THIRTY-NINTH KENNETH J. HODSON LECTURE IN CRIMINAL LAW[1]

MAJOR GENERAL MICHAEL D. CONWAY*

* Major General Mike Conway was born in Grimsby, Lincolnshire. He graduated in law from King's College, London, in 1981 and was called to the Bar of England and Wales in 1982. After training as a pupil barrister and working in London, he was commissioned into the Army Legal Corps as a captain in 1985. He served in Germany, England and, as an exchange officer, at HQ Land Command, Sydney, Australia. After promotion to Lieutenant Colonel in 1994, he served as Commander Legal HQ 3rd UK Division; as Commander Legal HQ Northern Ireland; as a prosecution team leader at the Army Prosecuting Authority (UK); in the Ministry of Defence as Staff Officer Grade 1 (SO1) International Law and as SO1 Legislation; and in the Operational Law Branch as Chief Operational Law and later as Colonel Operational Law. When serving as SO1 International Law he was a member of the UK delegation to the 2001 Geneva Review Conference of the 1980 Convention on Certain Conventional Weapons. From 2003 he served as Colonel Legal ALS2 (the International Law Directorate of the Army Legal Services), responsible for service legal advice in MOD on international and operational law and legislation affecting the armed forces, including the Armed Forces Bill 2006. In December 2003 he was a member of the UK delegation to the 28th International Committee of the Red Cross Conference in Geneva. He served as Colonel Prosecutions (UK) before promotion and appointment as Brigadier Advisory (then Director Legal Advisory) at the Directorate of Army Legal Services in 2006. He attended the Royal College of Defence Studies in 2010 and was promoted in October 2010 to Major General as the Director General Army Legal Services.

Major General Conway served in Bosnia for 6 months during the first UK NATO deployment on Operation RESOLUTE. He was attached to Headquarters 3 Commando Brigade, Royal Marines, during their winter deployment to Norway in 1987, and served in Headquarters Strike Command at the end of the 1991 Gulf Conflict during Operation HAVEN. He was a student in the 124th Basic Course at the U.S. Army's Judge Advocate General's School, Charlottesville. He was admitted to the Bar of New South Wales during his posting to Australia, and as an honorary member of the United States Army Court of Military Review when at Charlottesville.

[1] This is an edited transcript of a lecture delivered on 16 May 2011 by Major General Michael D. Conway, Director General Army Legal Services, British Army, to members of the staff and faculty, distinguished guests, and officers attending the 59th 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.

Thank you very much. "Boon" what was it? Boondoggle; someone may have to explain that to me later **[laughter]**. Good morning, all of you, and I begin by saying it was particularly pleasing to be invited to speak on this occasion, in this country, in this state, and in this school; and I feel particularly privileged to deliver a presentation which is made each year in honor of General Hodson, who served the JAG Corps and his country with such fine distinction.

When I was asked to do it, I thought, "What shall I talk about?" It's always slightly unnerving because you never quite know what the audience is going to be like. My predecessor as Director General was a man called Major General David Howell—some in this audience will know him—and he told me the story of a visit he paid to Australia, where he attended a conference of their Army. The speaker was less than exciting, and he went on and on at length until eventually one of the people in the audience could stand it no longer. He was drinking from a can of beer **[laughter]**. I don't know about you but you may think that drinking from cans of beer in military audiences is a little unusual. He threw the can at the speaker **[laughter]**. Fortunately, it missed, but unfortunately it hit someone sitting in the first row, who collapsed, and while people gathered around trying to assess the damage to his head because that's where it had hit him, the speaker just carried on regardless **[laughter]** until the man on the floor said, "Hit me again. I can still hear him **[laughter]**." Now I'm certain that this distinguished audience will not behave in that way, but if ever it does happen to me, I can only hope that, being English, the beer will be warm **[laughter]**.

I was originally given a little more time, but I decided that perhaps I should cut it down slightly. What should I cut down? Well, unfortunately I'm not going to discuss the Royal Wedding at all **[laughter]** unless there are any questions; and as the only question that anyone will ask is "Were you invited?": the answer is "no," so we've dealt with that **[laughter]**.

I was very generously given a broad latitude to speak, and I considered carefully where to start. I recalled one of the most fundamental principles of English law and law in other legal systems that ignorance of the law excuses no person from talking about it **[laughter]**, and so I decided to talk about service and military law. I ought to say that I'm expressing my own views. I do not represent the British Government and the opinions and particularly the mistakes are all mine. Also, being lawyers and being military lawyers, we are infused with a great deal of tradition. I'm going to break a tradition today. Many of you will be

familiar with the words of Lord Acton, who said famously, "Power corrupts, but absolute power corrupts absolutely," to which you may add "PowerPoint can really mess you up." **[laughter]** And so, most unusually, I'm going to speak without visual aids.

The United Kingdom's military law system has undergone a number of changes in recent years during my service. We don't really look like we did when I joined all those years ago as a fresh-faced captain with a fresh-faced Captain Tellitocci on the Basic Course. In part, those changes have come about as a result of cases in the European Court and in our own courts based on the European Convention on Human Rights, and I think it might be of interest to you to examine how these have affected the way we do our legal business and the effect these have had on our system, to see how we have traveled, and thereby to allow you, perhaps, to make comparisons with your own system in the United States.

Since I am going to talk about changes, I pause here to reflect that the British Army, as well as the Royal Navy and the Royal Air Force, are currently undergoing different kinds of changes. In the case of the Army, 7,000 posts are to be lost with redundancy terms offered to some personnel. The program is a phased one, and it will be complete by about 2015. By then, changes in the situation in Afghanistan may mean that if the Government still faces financial difficulties there may be consideration of further reductions. There are also structural changes being considered within the United Kingdom, and as you well know, it has been proposed to withdraw British troops from Germany.

Now as I mention reductions, that's not very meaningful unless you know what you're dealing with. You have much larger organizations in the United States, and other armies simply don't have the numbers of personnel or the numbers of lawyers that you have here. I was explaining to someone just now that my colleague, General Kumar, who is the Indian Director of Army Legal Services, has a team of about a hundred lawyers; that's less than we have in the British Army. He has an Army of about 1.1 million, and his lawyers do not operate below corps level. Anyone in my organization below the rank of about colonel does not know what a corps is. We don't have one, and we haven't had one for some time.

It may be helpful to give you some statistics to get an idea of scale. At least one of you may hail from Michigan, and there may be people from Wyoming and Oregon. Each of those three states on its own covers

a land area larger than that of the United Kingdom. The population of Michigan is about ten million, and the populations of Oregon and Wyoming are about four million and six hundred thousand respectively. The UK's population is some sixty-two million. The Regular Army is about a hundred thousand, or approximately the gate that would go into a large football stadium for a massive football match or an American football match.

Now size of our force and size of the numbers of lawyers is very important to me as a Director and the Head of Arm in our Army. Despite the current round of cuts affecting the British Army, we, the lawyers, have been given five extra posts in reparational law area. We number about 140 officers, all solicitors and barristers, or attorneys. When, about 15 years ago, our Army was much bigger than it is now and the lawyers were about 50 strong. The reasons for this increase in our size are to do with the increase and the increasing role in operational law, not just in what might be called the traditional area of the laws of armed conflict, or IHL, but operationally crucial work in intelligence law and cyber law.

The second reason that we've had such an increase in our numbers is the reforms to the military criminal justice system, including the setting up of independent elements within that system. And if the theme of this part of my presentation is the expansion of the requirement for legal advisors, I nevertheless recognize that it is not always bound to be the case that lawyers will increase in numbers. Every one of my officers knows that the value placed on them and on ALS as a group and the legal support they give to the Army is constantly under scrutiny. Plans to reduce our numbers and to consider other proposals, such as increased levels of joinery with the other two services, are bound to be looked at very carefully when the Army faces cuts in personnel and the finances are under such pressure.

About eight years ago, the Chief of the General's Staff, General Sir Mike Jackson, who some of you may have heard of, said in a newspaper interview at a time when the Army was bigger than it is now, "The only part of the Army that's growing is the lawyers. Make of it what you will," he said **[laughter]**. Well some of us have been making quite a lot of it. In the current, more straitened times, I'm often reminded of another quotation, one made by the Roman writer Horace a few years before the birth of Christ. "*Nos numerus sumus et fruges consumere nati*," he said. "We are but numbers, born to consume resources."

There's no getting away from resources, but I have reminded very senior officers and politicians of something very important as far as operational law is concerned. In accordance with the additional protocols to the Geneva Conventions, plans must have legal advice; and what that means is that in operations the lawyer is the only person who is legally required to be there. All the rest from the force commander down are, legally speaking, optional extras; nice to have **[laughter]**. Now the politicians I've said this to look rather quizzical when I mention it. The senior officers I've mentioned it to look extremely pained.

On a more serious note, I have been at pains to make it understood that while real fighting and other operational matters are crucial raison d'être for armed forces, even when they are not involved in operations, discipline is what makes an armed force what it is. If my own Army is not involved in Afghanistan, Iraq, or other operational matters, it will, of course, train for the next operational task, but whatever it does there will be charges that require handling by commanding officers and courts-martial, there will be complaints under the service complaint system, there will be inquiries, and all of the other new business of armed forces legislation. Whatever conflicts may come and go, the discipline operation in peacetime and in war is perpetual as long as there are armed forces.

The UK's military criminal system is based on a recognition of the unique environment in which personnel operate. The law reflects UK civilian criminal law as far as it's possible to do so; that is the law of England and Wales. But, of course, military law has to have modifications and there are separate military disciplinary offenses. An advantage of all this is that service personnel wherever they serve can face a legal system they are familiar with when they are accused of wrongdoing. A Soldier alleged to commit a theft or an assault in Kandahar or Basra or Germany or England can be dealt with in the same way for that offense.

The Armed Forces Act 2006 saw the MOD[2] involved in the most significant legislation of the past 50 years for that department. There were three Service Discipline Acts for each of the three services, and the opportunity was taken in the 2006 Armed Forces Act to repeal those three separate Acts and to have one main statute dealing with service discipline and to introduce changes where necessary and sensible to do

[2] Ministry of Defence.

so. The Act was based on the recognition that it was unwieldy to have three separate Acts, particularly as more and more operations are conducted jointly, and it provides for the current system of service justice, including complaints and inquiries as well as courts-martial and summary dealing; and by "summary dealing," I mean the process by which commanding officers deal with charges involving service personnel.

Before I look at its provisions, I turn to deal briefly with the Human Rights Act and some of the changes brought about before 2006. Now since the 1950s, the UK has been a signatory to the European Convention on Human Rights, and this was written in the aftermath of the Second World War to provide a baseline of fundamental rights and freedoms. Many countries inside and outside the European Union have signed the Convention, and its Court, the European Court of Human Rights, has built up a substantial body of case law. Some of the important provisions of the Convention are these: Article 2, which protects the right to life; Article 3 prohibits torture in human and degrading treatment or punishment; Article 8 protects the right to respect for family life, home, and correspondence; Article 10 protects the freedom of expression; and Article 14 prohibits discrimination. The provisions are very basic. They were designed, as I said, for a world in the aftermath of a terrible war to provide some baseline for countries that had been unable to deal with each other in sensible and legal ways.

In the present context, important provisions are Article 5, which protects the right to liberty and security and is concerned with matters such as arrest and imprisonment, and particularly Article 6, which protects the right to a fair trial, and it says this: in a determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent court—I'm so sorry—an independent and impartial tribunal established by law. It also provides for the presumption of innocence and provides minimum rights for those charged; for example, having adequate time to prepare a defense, to examine witnesses, and to have legal assistance at public expense if a person has not sufficient means. While it is correct that Article 5 has had an impact on service procedures, for example, where it provides that a person arrested or detained must be brought promptly before a judge or other officer authorized by law, it is Article 6 and the right to provide a fair trial that has made a major impact on the UK's procedures for service personnel.

It was open to applicants to take cases to the European Court of Human Rights. It didn't happen very often in the case of the United Kingdom. The process was slow and quite expensive and our own courts did not directly apply the provisions of the Convention. The Human Rights Act, which was passed in 1998, contained important provisions designed to give further effect to rights and freedoms guaranteed under the Convention. For example, a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration, or advisory opinion of the European Court of Human Rights insofar as it is relevant to those proceedings.

Primary legislation and secondary legislation, whenever enacted, must be read and given effect to in a way which is compatible with Convention rights. It provides that the Supreme Court and various other senior courts, including the Court-Martial Appeal Court, is permitted to make declarations of incompatibility where the Court is satisfied that a provision of primary legislation and in some circumstances secondary legislation is incompatible with a Convention right. This is not a power to strike legislation down, but there is a power for a Minister of the Crown where he considers there are compelling reasons for amending legislation following a court's declaration to amend the legislation by order. The Act also makes it unlawful for a public authority to act in a way that is incompatible with a Convention right, and the Army, the services are public authorities for these purposes. In essence, therefore, the Human Rights Act 1998, which came into force in 2000, was concerned with the direct application by the UK courts of rights under the Convention, and people could raise Convention points at courts in the United Kingdom, including the Service Courts, and they do.

But even before the Human Rights Act, there were cases that affected our system of justice. I said that not many people went to the European Court, but some did and were successful. In the case of *Findley and the United Kingdom* in 1997, the European Court considered our court-martial system as it existed then. As was normal at the time of the trial of Findley, the trial was convened by a convening officer, and in his case, because it was a more serious level of trial, by a general officer who convened a general court-martial. At the trial, Findley pleaded guilty to three charges of assault, two charges of conduct to the prejudice of good order and military discipline, and two charges of making threats to kill a person; and as was normal after the trial, the sentence and the hearing were confirmed by the confirming officer; and as was usual at

that time, the confirming officer was the same general who had convened the trial.

By the time the case reached the European Court of Human Rights, the European Commission had already ruled that there had been a violation of the fair trial provisions of Article 6 and the UK Government did not contest this. The Court found that since tribunals had to be impartial, they had to be subjectively free of personal prejudice and bias, as well as being impartial from an objective viewpoint. The Court found that the convening officer played a significant role in Findley's trial, deciding which trials were—which charges were brought; deciding on the type of court-martial. He convened the court, and he appointed the members and the prosecuting and defending officers. The court members were subordinate to the convening officer and within his chain of command, and therefore the Court found that in light of all of that Findley's complaints about impartiality and independence could be objectively justified. Also the role of the confirming officer included power to vary sentence, and the Court found this contrary to the basic and well established principle that a power to give a binding decision may not be altered by a nonjudicial authority. I would add that it's also important to consider how this failed to take account of victims' rights. Although the Court's decision was concerned with Findley where there wasn't a victim as such, I recall prosecuting a case where a Soldier received a three-year prison sentence but due to a technical defect within a two-day period the confirming officer had not confirmed the case, and the conviction was therefore quashed and the three-year sentence quashed with it.

The confirming officer was the divisional commander for whom I worked, and the victim in that case was not consulted. The Court described the flaws in our system as fundamental and said they were not remedied by the fact that there was a judge advocate, a civilian judge, or by the oath taken by the members of the court to try the accused according to the evidence and so on. They also said that the existence of review proceedings could not remedy the problems because the accused was entitled to a first instance trial that was in accordance with the Article 6 requirements. In view of the Government's position in not contesting the matter, even before the court ruling, legislation was prepared to change our system radically. The Armed Forces Act 1996 abolished the role of the convening officer and created three authorities: the Higher Authority; the Prosecuting Authority—in fact, there were

three of these; there was the Army, the RAF, and the Naval Prosecuting Authorities—and the Court Administration Officers.

"Higher Authority" was an officer superior to the commanding officer, and he would receive cases from the commanding officer and decide whether to refer them to the prosecutors for a decision on prosecution. The "Prosecuting Authorities" were responsible for deciding on whether a trial should take place and for conducting those prosecutions. Those Prosecuting Authorities were made up of officers of my service and the other two services under the direction of their respective directors; and so Major General Howell, my predecessor in this post, was additionally the Army Prosecuting Authority for a number of years, and in that role he and the other Prosecuting Authorities were responsible not to some military authority but to the Attorney General, and the Attorney General in our system has a general supervisory function in relation…or a superintending function in relation to prosecutions generally in the United Kingdom.

In addition, it was decided that officers who were selected to sit on boards and courts-martial would not come from the command where the accused was from. Judge advocates were to be appointed in every trial – and at one time they were not, and when they were not something almost always went wrong – and the judge advocates' rulings became binding at that stage, and previously they had only issued advice for the president and the members of the board to accept as they wished. Of course, they tended to accept the advice, but the position was made clearer by the 1996 legislation.

Judge advocates acquired a vote on the sentence but not on the finding. Confirmation of conviction and sentence were abolished but review was not. The Act gave the right of appeal against sentence to accused soldiers, whereas formally there had only been a right of appeal against conviction. The three Service Acts included the rights of an accused to elect trial by court-martial. The Royal Naval provisions, as ever I'm bound to say, were slightly different to the provisions that affected the Army and the Air Force.

The Armed Forces Discipline Act in 2000 made further amendments so that, for example, the right to elect trial was required to be given to all accused who were going to be dealt with by their commanding officers. There was also a Summary Appeal Court established to hear appeals from commanding officers dealing with charges summarily. They

operated by way of a rehearing and the court could not impose a more severe sentence than that that could have been imposed by the commanding officer.

In these ways it was intended to provide compliance with Article 6. An accused had the right to elect trial by court-martial and not to be dealt with by his commanding officer. His commanding officer was not independent from him, and therefore if he elected trial, he would have a right to appear in a court-martial which was Article 6 compliant. If he was dealt with by his commanding officer, then he had the right to appeal to the Summary Appeal Court, and again he would be dealt with by an Article 6 compliant tribunal.

In **[inaudible]** and the United Kingdom in 2002, the European Court found that the 1996 Act had gone a long way to remedying the Article 6 issues identified in Findley's case. It did, however, consider there was another problem. There were insufficient safeguards to exclude external pressure on the ordinary officers who made up the court-martial. Later, in another decision, the Court reconsidered these matters. By then it had heard from our own House of Lords, now the Supreme Court. They had given their views and expressed the opinion that in its first case the European Court had not really considered the matter perhaps as closely as the House of Lords had had an opportunity to do so. And the European Court, like the House of Lords, decided that there were sufficient safeguards and that a board of officers taking their oath and protected by offenses, such as attempts to pervert the course of justice, were sufficiently independent for there to be no breach of Article 6.

I mentioned earlier there were civilian judge advocates. In fact, the position was that there were judge advocates, civilian judge advocates, in the Army cases and the Air Force cases but not in the Royal Navy. Uniformed officers of the Royal Navy were uniformed judge advocates and they sat in naval trials, and that lasted until the case of *Greaves* **[phonetic]**, when the European Court said that this practice was a clear breach of Article 6 and it was stopped and all our judge advocates are now civilian.

Now turning to the 2006 Act and the present law, the 2006 Act in relation to discipline introduced a standing court-martial. Formerly, there were ad hoc trials for each case or a group of cases. The most serious cases, and there's a list of them contained in the Act, starting at treason and working down through murder and various war crimes and rape and

manslaughter and very serious offenses, those cases have to be notified by commanding officers or their units to the Service Police. They will then investigate, and when they refer the case they refer it directly to the Service Prosecuting Authority, provided a simple test is met.

The "Service Prosecuting Authority" is a joint body made up of the three former individual Service Prosecuting Authorities. The Director of Service Prosecutions or his delegated officers take all decisions on the trial. The current Director was appointed about three years ago and he is a civilian QC, a senior member of the Bar in England. All personnel who are facing summary dealing have the right to elect trial at the court-martial at the outset and the right to appeal to the Summary Appeal Court, which is very much the situation that prevailed before the 2006 Act. And so the situation is that we have at the moment police with significant levels of independence, which are to be increased to some degree by a new Act, the 2011 Armed Forces Act. We have a Head of Civilian Prosecutions—sorry, a civilian Head of Prosecutions who is the Director of Service Prosecutions, and there will be power in the 2011 Act for him to delegate his powers to people and not just to officers, and therefore he can delegate his power to civilians.

The most serious kinds of cases do not go to commanding officers for them to decide how they should be dealt with. They used to under the old system, but they go now to the police and then to the service prosecutors; and it's impossible under this system for a commanding officer to dismiss a charge of, say, murder, as he could and in at least one case did before this Act came into force. Judge advocates sit in all trials, including at the Summary Appeal Court. The Court-Martial Appeal Court that hears appeals from courts-martial is made up of civilian judges, and it can be seen, therefore, that there has been a massive change in our system since the days of convening officers and confirming officers and the like.

I should mention one or two things. The system works well. We did not start with a blank sheet of paper for the 2006 Act. We took many features of the old system and tried to incorporate those in the new system. For example, there was always a concern about the central role of the commanding officer in the whole process, and to an extent that has been maintained. And so while very serious cases are referred directly to the prosecutors, all of the other cases are referred by the police to the commanding officer and he can initiate cases of his own volition, and that was something that the three services felt strongly about. We could

have started with a blank sheet of paper and considered something like military magistrates, civilian judges sitting without commanding officers dealing with charges at all, but the services were not interested in that. Various papers have been written over the years on that topic in case summary dealing becomes vulnerable as a result of decisions in the European Court.

Some of the commanding officer's powers have reduced in relation to custody and so on because judges now play a much more prominent role. The numbers of courts-martial have been rising, at least in the Army, over the last few years, but last year there was a drop, a significant fall in the number of Army trials. Usually we had about 640 courts-martial; last year there were about 550 Army courts-martial. The Navy and the Air Force have between them about 80 or 90, so you can see the scale that we're dealing with is nothing like the scale that you're used to dealing with in the United States. Now this reduction may have been due to the tempo of operations. It may have been due to a decrease in the number of AWOL cases, absence without leave cases, and other factors rather than the structural effects from the more recent changes in the Act. It's probably too early to say.

I want to mention two other matters, as well. The three services have long used prerogative powers and powers in Queen's Regulations to take administrative action against personnel, so if a person is convicted by civil court, the Army or the Navy or the Air Force as the employer of that person may decide to take not formal disciplinary action (because that's being done by the civil court) but to take action as an employer. The Army Board, the governing body of the Army, can call upon officers to resign, for instance, if a case is sufficiently serious. This is not done in order to punish people but it is done to safeguard or restore the operational effectiveness of the Army. It's not contained in statute. It's not concerned with charges, but the service publications lay down a procedure for this sort of activity, and the Royal Navy and the Royal Air Force have over recent years adopted the practice originally taken by the Army to have minor administrative awards. Minor administrative awards are meant to be a simple, quick way of dealing with minor transgressions that do not merit formal charging and the statutory processes under the legislation. They involve punishments like extra work; interviews, formal and informal; muster parades; and extra duties. A very simple procedure laid down in relevant service publications. Units like this. You could argue it's probably because it avoids the administrative burden of charges and trials and people electing trial and so on, but they're really

designed for swiftness and simplicity and to restore operational effectiveness where there is no need to take formal disciplinary action.

I also mentioned earlier on complaints. Under the Service Discipline Acts and under the 2006 Act it is permitted to make complaints to the Defence Council. Now the Defense Council, which consists of ministers and the senior generals and admirals and their officers, does not actually deal with many cases. They are mainly dealt with by the individual Service Boards, so in the case of the Army, the Army Board, which is the senior generals of the Army. The power to complain remains in the 2006 Act. What the Act did was to establish, first of all, a Service Complaint Commissioner, a civilian, who has the power to refer cases, to monitor, and to make annual reports to the Secretary of State and also establish Service Complaint Panels. The Army Board were receiving quite a number of cases and were simply unable to deal with them in a very speedy way, and therefore it was decided that if they could delegate cases to a panel of brigadiers that would speed up the process and so the power was created. But in certain kinds of case where there is allegation of misconduct or improper behavior or bias, the panel must include an independent member, and the new legislation is likely, likely to increase the involvement of independent members. And so these are further changes that stem from a realization that what had gone on for a number of years needed amendment to make sure that we are complying with European Convention and our own provisions and a realization that greater civilian involvement and independent involvement would help with that.

Article 6 writes, "The right to a fair trial can be engaged in the process of complaints," and the 2011 Act, as I've suggested, will increase civilian involvement to ensure compliance. All of this stems from the fact that we have to operate fairly. In all the cases I've mentioned, there was no finding of a court that there was actual bias. Nobody found a case where a convening officer did something out of malice or a confirming officer did something out of malice or bias. It was the appearance of bias, the appearance of a lack of impartiality that was crucial in all of those cases. In order to ensure compliance with Article 6, you have to be sure that you can objectively justify what you are doing.

The system I've described, the new system, therefore looks rather different to yours. Within the British Army, people are very familiar with it, and while the pressure to change may have come from our ACHR obligations, when we were looking at the work on the 2006 Act—and I

did some of the work on that Act—nobody was seriously suggesting that here was a golden opportunity to revert to the age of the convening officer and the confirming officer and the powers that used to exist. The tenacity of the services to hold on to some redealing, the powers of the commanding officer, will be tested in the future, and not least because the phase of some redealing where the Soldier or the Sailor or the Airman appears in front of his commanding officer is of itself not compliant with Article 6 because the commanding officer lacks the independent—independence that the Article requires. The system is saved, however, because as a whole he can elect trial before he's dealt with and can appeal from some redealing and so that in those two ways there is access to a first instance, Article 6 compliant tribunal.

There are plenty of solicitors who will take these points at our courts-martial. Only last month the High Court decided in a case involving judicial review where the High Court oversees the proceedings of lower tribunals. In a very lengthy judgment, it decided on a case brought by one of our Army padres who was very unhappy with the way the Army Board dealt with his particular complaint. The High Court found that the—that he failed in his application for judicial review of the case, and it dealt with the case in some detail, but it proves the point that there will always be people who will challenge the system.

As I speak, there are hundreds of cases being brought against the Ministry of Defence arising out of incidents in Iraq, and I'm certain there will be many more rising out of incidents in Afghanistan: personal injury claims, claims that people should have been tried, applications for judicial review of the behavior of the police and of the prosecutors in not trying people and not investigating cases, and also major public inquiries. One of those which is about to come to an end is the inquiry into the death of Mr. Baha Mousa. Mousa died in Iraq having been held in our custody, in our jail for a period of some 36 hours. One soldier was convicted of a war crime as a result of the treatment of Mr. Mousa, although he was not convicted of causing his death. A number of others were acquitted of various charges in relation to that incident, and because the judge found that there had been a wall of silence that prevented the court-martial from getting into the incident really closely, at least partly because of that a public inquiry was ordered. Many of us have given evidence at that public inquiry, and it will report next month its findings. The Army has very carefully considered how it should react to any findings. It has been shown that our procedures now are as tight and professional as they can be, and to an extent I mentioned at the start the

five posts which we have been given in Army Legal Services. Those posts arise because of the pressure from that inquiry and other inquiries which are just about to begin to be seen to do the right thing.

I mentioned Horace earlier on. I want to finish with a quote by Horace. He said, "*Vis consili expers mole ruit sua*." "Force without wisdom falls of its own weight." Now as I draw to a close and in honor of General Hodson, I salute all of you and those you work with, who like my officers give legal counsel, wise counsel to help to shape the wisdom that prevents our use of military force from falling of its own weight.

Thank you very much.