THE THIRTY-FIFTH KENNETH J. HODSON LECTURE ON CRIMINAL LAW*

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"Reflections of the Past: Continuing to Grow, Willing to Change, Always Striving to Serve"

I. Introduction

First of all, I want to thank you for the kind and warm introduction. Secondly, I want thank those who honored me by inviting me to deliver the 35th Annual Kenneth J. Hodson Lecture. I'm particularly pleased to have this honor because I served as an Army JAG officer from 10 May 1967 until 15 April 1971; almost all that time, General Hodson was the TJAG. He, indeed, was an extraordinary Judge Advocate who made outstanding contributions to the military justice system. It was, indeed, a high honor to serve under him.

I would also like to bring greetings from all of my colleagues at the court. As a senior judge, I still feel and always will feel that I am part of the court.

I am very pleased to have the opportunity to speak to this audience because you and I have some common experiences and goals.

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* This lecture is an edited transcript of a lecture delivered on 28 March 2007 by Senior Judge, U.S. Court of Appeals for the Armed Forces, H.F. "Sparky" Gierke to members of the staff and faculty, distinguished guests, and officers attending the 55th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Established at The Judge Advocate General's School on 24 June 1971, the Kenneth J. Hodson Chair of Criminal Law was named after Major General Hodson who served as The Judge Advocate General, U.S. 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.

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First, we both have had the privilege to serve as a Judge Advocate. Second, we enjoy this privilege in a special military justice system. We serve a military that has the goal to provide for our national defense and security. To help accomplish that purpose, the military justice system provides each service member with a fair trial and quality legal services.

As I reflect back on my experiences in the military justice system, I will, for the most part, do so from the perspective of a judge. Many of you in this audience have had or will have the experience of being a judge. Some of you have or will have some of your richest professional experiences on the bench. Your experiences will mold you, shape you, and make you who you are. I believe we are better lawyers and people because we have developed, changed, and grown while embracing this unique and special privilege of serving as a judge. I have entitled my remarks *Continuing to Grow, Willing to Change, Always Striving to Serve*.

A. Continuing to Grow

If you want to be a good judge, you have to be passionate about both the law and life. You must stay eager to learn and to grow. Justice John Paul Stevens, in a 2005 speech at Fordham Law School, stated it best: "[L]earning on the job is essential to judging."[2] I can reaffirm the truth of this statement. In my nearly twenty-five years as a military judge, North Dakota Supreme Court justice, and judge on the Court of Appeals for the Armed Forces, I can say that the capacity to grow is one of the top qualities of being a competent, successful, and happy judge.

President Bush recently appointed two new judges to our court, Judge Scott Stuckey and Judge Margaret Ryan, both sworn in on the fifth of this month. If someone were to ask me what qualities we should look for in future judges, I would say immediately the capacity to grow in the job. Holmes said, "Experience is the life of the law."[3] In the context of my present remarks, I would say, "The ability to learn from our experiences is the lifeblood of good judges."

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[2] Charles Lane, *With Longevity on Court, Steven's Center-Left Influence Has Grown*, WASH. POST, Feb. 21, 2006, at A01.

[3] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Kessinger Pub. 2005) (1881) ("The life of the law has not been logic; it has been experience.").

Some of you may be new judges and you may be questioning your own experience to assume this important duty. Good for you. I hope so. It is a mark of your humility and character that you have these self doubts. I had those doubts when I reported to Vietnam as a full-time military judge.

I was very fortunate to have as my supervising judge Major Dennis Hunt, the senior full-time special court judge. He was very bright, more experienced, very patient, and helpful. I recall his insisting that new judges in country tour the Long Binh jail—he felt we should have that experience before we started locking people up in that facility. If you balance your doubts and reservations with a healthy shot of commitment to learn, you will be well on your way to being a fine judge. Now, I could devote my entire presentation to this subject of professional growth, but time does not permit me to do so. I want to make two points on the subject.

Point number one: I believe that the key to professional growth is *to be the best judicial colleague you can be.* I know that some of you are trial judges. You may view your work as a lonely challenge. I have walked in your shoes. You are right, it is solitary work. But you do not have to be alone or do it alone. Your presence today puts you in the network—friends and colleagues here at the JAG School. My advice is to *form strong relationships with colleagues*. Find other judges you trust, respect, and connect with. In these relationships, dare to confide and discuss your cases and your challenges.

Most importantly—improve your capacity to listen. Let me say that again. *Improve your capacity to listen*. If I were to begin my legal career anew, I would hope to be a better listener. If you want to grow professionally, become a master of the art of listening.

Point number two: If you want to become a better lawyer or judge, *become a better person*. The profession of judging is a humbling experience. When you sit in judgment of a fellow citizen and service member, you are forced to ask yourself a lot of questions. This experience of being a judge has made me look in the mirror hard and deep. Why? When we understand ourselves, we have a better capacity to understand others. I believe that self-awareness is the beginning of wisdom that is the essence of judging. I am not about to tell you how to do this. You've probably already been doing this very well.

So keep on doing what you are doing to grow and develop as a person. Rejuvenation is how we keep going. Take care of yourself and your families, friends, and colleagues.

B. Willing to Change

Whenever I have an opportunity to speak to an audience like this, it stimulates me to reflect (look back) and project (look forward). Today, I look back remembering when I was a young Army captain from the University of North Dakota just beginning this lifetime adventure. For me it has been a wonderful experience in the journey from the family ranch in western North Dakota to the privilege of being the Chief Judge of the Court of Appeals for the Armed Forces. But I don't think we can just look back. We have to also look ahead.

I have a strong conviction that our best days are ahead because I have seen a military justice system that is dynamic and embraces change. Today it is appropriate to talk about being open to change—willing to change. From my perspective, a strength of our military justice system has been its capacity to change with the times. For a few minutes, let's look back and then look ahead and see where I hope we can move forward together.

1. Looking Back

From May 1967 to April 1971, I was privileged to serve as a captain in the Judge Advocate General's Corps, United States Army. During the first part of my service in the Army JAG Corps, I performed duties as a legal assistance officer and later as a trial counsel and defense counsel. Until 1 August 1969, the effective date of the Military Justice Act of 1968,[4] I was part of a system where, in special courts-martial, we had people incarcerated for six months, forfeiting two-thirds of their pay and being reduced to the lowest enlisted grade without the presence of a law-trained person in the courtroom. It's difficult for me to now fathom that was going on as late as 1969.

[4] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

As a result of the Military Justice Act of 1968, there was a need for more military judges. In 1969, just before going to Vietnam, I attended the military judge course here at the JAG School. Between the end of the military justice school and my report date to Vietnam, I went back to the family ranch in North Dakota to spend Christmas. During that time, I received a call from a Colonel Tom Jones from the Office of Career Management—he asked me if I would like to serve as a full-time military judge. I asked if I could have a couple of days to decide and he granted that. When he called back, I decided to give it my best shot. By the way, the trip to Vietnam was quite memorable. I flew out of Minot, North Dakota—temperature twenty-five degrees below zero. When I arrived in Vietnam, it was 110 degrees above zero.

From December 1969 to December 1970, I served as a full-time military judge at the special court level in the Republic of Vietnam, presiding over more than 500 courts-martial. In recent years, I have questioned that number but my staff researched it and found that the Army tried over 41,000 courts martial in 1970.

This was a challenging time to be sitting on the bench. We were serving in a combat zone. We tried cases in some very nice courtrooms but we also tried some cases in bunkers out in the field. Of course, we had many courtrooms that fit in between the two extremes referenced above. There were six full-time special court military judges in country. Major Hunt assigned us to the various commands as the demand dictated. The first six months I flew in helicopters or small fixed wing aircraft from USARV[5] headquarters in Long Binh. The next three months I flew out of Camp Horne, XXIV Corps headquarters in Da Nang, and during my last three months in country, I flew out of Chu Lai, Americal Division headquarters. During my tour of duty in southeast Asia, I had the privilege of meeting and working with, among others, Dennis Hunt, John Naughton, Tom Crean, Bill Suter, Ron Holdaway, and Lee Foreman—all who went on to have outstanding careers in the Army JAG Corps.

We were attempting to implement the many changes just made to the UCMJ and the Manual for Courts-Martial. Article 16 was amended to create the position of military judge as the presiding officer and to require a military judge in every general court-martial.[6] Article 16

[5] United States Army Vietnam.
[6] Military Justice Act § 2(3), 82 Stat. at 1335.

authorized, but did not require, that a military judge be detailed to special courts-martial.[7] However, Article 19 provided that a special court-martial could not adjudge a bad-conduct discharge unless a qualified lawyer was detailed as defense counsel, a verbatim record of trial was made, and a military judge was detailed.[8] The requirement for a military judge at a special court-martial could be avoided if a military judge could not be detailed "because of physical conditions or military exigencies."[9] In such a case the convening authority was required to "make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed."[10] Furthermore, Article 16 authorized trial by a military judge sitting alone.[11] It is my recollection that well over ninety percent of the trials that I presided over were judge alone trials.

Article 27 was amended to provide a right to counsel in special courts-martial.[12]

Article 66 replaced the boards of review with a single court of military review for each service.[13]

Notwithstanding the dramatic improvements in military justice, there were many who still perceived it to be fundamentally unfair. The massive build-up during the Vietnam War and strong anti-war sentiments heightened criticism of military justice.

Robert Sherrill published his book, *Military Justice is to Justice as Military Music is to Music*.[14]

My response to this book is that my wife, Jeanine, and I have, for each of the last fourteen years, attended at least one performance of the Marine Corps' evening parade at "8th & I"—and we think military music is something to be proud of as well.[15]

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[7] *Id.*
[8] *Id.* § 2(5), 82 Stat. at 1336.
[9] *Id.*
[10] *Id.*
[11] *Id.* § 2(3), 82 Stat. at 1335.
[12] *Id.* § 2(10), 82 Stat. at 1337.
[13] *Id.* § 2(27) 82 Stat. at 1342–43.
[14] ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1971).
[15] The Marine Barracks Washington is commonly referred to as "8th & I" due to its location in southeast Washington, D.C. Marine Barracks Washington D.C., http://www.

In 1969, the Supreme Court decided *O'Callahan v. Parker*.[16] Sergeant O'Callahan was stationed in Hawaii. While on pass, he broke into a hotel room, assaulted a girl, and attempted to rape her. He was tried and convicted by a general court-martial and sentenced to a dishonorable discharge, confinement for ten years, and total forfeitures. The Army Board of Review and Court of Military Appeals affirmed. O'Callahan filed a petition for a writ of habeas corpus in federal district court, claiming that the court-martial had no jurisdiction to try him for a non-military offense, committed off-post and off-duty. The district court denied relief and the court of appeals affirmed.

The Supreme Court granted certiorari and reversed, holding that the court-martial had no jurisdiction because the crimes were not service-connected. (The decision was 6-3, with Harlan, Stewart, and White dissenting.) Justice Douglas delivered the opinion of the court. After enumerating a litany of perceived defects in military justice, he commented that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[17]

At the time of the *O'Callahan* trial, there was probably quite a bit to criticize. As part of the celebration of the fiftieth anniversary of the enactment of the Uniform Code of Military Justice, we had a black tie dinner at the Fort Myer Officers' Club. Chief Justice Rehnquist was our guest speaker at the dinner. He quipped that his confidence in the military justice system was shaken when he served in the Army Air Corps in World War II. He said he walked through the orderly room and saw the results of a case posted before the court-martial had taken place.

The next big step in changing our system of military justice was the Military Justice Act of 1983[18] and the 1984 *Manual*.[19] The act modified Article 60 to simplify the staff judge advocate's post-trial review.[20] Article 62 was amended to permit the Government to appeal an adverse ruling of the military judge.[21] Article 66 was amended to overrule the

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mbw.usmc.mil/ (last visited Oct. 15, 2007).
[16] 395 U.S. 258 (1969).
[17] *Id.* at 265.
[18] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).
[19] MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984) [hereinafter 1984 MCM].
[20] Military Justice Act of 1983 § 5, 97 Stat. at 1395–97.
[21] *Id.* at 1398.

Chilcote[22] decision by specifically authorizing a court of military review sitting en banc to reconsider a panel decision.[23] Article 67 was amended to permit an appeal by either side to the United States Supreme Court.[24] Since this amendment, the Supreme Court has granted certiorari in eight military cases decided by our court (counting *Weiss*[25] and *Hernandez*[26] as one case). Because these cases have been on the books for a long time and the majority of this audience is probably very familiar with them, I will just touch briefly on them.

Solorio v. United States:[27] Solorio was a member of the Coast Guard on active duty in Juneau, Alaska. He was charged with sexually abusing two young daughters of a fellow Coast Guard member. At his court-martial he moved to dismiss the charges for lack of jurisdiction, citing *O'Callahan* and arguing that his crimes were not service-connected. The court-martial granted the motion to dismiss, and the Government appealed. The Coast Guard Court of Military Review reversed the dismissal and reinstated the charges, and the Court of Military Appeals affirmed, holding that the offenses were service-connected.

The Supreme Court granted certiorari. Instead of turning the case on the question of service connection, the court overruled *O'Callahan*. The court made no specific comments about the quality of military justice. Instead, it faulted the *O'Callahan* decision's inaccurate reading of the history of court-martial jurisdiction and turned the case on the authority of Congress to "make rules for the government and regulation of the land and naval forces," and the plain language of the UCMJ.[28]

Weiss v. United States[29] involved the questions regarding the appointment of and tenure for military judges. This case and a companion case, *Hernandez v. United States*,[30] arose in the Marine Corps. Our court had addressed the tenure issue in *United States v.*

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[22] United States v. Chilcote, 43 C.M.R. 123 (C.M.A. 1971), *cert. denied*, 467 U.S. 1218 (1984).
[23] Military Justice Act of 1983 § 7, 97 Stat. at 1402.
[24] *Id.* at 1402–03.
[25] Weiss v. United States, 510 U.S. 163 (1994).
[26] *Id.* (the U.S. Supreme Court consolidated the *Weiss* and *Hernandez* appeals when it granted certiorari).
[27] Solorio v. United States, 483 U.S. 435 (1987), *aff'g* 21 M.J. 251 (C.M.A. 1986).
[28] *Id.* at 447–51.
[29] Weiss v. United States, 510 U.S. 163 (1994).
[30] *Id.*

Graf,[31] holding that the absence of a fixed term of office for military judges was not a denial of due process. We held that the UCMJ provides sufficient judicial independence to satisfy the due process clause. Before the Supreme Court, the appellants contended that military trial and appellate judges have no authority because the method of their appointment by the Judge Advocate General violates the appointments clause of Article II of the Constitution and because their lack of tenure violates the Fifth Amendment's Due Process Clause.

The Supreme Court held that the appointments clause was not violated because all military judges are already appointed as "officers of the United States" by virtue of their appointments as commissioned officers.[32] The Supreme Court rejected the due process argument, holding that the applicable provisions of the UCMJ and corresponding service regulations sufficiently insulate military judges from the effects of command influence.[33]

Davis v. United States[34] involved an ambiguous invocation of the right to counsel. The Supreme Court used the decision of our court to resolve a split among the federal circuits concerning a suspect's right to counsel during police interrogation. The federal circuits had split three ways. Some circuits held that any mention of counsel required that the interrogation stop. Other circuits held that only an unequivocal request for counsel required that interrogation stop. Our court and some other circuits held that an equivocal mention of counsel required that interrogation about the offenses stop, but interrogators could question the suspect to clarify whether he desired to invoke his rights or continue questioning. The Supreme Court took a hard line, holding that interrogation may continue until the suspect unequivocally invokes his rights.

Justice Souter, joined by Blackmun, Stevens and Ginsburg, wrote a concurring opinion saying they would have simply affirmed the opinion of our court.

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[31] 35 M.J. 450 (C.M.A. 1992).
[32] 510 U.S. at 175–76.
[33] *Id.* at 176.
[34] Davis v. United States, 512 U.S. 452 (1994).

Ryder v. United States[35] involved the validity of the appointment of a civilian judge (Chief Judge Baum) to the Coast Guard Court of Military Review (CGCMR). Chief Judge (C.J.) Baum had been appointed by the General Counsel of the Department of Transportation, who is the TJAG for the Coast Guard and empowered under Article 66(a) to assign CGCMR judges. In a companion case, *United States v. Carpenter*,[36] our court had held that C.J. Baum's appointment by the General Counsel was invalid, because the power to appoint "inferior officers" was limited to the President, the heads of departments, and the courts of law. While appellate review of the case was pending, the Secretary of Transportation appointed C.J. Baum to the court, in an effort to satisfy the Appointments Clause.

Our court held that C.J. Baum's appointment by the General Counsel was invalid, but that his acts had de facto validity, relying on *Buckley v. Valeo*.[37] The Supreme Court rejected our de facto validity rationale, held that C.J. Baum's appointment by the General Counsel was invalid, and remanded the case for further proceedings before a properly appointed Court of Military Review.

After the *Ryder* case was remanded from the Supreme Court, our court concluded that it was necessary to determine whether the CGCMR was properly constituted after the Secretary of Transportation appointed its civilian members. We held that the judges of the CGCMR are "inferior officers" within the meaning of the Appointments Clause, and that the Appointment by the Secretary of Transportation was valid.[38]

The Supreme Court upheld our court's characterization of CGCMR officers as "inferior officers" and the validity of C.J. Baum's appointment by the Secretary of Transportation in *Edmond v. United States*.[39] Edmond had argued that the authority of the Secretary of Transportation under 49 U.S.C. § 323(a) was a "default statute," and that Article 66(c) gave the exclusive power to appoint military judges to the Judge Advocate General (who for the Coast Guard is the General Counsel of the Department of Transportation).

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[35] 515 U.S. 177 (1995).
[36] 37 M.J. 291 (C.M.A. 1993).
[37] 424 U.S. 1 (1976).
[38] United States v. Ryder, 44 M.J. 9 (1996).
[39] 520 U.S. 651 (1997).

The Supreme Court rejected that argument and held that 49 U.S.C. § 323(a) gave the Secretary of Transportation power to appoint judges of the Court of Criminal Appeals. The Supreme Court distinguished between the Secretary's power to appoint judges and the Judge Advocate General's power to assign judges. Article 66(c) talks in terms of assignment, not appointment.

Edmond had also argued that appellate military judges are principal officers under Article II, and thus must be appointed by the President and confirmed by the Senate. After an analysis of the duties of appellate military judges, their scope of authority, and the finality of their decisions, the Supreme Court concluded that they are "inferior officers" who may be appointed by the secretary of a department.[40]

Understandably, the Court of Criminal Appeals judges may not have been pleased that they were deemed to be inferior officers. That characterization could be interpreted to be demeaning—diminishing the importance of their work. However, I believe the following quote from the *Edmond* case makes it clear that was not the case.

The Supreme Court said in *Edmond*, "[T]he exercise of 'significant authority pursuant to the laws of the United States marks, not the line between principal and inferior officer for appointments clause purposes, but rather, as we said in *Buckley*, the line between officer and non-officer".[41]

Loving v. United States[42] involved the constitutionality of a death sentence imposed by a court-martial. The specific issue was whether the President, instead of the Congress, could prescribe the aggravating factors that permit imposition of a death sentence. The Court held that the President had the authority to prescribe aggravating factors under Articles 18, 56, and 36, UCMJ, and that the congressional delegation of authority did not violate the separation of powers doctrine.

An interesting sidelight to the decision in *Loving* is Justice Stevens's separate concurring opinion, joined by Justices Souter, Ginsburg, and Breyer. These four justices raise the question and reserve judgment on whether *Solorio* applies to capital cases. They suggest that they might

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[40] *Id.* at 666.
[41] *Id.* at 662 (citing Buckley v. Valeo, 424 U.S. 1, 126 (1976)).
[42] 517 U.S. 748 (1996).

require a service-connection in capital cases. They didn't reach this issue, as there was adequate service connection in the *Loving* case.

United States v. Scheffer[43] involved the constitutionality of Military Rule of Evidence (MRE) 707, which prohibits admission of polygraph evidence in courts-martial.[44] The Supreme Court reversed a decision by our court where we held that the rule infringed an accused's Sixth Amendment right to present a defense. This was the first case in which the Solicitor General of the United States appealed to the Supreme Court to reverse our court.

Clinton v. Goldsmith[45] was another appeal by the Solicitor General. In *Goldsmith*, the Supreme Court reversed a decision of our court enjoining the President from dropping an Air Force officer from the rolls as a result of his court-martial sentence.

There have been further refinements in the military justice system.

C. Separate Chain of Command for Defense Counsel

In the late '70s and early '80s, the Army tested and implemented a separate chain of command for defense counsel and created a new organization, the U.S. Army Trial Defense Service. At about the same time, the Air Force established a chain of command composed of regional and circuit defense counsel. In May 1998, the Navy created a separate chain of command for defense counsel, assigning them to the Navy Legal Services Office (NLSO), separate from the SJA and trial counsel.

1. Further Development in the Navy

In some of their commands in Italy, the Navy is experimenting with moving the legal assistance and claims offices from the NLSO to the Trial Service Office. That leaves only the defense services in the NLSO.

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[43] 523 U.S. 303 (1998).
[44] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 707 (2005) [hereinafter MCM].
[45] 526 U.S. 529 (1999).

2. Rules of Evidence

In 1980, President Carter promulgated the Military Rules of Evidence. These rules parallel the federal rules of evidence.

3. Independent Trial Judiciary

Although military judges were removed from the command of convening authorities many years ago, their lack of tenure has from time to time raised questions about their independence. The issue reached the Supreme Court in *Weiss v. United States*,[46] discussed earlier. Although the Supreme Court held that military judges are independent and insulated from unlawful command influence, there is some movement among the services to increase their independence. By regulation, the Army now provides a fixed term of office (three years, with specified exceptions) for military judges.[47]

4. Expansion of Court of Military Appeals

In 1989, Article 67 was amended and Articles 141–145 were added, to expand the Court of Military Appeals from three judges to five.[48] This change certainly inured to my benefit. With the retirement of Judge Robinson Everett in addition to the two new judgeships, there were three openings on the court.

5. Courts Renamed

In 1994, the Courts of Military Review were renamed as Courts of Criminal Appeals and the U.S. Court of Military Appeals was renamed U.S. Court of Appeals for the Armed Forces. These name changes were intended to more accurately reflect the role of the courts.

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[46] 510 U.S. 163 (1994).
[47] *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE paras. 8.1.g (trial judges), 13.12 (appellate judges) (16 Nov. 2005) [hereinafter AR 27-10].
[48] National Defense Authorization Act for Fiscal Years 1990–1991, Pub. L. No. 101-189, § 1301, 103 Stat. 1352, 1569-74.

6. Expanded Jurisdiction for Special Courts-Martial

The Department of Defense (DOD) authorization bill for Fiscal Year 2000 was signed into law by President Clinton on 5 October 1999.[49] The bill includes an amendment to Article 19 that permits special courts-martial to impose confinement and forfeitures for up to one year instead of six months.[50]

7. Selection of Court-Martial Members

Some observers regard the selection of court members by the convening authority as the Achilles' heel of the system. Not too long ago, Congress directed the Department of Defense to study the feasibility of random selection of court members. The study was severely constrained because Congress directed that the study consider only options that are consistent with Article 25.[51] The Joint Service Committee on Military Justice, with input from members of the Code Committee, concluded that, within the constraints of Article 25, the present method of member selection is the most workable.

8. Change in the Number of Members in Capital Cases

In 2001, Congress enacted Article 25a, UCMJ, which requires a capital trial panel be "not be less than 12" members unless that number is "not reasonably available because of physical conditions or military exigencies . . . ."[52] In the recent capital case, *United States v. Akbar*, there were fifteen panel members.[53] In my view, the enactment of Article 25a will allay at least some of the concerns of the four Justices, who in a separate concurrence in the *Loving* case, reserved judgment regarding the applicability of *Solorio* in capital cases.

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[49] National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512.
[50] *Id.* § 577, 113 Stat. at 625.
[51] UCMJ art. 25 (2005).
[52] *Id.* art. 25a.
[53] *See, e.g.*, *Sergeant Sentenced to Death for Killing Two Officers in Iraq* [sic.], WASH. POST, Apr. 29, 2005, at A06.

9. Life Without Parole Has Been Added as a Sentencing Option

In 1997 Congress amended the UCMJ, enacting Article 56a.[54] This change allows a court-martial to adjudge a sentence of life without parole for "any offense for which a sentence of confinement for life may be adjudged."[55]

In 1994, twenty-five years after Justice Douglas's harsh criticism in *O'Callahan*, our system received some welcome Supreme Court recognition as a mature, sophisticated system. This recognition came and was highlighted in Justice Ginsburg's concurring opinion in *Weiss v. United States* in which she made the following observation: "Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally trained officers preside or even participate as judges."[56]

Looking back, I see that we have made tremendous strides during the last forty years. What I see is a system that is open to improvement—to give service members the best. In my view, that has been the reason for the great strides that we have made. Because our men and women in uniform volunteer to put their lives in harm's way and give their best to preserve our freedom, we need to continue to work hard to make sure they always get the best from all of us.

10. Looking forward

Appreciating where we have come from, we have a more clear vision to look to the future. I want to share some views of others and some of my own ideas about opportunities to improve the military justice system.

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[54] National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 581, 111 Stat. 1629, 1759.
[55] UCMJ art. 56a.
[56] Weiss v. United States, 510 U.S. 163, 194 (1994).

11. Proposals for change

In 2001, my good friend and former Chief Judge of our court—Walter T. Cox III—led a blue-ribbon panel that examined the military justice system. That panel included, among others, Rear Admiral John S. Jenkins, the highly-regarded former Judge Advocate General of the Navy and, at that time, Senior Associate Dean at the George Washington University Law School. Among other fundamental issues, the Cox Commission examined the roles of the convening authority and the military judge, and offered proposals to shift some responsibilities from the convening authority to the military judge. I was recently advised by Senior Judge Cox that he was going to reconvene the Cox Commission. As we look ahead, who do we see leading efforts to improve our system? Senior Judge Robinson Everett is there, where he has always been. He is a leader, visionary, and dear friend to our court and bar. At our Code Committee meeting in both 2004 and 2005, he made several proposals.

The first was to allow the accused to elect sentencing by the military judge after findings have been made by court-martial members. His second suggestion was to amend Articles 18 and 21 of the Code by adding words referring to the "law of nations" rather than the "law of war." Third, he recommended that the United States Court of Appeals for the Armed Forces be authorized to conduct discretionary review of cases tried by military tribunals. Fourth, Senior Judge Everett proposed that Congress broaden the authority of the United States Court of Appeals for the Armed Forces under the All Writs Act[57] in response to *Clinton v. Goldsmith*. Fifth, he proposed reexamining the issue of affording life tenure to the judges of the United States Court of Appeals for the Armed Forces. Sixth, he suggested the Code Committee examine a more effective manner in the review of administrative discharges, specifically other than honorable discharges. A committee chaired by Judge Erdmann considered these proposals and some of them are being studied by the DOD.

12. Applying Article III Precedent in an Article I Court

In the future a significant source of change may be the continued application of federal civilian cases construing the U.S. Constitution. We must be most sensitive to these issues that arise from federal civilian

[57] 28 U.S.C. § 1651 (2000).

courts in general and the Supreme Court in particular. I have written an article on this subject, entitled *The Use of Article III Case Law in Military Jurisprudence*, which can be found in the August 2005 edition of *The Army Lawyer*.[58] Our court's general approach is to apply the Bill of Rights' protections to service members absent a specific exemption for the military justice system or some demonstrated "military necessity that would require a different rule."[59] That standard comes from our 1976 decision in *Courtney v. Williams*[60] and was repeated recently in *United States v. Marcum.*[61] Recent Supreme Court cases that have and will continue to present issues in our military justice system include:

Lawrence v. Texas,[62] addressing the right to privacy. What is the potential impact on Article 125, the UCMJ's sodomy provision?

Ashcroft v. Free Speech Coalition,[63] striking down the portion of the child pornography prevention act that criminalized images appearing to be minors rather than of actual minors.

Crawford v. Washington,[64] addressing the scope of the Sixth Amendment right to confrontation.

Davis v. Washington,[65] follow-on case to *Crawford*.

Apprendi v. New Jersey,[66] interpreting constitutional due process and jury trial guarantees to require that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[67]

Ring v. Arizona,[68] applying the *Apprendi* principle to the Arizona capital sentencing proceedings that required the finding of an

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[58] H.F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25.
[59] Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976).
[60] 1 M.J. 267.
[61] 60 M.J. 198, 199 (2004).
[62] 539 U.S. 558 (2003).
[63] 535 U.S. 234 (2002).
[64] 541 U.S. 36 (2004).
[65] 126 S. Ct. 2266 (2006).
[66] 530 U.S. 466 (2000).
[67] *Id.* at 490.
[68] 536 U.S. 584 (2002).

aggravating factor. *Ring* required that a jury, rather than a judge, find the existence of the aggravating factor.

Wiggins v. Smith,[69] finding ineffective representation by a defense counsel in a capital case who failed to pursue leads and to expand the mitigation investigation into the defendant's traumatic life history.

Atkins v. Virgina,[70] holding that a person found to be mentally retarded cannot be sentenced to capital punishment. This authority was important most recently in *Parker v. United States*,[71] ordering that the Government shall provide petitioner with an appropriate expert consultant for purposes of the pending capital litigation and remanding to the United States Navy-Marine Corps Court of Criminal Appeals to consider the continued availability of the sentence to death in light of the following:

> Mental retardation is generally thought to be present if an individual has an IQ [intelligence quotient] of approximately 70 or below . . . there is a standard of error of measurement, which is approximately 5 points overall, [and] a full scale Intelligence Quotient (IQ) test administered prior to Petitioner's court-martial determined Petitioner's IQ to be 74.[72]

Those cases in which military courts determine it is appropriate to apply Article III precedent will certainly serve as vehicles for change (hopefully positive change) to the military justice system.

D. Five Questions

Between my time on the North Dakota Supreme Court and the Court of Appeals for the Armed Forces, I served as an appellate judge for twenty-three years. As those of you who have appeared before our court know, one thing appellate judges can do is ask questions. So, I would now like to pose some questions to you.

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[69] 539 U.S. 510 (2003).
[70] 536 U.S. 335 (2002).
[71] 61 M.J. 63 (2005).
[72] *Id.*

First, is it time for a comprehensive reevaluation of the military justice system? Second, how can technology improve the military justice system? Third, should the structure of the military trial judiciary be changed? Fourth, how can the services continue to meet the need to develop our Judge Advocates to become military justice professionals? Fifth, how will international concerns affect our military justice system? I have asked these questions before both publicly and in writing. My written questions and thoughts regarding them are presented in 56 Air Force Law Review 249 (2005).[73]

In a speech that he delivered in 2000, Major General Bill Moorman, who was then the Judge Advocate General of the Air Force, asked some fundamental questions about change in the Military Justice System. He noted that the "central question" was whether the Uniform Code of Military Justice needed to be changed. General Moorman responded, "There can be only one answer. Of course it needs to be changed! For fifty years, the UCMJ and the *Manual for Courts-Martial* which implements it have been anything but static documents." I have already covered how, since enacting the current military justice system in 1950, Congress has revisited and revised the system. Now that more than twenty years have passed since the last major revision of our system, is it an appropriate time to determine how it is working? Can our system withstand the current enhanced public scrutiny? Of course it can. Could our system be improved? Same answer—of course it can. While time does not permit me to elaborate on my thoughts expressed in the five questions article, I would like to briefly discuss question three: structure of the trial judiciary.

The military trial judiciary is close to my heart because one of the formative experiences of my life was serving as a special court-martial judge in Vietnam. The office of military judge was brand new back then. It was a substantial evolution from the old position of "law officer."

Is it time to consider further evolution? Courts-martial are not standing courts, but instead come into existence with a convening order and referral, then disappear upon authentication of the record. While already bearing the costs of a standing court infrastructure, the military justice system does not receive some of the advantages that standing courts would offer. For example, because our courts-martial no longer

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[73] H.F. "Sparky" Gierke, *Five Questions About the Military Justice System*, 56 A.F. L. REV. 249 (2005).

exist after authentication, we cannot have a trial level post-conviction hearing process—like that in place in the federal criminal justice system and each of the state criminal justice systems. Because there is no trial-level court to which an appellant can return to litigate collateral issues like ineffective assistance of counsel, conditions of confinement, and *Brady*[74] violations, we have been forced to cobble together a system replete with competing affidavits, application of the *Ginn*[75] framework, and *DuBay*[76] hearings.

Would a post-conviction procedure similar to that established by 28 U.S.C. § 2255 for federal civilian prisoners be preferable?

Should some of the functions currently vested in convening authorities or trial counsel be transferred to a standing military court system?

For example, in civilian criminal justice systems, the clerk of court typically issues subpoenas, which are equally available to defense counsel and prosecutors. Would that be more sensible than requiring one litigator to go to his or her opposing counsel to seek a subpoena? Also, in civilian criminal justice systems, defense counsel seeking funds for expert assistance or other litigation support typically make that request to the court, which has its own budget to provide such funding.

Would a standing court-martial system have a dedicated source of funding for defense support? Would that be preferable to draining command operational funds to provide defense support—and preferable to requiring convening authorities to make the first assessment of the necessity of providing assistance to the defense?

Is it unfair to require the defense to disclose its trial strategy to the Government to seek litigation support funds, while the Government bears no similar requirement to reveal its trial strategy to the defense? Should we instead follow the federal model—as the military justice system does in so many other areas—by permitting the defense to appear before the

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[74] Brady v. Maryland, 373 U.S. 83 (1963) (holding that the Constitution requires the prosecution to disclose evidence that is favorable to the defense).
[75] United States v. Ginn, 47 M.J. 236 (1997) (setting forth six principles to consider in determining whether a post-conviction fact-finding hearing (*DuBay* hearing) is required).
[76] United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

judge in an ex parte hearing to try to establish the necessity of funding for an expert witness or other litigation support?

Would establishing a standing court-martial system also provide opportunities to further enhance military judicial independence? Do we need a separate judicial career track? In 1994, Professor Fred Lederer wrote an article in the *William and Mary Bill of Rights Journal* proposing a detailed judicial career path designed to promote professional development and institutional independence.[77] Perhaps some of his ideas are unworkable or would still be considered ahead of their time, but isn't it time to dust them off and take a fresh look at those provocative ideas?

I invite your attention to these questions that I have asked as well as the ideas set forth by the Cox Commission, Senior Judge Everett, Professor Lederer and anyone else whose goal is to improve our system of justice.

E: Striving to Serve

I previously mentioned General Moorman's speech in which he discussed change in the military justice system. The questions I asked in my five questions article are posed in the same spirit as General Moorman's questions. They are designed to stimulate thinking about—to borrow an old Army recruiting slogan—making the military justice system all it can be. My questions are not designed to push any agenda—other than to continue a dialogue about some of the fundamental issues facing our military justice system. By discussing these issues, we may discover paths to an even better military.

As I have previously stated, I had the privilege of being a member of the military justice family from 1967 to 1971. I have special affection for this audience because my life in the law began doing what you do. Perhaps I should speak only for myself, but I think my contemporaries would agree—you do it better. If not better lawyers, I think better officers. You have done a better job of blending in with the officer corps—serving shoulder to shoulder with the line officers. Another big change over the last forty years is the number of women who are serving

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[77] Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary —a Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL OF RTS. J. 629 (Winter 1994).

as JAG officers. They have made and continue to make outstanding contributions to the military justice system.

Because our men and women in uniform volunteer to put their lives in harm's way, and give their best to preserve our freedom, we have to work hard to make sure that they always get the best from all of us, a justice system that is second to none.

I'd like to close my remarks on a somewhat personal note. I think for most people there is something that serves as an inspiration or that shapes their approach to their work. I would like to share what that something has been for me. I was proud to be one of 15,000 Veterans who marched behind General William C. Westmoreland in an emotional parade down Constitution Avenue to dedicate the Vietnam Memorial on 13 November 1982. Six years later, while I was serving as National Commander of the American Legion, I was honored to share the podium with President Ronald Reagan when he spent his last Veterans Day as Commander-in-Chief at the memorial. He and First Lady Nancy Reagan walked hand in hand past the black granite walls, and left a note at the base of the memorial. The note said, "Our young friends, yes young friends, for in our hearts you will always be young, full of the love that is youth, love of life, love of joy, love of country. You fought for our country and for its safety and for the freedom of others with strength and courage. We love you for it. We honor you, and we have faith, as he does for all his sacred children, the Lord will bless you and keep you. The Lord will make his face to shine upon you and give peace now and forever more."

The Vietnam Veterans Memorial and those sentiments of President Reagan remind me every day that more than 58,000 of my fellow service members in Vietnam paid the ultimate price for freedom. I realize the magnitude of their sacrifice when I think of the privileges that I have enjoyed and continue to enjoy since returning home from Vietnam over thirty-six years ago: the privilege to pursue the profession for which I was educated; the privilege of not only raising my children, but enjoying their company as adults; the privilege of enjoying the laughter of my grandchildren. My comrades who made the ultimate sacrifice for our country are heroes, and some of them were friends and classmates at the University of North Dakota. I doubt there are very many people in this country that don't have a friend or family member that is remembered on that wall.

When I realize the wonderful opportunities I have had in my life, opportunities that those fallen heroes were deprived of, I feel obliged and privileged to do everything I can to honor their service and sacrifice. I believe we honor them and their sacrifices by providing today's men and women in uniform a justice system that is second to none, and protecting their legacy of a strong, just United States. The constitutional value that I engaged in as a judge on the Court of Appeals for the Armed Forces is justice, and in seeking justice I was guided by one overarching principle, fairness. Fairness includes two important dimensions: a court-martial, like any other trial, must be fair, and it must appear to be fair. The military justice system must meet both of these requirements to win and deserve the public's confidence. That confidence is particularly important in this era of an all-volunteer military. If our armed services are to convince Americans to entrust their precious daughters and sons to the military, the public must be confident that the military justice system will be fair.

Today, our nation is fighting a new war on terror, a type of war that was not envisioned by my generation. The men and women proudly serving in the armed forces are performing with loyalty, professionalism, and patriotism. We must stand behind these fine patriots and work to ensure our military justice system continues to serve them well. Today, I ask that all of us recommit ourselves to protecting and advancing the fairness of our military justice system. We owe that to all of the service members whose lives will be touched by the military justice system, and we owe it to all those young trial counsel and defense counsel who are the front line fighters in the struggle for justice.

My final thought for you is one of optimism. I am most optimistic because I know your talent, your commitment to our profession, to the men and women that serve our country in uniform, and to our nation. Our future is in your strong hearts, heads, and hands. Another source of my optimism for the military justice system is that when Judge Crawford and I retired from the court in September, we left it in very capable hands. Judge Effron, now Chief Judge, Judge Baker and Judge Erdmann are outstanding judges. Also, I am hearing very good things about the two new judges, Scott Stuckey and Margaret Ryan.

I also want to express praise and appreciation for the staff at our court. We have excellent people in chambers as well as those under the supervision of our Clerk of Court, Bill Decicco, and Deputy Clerk of Court, Dave Anderson, both extraordinary lawyers and leaders.

When I wrote President Bush informing him that I would not seek reappointment, I said that when I look into the eyes of our men and women in uniform today, I am rejuvenated and uplifted because I see that America's best days are yet to come. I hope for all of you that your best days are ahead. Thank you for listening to this message from a man who is, and always will be, proud to be an American. God bless our men and women in harm's way, and God bless the United States of America.