THE EIGHTEENTH GEORGE S. PRUGH LECTURE IN MILITARY LEGAL HISTORY[*]

THE UNIFORM CODE OF MILITARY JUSTICE AT 75: REFLECTIONS ON THE TRANSFORMATION OF THE AMERICAN MILITARY JUSTICE SYSTEM

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I. Introduction

Good morning. It's good to be with you here this morning for two reasons. First, I knew General Prugh. When I came on active duty in January of 1972, he had been The Judge Advocate General (TJAG) for about a year, so I had an opportunity, having been assigned to the Washington, D.C., area at the Government Appellate Division, to interact with him a number of times.

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I was appointed to the Captain's Advisory Council (a creation of General Prugh), and one of the first projects we did was a two-day Continuing Legal Education (CLE) program at Fort Meade, Maryland. General Prugh showed up for the first day. He was anxious to make the junior members of the law firm feel very welcome, and I admired him for that. The CLE went fine, and shortly thereafter, I got word from his office that he wanted me to come and address the Worldwide Conference here in Charlottesville.[3] At that point I had been on active duty for about two years and was probably twenty-seven or twenty-eight years old. To say the least, it was a little bit intimidating. But afterwards, I got word from his office that he was very pleased with how things had gone, and I figured an attaboy from TJAG was about as good as it gets.

Now, the second reason is that Charlottesville is like home for me and my family. We spent five years here. I did my LL.M., and it was while I was here that I developed a love of academia. I started writing on my own time, books and articles, and I was fortunate enough to have support and mentors at the University of Virginia (UVA) and here at The Judge Advocate General's Legal Center and School (TJAGLCS) who promoted that.

Now, let's dive right in. I've identified several of what I consider to be significant benchmarks in the realm of military justice in the last seventy-five years. I've been part of it for fifty-three of those years. While I was a senior at Texas A&M, in the spring semester of 1968, we did a mock trial using the old 1950 Uniform Code of Military Justice (UCMJ), where there were no military judges. Cadets served as the court members. The fact pattern was an assault case, and I was assistant defense counsel. So, I've even had a little bit of experience with the old system.

After we discuss those significant benchmarks, I want to talk about players in the transformations that have taken place. And then lastly, I want to identify five trends I believe are present in the transformation of military justice.

I know that many in the audience will be leaving the Graduate Degree Program to go practice military justice in the field. To that end, I'm going to share some historical thoughts, some personal experiences, and, hopefully, give you an idea of what the future might hold.

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[3] This talk was later published in *The Army Lawyer*. Captain David Schlueter, *Captain's Advisory Council Notes*, ARMY LAW., Nov. 1974, at 21. The December 1974 issue of *The Army Lawyer* contained the after-action report on the conference. *See Captain's Advisory Council Notes,* ARMY LAW., Dec. 1974, at 19.

II. Significant Benchmarks

A. Adoption of the UCMJ

The first benchmark was the adoption of the UCMJ. In the 1950s, there were what were called the red books. That's what we used when I came on active duty. That early iteration of the UCMJ created a court of three civilian judges to review court-martial convictions, known as the Court of Military Appeals. Those early years were really tough because the Pentagon had been opposed to the establishment of a civilian court. I think it's vital for our current military justice practitioners to at least think about and understand the significance of what it meant for those three civilian judges to face serving as an obstacle to what the military wanted to do.

Chief Judge Robert Quinn wrote about it.[4] He wrote that he got assurances from the Pentagon hierarchy that they would do everything they could to support him,[5] and he made a comment in one of his early law

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[4] Robert Quinn, *The Role of Criticism in the Development of Law*, 35 MIL. L. REV. 47 (1967). The author, Robert E. Quinn, the Chief Judge of the Court of Military Appeals, notes that the UCMJ evolved out of massive complaints to the military justice system during World War II, and that as a judge on the civilian court reviewing military justice issues, he and his colleagues recognized that they would need help from the legal profession, both inside and outside the system, to provide alternatives of law available to the court.

[5] *Id.* at 49. He wrote:

> How few or how many in the armed services remained adamantly opposed to the Code and unalterably attached to the pre-code law and practice could not, of course, be determined. However, when the judges of the Court took the oath of office at the Pentagon in June 1950, George C. Marshall, then Secretary of Defense, assured me that he would do all he could to get the military establishment to cooperate, fully and imaginatively, with the Court in the administration of the Uniform Code. The Secretary's assurance of cooperation provided a solid foundation for the hope that all ranks in the armed services would eventually accept the letter and spirit of the Uniform Code, and express its disagreements or approbations within the framework thereof. About a year later, at a symposium on military justice at Vanderbilt Law School, I extended an invitation to the American Bar to scrutinize the work of the Court and to weigh its decisions "against the dichotomatic concept of military justice and tell the public, the services and us, the

review articles in the '50s about the "old timers", grumbling about the new system.[6] Those early years were important for the development of what we consider to be military justice.

B. The 1968 Military Justice Act

The 1968 Military Justice Act was the first major amendment to the UCMJ,[7] and a significant portion of that change was the addition of

> judges [of the U.S. Court of Military Appeals], whether we are performing properly our task of enunciating principles worthy of existence in this relatively new field of law."

Id.

[6] *Id.* at 48. Chief Judge Quinn observed that in the early years of the UCMJ, the "old timers" demonstrated resistance to change, but that military justice had improved. The author notes that criticism can be both helpful or vituperative and offers a number of examples where commentators had suggested helpful resolutions of military justice issues. He observes that with the possible exception of theses in the Service schools, military commentators had not been particularly helpful in offering solutions or new approaches**.**

> As late as May 1952, the Special Committee on Military Justice of the prestigious Association of the Bar of the City of New York reported that it was "abundantly clear that the Armed Forces have not essentially changed their attitude toward military justice, although this attitude resulted in the abuses" which led to the adoption of the Uniform Code. By that time, however, there had been distinct indications that the resistance to change prevailed largely among the "old-timers," who seemed to be too deeply embedded in the worn grooves of ancient, and to them irreproachable, practices; as a group, these *traditionalists* found it difficult to accommodate themselves to the more legally-oriented, and less command-dominated, provisions of the Uniform Code. Even a captious critic, however, could justifiably conclude, on the basis of records of trial in major cases, that "the [S]ervices . . . [had] made excellent progress in improving the caliber of courts-martial trials and in carrying out the spirit of the Code."

Id. (emphasis added).

[7] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968). This Act became law on October 24, 1968. It was the first major amendment to the Uniform Code of Military Justice Act of June 24, 1948, ch. 625, tit. II, § 203, 62 Stat. 604, 628 (1948). *See also* Fred Borch, *A Courts-Martial Revolution: How the Military Justice Act of 1968 Turned Military Criminal Law Upside Down*, ARMY LAW. Sept–Oct. 2018, at 7; Cath. Univ. L. Rev., *The*

military judges.[8] When I came on active duty in January of 1972, military judges had only been around for a few years.

C. The Military Rules of Evidence (1980)

Then, in 1980, the Military Rules of Evidence (MRE) were adopted. Now, this was not an actual amendment to the UCMJ, but I want to note that the adoption of the MRE was a significant benchmark. It didn't result in any amendments to the UCMJ itself, but it was really carrying out the President's prerogative under Article 36 to establish rules of procedure and evidence that, to the extent practicable, were consistent with Federal criminal practice.

D. The 1983 Military Justice Act

Next was the 1983 Military Justice Act.[9] Two things were really important in that act. First, it did away with or simplified what judge advocates had come to fear as the pre-trial advice and the post-trial review. I was a prosecutor at Fort Belvoir, Virginia, and the one thing we feared was getting a case kicked back from the appellate court because there was something wrong with the post-trial review by the staff judge advocate. These were not simple documents. They went on for pages. They listed all the results of trial, all the awards. And finally, Congress decided that it was getting too complex, so they cut it out.

Military Justice Act of 1968: Congress Takes Half-Steps Against Unlawful Command Influence, 18 CATH. U. L. REV. 429 (1969); Francis T. McCoy, *Due Process for Servicemen—The Military Justice Act of 1968*, 11 WM. & MARY L. REV. 66 (1969); Jacob Hagopian, *The Uniform Code of Military Justice in Transition*, ARMY LAW., July 2000, at 1.

[8] *See* UCMJ art. 26 (1968) ("A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State . . . ."); *see also* Colonel Timothy P. Hayes Jr. & Lieutenant Colonel Christopher E. Martin, *Independent but Invested*, ARMY LAW., no. 3, 2019, at 76 (discussing creation of position of military judge in 1968 Military Justice Act).

[9] The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, became law on December 6, 1983, and took effect on August 1, 1984. Iowa Senator Roger W. Jepsen sponsored the bill (S. 974) that became this major amendment to the UCMJ. Act of June 24, 1948, ch. 625, tit. II, § 203, 62 Stat. 604, 628.

One of the other big changes in the 1983 act that I want to touch on briefly was establishing direct review to the U.S. Supreme Court. Before this act, any military case making it to the Court was done by collateral review.

E. The 1984 Manual for Courts-Martial

The 1984 Manual for Courts-Martial (MCM) was a *major* rewrite. That's where we developed the Rules of Court Martial (RCM). Before that, it had all been paragraphs. And with each iteration of the MCM, it became lengthier and more complex.

F. Expansion of the Court of Military Appeals (1989)

In 1989, there was an expansion of the Court of Military Appeals from three members to five members. I was the reporter for the advisory committee. The question was, should the court be an Article III court? The answer was no for a variety of reasons, although there was pressure to do just that. But one of the things that the committee recommended was expanding the membership to five members, because if there were just three, and one judge retired or left the court, then you had tie-votes, and it was slowing down the process.

F. Sexual Assault Amendments to the UCMJ (2013, 2014, 2015)

The next significant benchmarks were the sexual assault amendments, starting in 2013. It started in San Antonio. There was a lot of attention at Lackland Air Force Base, where trainers were taking advantage of trainees.

G. The 2016 Military Justice Act

After that came the 2016 Military Justice Act. Chief Judge Andrew Effron and his committee, the Military Justice Review Group, compiled a 1,300-page report.[10] I recommend to anyone who's doing research on the articles of the UCMJ to take a look at that document. It's available online. The 2016 act was a very significant development, and there were a lot of changes made to the UCMJ because of it.[11]

H. *Ortiz v. United States*

Next was the Supreme Court's decision in *Ortiz*, which was decided in 2018.[12] The Court was reviewing a question about whether a judge on one of the Service courts of criminal appeals could also serve as a judge on the U.S. Court of Military Commissions. But a professor here at the University of Virginia wrote an amicus brief, challenging the jurisdiction of the Supreme Court to even review decisions from the Court of Appeals for the Armed Forces.[13] The Supreme Court spent a considerable amount of time addressing that jurisdiction issue, and in the process, I think they blessed the military justice system. In effect, they recognized that virtually all the protections that are available to civilian accused are also available to the military accused. In my view, it was a turning point, at least in Supreme Court jurisprudence, of how the Court viewed what we do.

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[10] MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS (2015), https://ogc.osd.mil/Portals/99/report_part1.pdf [https://perma.cc/QNR6-V3G8].

[11] *See generally* David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016,* 49 ST. MARY'S L.J. 1 (2017).

[12] Ortiz v. United States*,* 585 U.S. 427 (2018).

[13] Brief for Professor Aditya Bamzai as Amicus Curiae in Support of Neither Party, Ortiz v. United States*,* 585 U.S. 427 (2018) (No. 16-1423).

I. The 2022 National Defense Authorization Act

The 2022 National Defense Authorization Act made major changes to the practice of Military Justice.[14] We're going to talk about this as a trend from command-centric to lawyer-centric practice. The creation of the Office of Special Trial Counsel was certainly a significant event.

J. Summary

What, in summary, can you read from these benchmarks? While it's true that these are only selected benchmarks, I think it's clear to anyone who's looked at this history, the attitudes, and the people involved, that these changes are going to continue to occur.

III. Players in the Transformation of the Military Justice System

Who are the players in this transformation? Let's identify and discuss the organizations and individuals who were responsible for, or played key roles in, the transformation of the military justice system.

A. Congress and the President

First, Congress is a player; it has the primary authority for determining how we run the military justice system. They're the bosses. The President gets involved in the sense that the President, from time to time, may make public statements, but most of the President's actions are carried out by the folks in the Pentagon—the Secretary of Defense,[15] or the Joint Service Committee—which drafts suggested changes for comment and sends legislative packages over to Congress for enactment.

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[14] David A. Schlueter & Lisa Schenck, *Transforming Military Justice: The 2022 and 2023 National Defenses Authorization Acts,* 231 MIL. L. REV. 1 (2023).

[15] For example, the Independent Review Commission on Sexual Assault in the Military was created by Secretary of Defense Lloyd Austin to conduct a ninety-day review of sexual assaults in the military. THE INDEP. REV. COMM. ON SEXUAL ASSAULT IN THE MIL., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY (Feb. 2021) [hereinafter HARD TRUTHS]. It issued report on four areas: accountability; prevention; climate and culture; and victim care and support. *See id.*

B. The Public

What about the public? The public has become very involved from time to time. For example, after World War II, Service members came back from fighting and expressed concern about the way they had been treated by the pre-UCMJ military justice system. While I don't know that the public is a direct player, certainly public pressure on Congress and the President can have an impact.

C. Lawyers, Commissions, and Advisory Committees

Lawyers, commissions, and advisory committees have all been players as well. Going back to 1960, what I think was probably the first comprehensive review of the UCMJ was published: the Powell Report.[16] One of their main concerns was that they wanted the system to remain efficient. And one of that committee's recommendations was to modify non-judicial punishment so that it was easier for commanders to carry out their disciplinary punishment.[17]

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[16] THE COMM. ON THE UNIF. CODE OF MIL. JUST. GOOD ORD. AND DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY 11–12 (18 Jan. 1960) [hereinafter THE POWELL REPORT]. In October 1959, Secretary of the Army Wilber M. Brucker appointed a committee of senior officers to study the administration of military justice in the Army. The committee, which was chaired by Lieutenant General Herbert B. Powell, was tasked to: study the effectiveness of the UCMJ on discipline within the Army; "analyze any inequities or injustices that accrue to the Government or to individuals from the application of the Code and judicial decisions stemming therefrom;" and consider legislative or other improvements to the Code. *Id.* at 1. The committee's report, which is known as the Powell Report, was approved by Secretary Brucker in October 1960. Many of the recommendations of this report regarding the authority of military judges and The Judge Advocate General in courts-martial proceedings and reviews were subsequently adopted by the Army.

[17] The following is a list of various advisory committees that have addressed the military justice system: The Morgan Committee, which was responsible for drafting the original UCMJ, Felix Larkin, *Professor Edmund M. Morgan and the Drafting of the Uniform Code,* MIL. L. REV. (noting difficulties of reconciling Army and Navy Procedures into one code); The 1960 Powell Report, THE POWELL REPORT, *supra* note 16 (noting that the role of military justice is justice; discipline follows); Committee for the Evaluation of the Effectiveness of the Administration of Military Justice, COMM. FOR THE EVALUATION OF THE EFFECTIVENESS OF THE ADMIN. OF MIL. JUST., REPORT TO GENERAL WILLIAM C.

In 1989, there were two reports on the Court of Military Appeals, one from the then-Department of Defense and one from the Committee formed by the Court of Military Appeals. They were competing reports, in terms of what changes, if any, should be made.

D. Legal Commentators

What about legal commentators? While attending the Twenty-Fifth Advanced Class—the precursor to the Graduate Course—I opted to write a thesis. My wife was pregnant with our son, but I had a burning desire to write because I was unhappy with some of the decisions from the Court of Military Appeals about recruiter misconduct and its impact on court-martial jurisdiction. So, I spent a lot of time here at the library, writing

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WESTMORELAND CHIEF OF STAFF OF THE U.S. ARMY (1 June 1971); The 1983 Commission (also called the Hemingway Commission), THE MIL. JUST. ACT OF 1983 ADVISORY COMM., ADVISORY COMMISSION REPORT (14 Dec. 1984); The U.S. Court of Military Appeals Committee, U.S. CT. OF MIL. APPEALS COMM., UNITED STATES COURT OF MILITARY APPEALS COMMITTEE REPORT (27 Jan. 1989); Department of Defense Study Group on the U.S. Court of Military Appeals, DEP'T OF DEF. STUDY GRP. ON THE U.S. CT. OF MIL. APPEALS, REPORT OF DEPARTMENT OF DEFENSE STUDY GROUP ON THE UNITED STATES COURT OF MILITARY APPEALS (25 July 1989); Committee on the 50th Anniversary of the UCMJ (also known as the Cox Commission, this report was sponsored by the National Institute of Military Justice), COMM. ON THE 50TH ANNIVERSARY OF THE UNIF. CODE OF MIL. JUST., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (May 2001); Judicial Proceedings Panel (JPP), which was created in section 576 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112–239, sec. 576, 126 Stat. 1632, 1637 (Jan. 2, 2013); 2013-2015 Military Justice Review Group, MIL. JUST. REV. GRP., *supra* note 10 (multi-service group of dedicated lawyers under the leadership of Judge Andrew Effron, who completes a comprehensive review of the UCMJ); Military Justice Review Panel, which was created in the 2016 Military Justice Act, Article 146, Military Justice Act of 2016, Pub. L. No. 114-328, sec. 5001, 130 Stat. 2894, 2894 (2016); The Sexual Assault Accountability and Investigation Task Force Report (SAAITF), SEXUAL ASSAULT ACCOUNTABILITY AND INVESTIGATION TASK FORCE, SEXUAL ASSAULT ACCOUNTABILITY AND INVESTIGATION TASK FORCE REPORT (30 Apr. 2019); The Independent Review Commission on Sexual Assault in the Military, HARD TRUTHS, *supra* note 15; Defense Advisory Committee for the Prevention of Sexual Misconduct (DAC-PSM), National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116–92, sec. 550B, 133 Stat. 1998, 1381 (2019) (required to report annually to Secretary of Defense as well as House and Senate Armed Services Committees; holds public meetings); The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113–291, sec. 546, 128 Stat. 3292, 3374 (2014).

commentary, and when I finished it up, I showed it to my thesis advisor. He looked at me and said, "So what?" I said, "What do you mean, so what? It's on the enlistment contract, and I think what the court has done is wrong." He said, "You need to come up with a recommendation."

So I went back to the library, and I worked up a recommendation that the UCMJ be amended to adopt the Constructive Enlistment Doctrine. I didn't think much of it beyond being pleased with my grade. But two years later, someone from Congress came down to visit me in my office here at TJAGLCS and wanted to talk to me about my proposal. I found out later that the Pentagon used my recommendation to draft an amendment to the UCMJ. If you look at Article 2(c), you can see the direct result of legal commentators.

I always encourage people to write. And when I talk to my students, I always give them the same advice: come up with a recommendation. You never know who will read it or the impact you will have.

E. The Courts

The courts have certainly had a role to play. The Supreme Court, for a number of years—and those of us who are on active duty in the '70s and '80s remember Justice Douglas's comment that "courts-martial are singularly inept at deciding nice subtleties of constitutional law"[18]—was dismissive of military justice. Those of us on active duty knew that we were deciding issues of constitutional law, but we couldn't seem to convince the Supreme Court that we knew what we were doing. They gave the military a lot of deference, but they generally would agree with whatever Congress decided to do.

I want to comment briefly about the role of the U.S. Court of Appeals for the Armed Forces. In the 1970s, we had the so-called Fletcher Court. Judge Albert Fletcher, from Kansas, became chief judge. The court at that time was an activist court, to say the least. Every week, there was a new decision from the court making changes. These were troubling times for

[18] O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

folks on active duty because they felt like they were getting push back from the court. And to some extent, that was true.[19]

F. Civilian Interest Groups and Blogs

What about the role of civilian interest groups and blogs? Those organizations, at one time or another, all had something to say about military justice.[20] Starting with the American Bar Association. I served on several committees in the American Bar, where we had the opportunity to provide some input on proposed legislation. You also have publications like *CAAFLog* and *Lawfare*. Now, I wouldn't say that they have a direct impact on amendments, but they certainly can sway public opinion, and they can sway members in Congress.

IV. Trends in the Transformation of Military Justice

Next, I would like to address five trends that I think you can see from where we've gone in the last seventy-five years.

A. Trend: Moving from Discipline to Justice

The first one was moving from discipline to justice. So let me briefly explain the chart below. When I was doing my LL.M., I was writing a paper for a professor called A.E. Dick Howard, and he was a well-known national expert on the Burger Court. In my research, I ran across a law review article by Professor Herbert Packard, who came up with a competing model's theory. He wrote that every criminal justice system has

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[19] For those of us teaching here in the Criminal Law Department, we were continually changing our teaching outlines to reflect the court's latest changes to the military justice system.

[20] The following organizations have at one point or another been involved in proposed changes to the military justice system: The American Bar Association, the Federal Bar Association, NYC Bar Association, National Institute of Military Justice, Judge Advocates Association, the American Legion, *CAAFlog*, and *Lawfare*.

two competing models.[21] One is the crime control/discipline model,[22] which is on the left, against the due process/justice model[23] on the right. Years later, I developed this chart to apply these principles to military justice:

Crime Control-Discipline	Due Process--Justice
Efficient and Speedy	Efficiency Not Critical
Factual Guilt	Legal Guilt
Nonadversarial Procedures	Adversarial Procedures
Trust Government to Screen	Limits on Government Screening
Primacy of Public Interest	Primacy of the Individual

Starting at the very top, if you're in a crime control system, if that's your primary motivation, you want to be efficient and speedy. If you're on the due process side, then speed is not nearly as important. If you go to the bottom, the primacy of the public interest is on the bottom left, if you're a crime control model. On the right, it's the primacy of the individual. And what this chart encouraged me to do was to think more clearly about what the real purpose and function of military justice is. And I concluded that it always has been good order and discipline. That's the purpose.

About a week ago, I Googled the question, "What is the primary purpose of a criminal justice system?" The answer was crime control and protection of the citizenry. It wasn't due process for the accused. Now, that's an equal part of it, certainly. What I concluded is that while the primary *purpose* is good order and discipline—although that's not reflected in the MCM preamble—the primary *reason* for military justice is promote justice.[24] And so, I think we may have moved from a discipline

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[21] Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) [hereinafter *Two Models*]; *see also* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 209–13 (1983) (providing a critique and reconstruction of Professor Packer's models); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968). Professor Packer's law review article, and later book, were an attempt to provide some perspective on the Supreme Court decisions under Chief Justice Warren. Professor Arenella's work "reconstructed" Packer's two models in addressing the decisions of the Court under Chief Justice Burger.

[22] *Two Models*, *supra* note 22, at 9-13.

[23] *Id.* at 13-23.

[24] *See* David A. Schlueter, *The Military Justice Conundrum*, 215 MIL. L. REV. 1 (2013).

model to a due process model. I'll leave that to you whether that's good or bad.

B. Trend: Command-Centric to Lawyer-Centric

The next trend is command-centric to lawyer-centric, and I think it's one of those trends that slowly but surely crept in. And that's not necessarily a bad thing. When I was on active duty, I had no shame in saying, "I'm a lawyer, and I represent a client who's the commander. I give my best advice to the commander, and then I let the commander decide whether or not to go forward with charges or not." Sometimes it was an ongoing debate. Sometimes I recommended the charge not go forward, because I said, "Sir or ma'am, you're going to lose this case. The facts aren't there, the witnesses aren't there. I think you ought to consider administrative discharge." And because we had a legal center, I could take the commander from my office, as chief of justice, down the hallway to the admin board section, and they would take care of it. We could then get the problem taken care of without actually going to trial.

I don't know that you can identify a specific time in the last seventy-five years where we moved from command-centric to lawyer-centric, but there's no doubt in my mind that the role of the commander has been substantially diminished. And to some extent, now, most of the decisions are not in the commanders' hands, but in the lawyers' hands.

C. Trend: The Troublesome Hangnail—Unlawful Command Influence.

Next is the trend involving unlawful command influence (UCI). I don't live and breathe military justice. It tends to come in spurts. I read the advanced sheets. I try to keep it up. I keep supplements for the various books. But then I read a UCI case, I just have this adverse reaction in my body, and I'm asking: why? Doesn't anybody ever learn the lesson? Why did the sergeant major decide to talk to potential defense witnesses? It seems like we just can't get rid of that hang nail. No matter how hard you try, no matter how many opinions you write as an appellate court, it just seems to linger.

And here's the problem. You talk to the critics and they say, "See, UCI was one of the primary reasons we have the UCMJ." People came back

from World War II and talked about how they'd been railroaded, or they were unjustly convicted by a court-martial, and the public and members of Congress were upset.

Clearly UCI was one of the motivating factors for the UCMJ. So why do we still have it? Why can't we get rid of it? The Court of Military Appeals said that UCI "is the mortal enemy of military justice."[25] I couldn't agree more. Here's my idea. I think we need more reversals. I think we need to say if there's even a hint of UCI that you're going to reverse the case. That won't solve the problem, but it will make me feel better. The problem is that people are not going to learn the lesson.

Then, somebody says, "Well, I'll tell you what, then let's take it to a civilian system," or "Let's go with only lawyers." You think lawyers are immune to UCI? If you're a captain and the majors in charge say, "You know, I think we really need to take this to trial," and you respond, "Sir, I don't think we should. I don't think the evidence is there, and we just can't go forward with this case." And then somebody higher up says, "No, take it to trial." I don't have a solution. I'm sorry. But UCI is a trend.

D. Trend: The Growing Complexity of the Military Criminal Justice System.

Another trend I want to address is complexity. About four or five years ago, I ran across a law review article in which someone had used software to establish the complexity of the U.S. Code.[26] I was really fascinated by the concept in this article. I also knew the tax code was complicated. Anybody think the tax code is complicated? How many of you think hearsay is complicated? Another commentator has said that the subject of complexity is a complex subject.[27] You're not going to get rid of it.[28]

So, here's my point. Is there a trend for military justice to become more complex? I've certainly seen it. When the new MCM amendments came out in December of 2024, I groaned. Thirty-seven pages of changes

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[25] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).
[26] William Li et al., *Law Is Code: A Software Engineering Approach to Analyzing the United States Code,* 10 J. BUS. & TECH. L. 297 (2015).
[27] R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715, 718 (2000).
[28] *Id.*

to the manual. If I were only interested in this in passing, I would say, "Thirty-seven pages, okay, I don't care." But my job is to take those changes and then put them into some written form that would help active-duty judge advocates practice law better. And for some of these amendments, I scratched my head. There's no drafter's analysis accompanying it, and I'm looking to see what has actually been changed. In some cases, we're glad to have changes. But in some of those changes, there are potential traps for the unwary, due to increased complexity.

Another example: For seventeen years, I was the reporter for the Federal Rules of Criminal Procedure Advisory Committee. I wrote the agendas, and I drafted proposed amendments to the Federal Rules of Criminal Procedure. That committee was composed of distinguished judges, defense counsel, and representatives from the Department of Justice, who were all appointed by the Chief Justice. Sometime in 1988, there was a proposal to change a rule. There was discussion in a smoke-filled room, and someone said, "I move to table it." "Second." "It's tabled." I dutifully took my yellow pad, and I wrote down, "Tabled."

Five months later, getting ready to go to our next meeting, I sent the chair of the committee a copy of the agenda, which included the tabled item. He told me, "Dave, you don't understand. When we table an item, it's dead." The reason proposals were tabled is that the committee didn't see a real need for the change. Someone thought a rule should be changed, and the conversation would go something like this: "Has anybody seen this in their courtroom?" "Nope." These were judges with twenty to thirty years' experience. They were careful about adding any changes to the Federal Rules that would result in further complexity.

Complexity can arise in several ways. One is ambiguity, another is in sheer number, and the other is the inner relationship between the rules. For me, character evidence is more complex than hearsay. I asked my students the other day, which is more complex: hearsay or character evidence? Very few of them said character evidence. During the break, one of the students came up and said, "Professor, you don't understand. We have outlined character evidence. We have figured it out. You showed us how to 'keep it simple, stupid,' but we're still learning hearsay."

Another example is in sentencing. This is one area where I disagree with my colleagues and friends who, over the years, promoted sentencing parameters. I thought it was a mistake to adopt them. I knew enough from the Federal Sentencing Guidelines that this was creating traps for the unwary. You have to be really careful with your math. You need to get out

your calculator. You need to compare your chart. You need somebody to look over your work and make sure that you haven't made a mistake in where you draw that line. I'm not suggesting that it's bad. I'm just recognizing that it creates more complexity.

The other area of complexity is the creation of the Office of Special Trial Counsel. In a recent report by the Military Justice Review Panel, they commented that the new system, which was intended to create transparency, had actually not done that, but that it had created problems of communication and efficiency.[29] While I have proposed reforms, I've also been opposed to reforms, and one of them I was opposed to was a special track, a bifurcated system of military justice.

Let me explain a little bit why. How many of you have ever heard of the service-connection requirement? It's the requirement that before you can court-martial the Service member, you have to show subject matter jurisdiction. You have to show that what they did was service-connected. That's the 1969 decision by the U.S. Supreme Court.[30]

I was on active duty when we struggled with dealing with service connection. I know because I had a case reversed at Fort Belvoir. We tried a young man at a general court-martial for using marijuana at a bar, just thirty feet off post. He was convicted, and the Army Court of Military Review, as it was known at that time, reversed and said there was an insufficient service connection. There was no showing that he bought the marijuana from another Service member. There was no showing that it impacted his duties. In effect, that was an early version of what we have now.

In other words, if you didn't have service connections, the commander's hands were tied. It meant you had to go to the local prosecutor, and you think the local prosecutor's going to want to try a simple marijuana case? No. Which means that you had Service members who were violating the law, but they were getting out of jail free. We had that system that was somewhat bifurcated, and I anticipated that we might run into the same problem with the Office of Special Trial Counsel. Now I wish them the best. I understand one of the problems that you're going to run into is that everything slows down because you have all that extra communication, and then commanders are frustrated that they're not

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[29] THE MIL. JUST. REV. PANEL, COMPREHENSIVE REVIEW AND ASSESSMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 1-2 (2024).
[30] O'Callahan v. Parker, 395 U.S. 258 (1969).

getting efficient justice. This is what I mean when I talk about it being a complex subject.

E. Trend: The Search for Respect

The final topic I want to talk about is the search for respect. How many of you believe that you're practicing law? For years, my colleagues and I were asked to speak at the Homer Ferguson Conference at Georgetown Law School in Washington, D.C., every May on the Military Rules of Evidence. During one such conference, one of those colleagues and I were in a classroom waiting to go on stage, going over our notes, and I asked him, "Are we practicing law?" He asked me what I meant, and I clarified that there were a lot of people out there in the civilian community who don't see us as practicing law. They see military justice as something foreign or as the stuff they did back in the Civil War. He hit me back with, "I don't know whether you're practicing law or not, but I am." And I agree. I would say, yes, we are practicing law. It's a different type of law, but that doesn't mean it's a lesser quality of law.

When I came on active duty in the '70s and worked at the Government Appellate Division at the NASA building in Falls Church, Virginia, we didn't wear uniforms. I had to go to the PX and buy some more polyester sport coats and white shoes. Why? Because there was a concern about a military presence.

There has always been a search for respect. I saw it when I went into academia. In the 1980's someone had written a law review article about the process of law schools hiring faculty. The author noted that if a retired judge advocate is looking for a teaching job, they're looking for a place to hang up their spurs and just take the retirement pay and not do much.[31] And I thought that was insulting. I went into academia with the full idea of writing and teaching. I thank God that he has given me those two gifts. I wasn't going to retire in place.

In 1991, when I addressed the audience in this room for the Twentieth Hodson Lecture, I talked about the military justice system's search for respect. At that time, they were changing the court's names, from the Army Court of Military Review to the Army Court of Criminal Appeals, and changing the name from the Court of Military Appeals to the U.S. Court

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[31] Jon W. Bruce & Michael I. Swygert, *The Law Faculty Hiring Process*, 18 HOUS. L. REV. 215, 236 (1981).

of Appeals for the Armed Forces.[32] Why? Why change the name? To civilianize it, to make it look more legitimate. I am privileged to have worked in the military justice system. And yes, working in military justice is practicing law.

V. Conclusion

When I was a young captain, Major General Lawrence Williams, who was the Assistant Judge Advocate General to General Prugh, had a saying. He said, "Just cut the wood put in front of you." He was referring to people who were constantly looking down the road from a career standpoint of hitching their wagon to a rising star. But I always took it as just keep your head down and do the job that's been assigned to you and do the best job you possibly can. And when you finish your stack of wood, say, "Sir, may I have another? Ma'am, may I have another?" And then you saw that wood put in front of you. That's how I approached it.

I've been blessed. I've had some great opportunities. But my suggestion to you is whatever comes your way, whether it's military justice, cyber security, or any other type of work, just cut the wood put in front of you because you are the future. And perhaps in twenty-five years, one of you will be standing here talking about the good ole' days, and what it was like to practice law back in 2025.

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[32] David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect,* 133 MIL L. REV. 1 (1991).