Military Justice Supervision—TJAG or COMA[1]?

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Editor's Note: The following address was written in 1977, when the author was The Judge Advocate General of the Navy. It was delivered to the American Bar Association, General Practice Section: Committee on Military Law, in Seattle, Washington, on 11 February 1977. The Army Lawyer is pleased to present this article in its continuing series commemorating the Fiftieth Anniversary of the Uniform Code of Military Justice.

During the last twenty-five years, the responsibility for the supervision of the military's criminal justice system has been shared by the Judge Advocates General and the Court of Military Appeals.[2] Under this statutory system, the Judge Advocates General have had the responsibility for the general supervision of the administration of military justice, and the Court of Military Appeals has exercised it s supervisory role through its review responsibilities.

By ruling on questions of law in specific court-martial cases, the court's rationale for decisions has led to alterations—and in most case, improvements—in the operation of the military justice system. Recent actions by the Court of Military Appeals, however, such as the decisions in *McPhail*[3] and *Ledbetter*,[4] have put in question the court's view of the traditional roles of the Judge Advocates General and the court in their respective supervisory responsibilities. I have taken—and now take—serious exception, and express my view, both personally and professionally, that the *statutory* division of responsibility is mandated by the Uniform Code of Military Justice (UCMJ or Code), and by the circumstances of the military society as well, and I believe that that division of responsibility *must* remain a part of the military's criminal code, at least until changed by legislative action.

Military criminal justice is a unique and distinct system. Civilian systems only impose sanctions for violating "thou shalt not" rules, but the military system must be able to impose sanctions, too, for violation of "thou shalt" rules. Military criminal justice is designed to serve the need for discipline in a structured, ordered military force. Its distinctiveness is as basic as the Constitution. Article I, Section 8, empowers Congress "to make Rules for the Government and Regulation of the land and naval forces," and Article II, Section 2, makes the President commander in chief of the Armed Forces. [I]t is pursuant to these provisions that we have the Uniform Code of Military Justice. [T]his Code is just like every other code: it places the results of past legal development, which are founded upon the needs and experiences of the society which the Code serves, in a better and more authoritative form.

Pronouncements by the Court of Military Appeals on the scope of *its* powers are not new. In such cases as *United States v. Frischholz*,[5] decided in 1966, *Gale v. United States*,[6] decided in 1967, and *United States v. Bevilacqua*,[7] decided in 1968, the court commented upon its supervisory functions under the Uniform Code of Military Justice. Each of these cases discussed the court's supervisory responsibilities in the context of the court's statutory jurisdiction.

It is my view that the Code, in Article 67, limits the power of the Court of Military Appeals to act [in] only specified types of court-martial cases. My belief is based on the simple reality that the UCMJ is not a constitution; it is a statute. It is true, as the court has remarked, that the All Writs Act does provide a source of power to the court to grant ancillary relief, but the extent of that relief is—or at least should be—tied to the statutory description of the court's jurisdiction. The decision of the court on [27 August 1977], in *McPhail v. United States*,[8] however, purportedly expands the scope of its supervisory powers to include areas beyond the language of Article 67's jurisdictional grants.

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1. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) renamed the United States Court of Military Appeals (COMA) the United States Court of Appeals for the Armed Forces (CAAF).

2. *See id.*

3. McPhail v. United States, 1 M.J. 457 (C.M.A. 1976).

4. United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

5. United States v. Frischholz, 36 C.M.R. 306 (C.M.A. 1966).

6. Gale v. United States, 37 C.M.R. 304 (C.M.A. 1967).

7. United States v. Bevilacqua, 39 C.M.R. 10 (C.M.A. 1968).

8. *McPhail*, 1 M.J. 457 (C.M.A. 1976).

In papers entitled petition for writ of certiorari or *error coram nobis*, Sergeant McPhail asked the Court of Military Appeals to vacate his conviction by special court-martial on the ground that the court-martial lacked jurisdiction over the offense charged. At Sergeant McPhails's trial, the military judge granted his motion to dismiss the charges for lack of jurisdiction. The convening authority disagreed with the military judge and ordered him to reconsider his ruling. In accordance with the then prevailing law, the military judge reversed his ruling and McPhail was tried, convicted, and sentenced to a punishment which did not qualify for review under the jurisdictional language of Article 67.

Sergeant McPhail, upon completion of the required reviews, sought relief under Article 69. The Judge Advocate General of the Air Force denied relief, despite the pendency before the Court of Military Appeals of *United States v. Ware*,[9] in which the court was later to hold that a military judge is not required to reverse his ruling when a convening authority orders him to reconsider it. In *McPhail*, the Court of Military Appeals assumed jurisdiction *after* the denial of relief under Article 69, and ordered the Judge Advocate General to vacate Sergeant McPhail's conviction. In so doing, the court cited its supervisory powers and rejected the government's contention that the jurisdiction of the court was limited by the language of Article 67. It is significant to note, again, that Sergeant McPhail's sentence did not include a bad conduct discharge or confinement at hard labor of one year—and hence did not reach the lower jurisdiction levels of the Court of Military Appeals.

In spite of a prior decision directly to the contrary, *United States v. Snyder*,[10] the court, in *McPhail*, justified its expanded view of its supervisory power by drawing an analogy to the general supervisory authority exercised by the Supreme Court under the Constitution over the lower federal courts.

It seems clear to me, however, that courts-martial are not the same as the lower federal courts. Courts-martial spring from Article I and Article II of the Constitution as mechanisms for the maintenance of the discipline necessary for the successful performance of the military mission.

The Court of Military Appeals is not a constitutional supreme court and is not an Article III court, and its proper relationship to the military judicial system cannot be deduced from the model of the judicial relations in our constitutional system. All of us agree, I think, that the role of the Court of Military Appeals, or even its very existence, is not *constitutionally* mandated. Hence, the proper relationship between the Court of Military Appeals and the military justice system must be derived from the Code itself. It is the Code—and not the Constitution—which provides that part of the structure of the military society within which the court must function.

Under the numerous statutes which create a separate and distinct military society, including the Uniform Code of Military Justice, the scope of executive authority is considerably broader than that afforded the executive in the civilian environment. In the area of military justice administration, this was necessitated by the critical requirement for a disciplined force, which would be and will be responsive to military demands—which, frequently, call for personal sacrifices of the highest order. Hence, the military commander was assigned important and significant functions in the management of the military justice system, and its supervision was specifically and purposely assigned—in Article 6—to a military official, the Judge Advocate General.

This, of course, would be inconceivable in the framework of relations between Article II courts and the executive in civilian life—but we are not dealing with civilian life. The Chief of Naval Operation has frequently said—and its is true—that sailors and marines are not *civilians* in uniform. They are sailors and marines—with all the rights, responsibilities, and constraints which obtain to that status. Both the Court of Military Appeals and the Supreme Court recognize this and both recognize that the military is a society different and separate—and one which has different and separate needs, and, hence, different and separate requirements.

It seems clear to me, therefore, that, in evaluating its role and its authority, the court must do so in the context of the Code itself, and not by analogy to the far different role of the Supreme Court. [I]t is my view that the court owes this type of evaluation to the society which it is designed to serve.

I sincerely hope that I do not read in the court's opinion in *United States v. Ledbetter*[11] an indication to the contrary. I hope this case does not suggest that, in its efforts to develop its supervisory powers, the court will not consider itself constrained by codal provisions vesting responsibilities in the Judge Advocates General. In the issues dispositive of the case, the court in *Ledbetter* developed a test for the determination of the availability of military witnesses at Article 32 hearings. In another part of the court's opinion, however, it addressed a problem perceived by it as a threat to the independence of the military judges. It is this part of the opinion that raises my deepest concerns.

The military judge who tried Ledbetter alleged in post-trial statements that he had been asked by The Judge Advocate of the Air Force, as well as two of his trial judiciary assistants, to justify the sentences imposed by him on Ledbetter and two other accused. General Vague responded to these allegations in

9. United States v. Ware, 1 M.J. 282 (C.M.A. 1976).

10. United States v. Snyder, 40 C.M.R. 192 (C.M.A. 1969).

11. United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

a sworn statement by acknowledging that he *had* talked to the military judge about the sentences, but that he had told the military judge that an appropriate sentence was a subject matter best left to those who heard the evidence and that he was just trying to determine the facts which led to the sentences so that he could respond intelligently to any queries by the Air Force Chief of Staff.

On the basis of these statements, the court announced, in language which I consider *dicta*, the following:

> In the absence of congressional action to alleviate recurrence of events such as were alleged to have occurred here, we deem it appropriate to bar official inquiries outside the adversary process which question or seek justification for a judge's decision unless such inquiries are made by an independent judicial commission established in strict accordance with the guidelines contained in section 9.1(a) of the ABA Standards, The Function of the Trial Judge . . . [12]

It is my view that this language is the result of the court's [confusing] the Article 26 responsibilities of the Judge Advocates General [to ensure] the independence of the military trial judiciary with Article 37(a)'s prohibition against unauthorized command influence.

Let me assure you that I fully support the principle of the independence of military judges and as Judge Advocate General of the Navy I have not and will not tolerate any interference in their judicial decisions. But as Judge Advocate General I am charged with the specific statutory obligations with respect to military judges, not only as their commanding officer, but also as their chief protector.

The congressional history of Article 26 indicates that its purpose was to "provide for the establishment within each service of an independent judiciary composed of military judges . . . who are assigned directly to the Judge Advocate General . . . and [who] are responsible *only* to him or his designees for direction and fitness ratings." Article 26 charges me to certify military judges and I believe that such responsibility implicitly includes a *de*certification for disciplinary purposes. In this scheme it is clear that Congress did not intend military judges to be islands unto themselves, totally without direction or guidance from the Judge Advocate General within the military society. By equating *any* inquiry by the Judge Advocate General to unauthorized command influence, the court's language in *Ledbetter* would prevent me from obtaining any information from a military judge in the exercise of my supervisory functions over him. In addition, the prohibition would prevent me from defending my judges and ensuring their continued independence under the provisions of Article 26, because it would deny me the information I need for that purpose.

I believe that the failure of the Court of Military Appeals to properly evaluate its supervisory role in the context of the Code led to the *Ledbetter* language.

The court's language would prevent questions concerning a judge's decision by officials outside of the adversary process "unless such inquiries are made by an independent judicial commission established in *strict accordance* with the guidelines contained in section 9.1(a) of the ABA Standards, The Function of the Trial Judge . . . ."[13]

The critical language in section 9.1(a) is that part which empowers the highest court of the jurisdiction "to remove any judge found by it and the commission to be guilty of gross misconduct or incompetence in the performance of his duties."[14]

I hope the court's language, here, is not intended to be read literally, because the authority for the direction, assignment and discipline of military judges is given unequivocally to the Judge Advocates General by Articles 6, 26, and 66 of the Code. Congress clearly designated the Judge Advocates General, not the Court of Military Appeals, as the authority to whom military judges are responsible.

For these reasons, I believe that *Ledbetter's* suggestion of a judicial commission, with its provision for the highest court of a jurisdiction exercising disciplinary powers over military judges, is contrary to the clearly expressed intent of Congress in establishing the independent military judiciary by its designating the Judge Advocates General as the officials responsible for its supervision.

This brings me to the point—the single point—I want to make. Effecting change in the basic structure of the military justice system is the province of Congress, not of the Judge Advocates General, *and not* of the Court of Military Appeals, and, it seems to me, that those of us who perceive a need for any changes in the system—whether such would relate to the responsibilities and authorities of its participants, or otherwise—should seek them through the normal mechanism provided for effecting legislative change.

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12. *Id.* at 43.

13. *Id.* (emphasis added).

14. *Id.*