THE TWENTY-NINTH KENNETH J. HODSON LECTURE ON CRIMINAL LAW[1]

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How pleased and privileged I feel to have been invited to give the Hodson lecture this year. I recall that in the 1970's I lectured here once at The Judge Advocate General's (JAG) School and discussed *Parker v. Levy*,[3] and that was a memorable experience for me. Most important, by presenting this lecture today, I help honor the memory of a Judge Advocate General for whom I have always had the greatest respect and admiration and whose contributions to military justice are legendary. Although I did not have as close a contact with Ken Hodson as did my colleague Walter Cox, who at one time served as his aide, I certainly had ample opportunity to observe his immense talent and his dedication to military justice.

Because my career as a judge advocate began in 1951, only a few months after the Uniform Code of Military Justice (UCMJ or Code) took effect, I decided that my Hodson lecture would center on some personal reflections concerning military justice and would conclude with a brief look to the future.

During law school, I received no instruction about military justice and courts-martial. In retrospect, this seems ironic since I believe courts-martial were the first national courts—courts established by an act of a national legislative body, the Continental Congress, rather than by a state legislature. In my last semester in law school at Harvard, my evidence teacher was Professor Edmund M. Morgan, whom Secretary Forrestal had

1. This article is an edited transcript of a lecture delivered on 6 April 2001 by the Honorable Robinson O. Everett, Senior Judge, United States Court of Appeals for the Armed Forces, to members of the staff and faculty, distinguished guests, and officers attending the 49th Graduate Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The Kenneth J. Hodson Chair of Criminal Law was established at The Judge Advocate General's School on 24 June 1971. The chair was named after Major General Hodson who served as The Judge Advocate General, United States Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

appointed to chair a drafting committee for what became the UCMJ; but I don't believe that I heard Professor Morgan mention this project. I do recall that a fellow law student, John Gibbons, who later served as Chief Judge of the 3rd Circuit, told me that he was doing a law review note on a proposed code of justice for all the armed services.

The Korean War began during the week that I graduated from law school and I realized then that I might soon be in the armed forces. Sub-

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2. LL.M., Duke Law School; J.D., Harvard Law School, *magna cum laude*; A.B., Harvard Law School, *magna cum laude*. In September l950, Judge Everett became an assistant professor at the Duke Law School. Then he served on active duty with the Air Force for more than two years during the Korean War and was assigned to the Judge Advocate General's Department. Upon his release from active duty, he became a commissioner of the United States Court of Military Appeals. In the fall of l955, he returned to Durham, North Carolina, to practice law and subsequently joined a firm with his parents. From l955-l980 he was engaged in private law practice in North Carolina and at various times in the District of Columbia. Also, he was an officer of and counsel for various business organizations and nonprofit corporations. After rejoining the Duke law faculty on a part-time basis in l956, he has served continuously on that faculty. He became a tenured professor in l967. He presently serves as a full-time law professor on the Duke law faculty. In l956, Judge Everett published a textbook, *Military Justice in the Armed Forces of the United States*, and he has written numerous articles on military law, criminal procedure, evidence, and other legal topics. As associate editor of *Law and Contemporary Problems*, a legal periodical published at Duke, he edited and prepared forewords for various symposia on many topics. From l96l-l964, Judge Everett served part-time as a counsel to the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, and from l964-l966 he was a consultant for that Subcommittee. During this period he participated actively in extensive studies and hearings, which helped lead to enactment of the Military Justice Act of l968. Judge Everett was a member of the Air Force Reserve from August l950 when he enlisted as a private, until April l978, when he retired as a colonel. Judge Everett was president of the Durham, North Carolina, Bar and from l978-l983 was a member of the Council of the North Carolina State Bar. He is currently a member of the North Carolina IOLTA Board of Trustees. From l973-l977, he was a member of the American Bar Association's Standing Committee on Military Law and from l977-l979 he chaired that Committee. For many years he has been a member of the American Law Institute, and he is a life member of the National Conference of Commissioners on Uniform State Laws. He has chaired various sections and committees for the Federal Bar Association and in September l987 received the Association's Earl W. Kintner Award for his service. He is an American Bar Fellow. For many years, he has been the Chair of the North Carolina Committee on Legal Assistance for Military Personnel. In February l980, President Carter nominated Judge Everett to the United States Court of Military Appeals, and he assumed office on 16 April l980. At that time he was designated to serve as Chief Judge, a position which he held until his term expired on 30 September l990. He then became a Senior Judge and continued to serve in active service on the court until 1 January l992, when the court reached its full membership. As a retired Senior Judge, he is periodically requested to serve on the court when necessary.

3. 417 U.S. 733 (1974).

sequently, during the luncheon break on the second day of my Bar exam, I enlisted in the Air Force reserve and thereafter applied to be a judge advocate. Ultimately, I was commissioned as a judge advocate and ordered to active duty. Instead of being sent to a JAG school for training, I was to learn my duties by means of on-the-job training. When I reported in at Amarillo Air Force Base (AFB), Texas, I discovered that everyone was trying to learn how to apply the recently enacted UCMJ.

None of us really understood the importance of innovations contained in the Code. For example, the right to defense counsel was made available in general and special courts-martial and without respect to indigency. This, of course, was before *Gideon v. Wainwright*[4] was decided. The Code's Article 31(b) warning, which must be given to anyone who is accused or suspected of a crime, preceded *Miranda v. Arizona*,[5] and was later cited by the Supreme Court in seeking to justify the warning requirement imposed there.[6] Moreover, even today the *Miranda* warning requirement is much narrower than Article 31(b), which does not apply only to custodial interrogation.

Free military counsel on an appeal from conviction where the sentence included a punitive discharge or a year or more of confinement was another protection that went far beyond that available in state and federal criminal appeals either in 1950 or even today. Automatic appellate review, which included free records of trial and consideration of appropriateness of sentence and not only of the sufficiency of government evidence, but also the weight of its evidence, provided extra protection for service members. The Article 32 investigation constitutes an important screening device to protect accused persons prior to trial and also offer an accused discovery of the prosecution case, which usually is not available through grand jury review and otherwise in civilian court systems.

Some of the practices I encountered at that time would not be tolerated today. For example, at my base the trial counsel and the staff judge advocate conferred to determine what officers should be appointed as court-martial members. I served as defense counsel for a year, but because of some confusion in my records, I was not certified as a defense counsel by The Judge Advocate General, and the court-martial orders had to designate a certified co-counsel to serve with me. I never won a complete

4. 372 U.S. 335 (1963).
5. 384 U.S. 436 (1966).
6. *See id.* at 489.

acquittal, but gradually I began to get lighter sentences, whereupon I was switched over to the prosecution side.

Early in 1952, the Air Force established at Amarillo AFB the 3320th Retraining Group to rehabilitate enlisted persons convicted by court-martial and to restore them to active duty. Almost a decade later when Amarillo AFB was closed down, this retraining program was transferred to Lowry Air Force Base in Colorado, and subsequently it was consolidated into an inter-service retraining project at Charleston, South Carolina, which I believe the Navy [today] manages. In creating its retraining program in 1952, the Air Force truly pioneered and paved the way for similar endeavors in civilian penal systems. Currently, when recruitment shortfalls may be in prospect, rehabilitating experienced persons convicted of drug offenses may again become very important.

In the fall of 1953, after being released from active duty, I had the privilege of serving as a commissioner to Judge Paul W. Brosman, one of the three original judges of the Court of Military Appeals. The judges were very unique and interesting people. Chief Judge Robert E. Quinn was a trial court judge when appointed to the Court of Military Appeals, but previously he had been lieutenant governor and governor of Rhode Island and during World War II had served as a Navy captain. Judge George Latimer came to the Court of Military Appeals from the Utah Supreme Court, and during World War II he had served overseas as an Army colonel. Judge Brosman had been dean of the Tulane Law School when appointed to the court, but had actually been called to active duty during the Korean War as an Air Force Reserve colonel and was playing a major role in the selection of judge advocates for the recently created Air Force Judge Advocate General's Department. Thus, unlike any other judge in the court's history, Judge Brosman went on to the court directly from active military status, and he remained a member of the Air Force Reserve until his untimely death in December 1955.

Consistent with his great interest in military justice, President Truman interviewed each of the judges before appointing them to the court, and I assume that appointing a judge with experience in each of the armed services was intended to emphasize that the new Code was applicable to all the services. Although fifteen years was to be the term of office for a judge of the Court of Military Appeals, the terms of the first judges were staggered—with fifteen years for Chief Judge Quinn, ten years for Judge Latimer, and five years for Judge Brosman. Incidentally, I have heard that the Court of Military Appeals got its splendid courthouse at 450 E Street,

N.W. as a result of a personal appeal by Chief Judge Quinn to President Truman, wherein Quinn suggested that if the new court was to be the Supreme Court for service members, it should have its own courthouse and that the courthouse just vacated by the D.C. Circuit would be especially suitable. Truman agreed and that was the end of the matter.

Chief Judge Quinn never moved to Washington during his two decades of service as a judge and instead flew down for court sessions and would usually stay at the Army-Navy Club. Judges Brosman and Latimer, on the other hand, lived near each other out in the Chevy Chase area and sometimes drove to work together. Fortunately, Quinn had an excellent Clerk of Court, Fred Proulx, who also was from Rhode Island. Of the three judges, Judge Brosman was the most scholarly and was especially precise and colorful in the language of his opinions. Chief Judge Quinn was probably the most result-oriented of the three, and Judge Latimer was probably the most pro-government. Interestingly, unlike almost every other federal court at the time, appointments to the court were subject to a political test [because] not all the judges could be appointed from the same political party; Judge Latimer was a Republican, while Quinn and Brosman were Democrats.

Incidentally, my appointment to serve as a commissioner to Judge Brosman was a real fluke. When I was on leave shortly before leaving active duty in 1953, I had gone to Washington, and while there I visited the Court of Military Appeals to seek admission to its Bar. Judge Brosman swore me in and thereafter asked whether I would be interested in serving as his commissioner, a position which had become vacant. When I asked what was a commissioner, I was told that it was a GS-13 position; and when I asked what was a GS-13, I was told that it was the equivalent to being somewhere between the rank of major and lieutenant colonel. Since I was only a lieutenant, this sounded like a great "jump promotion," and so I accepted Judge Brosman's offer and spent the next two years as his commissioner, which was in many ways equivalent to being his law clerk.

Since it was newly created and was interpreting a new statute, the Court of Military Appeals faced many new challenges, and this made it an interesting place to serve. The judges were not bound by extensive precedent and so—in Judge Brosman's words—it was a court "freer than most." Some guidance was provided by cases interpreting the Articles of War and

Articles for the Government of the Navy and by the legislative history of the Uniform Code, but even so, the court had room to be innovative.

I recall that in 1954 the court had some novel cases involving the insanity defense and the test to be applied in determining mental responsibility. These issues arose shortly after the Court of Appeals for the District of Columbia had applied in *United States v. Durham*[7] a new and very controversial test of insanity—a test which did not focus on knowledge of right and wrong or ability to adhere to the right, but instead on whether the criminal act was the "product" of a mental disease. In *United States v. Dorothy K. Smith*,[8] insanity had been relied on as a defense by the self-made widow of an Army colonel whom she had fatally stabbed with an Okinawa ceremonial sword. One interesting aspect of her case was that Mrs. Smith's father was Walter Krueger, an Army lieutenant general, who had held an important position under General MacArthur. A sanity board of three colonels concluded that she was mentally responsible, but a general who had treated Mrs. Smith as a patient years before, testified at trial that she had been insane when she killed her husband. She was convicted and given a life sentence.

The other case involved Clarice Covert, who was the wife of a member of the Air Force. When she came in to see her psychiatrist for a routine appointment, she told him that the night before she had stabbed her husband several times with a knife and then had slept in bed with the cadaver for the rest of the night. The doctor was incredulous, but asked that military police check her account, and they found her husband's corpse in the bed. At her subsequent trial for murder, some experts testified that she had been sane at the time of the homicide, and others testified that she was not mentally responsible. The court-martial found her guilty and also sentenced her to life imprisonment. The Court of Military Appeals affirmed the conviction of Dorothy K. Smith but reversed that of Clarice Covert because of instructional error and ordered a new trial.

Ultimately in both cases, the Supreme Court later ruled that the courts-martial lacked jurisdiction to try civilian dependents for murder; and since both homicides had occurred overseas, no American state or fed-

7. 214 F.2d 862 (D.C. Cir. 1954).
8. 10 C.M.R. 350 (A.B.R. 1953).

eral court could try these women. Thus, the ultimate result was crime without punishment.

Another issue I recall concerned the Article 31(b) warning and whether a warning was necessary when an undercover agent was questioning a service member suspected of a crime. The Court's conclusion was that the Code's language should not be applied literally, and that the warning was not necessary. Obviously, if the warning were required by the Code, the use of undercover agents would be severely restricted.

While working for Judge Brosman, I wrote a textbook, *Military Justice in the Armed Forces of the United States*. My purpose was to provide a readable explanation of how military justice had developed and an account of its major features. I discovered that finding a publisher for the book was as hard as writing the book, if not harder. Perhaps someday I can update my 1956 book and describe some of the later developments in military justice.

Soon after serving with Judge Brosman, I conceived another project, of which I am reminded when I see announcements about the television series *JAG*. Some of the cases that came to the court involved factual situations and issues that I thought would be of interest to the general public. One example is the alleged "brainwashing" of Americans captured by the North Koreans. With this in mind, I mentioned the idea of a television series based on courts-martial to a friend who was working at CBS, and then I recruited another friend with literary talents to review some case files at the Court of Military Appeals and to prepare some scripts. Unfortunately, my intended screenwriter married someone and because of domestic responsibilities could not complete her task, and I ultimately abandoned the project and my dreams of being a producer.

My first contact with General Hodson was the result of service in the 1960s as a counsel to Senator Sam Ervin's Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. I had testified before the Subcommittee on some topics concerning criminal procedure, and the Subcommittee Chief Counsel invited me to serve on a part-time basis as a counsel for the Subcommittee. My anticipated tasks involved some issues of criminal procedure.

Soon after accepting the invitation, I had dinner with an Air Force colonel, Leroy Kahn, under whom I served in the Air Force Reserve. When I described my new position as a Senate counsel, Colonel Kahn said

half-jokingly something to the effect that while the Subcommittee was studying constitutional rights, it should look at the constitutional rights of service members. To his surprise, I responded that I thought this was a great idea and that I would pass it on to Senator Ervin. Colonel Kahn was probably shocked at what his chance remarks might have unleashed. In any event, Senator Ervin reacted very favorably to the idea. This was quite foreseeable because Ervin had a well-established interest in the welfare of service members. His own record in World War I had been unique, and I understand that among the U.S. Senators who had served in that war, he was the most decorated. Furthermore, he was a ranking member of the Senate Armed Service Committee.

Senator Ervin—whom some have called "The Last of the Founding Fathers"—announced at the outset of the hearing that "[w]ithout justice there can be no discipline and without discipline there can be no justice". On that premise, in the winter of 1962, the Subcommittee conducted extensive hearings on the constitutional rights of service members and placed special emphasis on military justice. Detailed questionnaires were sent to each of the three military departments in order to ascertain differences of approach among the services. In addition, field trips were made by Subcommittee staff members—including one to Europe. In connection with the Army's responses to the Subcommittee, General Hodson played a major role, and he was greatly respected by all who came in contact with him. Unlike some who appeared before the Subcommittee and were primarily interested in maintaining the status quo, he was genuinely interested in discovering defects in military justice and correcting them.

One area in which the armed services had different approaches was with respect to plea bargaining. The Army had authorized pretrial agreements between the accused and the convening authority, whereby the convening authority agreed that if the accused pled guilty, no more than a specified sentence would be approved. Thus, the accused in return for pleading guilty was assured of a ceiling on sentence, but could try to "beat the deal" at the trial level. The Navy soon followed the Army's example; but for many years the Air Force refused to allow plea bargaining except with approval from The Judge Advocate General himself.

It is important to remember that the Army approved pretrial agreements a decade before the Supreme Court decided *Santobello v. New York*,[9] wherein Chief Justice Burger's opinion for the Court described the advan-

9. 404 U.S. 257 (1971).

tages of plea bargaining and allowed it to be done overtly—rather than covertly—as was the practice in many states and federal courts. Ultimately, the Air Force changed its position and allowed plea bargaining at the base level, although I understand that concern still exists as to possible disparities between different installations in entering plea bargains.

Senator Ervin was troubled by a jurisdictional gap that had been created by Supreme Court decisions in *Toth v. Quarles*,[10] and *Reid v. Covert*.[11] The former concerned crimes by service members who later had been discharged, and the latter dealt with crimes committed by civilian dependents accompanying the armed forces overseas. In each instance, the Supreme Court ruled that the exercise of military jurisdiction was unconstitutional. Senator Ervin introduced bills that in both situations would have authorized federal district courts to exercise criminal jurisdiction. Although these bills were not passed then by Congress, in November 2000—more than three decades later—Congress wisely closed the jurisdictional gap by enacting legislation of the type Senator Ervin had proposed.

Senator Ervin was also concerned about the possibility that other-than-honorable administrative discharges might be used to bypass safeguards that the UCMJ provided for punitive discharges. Indeed, in addressing a group of lawyers, The Judge Advocate General of the Air Force had adverted to this alternative. For example, what if a service member who had been tried and acquitted by a court-martial for crimes that authorized a bad-conduct discharge was later brought before an administrative board to be processed for an other-than-honorable discharge—at one time called an undesirable discharge—because of the same alleged misconduct? In any event, Senator Ervin proposed some legislation to avoid possible abuse of administrative separation procedures, but none was enacted. However, I believe that the Subcommittee's investigation probably led to some improvement in military administrative procedures involving service members.

The Subcommittee held further hearings in 1966, and ultimately its efforts resulted in enactment of the Military Justice Act of 1968. My understanding is that General Hodson was delegated authority by the Pentagon to work out some mutually acceptable reforms of military justice with Larry Baskir, who had become Chief Counsel for the Subcommittee, was later Deputy General Counsel of the Army, and now is Chief Judge of

10. 350 U.S. 11 (1955).
11. 354 U.S. 1 (1957).

the Court of Federal Claims. In any event, the 1968 legislation made important changes by broadening the right of accused service members to be represented by trained military counsel, changing "law officers" into "military judges" and providing these "judges" for special courts-martial as well as for general courts-martial.

A similar change was made as to members of "Boards of Review," who became "appellate military judges" on "Courts of Review." Of special importance was the Act's authorization for service members to waive trial by court-martial members and be tried by military judge alone. In light of the important improvements in military justice, which resulted from the work of Senator Ervin's Subcommittee, I think it would be fortunate if in the near future some other congressional committee would undertake a similar intensive study of military justice and the rights of service members.

Military justice received a hard blow in 1969 when the Supreme Court decided *O'Callahan v. Parker*,[12] which held that courts-martial only had jurisdiction over offenses which were "service-connected." In a footnote to the Court's opinion, Justice Douglas referred to "so-called military justice," and the impression conveyed is that service members should be subject to this unjust system no more than absolutely necessary. I recall that at the 1970 meeting of the American Bar Association in St. Louis, I participated in a panel along with General Westmoreland and others and harshly criticized Justice Douglas' opinion in *O'Callahan* for conveying an unfair impression of military justice. As I learned later to my horror, Justice Douglas was in the room at the time, and so I hoped I would never have any occasion to argue before him.

In a later conversation with Colonel Frederick Bernays Wiener, an authority on military law who had successfully argued *Reid v. Covert*, I was told that he had talked about *O'Callahan* with Dean Erwin Griswold, who was then Solicitor General, and that he had expressed to Griswold the view that it was unfortunate that Griswold himself had not argued *O'Callahan* for the government. In any event, I believe Griswold did personally argue two later cases which presented *O'Callahan* issues, and that he suc-

12. 395 U.S. 258 (1969).

ceeded in obtaining Supreme Court rulings that the *O'Callahan* decision did not apply overseas and did not apply retroactively.

During the early 1970's, I learned that after completing his tour of duty as Judge Advocate General, General Hodson had become Chief Judge of the Army Court of Military Review. His assuming this position was important in enhancing the stature of that court and was still another action on his part to improve the military justice system. In my view, the precedent he established of having a general officer head the Army Court of Military Review—now Army Court of Criminal Appeals—has increased the effectiveness of that court and the respect given to it and its counterparts in the other services.

In April 1980 when I became Chief Judge of the Court of Military Appeals, the caseload of that court was dramatically increasing—especially because of the war on drugs. Moreover, relations between the Pentagon and the court had become strained, and the [Department of Defense (DOD)] General Counsel, Deanne Siemer, had suggested the abolition of the Court of Military Appeals and the transfer of its jurisdiction to some other court, such as the Fourth Circuit. My appointment was only to fill an unexpired term of thirteen months, although a subsequent statutory change in December 1980 increased it to ten years. To say that the situation was challenging would be an understatement.

Some of our most interesting issues concerned the application of *O'Callahan*. Frankly, I took a broad view of "service-connected"—perhaps because my view of military justice was more favorable than that of Justice Douglas. Indeed, on one occasion I was asked if I thought *any* action by a service member was not service-connected, and I replied that the best example would be a crime committed by a service member who was attending law school pursuant to an excess leave program. Ironically the Supreme Court overruled *O'Callahan* in 1987 in *Solorio v. United States*,[13] where I had written the opinion for our court and in which we had taken a broad view of service-connection. Obviously the Supreme Court finally decided that drawing a line between service-connected offenses and other offenses was not worth the attendant uncertainty and that it was bet-

13. 483 U.S. 485 (1987).

ter to predicate court-martial jurisdiction on military status. My confidence in military justice is such that I am convinced this was a wise choice.

The drug war also gave rise to a variety of Fourth Amendment issues. Is compulsory submission of a urine sample for testing an unreasonable search and seizure? To what extent should efforts to locate drugs be analogized to health and welfare inspections? Here again our court, recognizing the legitimate concerns about the effects of drug use on military readiness, took a broad view of the reasonableness of the searches being performed. However, at the same time we construed broadly the term "search."

Some other important legislation for military justice was enacted in 1983 when Congress provided for appellate review by the Supreme Court of cases in which the Court of Appeals for the Armed Forces—then the Court of Military Appeals—had granted review. This change made it easier to obtain from the Supreme Court its answer to legal questions raised in a court-martial. Note, however, that the Court of Appeals for the Armed Forces is gatekeeper for the Supreme Court, which is not authorized to undertake direct review of a court-martial case denied review by [the Court of Appeals for the Armed Forces]; and I believe this role of gatekeeper for access to the Supreme Court is almost unique among appellate courts.

In the mid-1980's, our three judge court was confronted with a situation in which for some eighteen months only Judge Cox and I were actually able to serve. This situation was the result of a retirement of Judge Cook, a disability retirement of Judge Fletcher, and delay in filling vacancies. Meanwhile our caseload had almost doubled and had gone well over 3000 petitions for review in one year. That probably is almost three times the number of petitions currently being reviewed by the court each year. Fortunately, however, the number of petitions finally peaked, and meanwhile Judge Cox and I were able to keep cases moving. Incidentally, I should note that the state of discipline revealed by the records of trial when I first became a judge was at best disappointing, but later it seemed to have improved significantly.

Because I felt that military justice was high quality, but that the general public seemed to have a different impression, I believed it important to provide opportunities for the public to learn more about the system. Thus, at the suggestion of Professor Steve Saltzburg, who was then on the faculty of the University of Virginia Law School, I arranged for our court to hear an actual argument here at Charlottesville. Once we had opened

the door, a flood of invitations came in for us to hear arguments elsewhere, and the court heard actual cases at West Point, Wake Forest, the Air Force Academy, and various other law schools and military installations. This was the origin of Project Outreach, which provided a valuable model for other courts.

At a reception I was talking to Tim Dyk, a Washington attorney, who did First Amendment work for at least one television network. Incidentally, he is now a judge on the federal circuit. In any event, Tim was dejected because of his inability to persuade the Supreme Court or the Article III federal courts to allow televising of oral arguments. I told Tim that our court—as an Article I court—was not bound by the policies of the Judicial Conference and that I felt we would be willing to allow some experiments with televised arguments. The result was that several of the arguments of the Court of Military Appeals were televised, and from all I have heard, the reaction was favorable. Incidentally, before we had the first televised argument, I received a letter from Senator Nunn and Senator Warner, the chair and ranking minority member respectively of the Senate Armed Services Committee, expressing concern about our decision to allow televised arguments. I hand-carried a letter to the Senators expressing our court's view that we took pride in the military justice system and wanted to let the public know more about it, and that for this reason we were allowing television of the argument. I heard nothing further from Capitol Hill.

Histories are written of various courts, and I concluded it would be worthwhile to have someone writing a history of our court. Initially I asked a staff member to be our court historian in addition to his other duties. However, in a subsequent discussion with "Doc" Cooke, the DOD official who oversees the administrative support provided the court by the Pentagon, it was suggested to me that we should seek a professional historian to write the history of the court. In turn, he requested the DOD historian and the Air Force historian to help our court find the best person for the task; and with their expert advice we chose Professor Jonathan Lurie, a legal historian at Rutgers University.

Lurie undertook the task with vigor and within a decade had published two books—*Arming Military Justice* and *Pursuing Military Justice*—which trace the history of military justice in America from 1775 until the beginning of my term of service as chief judge in 1980. Within the past few weeks, Professor Lurie has completed condensing these books into a paperback titled *Military Justice in America*, and thereby has provided an

accessible, readable history of our system of military justice and of the first three decades of the Court of Military Appeals. I am proud that our court induced the writing of the history of military justice by a distinguished legal historian, and I hope that at some future time Dr. Lurie will chronicle some of the developments in military justice after 1980.

When I was serving on Judge Brosman's staff in the early 1950's, I heard some references to a committee of distinguished lawyers that the court had appointed to advise it. However, after a few years that court committee had ended its service. More than thirty years later during my term on the court, I persuaded my two fellow judges that we should create another court committee to advise us. The chair was James Taylor, Jr., who after retiring as Deputy Judge Advocate General of the Air Force, had become a professor and associate dean at Wake Forest Law School. The nine-member committee included Robert Duncan, former Chief Judge of our court, and several distinguished legal scholars—two of whom, Dan Meador and Steve Saltzburg, were then on the law faculty of the University of Virginia. The advice I received from the court committee was valuable. The committee made a report to the court and thereafter ended its service. However, I would suggest that in the future the Court of Appeals for the Armed Forces consider periodically obtaining outside advice as to its method of operating.

As a result of the experience of having only two judges serving actively for many months during the mid-1980's, I decided that some solution should be sought for the problem of vacancies. Actually the [UCMJ], when enacted in 1950, contained authority in Article 67 (a)(4) for the President to "designate a judge of the United States Court of Appeals" if a "judge of the Court of Military Appeals was temporarily unable to perform his duties because of illness or other disability." However, the Code provision had many defects, was probably unconstitutional, and had never been used.

After the court made Congress aware of the problem, the UCMJ was amended to allow the chief justice to designate Article III judges to hear cases when—because of illness or other disability, recusal, or a vacancy—our court would not have available all its active judges.[14] Congress also made provision for senior judges of our court to sit under similar circumstances. As a result of this legislation, Judge Cox and I have sat with the court as senior judges on many occasions and Senior Judge Bill Darden has

14. *See* U.C.M.J. art. 142(f) (2000).

sat on at least one occasion. Several distinguished Article III judges have also heard cases with the court. For example, Judge David Sentelle of the District of Columbia Circuit wrote the opinion of the court in *United States v. Lonetree*,[15] the case of the Marine guard who gave Soviet agents access to the American embassy in Moscow.

Let me now turn to the future. Various changes in military justice have been suggested—some as a result of changes being made in military justice in other countries and treaties the United States has entered or may enter. Senior Judge Cox is chairing a commission established by the non-profit Institute for Military Justice to propose changes in the Uniform Code, and his commission has proposed issues, solicited suggestions, and conducted a hearing in March 2001. I think that this examination of military justice is desirable, and it is somewhat reminiscent of the examination made by Senator Ervin's Subcommittee in the 1960's. Let me mention the suggestions I made to Judge Cox's commission.

My first suggestion is that a change be made in the current UCMJ provisions whereunder in general and special courts-martial an accused either is tried by the court-martial members and, if convicted, sentenced by these members or else is tried by the military judge and, if convicted, sentenced by the judge. The UCMJ provides no specific option for an accused to be tried by the members and, if convicted, to be sentenced then by the judge.

I am not advocating now that in all cases sentencing be done by the military judge, but only that the accused be provided the *option* to have his or her guilt determined by the members and, if convicted, nonetheless choose to have any sentencing done by the judge. You may ask me why not go further and have all sentences determined by the judge—as occurs in criminal trials in federal district courts and in most state courts? Perhaps to some extent I am a traditionalist in wishing to retain for an accused the opportunity to be sentenced by his comrades if they have found him guilty, rather than to be sentenced by a judge who may be unfamiliar with local conditions and may even come from another armed service. In any event, for the present I would prefer giving the accused the choice I have suggested, rather than eliminating all sentencing by court-martial members.

Some might argue that an accused already has an implicit right to waive sentencing by the court-martial members or, at the least, that an accused may enter an agreement with the government—with the military

15. 35 M.J. 396 (C.M.A. 1992).

judge's consent—for sentencing to be done by the judge, although guilt has been determined by the court-martial members. Even if this contention is accepted, it would still be best to have this option clearly authorized by the UCMJ.

What are the disadvantages of providing this option to an accused? Some may contend that it will discourage an accused from electing to waive trial by court members in order to assure that sentencing will be done by a judge if the accused is convicted. I would reply that this is an inadequate justification and that an accused who disputes his or her guilt should not be under pressure to waive trial by court-martial members in order to obtain sentencing by a military judge.

In connection with sentencing, I should note that when sentencing is done by a military judge, I have no objection if the judge refers to the sentencing guidelines used in the federal courts for analogous crimes, but I oppose the suggestion some have made that mandatory sentencing guidelines should be used in courts-martial in order to provide predictability. In my view, such predictability would come at too high a price, and I would prefer to continue the present system which places reliance on the judgment and experience of court-martial members and military judges—with the additional safeguard that appropriateness of sentences is subject to review by the Courts of Criminal Appeals.

Random selection of court-martial members has been recommended by some, but was not favored by a DOD commission that recently made a report on the subject. To some extent, I share that commission's apparent concern about possible interference with military operations if court members are selected randomly. I suspect, however, that this danger of interference has been exaggerated. For the present, I would propose that random selection be specifically authorized for use by a convening authority who chooses to do so instead of using the criteria for selection set out in Article 25(d) of the UCMJ. Perhaps a convening authority already has the power to use random selection, and I believe that random selection has been used a few times on a test basis. However, if so, the convening authority's power should be made more explicit. Let me also emphasize that I strongly favor decisions of the Court of Appeals for the Armed Forces which discourage a convening authority from selecting court mem-

bers with a purpose to achieve a particular result—a practice which I believe was widespread in earlier times.

The Army has adopted procedures to assure fixed terms in office for military judges. To me this seems desirable and should be followed by the other services.

In its consideration of petitions for review, the Court of Military Appeals—now the Court of Appeals for the Armed Forces—has been paternalistic in many ways. Frequently it has considered issues not specifically raised by an accused or his counsel, and the doctrine of waiver has not been vigorously applied with respect to errors unassigned by the defense counsel. Some have criticized this practice, but I believe that it accords with congressional intent and helps maintain confidence in the fairness of the military justice system. I hope it will continue.

For many years, the Court of Military Appeals . . . considered that Congress had assigned it a supervisory power and responsibility with respect to the military justice system. Perhaps the pioneer opinion in that regard was rendered in *United States v. Bevilacqua*.[16] I took a similar view in *Unger v. Ziemniak*,[17] which involved the court-martial of a female naval officer who refused to provide a urine specimen for analysis. The accused was being tried by a special court-martial and therefore, if convicted, was not facing a sentence which would have made her case eligible for appellate review by our court. Lieutenant Unger petitioned our court for an extraordinary writ to prohibit her trial, and relying in part on the All Writs Act,[18] our court considered the petition, but denied it on the merits.

Another case involving a petition for extraordinary relief arose when the members of the Navy-Marine Corps Court of Military Review sought and obtained from the Court of Military Appeals an extraordinary writ prohibiting the Secretary of Defense or his subordinates from questioning these military appellate judges about their reasons for setting aside the homicide convictions of Dr. Billig, a naval surgeon, several of whose patients had died at Bethesda Naval Hospital.[19] A recent decision by the

16. 18 C.M.A. 10 (1968).

17. 27 M.J. 349 (C.M.A. 1989).

18. 28 U.S.C. § 1651(a) (2000).

19. *See* United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988); *see also* Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982); McPhail v. United States, 1 M.J. 457, 460 (C.M.A. 1976); United States v. Frischholz, 36 C.M.R. 306 (C.M.A. 1966).

Supreme Court in *Clinton v. Goldsmith*[20] has created uncertainty as to the scope of the authority of the Court of Appeals for the Armed Forces in cases like this.

Perhaps because I wrote the opinion reversed in the *Goldsmith* case,[21] I disagree with the result reached there, and I think that even under the existing provisions of the [UCMJ], a strong argument can be made that the Court of Appeals for the Armed Forces had implicit authority to issue the writ that was ultimately set aside.[22] More important, I would suggest that Congress should now explicitly confer upon that court a broad supervisory role as to military justice and provide it broad power to grant extraordinary relief as to any court-martial proceeding or Article 32 investigation.

In California and some other states, extraordinary writs—such as writs of mandamus and writs of prohibition—are an important part of the judicial review process. I would recommend that the Court of Appeals for the Armed Forces be granted similar powers to those exercised by appellate courts in those states. I realize that General Prugh, in a recent article in the *Military Law Review*, has made clear that he believes the Court of Appeals for the Armed Forces should not be authorized to issue extraordinary writs and that these writs have the potential to be disruptive and to interfere with the power of commanders. Many others may agree with him; I, however, am convinced that, if used with discretion, extraordinary writ power can be helpful in obtaining swift solutions of urgent problems. Admittedly, conferring explicit supervisory responsibility over military justice would increase the court's workload, but my examination of the current workload indicates to me that this increase would not result in an undue burden on the court.

I have two other proposals related to the Court of Appeals for the Armed Forces. First, I would recommend that centralized judicial review be provided as to military administrative action and that such review be channeled through the correction boards directly to the Court of Appeals for the Armed Forces. My analogy would be to the procedure for review of personnel action involving federal employees, whereunder a board conducts initial review and appeal is directly to the federal circuit. Currently there is often great confusion as to the proper procedure to be employed by a service member who believes he or she has been wronged by military

20. 526 U.S. 529 (1999).
21. *See* Goldsmith v. Clinton, 48 M.J. 84 (1998).
22. *Cf.* Dames & Moore v. Regan, 453 U.S. 654 (1981).

administrative actions concerning such matters as promotion, separation, and characterization of a discharge.

As was recently acknowledged by a DOD commission established at the direction of Congress, currently there is confusion as to the proper forum, exhaustion of remedies, and other matters relating to such claims. In my view, centralized review of such claims would be fairer and more expeditious—especially if the centralized review included discretionary judicial review by the Court of Appeals for the Armed Forces. The expertise of that court as to matters affecting service members and the experience of its judges and staff would facilitate fair and quick consideration of errors in military administrative actions affecting service members. Although the workload of the Court would be increased, I believe that this increase could also be accommodated.

Finally, to resurrect a proposal that goes back to a time even preceding enactment of the UCMJ, I would urge that the judges of the Court of Appeals for the Armed Forces be granted Article III status, that is, life tenure. Since the judges' pay during active service already is equivalent to that of federal circuit court judges, no extra cost would result in that regard, but the judges would not face the current uncertainty as to reappointment. Moreover, if given Article III status, the judges would participate in the Judicial Conference and be brought more fully into the federal judicial mainstream.

Those then are a few suggestions that I hope will be of some value. Let me close by reiterating my appreciation of the opportunity to appear here today and honor the memory of General Hodson.