

**THIRTY-SIXTH KENNETH J. HODSON LECTURE ON
CRIMINAL LAW***

*Today's Military Advocates: The Challenge of Fulfilling
Our Nation's Expectations for a
Military Justice System that is Fair and Just*¹

BRIGADIER GENERAL PATRICK FINNEGAN²

Ralph Waldo Emerson said, "Our life is an apprenticeship to the truth that around every circle another can be drawn; that there is no end in nature but every end is a beginning." For me, today could be viewed

* Established at The Judge Advocate General's School on 24 June 1971, the Kenneth J. Hodson Chair of Criminal Law was named after Major General Hodson who served as The Judge Advocate General, U.S. Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

¹ This lecture is an edited version of remarks made on 19 March 2008 by Brigadier General Patrick Finnegan to members of the staff and faculty, distinguished guests, and officers attending the 56th Graduate Course at the Army's Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Citations to authorities have been added.

² Dean of the Academic Board, United States Military Academy, West Point, N.Y. 31st Graduate Course, 1983, The Judge Advocate General's School, U.S. Army, Charlottesville, Va.; J.D., 1979, University of Virginia Law School; M.P.A., 1973, Harvard University Kennedy School of Government; B.S., 1971, United States Military Academy. Previous assignments include Professor and Head, Department of Law, United States Military Academy, 1999–2005; Staff Judge Advocate, United States Military Academy, 1998–1999; Legal Advisor, United States European Command, 1996–1998; Staff Judge Advocate, U.S. Special Operations Command, 1994–1996; Legal Advisor, Joint Special Operations Command, 1991–1993; Deputy Staff Judge Advocate (1989–1991) & Chief, Administrative and Civil Law (1988–1989), XVIII Airborne Corps, Fort Bragg, N.C.; Deputy Director, Academic Department (1985–1987) and Criminal Law Instructor (1983–1985), The Judge Advocate General's School; Chief, Military Justice (1981–1982), Chief, Administrative Law (1980–1981), and Trial Counsel (1979–1980), 8th Infantry Division (Mechanized), Bad Kreuznach, Germany. Brigadier General Finnegan's assignments as an Infantry Officer and Military Intelligence Officer prior to attending the Judge Advocate General's Funded Legal Education Program include the 9th Infantry Division, Fort Lewis, Wa., and Company Commander, U.S. Army Security Agency Materiel Support Command, Vint Hill Farms Station, Va. Member of the Virginia Bar and admitted to practice before the U.S. Supreme Court.

as the drawing of more circles, both beginnings and endings. I am particularly pleased that attending this lecture in criminal law is Dean John Jeffries of the University of Virginia School of Law, because in my first year of law school in 1976, Professor John Jeffries taught my course in criminal law. And when I reviewed the list of distinguished Hodson lecturers over the years, I noted that four of those individuals taught me law, either at UVa or at the JAG School. Another circle is completed in returning to Charlottesville and to the JAG school—I spent eight years of my military career here on the North Grounds, much of that time devoted to criminal law. Of course, the first criminal law lecture in this series was delivered by Major General Kenneth Hodson himself, a true gentleman and the single individual most responsible for shaping today's well respected military justice system. It's an honor to deliver a lecture named after him. And to begin this circle, General Hodson presented that initial criminal law lecture during my first year of active duty in the Army.

A few years prior to that, at age seventeen, I went to my West Point interview. After some preliminaries, the major conducting the interview asked, "So what do you want to do with your life?" I replied, "Well, sir, I really want to be a lawyer." To which he responded, "Then you probably shouldn't go to West Point." I disregarded his advice and am very happy that I did. I knew from an early age that I wanted to be a lawyer—and a lawyer who specialized in criminal law in particular. I was an avid fan of the Perry Mason books (and the TV show as well) and read every other book I could find, both fiction and non-fiction, about criminal law. And, as a practicing military lawyer for twenty years, I was fortunate to be involved with criminal law on many occasions and most assignments. As we talk today, I hope you will be able to see how those experiences have shaped my thoughts and ideas about what we do in practice and what we should aspire to in the military justice system.

In fact, when I was at this school in the 90th Basic Course in 1979, I received a letter from my sponsor in the 8th Infantry Division in Germany. As the Chief of Military Justice, he was also to be my boss. In his welcome letter, he enclosed the front page of the *Stars and Stripes*, the military newspaper in Europe. The top headline read "23 arrested in Dexheim for heroin sales." My future boss had written across that story, "These will be your cases." So, six months after graduating from law school, I was prosecuting major felony cases. One drug sale case had an interesting sentencing phase to the trial. While the trial was pending, the Soldier decided to go AWOL so when he had run out of money and was

rounded up a few days later, he went to pretrial confinement, where he remained until his guilty plea at trial. When it was time for extenuation and mitigation, the defense counsel asked if the accused could take the stand, guitar in hand, to sing a song he'd written while in pretrial confinement about how sorry he was. As the prosecutor I had no objection, so the accused performed his soulful ballad for the court members. They sentenced him to a dishonorable discharge and three years. I always thought it was two years for the crimes and one for the song! The significant responsibilities that you are given early on can be an exhilarating and sometimes intimidating aspect of our system—from the start, you must understand the underlying principles and be prepared to fulfill your crucial role in ensuring fairness, discipline, and ultimately justice. Just over two years later, still in my first assignment out of law school, I was the Chief of Military Justice for the 8th Infantry Division and prosecuted a Soldier in a capital murder case in which he received the death penalty. Those can be daunting circumstances for everyone involved and that's why it is crucial for our military justice system, of which we can be justifiably proud, to be efficient, effective, and most of all, just.

History shows that our system has not always been that way, or perceived to be a system of "justice," but the changes and significant improvements wrought by General Hodson and his successors have brought the practice of military criminal law to a place where we compare very favorably with criminal law systems throughout the United States and around the world.

The significant changes began after sixteen million citizens served in uniform during World War II and returned to their cities and towns with the correct perception that the military criminal law system may have been related to discipline—arbitrary, swift, and kangaroo-court like at times—but it was not concerned particularly with either fairness or justice. Their concerns ultimately resulted in the Uniform Code of Military Justice (UCMJ), the first major step toward a system based on principles of fairness and justice crucial to our nation and its citizens.³ As Justice Oliver Wendell Holmes said, "A system of justice must not only be good, but it must be seen to be good."

The UCMJ was a crucial step, but it was only the first step, and the history of our system since 1951 has been one of change as military

³ 10 U.S.C. §§ 801–946 (1950).

justice and military legal practice adapted to a different armed force and to evolving ideas concerning criminal law procedures. General Hodson was at the forefront of many of those improvements—it's enlightening to read his initial Hodson lecture from 1972 to see how many of the changes he urged, from separate and independent defense counsel, to a trial judiciary with military judges who actually ensured proper proceedings at courts-martial, to writs of certiorari to the Supreme Court, have come into being, first through the Military Justice Act of 1968,⁴ later with the Military Justice Act of 1983,⁵ and then subsequent advancements.

When I was assigned to the criminal law faculty in the early 1980s, I actually played a small role as the armed forces implemented the changes dictated by the Military Justice Act of 1983, which among other steps forward led to the promulgation of the Military Rules of Evidence, patterned on the Federal Rules of Evidence. That was back in the days of C-rations, so those were truly the first MREs. At any rate, the significant changes in the Act of 83 resulted in a complete rewrite of the Manual for Courts-Martial (*Manual*) in 1984.⁶ That effort was led by then Major, later Brigadier General John Cooke, the Hodson lecturer ten years ago. After the *Manual* was written, and about to go to press, the people responsible for the re-write realized that they had neglected to include an index for the *Manual*. After considering what to do, they said, "Ah ha, we have that criminal law faculty down at the JAG School in Charlottesville, let's task them to compile the index." One of my additional duties in the department was publications officer, so I was given the lead in this unenviable task. We quickly realized that a committee of nine—the entire criminal law faculty—was not workable for this project. So, one other officer and I locked ourselves into one of the practice courtrooms for two weeks and did nothing but compile an index for the *Manual*. It was truly mind-numbing work. Near the end of that two weeks, in our near-delirium, we decided that, if we had to do this, we were going to put our own personal stamp on the index. So we created an entry for "aircraft carrier" that said "see boat." When you went to "boat," the entry said "see vessel," and when you looked up "vessel," it completed the circle by saying "see aircraft carrier." Now you may know that the Navy is particular about calling those big gray things that float on the water "ships" and not "boats" so we were

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

⁵ Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).

⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984).

particularly proud of this entry. And it just got better because the criminal law faculty was later tasked to go around the country to brief joint audiences about the Military Justice Act of 1983 and the 1984 *Manual*. We would always make sure to use a case or hypothetical in these classes that included an aircraft carrier and of course referred to it as a “boat.” Invariably a naval officer in the class would raise his or her hand and say, “Excuse me, but aircraft carriers are ships, not boats.” At which point, we would point out the entry in the index and say that, apparently according to President Reagan’s executive order, they were in fact boats.

I want to return to a fundamental issue—why are these changes and improvements to our system so important and essential, other than to properly classify naval vessels? For that answer, I think you must go back to first principles, and for Americans, those are found in the Constitution. And how does that Constitution begin? The first three words—the beginning of the preamble—are “We the People.”⁷ This government, this country, is for the people. This is a Constitution and a form of government that wasn’t handed down by a sovereign or king or other government, it emerged from the people. And who are those people, where are they? Are they in this room? Maybe to some extent, because our Army has always come from a cross section of America, but in our role as officers, we are actually servants of the people. We are sworn to support and defend their rights. There’s an important reason that constitutional law has been a required course at the Military Academy since the 1820s—those young officers will swear to support and defend the ideals embodied in this historic document, and they need to know what that means.

If you really want to know who We the People are, go to the Barracks Road shopping center or Fashion Square Mall and sit and watch the people go by. There you will see, in all their glory and diversity, the people the Constitution is for. They will be White, Hispanic, African-American, Asian-American, male and female, and some of undetermined genders. Senior citizens, teenagers cruising the mall, infants and toddlers, people with strange clothes, stranger hair, and maybe even strange lifestyles. The military is not an end in itself; it exists to protect the American way of life, including those who may never fully understand, appreciate, or value how the lives of those in uniform are dedicated to protecting the freedom they enjoy every day. It’s an

⁷ U.S. CONST. pmbl.

interesting paradox—you are part of a regimented, authoritarian military that protects a diverse, democratic society so that its members—from Whoopi Goldberg to Rush Limbaugh—can enjoy great personal liberties. As George Orwell once said, “We sleep safe in our beds because rough men stand ready in the night to visit violence on those who would do us harm.” Those rough men—and women—are us, who swear an oath designed to keep this country and its people safe from harm.

And what’s more, it’s from those “People,” with their aspirations, beliefs, and ideals, that our Soldiers, Sailors, Marines, and Airmen come. Together we protect liberty and freedom for all Americans, but we must exemplify those ideals in the ways we deal with the citizens who elect to serve their country in uniform. Of course, there are some differences that are required by the demands of military discipline, but they should not generally override the basic constitutional principles that we believe in and aspire to as individuals and as a nation.

Remember some of the other words of that preamble “to form a more perfect Union” and to “establish Justice.”⁸ That is what we ought to be about. If you need a reminder of that, just recall the oath that each of us takes as an officer, to support and defend the Constitution. That oath promises defense and support of the moral values that the Constitution expresses concerning the relation between individuals and the government—values like equality, inalienable rights, the democratic process, sovereignty of the people, and supremacy of the law.

We swear an oath—not of allegiance to any particular sovereign or political party, but of protection for the ideas and system that are the heart of our nation. That promise glues the country together and holds this awesome military power in check. We swear to serve a government that is structured to serve the ends of justice, that relies on principles of fair play, that clings to moral restraint in the exercise of military might.

To support and defend the Constitution and the nation with the force of arms, that’s a given. To support and defend the Constitution in the way we deal with each other, with our subordinates—America’s sons and daughters—in observing their rights and our duties. To support and defend the Constitution so that we preserve and protect the rights and liberties of all Americans, including those parts of “We the People” who may not look like us, or behave as we do, or even think like us. And

⁸ *Id.*

certainly those same principles must apply in a criminal law system, a military justice system, for an armed force composed of volunteer members of We the People.

Often in discussing military justice, people will debate whether the system is more about discipline or justice. Certainly in the days prior to the UCMJ, the focus seemed to be primarily on iron discipline, often at the expense of true justice. But I think that's a false dichotomy. The system is, and should be, about both discipline and justice, and in fact, the two are mutually reinforcing. In my first week of law school, one of our instructors told the class that the real work of lawyers should be to stop injustice, and that is part of what any good criminal law system does. When the military justice system works properly to punish offenders, it not only enforces discipline for the commander, it provides justice to all Soldiers in the unit, who should know that they will be treated fairly and who will retain their faith in the value of doing the right thing. Justice, in fact, promotes discipline.

George Washington said, "Discipline is the soul of an army." General Cooke summarized this very well in his Hodson address ten years ago. He said that the ultimate success of any military mission depends on young men and women doing their jobs under difficult, demanding, and dangerous circumstances. That success is a product of a military system of training and education, standards and customs, ethics and values. Military justice is central to that system—it inculcates and reinforces morale and discipline. And it does so by consistent adherence to two principles: each person, regardless of rank, is responsible and accountable for his or her actions; and each person, regardless of circumstance, is entitled to be treated fairly and with dignity and respect. We say, and I hope we believe, that the Army is people, and we must always remember that every case involves people, from the Soldier accused of wrongdoing to a family member like Barbara Allen, who has been attending the pretrial proceedings for the Soldier accused of killing her husband, a first lieutenant, in a fragging incident in Iraq. We owe it to them to have, in Justice Holmes's words, a good system that is also seen as good.

We should be proud of the fact that our system has adapted and changed over time. Thomas Jefferson's words, which are affixed to a wall in this school, explain why. He said "Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new

truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.” General Eric Shinseki, former Army Chief of Staff stated it more succinctly if less elegantly: “If you don’t like change, you’re going to like irrelevance even less.” The military justice system must continue to evolve and change—but how, and who drives that change will be key. The changes that have been made over the years since 1951 have led to increased faith in the fairness of the system, both within the armed forces and from an outside perspective, and that is what future changes need to do as well.

One of the interesting aspects of past changes in our system is that many have come about from our experiences in wartime, from World War II to Korea to Vietnam. Those periods tend to highlight issues and potential problem areas, and today’s circumstances do the same. We are facing significant challenges in the current fight. This is the information age, from embedded reporters to ubiquitous CNN cameras, and individual difficult cases take on even greater significance in the light and heat of publicity. Our cases tried are on the increase, particularly in complex and often notorious cases related to sexual abuse and child pornography. As we continue to try to grow the force in a protracted conflict, the number of enlistment waivers for prior felonies is increasing. Working the difficult justice cases that overlap between deployed units and rear detachments is a growing problem. And from Abu Ghraib and other war crimes allegations to Guantanamo and the fits and starts of military commissions, we are involved in an increasing number of high profile cases that all focus increased attention on the military justice system. Since the Goldwater-Nichols Act in 1986,⁹ we fight and operate as joint forces but we have yet to embrace that fact in military justice. And while all this is occurring, the Army has changed to a modular system that adds significant operational responsibilities for attorneys assigned to brigade combat teams (BCTs) who are also largely responsible for advising the commander on military justice and prosecuting cases. It does not appear that the operational tempo will lessen significantly anytime soon. Left unchecked, these factors and challenges are likely to have a significant impact on the fair administration of military justice—both as it is practiced and perceived. Left untended, that will leave the Army vulnerable to forced changes

⁹ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified in scattered sections of 10 U.S.C.).

from the outside, possibly from those who do not fully understand or appreciate how the system works.

So what changes should we explore? Certainly we need to take a close look at the effects of modularity and OPTEMPO on our ability to provide quality military justice at the BCT level. We may well need to make adjustments in areas ranging from physical location of the trial counsel to the number of organic criminal law positions in the Office of the Staff Judge Advocate to training and selection of personnel for key military justice assignments. In a way, we are victims of our own success in operational law. Every commander wants their lawyers close by to assist with complex issues that face deployed units. But if that comes at the expense of quality military justice, which has always been and should always be our primary core competency, we simply must re-think how we are accomplishing the mission. It may be time, particularly for high profile cases, to devise specialized trial teams, much as General Tate did in prosecuting some of the cases that arose from Abu Ghraib.

As the armed forces have shrunk but the missions and requirements have not, we have increasingly used contractors to fulfill what were previously considered military responsibilities. They are in the area of operations, they are on the battlefield, they are intimately involved in what the military is doing—and in many cases, the perception is that they are part of the military. Yet we have no good method for prosecuting even serious offenses by those “accompanying the force.” The Military Extraterritorial Jurisdiction Act¹⁰ was a needed first step, but in practice it is largely ineffective. Circumstances like the uncontrolled Blackwater operatives focus this issue. And yes, I know they were State Department contractors, but does that really matter? Certainly it does not from a perception standpoint, both in other countries and in our own. What’s interesting is that General Hodson highlighted this issue as a potential problem in his initial lecture in 1972—the exercise of jurisdiction over civilians accompanying the force. In the intervening decades, we have not moved forward. In fact, with the increased number of contractors, the problem has worsened. When I was the Staff Judge Advocate at European Command (EUCOM) in 1996 and we had just put our first forces into Bosnia, we discovered a U.S. contractor who was running a black market and drug sale ring on the side—and our only recourse was

¹⁰ 18 U.S.C. §§ 3261–3267 (2000).

to tell his company to fire him and send him home. No criminal prosecution was possible—and that is not justice.

Joint justice is another issue we have not really confronted or tried to solve. I think the Army is just hoping that Goldwater-Nichols will go away. It won't. And justice issues are certainly present in joint commands, as I discovered a couple times. When I was at the U.S. Special Operations command in Tampa (where General Chipman later served as one of my successors), General Shelton, then the XVIII Corps commander at Fort Bragg, was named as the new SOCOM commander. Along with other staff members, I traveled to Fort Bragg to brief him on his new responsibilities. I blithely informed him that one thing he wouldn't have to worry about was military justice, we really didn't have these issues. So, of course, immediately after he arrived in Tampa, while he was still on leave moving into his house, I had to go see him to tell him that we had a significant case involving a senior officer. And that was just the start of the flood because for the next three or four months, a new high profile case seemed to pop up every week. As I would tell General Shelton about the latest developments, I could tell he was thinking back to my assurances that he wouldn't be involved in military justice issues. It's a good thing I had LTC Tate to handle all those cases. After that assignment I headed to the European Command where our clear focus was operational law, with little attention paid to criminal law. But then, a decade ago, in February 1998, you may recall the tragedy at Cavalese, Italy, where a U.S. Marine aircraft flew through and severed the cable of a ski resort gondola, sending twenty people crashing to their deaths. This tragedy and the attendant events were under the overall jurisdiction of General Wesley Clark, the SACEUR¹¹ and an Army officer. The pilots were Marines assigned to Camp Lejeune but attached to an Air Force base in Italy, which fell under the U.S. admiral in London for claims purposes and decisions on whether to allow the Italians to prosecute. The twenty victims were from six different countries, and this had been a NATO operation. In addition, there was intense interest from the State Department and the DOD General Counsel. And there was no playbook on how to handle this, particularly from a military justice perspective. The case involved all four services and several foreign countries, and we were making it up on the fly. I don't think we've done much better since then. In fact, at Camp Bucca, Iraq, the Army brigadier general who is in charge of force protection has Sailors and Airmen working directly for him, under his control, but no

¹¹ Supreme Allied Commander Europe.

military justice authority over them. If justice and discipline of a unit are related, and I'm convinced that they are, and one of our stated purposes for a commander-centered separate military justice system is to allow the commander to control all aspects of the unit and its members, then we must update our justice system to reflect the realities of the joint world.

There is one other change that we ought to consider, although it is not directly related to the current fight. Because of concerns over disparate sentencing, many [civilian] jurisdictions have adopted systems where judges decide sentences. That would be a significant change to our current system that allows court members to adjudge a sentence if they were the fact finders, but there is some merit to allowing this responsibility to devolve to military judges in all non-capital cases. I realize there are arguments on both sides and am not fully convinced of the right answer, but as the military justice system continues to strive for fairness and to some extent reflect the civilian justice system when appropriate, this topic deserves detailed study.

I'd like to return to the key issue of why we must have a military justice system, a criminal law system that is both fair and just. We should go back to the Constitution, the purpose of having a standing army, and our obligations to the Soldiers who make up that army.

We have endured as a nation because of the special relationship America has with its armed forces that protect and believe in constitutional freedoms. Consider this: when George Washington was sworn in as President of the United States on 30 April 1789, an emperor ruled China, a tsarina ruled Russia, a kaiser ruled Germany, a shah ruled Iran, a shogun ruled Japan, a sultan ruled Egypt, kings ruled in France and Spain; but the only one of these forms of leadership and government that is left today is the Presidency of the United States.

In large measure, the relationship that our armed forces and our nation enjoys has come about because our Army was never imposed on us from the outside; it came up from our people just like our Constitution and law came up from our people. Our Army has in the long history of America been, in many ways, ourselves. Our Army has not had a hereditary leadership caste born to rank and privilege and position. Our Army has leaders that have earned their way to the front of troops. Our Army looks like us. It is our sons and daughters; our brothers and sisters; our aunts, uncles, mothers, and fathers.

In recent years those brothers and sisters and sons and daughters fought their way over hundreds of miles of desert, stormed Baghdad, and defeated the Republican Guard, but they also handed over food to hungry Iraqis, gave their own medical supplies to Iraqi doctors, and brought water to the thirsty. No other army—no other soldiers—in the world are capable of such fierce fighting while retaining such compassion for their fellow human beings. No society except America could have produced them.

In closing, I would like to tell you about one young Soldier and his platoon. Second Lieutenant Scott Cassidy, West Point Class of 2005, joined his platoon in the 101st Airborne Division several months into their deployment in Iraq. Within three months of being the platoon leader, he had earned three Purple Hearts, but, as he put it, that made him part of the majority in the platoon because almost every Soldier had a Purple Heart. A little more than a year ago, he wrote this email:

If you watch the news, you know that the Baghdad area is in turmoil. We are spread thin but we are getting the job done. The television highlights every explosion and loss of life, but you miss what we do. You miss my Soldiers giving the little kids high-fives and soccer balls. You miss my Soldiers giving food and water to local nationals. You miss my Soldiers emplacing sewer systems and rebuilding roads. You miss my medic treating the villagers for injuries. The news shows death, murder, and violence, but daily I see smiles, hard work, and hope. Is the area in turmoil? Yes. Is it lost? No, and every day American Soldiers bring hope to these people. You won't see it in the morning paper or on the evening news, but I am telling you it's here. I know, I am seeing it and doing it. I miss everyone and look forward to coming home. Know that your Army is making you proud to be an American.¹²

I am proud to be an American and proud to be a Soldier in this Army. These brave and dedicated young Americans, raised in liberty and believing in constitutional principles, are still the best hope of free men and women around the world. They deserve our complete support,

¹² E-mail from Second Lieutenant Scott Cassidy, to Brigadier General Patrick Finnegan and others (August 3, 2006) (on file with lecturer).

including the very best military justice system that we can provide. It will only aid in our overall success in demonstrating the strength of the rule of law and the ideal of liberty and justice for all.