linda Greenhouse, *A Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals*, 122 MIL. L. REV. 117 (1987).

**thin. Second, it's at odds with appellate judicial administration in the United States and is a holdover from a time when the system was less reliant on lawyers and was especially concerned about issues like command influence. Third, it impedes Congress giving full-blown Article III status to the court. How do you respond to these criticisms?**

*Judge Cox:* Well, I think Mr. Fidell's criticisms, which I've read and discussed with him, are heartfelt and intellectually stimulating. But I tried to figure out one time how many petitions I've heard in fifteen years, and it was at first perhaps two or three thousand a year, down to—we're predicting maybe eight or nine hundred this year. But assuming fifteen hundred a year times fifteen years: what's that? 22,500. I would query how many issues we specified in that time. There weren't many, I don't think, to begin with, so it doesn't spread those precious appellate resources any thinner I would say.

Secondly, if you analyze the specified issues, some of them, and maybe many of them, I can't remember exactly, are re-characterizations of the way the issue was brought to us. In other words, we specify it, but it really is a restatement in the language we want to decide the case of the issue as presented to us. A good example of that is the *Campbell* case.<sup>57</sup> On a rehearing, we specified new issues because of the way the case was argued and the way it was presented wasn't what we were concerned about once we got into it. That is a typical specified issue.

Now that to me doesn't seem to encroach on your Article III status or anything else. That's a better way of doing business. If somebody says, "The issue is: The military judge abused his discretion by letting in the fruits of an unlawful search and seizure or something." The real question is: was the search and seizure unlawful? So if we restructure it like that, it's a restructuring of the way the appellate defense counsel presented it, so we get the cleaner argument on it.

This leaves a small category of cases where we have reached out and specified some issue that was not raised, not considered, not anything. I would agree with Judge Everett's argument that that's a portion of the responsibility that Congress has given to our court to have a civilian court

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57. Referring to the case *United States v. Campbell*, 50 M.J. 154 (1999), in which the CAAF specified a series of issues concerning what was required for a permissive inference of wrongful use of LSD.



of last resort that shouldn't be trumped by control from the military by the way the military wants to structure the issues. And you and I know that the appellate defense counsel are men and women of good will and want to do the best they can, but the parents back in Clemson, South Carolina, still have an innate distrust for the fact that their son or daughter's lawyer is in uniform.

In the long run, the specified issue power inures to the stature of the court as being able to render the final word in a case, not controlled by the military. The way the court was originally proposed, The Judge Advocates General wanted to control the gate to the court. So that battle was fought in the 1950s.

***Judge Everett:*** I just don't see the criticisms, really. The U.S. Supreme Court has about 5000 petitions for certorari each year that are *in forma pauperis*, and about 2000 or so regular petitions. The Supreme Court, in the interests of justice, will take something sent in from a prisoner *in forma pauperis*, written in a very informal fashion, a letter or something of that sort. If it finds the issue worthy—the issue is raised which the court thinks is worth considering because of the significance of that issue—then it will appoint counsel and, basically, set the case and proceed with some type of presentation of the issues by counsel who are appointed to assist the petitioner. So in the Supreme Court and in many other appellate courts, an effort is made to deal with issues that are implicit in the case, but which are not specifically raised by counsel.

Secondly, it is very unfortunate, but a lot of service members don't trust their counsel because they are wearing a uniform. And they feel like the counsel is beholden to the convening authority, beholden to the government. That's a very erroneous impression, but it exists. And, for that reason, you will have situations where people will pay substantial amounts to civilian attorneys when they might be able to get the same service, or even better service, free of charge from a uniformed lawyer through appointed defense counsel.

So, I think it is good to be able to reassure a convicted service member whose case is being reviewed that he not only will have a counsel who is his counsel, but that also he will have an appellate court that is interested in having justice done and has its own central legal staff who can pick out the good cases that need consideration.

I have tried to read, in some form or fashion, the petitions in all our cases when I was at the court. It was a pretty difficult task, and some of the stuff is just garbage, in the sense that there's no real issue. You could look at it and know it's not there. But there are some cases where counsel's overlooked something where an issue is buried in language that, perhaps, has not been adequately communicating that issue. The chances of doing justice are better if the court says, "Well, they may not have raised this. We're going to specify this issue."

Finally, in specifying issues, you can sometimes tell counsel exactly what you're concerned with and focus them on that particular matter that you wish to decide. So I think we're getting in the right practice and should continue, as far as I'm concerned.

### XIII. Standards of Review

**It does seem at the same time the court has preserved its specified issue power, it has "powered down" to the lower courts the ability to review issues by giving the lower courts standards of review for all types of legal questions that arise in cases and thus perhaps has implicitly narrowed its own ability to judge or to reverse cases.<sup>58</sup> Do you see that as a kind of contradiction or tension with its continued specified issue power?**

*Judge Everett:* Not a contradiction. I see them as moving somewhat in a different direction. And, candidly, the effort to specify standards of review, which is very desirable, I think, started with somebody who came in after I left the court. Primarily, I believe, through Judge Wiss. I think he may have been the one who suggested trying to be clearer in that regard. And, certainly, by delineating the standards of review and giving guidance to the lower court, you reduce the number of issues that are potentially available for review. By that, I mean, you shouldn't have as many instances where there's occasion to specify an issue, because that's already going to be taken care of. The lower courts know what they're supposed to do, and they do it.

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58. For an overview of CAAF's recent focus on standards of review, see Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213 (1997).

But I still think there are enough cases where injustice might be done if we follow the idea of not specifying issues that I think we should continue the practice. Frankly, the caseload is not that heavy. Back in the early 1980s, there was about a one-year period, or a year and a half where there were two of us there<sup>59</sup> and we were waiting for a third to come aboard, a long, unhappy period. But the caseload went from about 1700, I think when I went on the court, to about 3200 or 3300 during that period of time. There were a lot of cases. And, even then, we followed the practice of specifying issues.

**Judge Cox:** No. I don't see a tension. I think when Judge Wiss and Judge Gierke<sup>60</sup> joined the court, both led the charge for more standards of review. The standards of review probably always were there and not so open and notorious, but the devolution of power, I think, is a different issue. I think that's because our court, at least since I've been there, has wanted to insist upon the Courts of Criminal Appeals and the courts-martial being "courts," and the military judges, "judges" in every sense of the word of American jurisprudence. And to do that, one must give the judges the authority and responsibility to be judges, and give them the tools to do it with.

I don't think that's yielding our ability to review what they've done so much as it's been an effort to make our system a good judicial system. So someone looking at the system says, "That's a good system; it works. Those guys know what they're doing. They've got standards of review; they've got good counsel; they brief their cases well; they argue them well. It's a good system." I think that's what that's all about, more than giving up any power.

#### XIV. The Service Courts (Courts of Criminal Appeals)

**Chief Judge Fletcher once suggested that the service courts consolidate; that there should be one service court rather than four.<sup>61</sup> Given an increased emphasis on "jointness," is this an idea whose time has come?**

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59. Then Judge Cox and then Chief Judge Everett.

60. Judge Robert E. Wiss served on the court from 1992 until his death in 1995. Judge H.F. "Sparky" Gierke has been on the court since 1991.

61. See Lurie, *supra* note 5, at 238-39.

***Judge Cox:*** I've never really given much thought to that idea. I wouldn't advance that it's an idea whose time has come. As long as we have separate services with separate missions and separate traditions and separate needs for what makes good order, morale, and discipline in those various branches of the armed forces, I think we have a need for lawyers and for judges who understand those various factors. Having said that, ten, fifteen years from now, as to the way we deliver our military might and how we carry out our military missions, as those keep changing, then I wouldn't say, "No," I wouldn't say, "Never." But I don't think it's an idea whose time has come.

I can see the differences between the courts; the way they act and the way they talk and the way they think about the problems that they're having. I can see differences in the way the charges come out and things like that, and I think a unified court would just ultimately create a unified way of doing it. Maybe that's what the Uniform Code of Military Justice is all about, but I just don't think it's an idea whose time has quite come. But I wouldn't say it will never come.

***Judge Everett:*** I thought Judge Fletcher's idea had a lot of good aspects to it, and it may still have a lot of good aspects. I just plain don't know how desirable that would be. There are some advantages in the present system.

Your question about the lower courts reminds me of something that shows how conditions can change. I guess it was after I had been chief judge for about a year, there was some comment that we did not schedule terms of court in advance enough, and, therefore, it could create problems for lawyers who had cases to argue in the intermediate court. They'd have a conflict, being in two places at the same time. So I had made inquiry to see if that were a major problem and discovered, at that particular point in history, the service courts virtually had no oral arguments. It really was interesting. We went back to 1980 or 1981. You'd find some of the Courts of Military Review never bothered with the oral argument; I was amazed. So I decided I wouldn't worry too much about the scheduling because we weren't going to put them to any real trouble in their scheduling.

But it seemed to me the professionalism of those courts is very high, and I'd be a little concerned with the possibility of upsetting something that's working well. That would be my biggest concern. I think there is something to be said for having courts drawn from all the services and sitting in a single body. I think, though, as things now stand, I would proba-

bly say that there is enough uniqueness to the conditions of the particular services in having Courts of Military Review, now Courts of Criminal Appeals, for each of the military departments.

As for trial judges, I know, at various times, it appeared that the judges in some services might have either a more lenient or a tougher view than those in others. I don't know if that's true anymore either. But I think we're in pretty good shape at the moment. I'd like to see some greater cross-utilization across services of trial judges. I think that could be expeditious and economical, and apparently it has occurred from time to time in different commands, like in Hawaii, Okinawa, Alaska. I'd like to see, perhaps, greater cross-utilization of counsel from time to time. But as I understand it, there are not so many cases tried in any service that you want to have somebody come in from another service and defend the case, because you're depriving one of your own people of an opportunity. So all of that would have to be pretty carefully studied.

#### **What about the question of tenure of the service court and trial judges?**

*Judge Everett:* I think the three-year tenure given in AR 27-10<sup>62</sup> and elsewhere is certainly going to be very helpful in that regard. The three years ought to provide, in most instances, enough longevity so the person can gain some experience and will not feel too much at risk.

Obviously though, when you get to the two year nine month mark, you're going to feel a little bit ill at ease, and one of the concerns has been that the person who is hanging on may favor the government in order to be reappointed.

I think that was a point that came up related to the issue about having a fixed time for service by a chief judge. As you know, it was at the discretion of the President. And that was changed a few years ago partly because of the concern that the chief judge would be anxious to retain his position and, therefore, would be too inclined toward the government. That issue was really sort of a spin-off of an issue that I think had been raised otherwise as to the problems when somebody was nearing the end of their term and might have some incentive to rule for the government to

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62. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, ch. 8, para. 8-1g. (20 Sept. 1999).

gain re-appointment. That, of course, is one of the disadvantages of not having life tenure.

I think it's a problem, but I think probably the three-year term is adequate for the present, and the military is developing a tradition of re-appointing people who are doing a good job. By "good job," I don't mean just affirming convictions.

***Judge Cox:*** I look at tenure and judicial independence like the Wizard in the Land of Oz. If you want to give the lion courage, give him a medal, and if you want to give the straw man brains, give him a degree. If you want to give judges independence, give them tenure.

I said in my dissent in *Mabe*<sup>63</sup> that there's a certain thing you've got to have to be a good judge and tenure and all that doesn't fit into that ingredient; that's character and your moral beliefs in what's right and wrong that gives you a good judge.

Having said that, what I have said publicly on the record and strongly believe is that the military judiciary has evolved to a point in time where it ought to be a career choice, and the way I would view it working would be something like this. A board would be created and people that wanted to opt into the judiciary would apply, and the board would either select them or make a recommendation to the TJAG. I'd prefer to leave the power to make a decision with the TJAG. Let the selectees serve for a year or two years, and then have peer review from other judges who would recommend that they be brought into the "judge corps" of the JAG. At such time, they would be ensured at least the grade of O6, and would get the requisite training and experience and so forth to do that. To me, that would solve the tenure problem, if there is one. But more importantly, it would also create a cadre of people who wanted to be judges, who were trained to be judges, and then you would remove the judges only for good cause shown, again, by peer review or whatever. And then, I think, what would happen would be we would end up with a judicial system in the military that looks exactly

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63. Referring to *United States v. Mabe*, 33 M.J. 200, 206 (C.M.A. 1991) (Cox, dissenting in part and concurring in the result). In his dissent, Judge Cox wrote: "A judge who lives by the Code [the ABA Code of Judicial Conduct and the Uniform Code of Military Justice] cannot be unlawfully influenced by outside pressures." Judge Cox concludes near the end of the dissent that "[t]he solution to unlawful influence of military judges is not found in words; it is not found in creating tenure for them or isolating military judges from the world around them. The solution is found in selecting men and women of good character and integrity . . ." *Id.* at 207-08.

like the one we got now, but we'd just recognize it as a "de jure" system, not a "de facto" one.

**Article 66 fact-finding power was originally created to ferret out unlawful command influence.<sup>64</sup> It has steadily grown through the years. Have the service courts overextended their reach with this power?**

*Judge Cox:* I'm working on an opinion as we speak where I'm trying to figure all that out one more time. Do you recall the Supreme Court case, *Jackson v. Taylor*?<sup>65</sup> A soldier was convicted of murder, my recollection is, and the board of review found the evidence to be inadequate for that but affirmed the rape, and the board of review reduced his sentence from life to twenty years. The Supreme Court said that was perfectly all right to do that, and that was the genesis, I think, of the power of the boards of review and the courts of military review to approve only such sentence that is correct in fact and law.

The *Dubay* hearing,<sup>66</sup> to get away from reassessment, came about as a result of the government looking for a way to investigate claims of unlawful command influence at Fort Leonard Wood. And so the government really supported the idea of a judge having the power to go out and make fact-finding.

Now how did that get to the Courts of Criminal Appeals having sweeping fact-finding power and resorting to affidavits? I guess necessity

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64. See UCMJ, article 66(c), which states: "In considering the record, it [the service Court of Criminal Appeals] may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

65. Referring to the case *Jackson v. Taylor*, 353 U.S. 569 (1957). A general court-martial found Jackson guilty of premeditated murder and attempted rape and gave an aggregate sentence of life imprisonment for both offenses. The Army Board of Review disapproved the finding of guilt for murder, approved the finding for attempted rape, and reduced the sentence to 20 years confinement. Jackson filed a habeas corpus petition in federal court, challenging the modified sentence. Both the U.S. District Court and Court of Appeals held that the Board of Review was not required to order a new trial or remand for resentencing, and the Supreme Court affirmed. *Id.*

66. A *Dubay* proceeding is based on the case *United States v. Dubay*, 37 C.M.R. 411 (1967), and is a "limited hearing ordered by the Court of Criminal Appeals to sort out conflicting allegations in cases prior to their resolution and adjudication on appellate review." David D. Jividen, *Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c)*, UCMJ, 38 A.F.L. REV. 63, 73 (1994). Captain Jividen's article provides an overview of the service courts' fact-finding powers.

is the mother of invention. You start by saying, “Do you have to do a hearing in every case when the facts are pretty clear? When they’re really uncontested? How does that work?” I thought Judge Sullivan did a nice job in *Ginn*<sup>67</sup> trying to tie in what I would call the power of summary judgment to decide on the record and on the affidavits rather than ordering a *Dubay* hearing in every case. I thought he did a pretty good job on that one, setting out the rules there.

The CAAF has struggled with the problem and tried to leave it up to the Courts of Criminal Appeals. But we’ve recognized that the Courts of Criminal Appeals have fact-finding power, and it seems to work. The flip side of the coin is there’s no standing court-martial out there. You don’t have the Court for the Eastern District of Virginia to send the case back to. You would have to send it back to a convening authority to convene a new court, and then what does the convening authority do? So there’s a lot of cases that probably don’t really need to go back to a convening authority; others that do, and which ones do and don’t is where the controversy seems to be. You never can clearly articulate that. But I don’t think we’ve gone too far with it. I think the Courts of Criminal Appeals have done a good job carrying out their fact-finding power. Always the exception begs the rule but as a rule, I’d say they’ve done a good job. And I think it’s founded in the plain language of Article 66; I think you can stretch it to find it. You don’t even have to stretch it. I think it’s there.

Having said that, I don’t think the defense appellate shops—because they’re not the trial team—have been very aggressive in presenting the rationale for getting a rehearing at the trial level, either on a factual claim of ineffective assistance of counsel, rehearing on sentence, or those kind of things. I think they enjoy fighting the battle in the appellate courts, rather than get aggressive to send it back down because they lose control of it, if it goes back to somebody else. That’s a human phenomenon.

***Judge Everett:*** A lot of courts use special masters for various purposes. And so what they’re doing in the situation in the *Dubay* area in many instances is sending it back to the trial judge. And they can sometimes handle it by affidavits at the appellate court level, but the idea of

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67. Referring to *United States v. Ginn*, 47 M.J. 236 (1997), in which CAAF held that the Army Court of Criminal Appeals legally erred in denying Ginn’s post-trial ineffective assistance of counsel claim “by making findings of fact partially based on post-trial submissions.” *Id.* at 238. The error, however, was considered harmless. *Id.* Judge Sullivan analyzed Article 66(c) fact-finding power in his opinion. *Id.* at 242-43.



sending it back to the lower court for more detailed factual scrutiny is fairly typical of appellate judges.

My feeling has been that the power's been used in a judicious way. I don't see anything inconsistent about having affidavits on matters that have not been fully litigated for one reason or another. And, I think the *Dubay* hearing has been a worthwhile means of handling some of the problems, and I think, in many instances, there's certain things you should not settle by affidavits. You should send back and have witnesses actually called in, subject to cross-examination. But, on the other hand, there are some instances where an affidavit makes it clear that there's really no issue, and you can move on pretty rapidly.

#### XV. Public Courts-Martial

**It's fair to say there's a lot of misunderstanding and confusion out in the public about military justice. One proposal to educate the public is to modify R.C.M. 806(c),<sup>68</sup> which prohibits cameras and video and photographers in the courtroom. What about opening up courts-martial this way?**

*Judge Everett:* I favored having access to our court, the appellate court, by the media. This was based on the assumption that it would not affect the actions of the counsel or of the appellate judges. When you begin doing it at the trial level, you can run into some problems, I gather, and the O.J. Simpson case is certainly an example of problems at their worst. So, the extent to which the televising or the videotaping of court proceedings should take place at the trial level is a matter of choice. I have mixed feelings, and I wouldn't want to go overboard.

At the very least, I'd want to make sure the trial court had authority in that regard and had full authority not to have televising. At the appellate level, I think it could be perfectly desirable. I see no harm in it. There was a request, sort of a strange request, by letter in connection with a new case. Some group wanted to videotape the argument, and this was about two days before the argument was to take place. So it had to be handled informally with just a letter, not a motion. We decided not to go forward on that, although there was one judge who would have done so. My usual reaction

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68. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 806(c) (1998) [hereinafter MCM].

would be to say, “Well, we should have made it accessible.” And I learned in that connection that you can’t get an audiotape very readily, if at all, of the argument in our court. And, as I understand it, you can get it in the Supreme Court very readily and very quickly.

I think that’s an area where we probably need to review our procedures. But having videotaping or televising of the argument of the court at the trial level gives me some apprehension, and I suppose I’d be willing to authorize it assuming counsel had no objection and the judge thought it was desirable.

I’m very proud of the system. I think it’s an excellent system. And I like people to know how good it is because then I think they have a much greater confidence in military justice, and the people are willing to abide by the restraints imposed by military justice, much more readily than under other circumstances, etc. So I am an advocate of openness, but I have some caution in this regard.

**Judge Cox:** I have not been opposed to having cameras in our CAAF courtroom, and I do think it helps educate the public. We get a lot of interesting comments whenever C-Span runs one of our cases, but I think that’s an area that I think the President and the local commander should have a lot of discretion in. Let’s face it: many of our courtrooms around the country are inadequate to handle that type of thing. And the fact would be that only the sensational cases would be the ones that the press and television people will want to come to. So I don’t know. I’m not a real advocate for opening the court-martial to television, even though I acknowledge that it would help the public understand the process.

I’m not so sure that when we’re talking about “the public” we’re not talking about the legal community that we’ve really focused on. One of Jon Lurie’s criticisms<sup>69</sup> is focused on opening the process to the legal community so they’ll understand it and have some criticism of it, constructive criticism. But I wouldn’t advocate abolishing Rule 806<sup>70</sup> or changing it. I might leave it to the convening authority or the judge or somebody, to have the option, but it’s probably better to have the rule so people don’t have to worry about it. A lot of judges are very opposed to the cameras in the courtroom; they think it warps the process a little bit.

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69. See *infra* note 42 and accompanying text.

70. MCM, *supra* note 68, R.C.M. 806(c).

## XVI. International Trends/Court-Martial Panel Selection

**Another area of controversy is court-martial panel selection, and perhaps more so now, given the recent developments in the United Kingdom and Canada.<sup>71</sup> These systems have moved away from a system run by convening authorities, to include picking panel members. Interestingly, however, in the United States, in the civilian community, the jury system is one of the things that some scholars and judges attack.<sup>72</sup> And so the question comes up: Should we follow the trend of countries such as the U.K. and Canada and move toward random selection, or, is this necessarily a good idea, when we see the numerous criticisms of jury trials in our own civilian systems?**

*Judge Cox:* I don't see such developments having immediate impact, but what I do see, and I may—I hope I'm wrong, but I do see the public pendulum swinging from the 1960s when I was practicing military law for the courtroom—from the system being called a kangaroo court system to one in which convening authorities are catching the brunt of the criticism in their exercise of discretion or lack of exercise of discretion. You can look at a number of public cases that have taken place regarding this. I can see convening authorities graciously yielding that authority and getting out of the crossfire of being the decision-makers in this.

But if anything impacts on military justice in this country, it'll be the lethargy that's kind of set in, in the Congress, in the leadership of the various JAG Corps—although they would deny this—the de-emphasis on military justice, the “Lay low; keep low; let's don't think about it; out of sight, out of mind” attitude. You can see a zealous congressman leading a

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71. In 1997, the European Court of Human Rights found that the court-martial system used in the United Kingdom violated the European Convention for the Protection of Human Rights because the convening authority's role was too involved in the trial process. See *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221 (1997). In 1992, in *R. v. Généreux*, 1 S.C.R. 259 (1992), the Canadian Supreme Court held that Canadian military tribunals were not “independent and impartial tribunals” and thus violated the Canadian Charter of Rights and Freedoms. Substantial changes have been made to both countries' military justice systems since then, greatly reducing the convening authority's role in the process, to include in the selection of members.

72. See, e.g., William T. Pizzi, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT (1999).

charge for reform, saying “look at these other countries” and just all of a sudden the whole system rolls over.

And why? If this happens, the leaders of the change may hide behind some noble idea that it’s modern due process, but I think the cause, if the change happens in our country, will be because the convening authorities have so much operational responsibility already, so much logistical responsibility. For the convening authorities to catch a bunch of heat because they didn’t prosecute some soldier who was accused of date rape, the convening authorities would just as soon get out of that business and let some JAG take the heat. That public attack on the convening authorities will be the catalyst for change.

If a revolution comes in our system, it would be because of a kind of weak resistance from the leadership of the military, a “let’s just turn it over to the JAGs; they’re doing it anyway” kind of thing. I may be totally wrong on that, but I see that in talking to commanders, talking to friends of military justice from around the world.

As for jury trials, having been a trial judge for seven years before going on the court, I would have to say that, except for one or two cases where I really disagreed with the verdict that the jury rendered, I have great respect for the American jury system. Yet I understand the criticism of it, particularly if you have one of these cases that lasts for a year or two or three years or something like that, one of these big antitrust cases. They’re no longer jurors. They’re employees of the system or something. It’s really contrary to what the system was all about, but I’m a supporter of the American jury system and would make exceptions rather than change the rules.

As far as random selection in the military, I never have been a real champion of that. I’m not opposed to it, if somebody were to come up with a solution. Again, in fifteen years I’ve seen a few cases where the system didn’t work, but usually those get ferreted out and solved. The thing I’ve always been interested in is why the government should have a peremptory challenge since the convening authority has what I call an unlimited number of peremptory challenges, although I’ve been taken to task for using that term.

But it’s very interesting the way the jury system works in the military today. I see in the Air Force a lot of commanders with these elaborate nomination systems, really nominating people who are not off flying or not

off doing something. I imagine the Army is very similar to that, and so I can't make the case for the fact that convening authorities are packing juries right and left. There might be a clerk in the SJA office every now and then who starts packing them or something. I think it's something we have to be sensitive to, but I didn't take a position on the random jury selection, and don't care to now.

***Judge Everett:*** The appearance argument is a significant one, because you do want to have the confidence of people inside and outside of the military. But I've been pretty content, personally, with the way the system seemed to be operating. It's sort of interesting. Back in the 1930s and 1940s, they were having so-called "blue ribbon juries" in civilian courts to handle really complicated issues. In the military, there is sort of a blue ribbon jury to begin with.

I think it was F. Lee Bailey who said that if he had an innocent client, he'd want him to be tried by a court-martial; if he had a guilty client, he'd like to have him tried by a civilian court, because the military officers have an oath that they take as officers, and part of that is to perform their duties later when they become a court-martial member. It's all part of a system that they have sworn into voluntarily. And even with a non-com sitting on an enlisted court, the same thing is true. They probably will take very seriously the obligation to acquit, unless somebody is proven guilty beyond a reasonable doubt. There are some very good features of it.

I've never sat on a jury. Right now, I'm under summons to be a juror, and I sort of hope I can do that, never having done it. I'd like to see a little bit of the jury system from the inside to see how it operates.

My mother, who was a lawyer, sat on a jury; in fact, she was foreman of one on one occasion, a homicide case. She was tremendously impressed with the way the jury used common sense and interacted to get to a good solution. And I've heard other lawyers who had been on juries express confidence in the jury system. So I don't want to disparage juries.

One of the leading experts on juries is here at Duke. He's a sociologist on the law school faculty, Neil Vidmar, and he's made a lot of studies of the jury system.<sup>73</sup> And I think he thinks that, basically, it works pretty

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73. See, e.g., NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* (1995).

well. So, as we make the comparison of the court-martial system with the jury system, I don't start out with any strong bias one way or the other, any strong preconception. I think the juries work fine. I really think courts-martial work fine. Can you improve the system by making some of the changes that have been recommended, such as random selection? Certainly I've heard a lot of the discussions, and I gather the results were not very persuasive that there was a need to change the present system.

It does seem clear to me that a malevolent convening authority could play games with the system, and we had cases like the ones over in Germany, I think it was the *Thomas*<sup>74</sup> case where the court said that command influence is the mortal enemy of military justice, which I think is certainly true. And the selection system now in existence does offer possibilities for command influence. There is no denying it. But I think you balance those dangers against the harm to military operations that may result if you use random selection. You have a much greater likelihood of interfering with military operations if people have to be chosen just by lottery, or something of that sort. I'm inclined to leave things as they are.

I do think there should be some clear authority, either in the *Manual* or in the Code itself authorizing a convening authority to use random selection. However, currently I think the defense could make an argument if it were attacking any random selection used now. Suppose an accused was convicted under one of these experimental programs of random selection, which have been used a couple of times by, I think, the Air Force and the Army? And what if the accused said, "Well, the convening authority did not select the people in accordance with Article 25"?

You could make that argument, so I think there should be a clear authorization that they could use the random selection, if they chose to do so. If a commander feels that he can do that without interfering with his military operations and can have a court-martial that produces real confidence in results, without disrupting operations, I think he should be free to do that. If the matter came up today under the existing rules and Article 25, and so forth, I think it would be an open question. I don't know of any decision directly on point.

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74. Referring to *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

*So you don't think it's necessary to move in a direction like the UK has, removing the picking of the panel entirely from the convening authority?*

*Judge Everett:* No, I don't. I've got to admit when I first saw it as an Air Force judge advocate, the Code had been in effect a very short period of time, and the system was pretty primitive. I remember the base where I was stationed, the SJA and the prosecutor did, in fact, select the court. Now, they submit the names to the convening authority. I was not part of the process at all as a defense counsel, and I thought that was a pretty lousy arrangement, although I assumed at the time it was just the way things were done. So I think that there has to be some emphasis from the SJAs to try to make sure that the convening authority is not result-driven in the selection of court members and keeps his or her hands off, but I don't think I would change the statute or go as far as some of the proposals would go.

I think if change is going to be forthcoming, it will have to come from Congress. I think that would be pretty hard to persuade Congress to do. The example of what's happening in other democratic societies, like the United Kingdom and Canada, may prove to be very persuasive to Congress. But I wouldn't be betting on it. I do think, though, at the very least, that Congress should give specific authorization for the convening authority to use random selection. Then perhaps, encourage as much experimentation as possible to see whether it has any adverse effect on military operations, did not prove to be inconvenient, and did not seem to be affecting the accuracy of the result reached by the court or the fairness of the sentence. If no adverse results, then I'd say go forward. But that's about as far as I would go.

Incidentally, one thing I've recommended time and again, and it seems to go nowhere, is that there be an option available for a service member to be tried by a court-martial by the members and then to waive trial by the members and have trial by military judge as to the sentence. To me, that does not affect military operations adversely. It brings the military system more into a parallel with the civilian, but allows for it to be done by consent, very much as you can waive other rights. So I think that would be an improvement. I've heard some claims that this is opposed in some quarters because they want to make the service member have an all or nothing option, on the assumption that he or she is more likely to go for a trial by military judge alone for the whole thing, the findings and the sentence. But I've had the impression the Joint Service Committee was going to study that idea, particularly since I've mentioned it several times.

## XVII. Court-Martial Panel Sentencing

**What about doing away with panel member sentencing altogether, to mirror civilian courts?**

*Judge Everett:* I guess related to that would be the question whether you were trying to have sentencing guidelines for those judges in order to have greater predictability. I suppose one of the reasons I am recommending that at least there be an option to waive the sentencing by the court-martial members if the trial had been by the members, would be to allow an accused at least to have the opportunity for the sentencing by judge alone.

But I'm inclined to leave it as it is. I think probably the more unusual sentences by courts-martial are those that are too light, almost the type of jury nullification. If they are too heavy, then they probably would be cut down by the convening authority. I assume that still occurs, at least it was true according to the past. So I think the situation today is not intolerable, and I'm not sure how much it would be improved by switching the sentencing over to a military judge.

It would be interesting to have some statistical information on that and see what happened with judge alone, and what happened with court-martial members who were all officers, and what happened with one-third enlisted courts. The differences might vary in relation to the particular offense and the activities of the particular defendant and of the victim, but some comparative data of that sort would be very interesting in giving us some insights.

## XIX. Post-Trial Problems

**Post-trial procedure is an area that CAAF in the last few years has been focusing on. Is there a systemic problem? If so, is there a systemic remedy?**

*Judge Cox:* I would put it this way. If some of the practices I've seen were in civilian practice, you'd see reprimands from the Supreme Court, and lawyer grievance hearings and everything else. It's just malpractice; it's as simple as that. It's just malpractice. People aren't doing what they were told to do by the rules. My solution has been for the Courts of Criminal Appeals to just turn around and send it right back and fix it and don't



get it into the appellate process, but I've been unable to get a majority for that over the years.

It's really not that systemic a problem, however. You see the cases, but there's only five or six out of thousands. And the cases you see are the ones we're making a point. So I don't think it's a big systemic problem. The Navy has an unusual—and I'm not being critical; I'm being sensitive, I hope—circumstance in that they don't have centralized control over the records and over the SJA reviews and all of that. They have legal officers doing reviews. They have a lot of special court-martial convening authorities. So they have really an administrative nightmare getting it right all the time.

Having said that, they've started emphasizing it, the Navy TJAGs, the Navy-Marine Corps courts and everyone else, and so we're starting to see fewer and fewer cases coming out of the Naval service. I'm not patting the Army on the back but we rarely see those kind of cases coming out of the Army because you have a centralized system and you've got controls and you've got SOPs and ways of doing business. We have had clerks of the Army court who will not accept half-baked records and things like that. So I don't see it as a systemic problem; I see it as something we ought to pay attention to. That's basically all.

XX. Military Rules of Evidence 413/414 (Evidence of Similar Crimes in Sexual Assault Cases & Child Molestation Cases)

**What is your position as to the workability and validity of Military Rules of Evidence 413 and 414?<sup>75</sup>**

**Judge Cox:** We have a couple of cases pending on them right now. I think the principal criticism of the rules from what I've seen is that they were adopted by Congress without the process working. If you go back and think about the way the Rules of Evidence evolved, the fifty states were operating under basically common law rules of evidence. Some states had codified rules of evidence—this state would have this rule, that

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75. MCM, *supra* note 68, MIL. R. EVID. 413, 414. Military Rule of Evidence 413(a) states that "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any manner to which it is relevant." Military Rule of Evidence 414(a) states the same, substituting the words "child molestation" for "sexual assault."

state would have this rule, and federal courts were all operating under whatever rules were in their jurisdictions. So the foremost evidentiary scholars in the country and judges and others got together to build the Federal Rules of Evidence.

When I was a state judge, if there were no other rule, I'd say, "The Federal Rule represents the foremost thinking of the legal community today on what the rule ought to be. I'm adopting it for this case. Any objection?" Usually no objection, particularly in expert testimony. The old common law rules of expert testimony were cumbersome, difficult to work with. So I think the first criticism I would have with 413 and 414 would be that they were adopted without the process working. All the legal scholars who have an idea of what how rules of evidence should play in the courtroom didn't have any input into the game.

Having said that though, I have always wondered whether this type of evidence, particularly the propensity evidence in sexual cases, is character evidence. Or is it something else? And I never have been able to articulate it very well. I have tried to get some psychiatrists involved, whom I have asked, "Do you consider, if someone is a homosexual, is homosexuality a trait of character? If somebody is a pedophile, is that a trait of character? If somebody is interested in having sex with animals, is that a trait of character or is it some other psychological phenomena like left-handedness or blue-eyedness?"

I have never gotten a clear answer. I've wrestled with the question of whether or not this evidence is 404(b) evidence<sup>76</sup> anyway. And if it's not, then you don't have to worry about the character side of it. Whether it is or isn't, you have to look at legal relevance in any event. So the bottom line is: I don't know how our court will actually shake out on the rules as far as some of the arguments that are being made about them, but I think

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76. Referring to Military Rule of Evidence 404(b), which states:

Evidence of other crimes, wrongs, or acts is not admissible to prove character of a person to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident . . . .

MCM, *supra* note 68, MIL. R. EVID. 404(b).

that to the extent that judges still have the gate-keeping under M.R.E. 403,<sup>77</sup> the rules aren't going to be abused.

Would I have adopted the rules if I were the decision-maker? I'm not sure whether I would or wouldn't, whether I would have just let the evidence continue to flow in under the 404(b) analysis. Most of this evidence would come in, if you think about it.

The other side of the coin on that evidence is: once it does come in, I think it changes the dynamics in the courtroom pretty strongly in favor of the prosecution. I think it's very difficult for someone who is a prior sexual predator to overcome that in the trial where he's being accused of that again. I think it's very difficult. But I think the M.R.E. 403 balancing test still has to be done. I just wonder how many judges would ever exclude it under that. It would take a pretty strong judge to say, "Well, I know you've got two or three other acts of rape there and I know he's charged here, but, if you let that in it's too prejudicial."

The other interesting argument that can be made, I think, is an equal protection argument. And that is: if one's bad acts or one's sexual propensities are relevant to prove that at the time and place of the charge, that person is likely to have done it because he is a bad actor or because he has such a sexual propensity, then why isn't it also relevant that the victim in a rape case should be judged with her bad acts as baggage and her sexual promiscuity as baggage? What's the difference? What's the difference in the legal and logical relevance between the two, other than one's a victim and one's the accused? And that raises to me an equal protection argument that would have to be made in the context of that battle. Here you have the person accused of sexual misconduct and here you have the victim and you want to introduce prior sexual misconduct as to her. The judge lets the male's in and keeps the female's out. Then you've got the battle, and I haven't seen that case, maybe there's one and maybe you've read one out there, but I haven't seen that case clearly. I think that's going to be an interesting case if it ever gets litigated.

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77. Referring to Military Rule of Evidence 403, which states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* MIL. R. EVID. 403.

## XXI. Military Commissions

**Judge Everett, you've stated that you are in favor of using military commissions<sup>78</sup> under Article 18 of the UCMJ<sup>79</sup> to try law of war offenses and U.S. civilians overseas. How would that work and how it would impact on our military justice system?**

**Judge Everett:** If we are using commissions for civilians, say, a civilian employee who committed a war crime, then I don't see how it would have any impact on our current system at all. You're still trying your service members by court-martial. If it were used for ex-service members, then it would sort of help bridge the gap created by the *Toth*<sup>80</sup> case.

My understanding is that, after the My Lai episode, and perhaps with reference to some other alleged war crimes, one of the services was proposing proceeding with military commissions against the ex-service members who could no longer be tried by court-martial utilizing the jurisdiction that, supposedly, existed under the Law of War. And that might be the best alternative under some circumstances. So that I think the military commission has its use.

When the House of Representatives was considering it in 1996, I had written a little bit on this subject, and I was contacted by one of the counsel for the judiciary committee—for some reason, it was Immigration Subcommittee of Judiciary, if I'm not mistaken. They asked my view about creating jurisdiction in Article III Courts to try war crimes. I said, "That's fine, but be sure you don't have an implied repeal of the authority under Article 18 to use military commissions for violations of the Law of War." Because it seemed to me if they did that, Congress would be shooting itself in the foot, as it were, by eliminating something which can prove to be

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78. See, e.g., Robinson O. Everett, *Possible Use of American Military Tribunals to Punish Offenses Against the Law of Nations*, 34 VA. J. INT'L L. 289 (1994); Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994).

79. Article 18 of the UCMJ establishes jurisdictions of general courts-martial. The relevant portion states: "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." UCMJ, article 18 (2000).

80. Referring to *Toth v. Quarles*, 350 U.S. 11 (1955), in which an Air Force enlisted member, after having been honorably discharged was arrested five months later for murder and conspiracy to commit while an airman in Korea. The Supreme Court ruled that the former airman "could not constitutionally be subjected to trial by court-martial." *Id.*

quite useful in favor of something which may be useful in some cases, but certainly has limitations. You could set up a military commission in Kosovo, I suppose; you can't have a federal district judge go over there and try a case.

Interestingly, by the way, when I expressed my concern about implied repeal, I was told by counsel for, I think, the House, from one of their legislative counsel, that in the federal courts, there is no doctrine of implied repeal. They provided a little legislative history to back it up; I think a letter from Judith Miller as General Counsel<sup>81</sup> said something to that effect, "There is no implied repeal."

**So, under the UCMJ, commissions could try people for Law of War offenses regardless of their status?**

*Judge Everett:* That would be my interpretation. As I recall, the Supreme Court in the *Quirin*<sup>82</sup> case took comparable language in the Articles of War and said that Congress had, basically, ratified application of the Law of War in dealing with war criminals like *Quirin* and the other German saboteurs. So that I think you can do that.

In any event, I think a military commission could be used under some circumstances today. I've made the suggestion that, if we should ever become involved with the International Criminal Court (ICC) and are concerned about Americans being tried by the International Criminal Court, we are in a position to utilize complementary jurisdiction, to some extent, by saying, "Yes, we can try these war criminals by military commission. We do have the way to do it; therefore, we get the first crack at them. And the ICC does not get an opportunity to try them."

**How would you compare a tribunal such as the ICC with military commissions?**

*Judge Everett:* The real concern, as far as trial by the ICC or by one of these international tribunals established ad hoc for a particular area, one

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81. Currently General Counsel to the Department of Defense.

82. *Ex Parte Quirin*, 317 U.S. 1 (1942). *Quirin* was a German saboteur who infiltrated U.S. territory to destroy industries and war effort activities. He was captured and tried by a military commission in accordance with the law of war, and the Supreme Court upheld the ability of the military commission to do so. *Id.*

of the real concerns there is not so much feasibility of trial by the international tribunal, but the fairness of the trial, the circumstance of Americans being turned over to an international court that would not provide the same sort of trial they would receive in an American court.

**What about concerns of due process at commissions, such as the fact that the Military Rules of Evidence would not necessarily apply?**

*Judge Everett:* In the past, they've been done ad hoc pretty much with specific parameters, and I would think that making such rules applicable would be part of the executive order establishing a particular military commission. To me, it would seem a logical way to proceed. My recollection is, from what I've read, that when General Yamashita was tried by military commission,<sup>83</sup> they used a lot of hearsay evidence such as newspaper articles from the Philippine newspapers. I think that's a little bit questionable. But I think one of the big advantages of the military commission now is that it would enable us to take advantage of complementary and basically say we'll try these people ourselves, instead of turning them over for trial by an international tribunal.

I think a military commission can administer justice, and I would think that it would be worthwhile to use the Military Rules of Evidence on the assumption that many of the people involved would be familiar therewith, and also that it's a good, modern updated system, very parallel to the Federal Rules of Evidence.

**What about the concern that a lot of what's international law is admittedly very vague, such as trying a commander for a failure of "command responsibility"? Is international law concrete enough for us to launch forays into making these determinations of guilt or innocence over people?**

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83. General Tomouki Yamashita commanded the 14th Army Group of the Japanese Army in the Philippines in 1944-45. He was charged with failing his responsibilities as a commander in permitting brutal atrocities to be committed by his soldiers, thereby violating the law of war. He was subsequently convicted and sentenced to death by a U.S. military commission, and hanged in 1946. The Supreme Court upheld the conviction and sentence. *In re Yamashita*, 327 U.S. 1 (1946).

**Judge Everett:** You have a lot of treaties that help supplement the law of war—The Hague Convention, Geneva Convention, things of that sort, so you've got some things flushing some of that out. I think that somebody's going to be making those forays and the International Criminal Court will be making them before we do it. So I think personally that we should make as broad a claim of jurisdiction as possible, predicated on customary international law and the Law of War. I view it as a sort of defensive mechanism. I don't think it will have much impact on people who are on active duty because most of the alleged offenses would be included within proscribed crimes, like murder and rape. But it could be of value as to people who are not subject to jurisdiction anymore. The ex-service member or the civilian—not so much the civilian dependent, but the civilian employee accompanying the military in connection with some type of operation. So I think it has some utility. There are going to be complaints, of course, that it's victor's justice, no matter what type of tribunal administers it when you get right down to it. But I think it's important to have that as a potential weapon.

## XXII. Recommendations for the Future

### **What, if any, changes would you propose to the current military justice system?**

**Judge Cox:** Two suggestions I've made I think would improve the system. One, is the establishment of a permanent judiciary at the trial and service court levels, which I talked about earlier.<sup>84</sup> The other one is that there is no comparable provision in the Uniform Code of Military Justice or in the Rules for Courts-Martial to the Federal Post-Conviction Relief Act or the State Post-Conviction Relief Acts. Therefore, we're left in my judgment, without standards or without rules or without procedures on how to handle collateral attacks on courts-martial. By the rule of necessity; we've done it via *Dubay*.

But we've had extraordinarily important cases resolved on collateral attack. The *Curtis*<sup>85</sup> case and its ineffective assistance of counsel is an example. We sent that back to the court with the option of ordering a rehearing or reassessing and that turned into a controversy too.

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84. See *supra* notes 63-64.

85. *United States v. Curtis*, 33 M.J. 101 (1991) (remanded), 46 M.J. 129 (1997) (on reconsideration).

My point is, had there been an established procedure, then Curtis would have had to follow that. He would have had to file his claim for ineffective assistance, not with a federal appellate court but with a fact-finder and the fact-finder would have had to decide whether he had sufficient cause to have a hearing. And that's the way it's done in every state and every federal court in this nation on collateral attacks, and we have no such procedure. And I've urged people to adopt it.

The third thing that I would—I've urged the Judge Advocates General to do—and that is establish a fixed training course for appellate defense counsel. I would like to see it as a residential course at one of the justice schools, but I would have no objection to the alternative of it being held in Washington or some place else. I don't have any problem with that, but I've urged them to establish a course with a syllabus and some real training patterns.

Those are three suggestions that I've had that I think would improve it. I'm not in favor of a constitutional convention to relook at all of military justice and all of that. I don't think anybody can make a case for any particular aspect of it not working well. You're always going to have criticism where the convening authority's selecting the members, but no one's come up and articulated a better solution for that. And given the responsibility of a commander to be ready to fight and carry out his mission or her mission, then I think the corollary to that is they've got to be able to decide what the best utilization of their manpower—who has range duty, who has staff duty officer, and who has court-martial duty. So I don't have much problem with that. But other than that, I think the system is in good shape, and I think the lawyers do a good job out there defending their clients and the prosecutors do a good job prosecuting the cases. Our court, at least over the last years I've been on it, has just been kind of tweaking the system. We haven't tried to reinvent it or rebuild it or anything else.

***Judge Everett:*** I think I have a variety of recommendations that I've already mentioned, none of which looms very, very high. But I would enact legislation that would clarify and strengthen the supervisory role of the Court of Appeals for the Armed Forces, as well as the Courts of Criminal Appeals with respect to the military justice process.

Item two, I would provide centralized judicial review of administrative discharge activity, and probably some other types of significant administrative action. My own choice would be to have that review centralized in the Court of Appeals for the Armed Forces, but if not there, then



in the Court of Federal Appeals. Thirdly, I would go ahead and create Article III status for the court, but that's not a burning issue.

Next, I would consider making the change in providing the option whereby an accused could utilize an option for trial, for sentencing by the military judge, even though he or she had been tried by the members of the court-martial.

Next, I would authorize, but not require, convening authorities to use some type of random selection.

Next, I would expressly create jurisdiction for federal Article III courts to try ex-service members and civilian dependents or employees, and I would certainly consider use of military commissions of some sort. Probably in this particular stage with an international tribunal there that I guess has jurisdiction, I think we'd be rocking the boat too much to do that, but I think we should at least look at that as a viable option for any future deployment. It may be helpful in some respects.

One other thing they need to do: they need to press forward to get the funding for continuation payment for judge advocates, so that they have more money to stay in the service and pay off those loans for their legal education.<sup>86</sup>

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86. On 10 May 2000, the Assistant Secretary of the Army (Manpower and Reserve Affairs) approved the implementation of the Fiscal Year 2000 (FY00) Judge Advocate Continuation Pay (JCAP) Plan. It is open to certain junior judge advocate officers and allows certain junior judge advocates to apply for continuation pay for \$10,000 or \$25,000, depending on career status and years of service. *See* Personnel, Plans and Training Office, United States Army Judge Advocate General's Corps (visited 20 July 2000) <<http://www.jagcnet.army.mil/PPTO>>.