THE TWENTY-EIGHTH ANNUAL KENNETH J. HODSON LECTURE:[1]

JUDICIAL DECISION MAKING

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I would like to address the rather broad topic of judicial decision-making. More specifically, I will describe how I, as one individual appellate judge, approach deciding a legal issue that is before the Court of Appeals for the Armed Forces, and how that may help you as judges and counsel. Additionally, I will also make a few comments on *United States v. King*[3] and on the Fiftieth Anniversary celebration of the Uniform Code of Military Justice (UCMJ).

While I do not think that it would be appropriate for me to talk about the judicial philosophies of my colleagues, I do hope that I can lay out my own views in providing a conceptual approach to judicial decision-making. Judicial decision-making and opinion writing is in part a question of collegiality. Chief Justice Rehnquist has said that he enjoyed writing his book on impeachment because he did not have four other individuals telling him how to do it. That says a lot, because what we seek to do in writing opinions is gather a majority for the opinion.

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1. This article is an edited transcript of a lecture delivered on 19 May 2000 by Chief Judge Susan J. Crawford to members of the staff and faculty, distinguished guests, and officers attending the 48th Graduate Course at The Judge Advocate General's School, 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 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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3. No. 00-8007/NA, 2000 CAAF LEXIS 472 (C.A.A.F. May 8, 2000).

The primary purpose of our decision-making is to interpret the law so that it is predictable to members of the bench and bar. A judge should not use the opportunity merely to pursue his or her own private aims or views. This requires an accurate appreciation of the requirements of the military community as well as the application of good common sense.

When you ascend to the bench, you are not required to discard the knowledge you have gained over the years. You may have been counsel for the defense or for the government, a trial judge, a staff judge advocate (SJA), or held other positions. Your experience is important. As Justice Holmes once declared, "The life of the law has not been logic: it has been experience."[4]

In the final analysis, our role is to enforce the Constitution, statutes, executive orders, service directives, and common law while ensuring truth-finding, as elusive as that goal may be. This means protecting the rights of defendants, protecting the rights of victims, and ensuring that our military can enforce our national interests throughout the world.

I believe that it is vital to our judicial decision-making for us to have a conceptual approach that provides us with a method of analyzing and deciding legal issues. We begin with the premise that the purpose of a criminal trial is truth-finding. That is, we seek to find the truth within a framework of certain rules. These include constitutional, manual, ethical, regulatory, and common law rules.

Sometimes it may appear that some of these rules, such as defense counsel's ethical obligation zealously to represent his client, may conflict with the goal of truth-finding. But, I submit to you that this ethical obligation is a part of our truth-finding quest in an adversarial criminal justice system. The same can be said for constitutional and *Manual for Courts-Martial* provisions that protect individual rights and limit law enforcement activities.

How and when to apply these rules are not only part of the life-blood of the military justice system, but also the lodestar for appellate issues. How trial and appellate courts decide these issues can have reverberations throughout the system. The hallmark of good judicial decisions then is consistency, rationality, and coherence.

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4. OLIVER W. HOLMES, THE COMMON LAW 1 (1881).

These characteristics—consistency, rationality, and coherence—are of course important in order to insure stability and predictability for those with responsibilities in the military justice system. As an appellate judge, trial or defense counsel, or even a commander or his SJA, you know how important stability and predictability can be as you analyze the issues and strategies before you in a particular case.

I believe that we achieve stability and predictability if we have a conceptual foundation from which to make decisions. It is a starting point with a rather straightforward building block approach that has different levels.

There is an old saying that your starting point will, on many occasions, determine what road you will take and ultimately, your final destination. For me, the starting point for our conceptual foundation is what I have frequently referred to as the "hierarchy of sources of rights." That is, the sources of rights that service members enjoy.

I have emphasized the hierarchy in my opinions because of its importance throughout the judicial system, whether at a court-martial, the Supreme Court, or any other appellate court. At the top of the hierarchy is the United States Constitution, followed by federal statutes, including the Uniform Code of Military Justice. Next come executive orders, including the Military Rules of Evidence (MRE) and Rules for Courts-Martial (R.C.M.), followed by Department of Defense (DOD) and service directives, and, finally, common law, that is, case law.

Each source of a right falling below the Constitution must satisfy the higher source and remain consistent with that source. Note, however, that a lower source of rights—such as a service directive or a *Manual* provision—may grant greater rights than required by the Constitution or another higher source. If we apply the hierarchy, an objective, rational approach will resonate throughout the legal community and with the public. When our questions are not answered by looking at the hierarchy, then we will look at the values and interests meant to be protected by the Constitution, rules, and other sources of rights.

The hierarchy also highlights the type of government we have and shows trust, rather than distrust, in democracy and the separation of powers. The task of rule-making is left to Congress and of enforcement of those rules to the President. The role of the judiciary is to interpret those rules within certain formal and institutional norms. Justice Holmes once

said that the law is something more than some "transcendental body of law outside of any particular state."[5] The law is a prediction of what trial judges and appellate judges will do in any given case.[6]

There are basic ingredients that a judge uses to ensure that what happens is predictive, be it the *Bench Book*, the *Manual*, the UCMJ, the Constitution, court decisions—or all of these tied together. In a sense all of you as judges seek to predict what will happen—both at the trial level as to the findings when you are not the fact-finder—and what will happen on appeal. The question is how do you increase your probabilities of being correct. Without the hierarchy, our decisions might be based upon intuition or individual moral values. Predictability and stability would be cast to the wind. This would amount to a distrust of democracy and ultimately lead to a distrust of what courts do.

I do not mean to imply that the law does not have morality attached to it. It does. But, generally, the decisions as to morals, values, and other factors are made in the first instance by Congress in the Legislative Branch and not by the courts. If the law depended upon individual moral values, it would be hard to justify and difficult to respect. Stated differently, to act solely on an individual sense of right or wrong is to confuse the bench and bar as we all struggle to interpret the law.

We build on the past. This is an endless process, one that hopefully will better society. But in so doing, we must drive in our own lane and be mindful of the separation of powers. A court can—of course—always try to articulate a rationale for over-stepping the separation of powers doctrine. But I believe the recent *Clinton v. Goldsmith*[7] case teaches us that a court does so at its peril.

Courts should stick to the law and not make decisions based on politics or value choices. Neither should decisions be based upon personal views or preferences as to a particular case, set of facts, defendant, or other subjective criteria. Requiring courts to set forth sound reasons for their decisions acts as a control on the authority of courts and obedience to legal doctrine. This is vital to the functioning and constraining of the judiciary's exercise of power. It is law—and not personal politics or preferences—

5. Black and White Taxi and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). *See* HOLMES, *supra* note 4.

6. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457-61 (1897).

7. 526 U.S. 529 (1999).

that should control. Where there are gaps in the law, courts may suggest that Congress or the President change a particular rule to conform with what is considered to be a just result.

Let us examine the hierarchy of sources of rights more closely. In *United States v. Guess*,[8] the court discussed the hierarchy as cited in previously decided *United States v. Taylor*[9] and *United States v. Lopez*.[10] Part of that discussion is as follows:

> The military, like the Federal and state systems, has hierarchical sources of rights. These sources are the Constitution of the United States; Federal Statutes, including the Uniform Code of Military Justice; Executive Orders containing the Military Rules of Evidence; Department of Defense Directives; service directives; and Federal common law. Unlike the Federal Rules of Evidence, Section III of the Military Rules of Evidence "codifies" the constitutional rules. Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual; for example, [MRE] 305(e) as to notice to counsel, or Article 31, UCMJ, requiring warnings to suspects not in custody.

We have employed the hierarchy in *United States v. Davis*,[11] *United States v. Marrie*,[12] *United States v. Johnston*,[13] *United States v. Kossman*,[14] *United States v. Lopez*,[15] and in the dictum in *United States v. Williams*.[16]

Johnston focused on the purpose of a criminal trial and the admissibility of so-called "negative" urinalysis results. These negative results were not true negatives, but rather tests in which the subject's nanogram level fell below the high DOD cutoff for a positive determination.

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8. 48 M.J. 69, 70 (1998).
9. 41 M.J. 168 (C.M.A. 1994).
10. 35 M.J. 35, 39 (C.M.A. 1992).
11. 47 M.J. 484 (1998).
12. 43 M.J. 35 (1995).
13. 41 M.J. 13 (C.M.A. 1994).
14. 38 M.J. 258 (C.M.A. 1993).
15. 35 M.J. 35 (C.M.A. 1992).
16. 43 M.J. 348 (1995).

United States v. Arguello[17] had been read not only to preclude the government's introduction in the first instance of these negative results, but also to prohibit the government from rebutting a defense presentation that the defendant tested negative. The *Arguello* majority elevated the DOD and implementing Air Force regulations to the level of a constitutional exclusionary rule. This result essentially turned the hierarchy upside down and ignored the fact that the admission of scientific evidence is governed by the Military Rules of Evidence. The absurdity of this result was best illustrated by Chief Judge Cox during oral argument. He held up a pencil and said "this is a pencil." Then he added that if we broke it in two, it would still be a pencil.

Similarly, just because test results falling below the high DOD cutoff level are called "negative" does not mean that the accused did not use drugs. Therefore, if the defense in its case-in-chief introduces evidence of a negative urinalysis to imply that there was no trace of drugs in the defendant's urine, the government ought to be able to rebut by explaining what the negative results really mean. Otherwise, the truth-finding purpose of a trial would be undermined. As the government recognized in its Answer to Final Brief:

> If an accused can testify that he has never used drugs, although there is the presence of them in his 'negative' urinalysis, and the Government is not permitted to rebut that testimony, the accused can lie without any fear of being confronted by the truth.

What could more clearly undercut the truth-finding purpose of a criminal trial! Additionally, the *Johnston* majority asserted that "contrary to *Arguello*, a violation of the DOD Directive should not lead to the exclusion of evidence."[18] If the DOD wants that result, then it should say so.

In *United States v. Kossman*,[19] we implicitly followed the hierarchy in rejecting the *United States v. Burton*,[20] ninety-day speedy trial rule. You may recall that *Burton* was decided at a time when there was no R.C.M. speedy trial rule so the court had established a ninety-day rule.

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17. 29 M.J. 198 (C.M.A. 1989).
18. *Johnston*, 41 M.J. at 16.
19. 38 M.J. 258 (C.M.A. 1993).
20. 44 C.M.R. 166 (C.M.A. 1971).

Thereafter, the President adopted the R.C.M 707[21] speedy trial rule. We implicitly applied the conceptual hierarchy analysis in holding that the R.C.M rule—as a higher source on the hierarchy—trumped the court-made ninety-day rule in *Burton*.

Likewise, *United States v. Lopez* expressly followed the hierarchy in upholding the *Manual* good-faith exception to the exclusionary rule.[22] Over an eight-year period the court had had the good faith exception before it,[23] but had refused to adopt it. *Lopez* was the first case to apply the *United States v. Leon*[24] rationale to the military.

I should point out that not all of the judges of our Court have expressly embraced the hierarchy of sources of rights, even though it seems to be hornbook law discussed by Professors Wayne R. LaFave, Jerold H. Israel,[25] and Professor Edward J. Imwinkelried.[26] I suggest that that might be one reason why our court has issued so many separate opinions over the past few terms.

While the high number of separate opinions may be understandable, they are a bit unsettling at times. I think—philosophically—the court is searching for a foundation for its opinions in the Constitution, the UCMJ, the *Manual*, and other federal case law. In my personal view, if we could reach a better consensus on the hierarchy and sources of rights, as well as on the interaction of these various sources, we could go a long way in cutting down on separate opinions and potential confusion in the field.

Adopting the hierarchy as a conceptual framework has another benefit as well. By relying on the hierarchy of sources of rights for guidance in decision-making, our role as jurists is maintained. We do not step across the separation of powers boundary by acting as legislators in making rules. Thus by following the hierarchy, we can properly assume our role as jurists pursuant to Article 67 of the UCMJ.

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21. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998).

22. 35 M.J. at 39-40 (C.M.A. 1992).

23. United States v. Queen, 26 M.J. 136 (C.M.A. 1988).

24. 468 U.S. 897 (1984).

25. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEEDURE § 1.5 at 29 (2d ed. 1992).

26. EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 2 at 2 (3d ed. 1998).

Before I go further, I believe it is important to address the scope of the constitutional protections of a service member—specifically, whether the Bill of Rights applies to the military. In *Lopez*, which was one of the first opinions I authored, I suggested in a footnote that that issue was still open.[27] I noted that although the Supreme Court has assumed that most of the Bill of Rights applies, it has never expressly so held.[28] The resistance to that footnote in some quarters was swift and forceful. From the reaction within our Court one would have thought that the military justice system was going to collapse. Yet, despite burning up the Westlaw lines for several days, no one could find a Supreme Court holding to the contrary.

In separate opinions, one of my colleagues disassociated himself from any implication that the Bill of Rights does not apply to the military.[29] Another colleague said that my discussion of the application of the Bill of Rights was "tardy" since our court had already so held in *Jacoby* in 1960.[30]

Actually, *United States v. Jacoby*[31] is interesting because our court held that the Bill of Rights applies, "except those which are expressly or by necessary implication inapplicable." That is hardly an unqualified application of the Bill of Rights. We know, for example, that the right to indictment by grand jury is expressly inapplicable to members of the armed forces.[32] Likewise, the oath requirement of the Fourth Amendment does not apply. "No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or Naval Forces . . . ."[33]

Furthermore, it took our court nine years—from 1951 to 1960—to reach the result in *Jacoby.* Nevertheless, my raising of the issue in *Lopez* stirred some controversy at the Court. In a later opinion by one of my colleagues, I was accused of trying to "drive a wedge" between service members and their constitutional rights.[34] That gave rise to some good-natured kidding by some of my other colleagues and my staff who dubbed me with the nickname, "wedge-driver."

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27. United States v. Lopez, 35 M.J. at 41 n.2.
28. *Id*.
29. *Id*. at 48 (Sullivan, C.J., concurring in result).
30. *Id*. at 49 (Wiss, J., concurring in result).
31. 29 C.M.R. 243 (C.M.A. 1960).
32. U.S. CONST. amend. VI.
33. *Id*. amend. IV.
34. United States v. Taylor, 41 M.J. 168, 174 (C.M.A. 1994) (Sullivan, C.J., dissenting).

With this background, you can imagine my great feeling of vindication about a year later when the Supreme Court handed down its *United States v. Davis*[35] opinion. In writing for a majority of the Court, Justice O'Connor noted in a footnote: "We have never had occasion to consider whether the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military . . . ."[36]

Of course, Justice O'Connor went on to say that it was not necessary to resolve the question of the applicability of the Fifth Amendment to the military because of MRE 304.[37] She also acknowledged that our court had already held the Fifth Amendment to be applicable.[38] Thus, because the parties did not contest the point, the Supreme Court could proceed on the assumption that its precedents apply to courts-martial. As you may have noticed, I have not missed an opportunity to cite Justice O'Connor's footnote.[39] I also have not heard of anyone calling her a "wedge driver."

Shortly after the release of *Davis*, I was equally delighted to read the *William and Mary Bill of Rights Journal* article authored by Fred Lederer and Fred Borch entitled, "Does the Fourth Amendment Apply to the Armed Forces?"[40] The authors conclude: "It is incredible that in the late twentieth century, it is not absolutely known whether the Bill of Rights, and in particular the Fourth Amendment, apply to those sworn to defend it."[41]

In *Loving v. United States*,[42] the Court on at least four occasions in three separate opinions assumed that the Bill of Rights apply. I think from your perspective it is certainly the safe approach—and indeed the desirable approach—to assume that most of the protections of the Bill of Rights do apply to members of the armed forces. The 1960 *Jacoby* case from our court is still good law and I certainly perceive no movement to change that approach.

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35. 512 U.S. 452 (1994).
36. *Id*. at 457 n.*.
37. *Id*.
38. *Id*.
39. United States v. Taylor, 41 M.J. 168, 170 n.2 (C.M.A. 1994).
40. Fredric I. Lederer & Frederic L. Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 3 WILLIAM & MARY BILL OF RIGHTS J. 219 (Summer 1994).
41. *Id*. at 232.
42. 517 U.S. 748 (1996).

Additionally, because the Rules for Court-Martial and the Military Rules of Evidence have codified most of the constitutional protections—and in many instances have gone beyond what is constitutionally required—it is hard to imagine a scenario that would be ripe for Supreme Court review. In most instances the Rules provide a more than adequate as well as an independent basis for resolving an issue. Therefore, Supreme Court review of the applicability of the Bill of Rights appears to be unlikely.

The discussion regarding the Bill of Rights is important, however, in determining how to conduct a conceptual analysis of the issues raised. The analysis focuses first on *whether* to apply a constitutional protection, and—if so—*how* to interpret and apply the right.

There are various approaches to determine how to apply constitutional rights:

- an historical approach,
- a contemporary approach,
- a definitional approach,
- an expectation of privacy approach, or
- a balancing test approach.

I mention the historical approach because recently, in *Wilson v. Arkansas*,[43] a Fourth Amendment "knock-and-announce" case, the Supreme Court looked at the original intent of the framers. Also in *Veronia School District v. Acton*,[44] a school search case, the Court made reference to the practice at the time of the adoption of the Constitution. The point is that one must consider these various approaches in determining whether a right applies and, if so, how to apply that right.

Let us now turn to some specific issues and cases and apply the conceptual analysis I have been discussing. The first area is eyewitness identification. In *United States v. Webb*[45] our court noted that there are four potential attacks defense counsel can make on eyewitness identification. These are:

(1) a Fourth Amendment attack,
(2) a Fifth Amendment self-incrimination attack,

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43. 514 U.S. 927 (1995).
44. 515 U.S. 646 (1995).
45. 38 M.J. 62 (C.M.A. 1993).

(3) a Fifth Amendment due-process attack, and
(4) a Sixth Amendment right to counsel attack.[46]

A conceptual analysis of this issue means analyzing the case to see if any of those attacks would be viable.

More recently, in *United States v. Rhodes*[47]—another eyewitness identification case—the Fourth Amendment attack was noticeably absent. Whenever your client is asked to go down to the criminal investigation office, unless it is a voluntary consensual appearance, there is a Fourth Amendment interest. Too often prosecutors and defense counsel forget that.

When there is an allegation of a violation of the Fourth Amendment—or for that matter of the Fifth Amendment self-incrimination or Due Process Clause—both sides must determine whether there are alternative grounds for admissibility or an independent source for the evidence.

While I have addressed the four potential attacks on eyewitness identification, bear in mind that even if one or more of these attacks is successful, if the government can show an independent source for an in court identification, that identification will still be admissible.[48] How the independent source doctrine works and how it might be applied by counsel and judges brings us to the broader issue of the Fourth Amendment.

In the Fourth Amendment area, trial judges preach to counsel "don't just give me one basis for admissibility." It reminds me of *United States v. Copening*,[49] in which the judge granted a motion to suppress. Later, in the hallway, the prosecutor approached the judge and said that he had other alternative theories of admissibility that he wished to present. The judge replied, "Well, you should have presented those at the initial hearing."

That is good advice for trial and appellate judges as well. Trial judges should not assume that they know what the appellate courts are going to do in a particular case. I think that was adequately demonstrated recently by our *United States v. Lincoln*[50] and *United States v. Kaliski*[51] opinions.

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46. *Id*. at 67.
47. 42 M.J. 287 (1995).
48. *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967).
49. 34 M.J. 28 (C.M.A. 1992).
50. 42 M.J. 279 (1995).
51. 37 M.J. 105 (C.M.A. 1993).

In *Kaliski*, all five judges agreed that standing on a patio and looking through a gap in the blinds at the accused and his paramour constitutes a violation of the right to privacy. However, I parted company with the majority and asserted that an issue remained as to whether there was an independent source for determining the identity of the paramour who was a witness against the accused.[52] That doctrine had not been explored at trial. Yet the record revealed that there was very extensive evidence gained two months prior to the illegal presence on the patio that the police knew the identity of the defendant's paramour.[53] Unfortunately, rather than authorizing a rehearing on this issue, the court dismissed the charges.[54]

Considering alternative grounds of admissibility is equally important for the bench and bar in the Fifth Amendment and Article 31 areas. In *United States v. Kosek*[55] alternative grounds for admission of evidence seized from the accused were not addressed. There the accused was suspected of involvement with illegal drugs. The agents also had obtained information that the accused had a 44-magnum colt pistol. They finally located him at a bar and asked him to step outside. When they started doing a pat down, the accused reached into his jacket pocket. Both agents—apparently concerned about the accused's pistol—immediately grabbed him and one agent asked, "Where is it?" The accused then produced a straw and a small round container with drug residue.

At trial the judge suppressed the production of the container and straw. The government, of course, appealed the suppression under Article 62. However, neither the question of whether there was a custodial interrogation nor whether the statement was part of a public safety exception was addressed. Nor did the judge determine whether the production of the container and straw were testimonial acts.

Kosek demonstrates that if the case had been analyzed in terms of the conceptual issues involved—that is, (1) was there a substantive right involved?, (2) was there a requirement for a rights warning pursuant to *Miranda* and Article 31?, and (3) was there an exception to the rights warning requirement?—it may well have saved two appellate courts from

52. *Id*. at 110 (Crawford, J., dissenting).
53. *Id*.
54. *Id*. at 110.
55. 41 M.J. 60 (C.M.A. 1994).

examining the case. As part of analyzing an issue in the exclusionary rule area, we should also consider the partial severance doctrine.

In *United States v. Camanga*,[56] the court adopted the partial severance doctrine. Under this doctrine, evidence used to establish probable cause, obtain a search warrant, or make a stop is partially tainted. The courts can then excise the tainted evidence and reevaluate the remaining information to determine if the appropriate probable cause standard was still met for the seizure or search.

I cite these examples because I believe a greater part of our work lies in trying to convince others of the hierarchy and the power of its conceptual analysis. That analysis has its roots in the wisdom and foresight of our Founding Fathers, and the values and objectives for which they strove.

As I mentioned earlier, the failure to follow the separation of powers doctrine has led to a recent grant of certiorari and reversal by the Supreme Court. This case was *Clinton v. Goldsmith*.[57] Had we been true to our charter, this case would not have reached the Supreme Court.

The challenge now for the bench and bar in the wake of *Goldsmith* is to determine just how broadly that case should be applied. Recently, our Court had occasion to consider that issue when it was before us on an extraordinary writ in *United States v. King*.[58] You may be aware that the hearing on the writ was heard on May 4 and later televised by C-Span.

The Navy-Marine Corps Court of Criminal Appeals held that under *Goldsmith* they did not have jurisdiction[59] to grant relief to a defendant charged with espionage who claimed that the government was interfering with his attorney-client relationship by requiring that a security officer be present during all communications. We implicitly reversed the Court of Criminal Appeals by staying the Article 32 hearing and on May 8 ordering the following:

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56. 38 M.J. 249 (C.M.A. 1993).

57. 526 U.S. 529 (1999).

58. No. 00-8007/NA, 2000 CAAF LEXIS 472 (C.A.A.F. May 8, 2000).

59. King v. Mobley, No. 200000329 (N.M. Ct. Crim. App. March 13, 2000) ("While this Court may issues writs . . . our authority to issue them must be 'in aid of' our statutory jurisdiction. . . . We have concluded that to act at this point in this case would not be 'in aid of 'our jurisdiction.").

ORDERED:

That the stay of proceedings issued by this Court be continued, to be lifted upon a showing that:

(1) Defense counsel have been granted clearances and the ISO monitoring requirements have been rescinded; or

(2) The Government demonstrates that defense counsel have not promptly provided all information necessary to initiate processing for the required security clearances; or

(3) Lifting the stay is warranted for other good cause shown.[60]

Implicit in our order was that it was "necessary" or "appropriate" to grant relief. The defendant had exhausted his remedies and the exercise of jurisdiction was consistent with judicial economy as in *Murray v. Haldeman*.[61]

I believe that the issue of the application of *Goldsmith* will be with us for some time as we re-examine the question of jurisdiction. While the majority of our court may have stretched a bit beyond our jurisdiction in *Goldsmith*, we are now seeing a reaction in some quarters that seems to be going too far the other way.

I submit to you once again that by analyzing and applying the rules regarding jurisdiction—rather than relying on personal preference—we will assure that all of us will drive in our proper lanes and maintain our role as jurists. Let me say once again that the basic premise or purpose of a criminal trial is truth-finding. We of course seek the truth within a framework of rights and rules that apply to those rights. Those rules have their foundation in the Constitution, in statutes, in the rules of procedure, evidence, and ethics, in regulations and directives, and in federal common law.

This, then, is the theme that we can all use as we apply a conceptual analysis to whatever issue may be before us. Recognizing the hierarchy of sources of rights—and focusing on the relationship among those sources—gives us the basic foundation from which to develop a conceptual analysis of a legal issue. And if we apply a common foundation both as practitioners and judges, then hopefully our approaches and decisions will be internally consistent, rational, and coherent. That, of course, ensures greater stability and predictability for all who work within or are subject to the mil-

60. No. 00-8007/NA, 2000 CAAF LEXIS 472 (C.A.A.F. May 8, 2000).

61. 16 M.J. 74 (C.M.A. 1983).

itary justice system. And in the final analysis, that ensures fairness and justice for all members of the armed forces.

In closing, I would be remiss if I did not mention that we are in the midst of the Fiftieth Anniversary celebration of the UCMJ. C-Span televised our ceremony celebrating the Fiftieth Anniversary of President Truman signing into law the Uniform Code of Military Justice. We were especially honored to have as our special guest, the Honorable Strom Thurman, the distinguished Senior Senator from the great state of South Carolina and President Pro Tempore of the Senate. We also were honored to read a message from the President that was signed on May 5th and commemorated the Fiftieth Anniversary of the Uniform Code of Military Justice. We all know that on 5 May 1950, President Truman signed Public Law Number 81-506, which is the Uniform Code of Military Justice. With that signing, the modern military justice system was born.

Military justice in the United States—while firmly rooted in our Constitution—can trace its lineage to the adoption of the Articles of War by the Continental Congress in 1775. It can be said that the first national courts for our soon-to-be created new nation were those courts-martial conducted by the Continental Army. The Articles of War—and the courts-martial for which they provided—withstood six wars and other tests of time for nearly two centuries. However, our experiences during World War II demonstrated the need to modernize and revamp our system of military justice. That is what the Uniform Code of Military Justice did and why we celebrate its passage.

The 1950 Uniform Code did many important things. Most notably, it ensured the protection of individual rights to the men and women who serve in our armed forces. These include:

- the right to counsel;
- the privilege against self-incrimination;
- the right to a speedy trial;
- the right to compulsory process;
- and protection against double jeopardy.

Of equal importance, the UCMJ also created an independent civilian court—then called the Court of Military Appeals—to oversee the military justice system.

For the past fifty years the UCMJ has served as the backbone of our military justice system. Like the Constitution in which it is grounded, the UCMJ has also been a living document. Many of you have not only seen change but have been instrumental in bringing about many of the changes that have improved the UCMJ during the past fifty years. I personally applaud each of your efforts. For it is our working together as a team that ensures that our men and women in uniform do not forfeit their guarantees as American citizens when they enter the armed forces of our nation.

The UCMJ stands as a hallmark of fairness—a constant reminder that we are a nation of laws, not of men. It is also a shining example of democracy in action to the rest of our world. I thank all of you who have helped make the UCMJ the bedrock on which every service member can rely to say that ours is not only a system of discipline—but also a system that is fairly disciplined.

I am sure most of you saw the issue of *Time* magazine last July that named "The American GI" as the most influential person of the twentieth century. In his introduction to that article, General Colin Powell said:

> The GI carried the value system of the American people. GIs were the surest guarantee of America's commitment. For more than 200 years they answered the call to fight the nation's battles. They never went forth as mercenaries on the road to conquest. They went forth as reluctant warriors, as citizen soldiers. They were as gentle in victory as they were vicious in battle.[62]
>
> In this century hundreds of thousands of GIs died to bring to the beginning of the Twenty-first Century the victory of democracy as the ascendant political system on the face of the earth. The GIs were willing to travel far away and give their lives, if necessary, to secure the rights and freedoms of others. Only a nation such as ours, based on a firm moral foundation, could make such a request of its citizens. And the GI wanted nothing more than to get the job done and then return home safely.[63]

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62. Colin Powell, *The American G.I.*, TIME, June 14, 1999, at 72.
63. *Id*. at 73.

I assure you that as we begin the twenty-first century our court will guarantee that the American GI will continue to have a system of justice that not only is fair, but also one they believe to be fair.