



ST. MARY'S  
UNIVERSITY

Digital Commons at St. Mary's University

---

Faculty Articles

School of Law Faculty Scholarship

---

1991

## The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's - A Legal System Looking for Respect

David A. Schlueter

*St. Mary's University School of Law*, [dschlueter@stmarytx.edu](mailto:dschlueter@stmarytx.edu)

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Military, War, and Peace Commons](#)

---

### Recommended Citation

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).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu), [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu).

# THE TWENTIETH ANNUAL KENNETH J. HODSON LECTURE: MILITARY JUSTICE FOR THE 1990'S— A LEGAL SYSTEM LOOKING FOR RESPECT

by David A. Schlueter  
Professor of Law, St. Mary's University

*The Kenneth J. Hodson Chair of Criminal Law was established at The Judge Advocate General's School on June 24, 1971. The chair was named after Major General Hodson, who served as The Judge Advocate General 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. During that time, he was active in the American and Federal Bar Associations, and he authored much of the military justice legislation existing today. 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 Corps.*

*On March 28, 1991, Professor Schlueter delivered the twentieth Kenneth J. Hodson lecture. Professor Schlueter received his B.A. from Texas A & M University in 1969, his J.D. from Baylor University School of Law in 1971, and an LL.M. from the University of Virginia School of Law in 1981. He served on active duty as a judge advocate from 1972 to 1981. Professor Schlueter is a Lieutenant Colonel in the United States Army Reserve and is an individual mobilization augmentee to The Judge Advocate General's School. He has published numerous books and law review articles on criminal law topics, and is currently the Reporter for the Federal Rules Advisory Committee on the Rules of Criminal Procedure. In addition, Professor Schlueter has held several prominent positions in professional legal organizations and currently is the Chairman of the ABA Standing Committee on Military Law.*

## I. INTRODUCTION

It is a double honor to be this year's Hodson lecturer. First, I have the highest regard for General Hodson. I always have respected General Hodson and his contributions to the JAG Corps and the legal profession in general. As some of you may be aware, he has been

very active in the American Bar Association. I regret that he is not able to be with us today. Second, being here today brings back pleasant and warm memories. In many ways the School is my second home, and it is always good to be back among friends.

In some respects I have been preparing my remarks for this occasion for almost twenty years. In the process of writing and talking about military justice, I have had numerous opportunities to think about, or as Justice Holmes wrote, “brood” about the law. Events such as the annual Hodson Lecture are good for the system because they provide an opportunity to step aside from the everyday hustle and bustle of the practice of law, and to think for a moment about the larger picture. Today, that larger picture is “Military Justice for the 1990’s” and its search for a little respect.

I have the highest respect for the military justice system. In my view, it has many features that should be adopted by the civilian criminal justice system. For example, features such as broad criminal discovery, speedy trial provisions, and worldwide access to witnesses and counsel have led people like F. Lee Bailey, a noted criminal defense lawyer, to observe the value and benefits of military justice.

But the object of my time with you this morning is not to praise the military justice system. I am sure you already know that the system is sound. Rather, I would like to discuss with you what seems to me to be a lack of respect for the system by the public and the legal profession generally.

Because I have high regard for the system, and because it has been a large part of my legal career, I am disturbed when I hear from those who have no respect for the system.

How much have you heard about military justice from those outside the system? I know that my exposure to the criticisms of military justice was extremely limited in the early years of my service on active duty. I was too wrapped up in the day-to-day grind of writing appellate briefs, post-trial reviews, and trying cases to really spend too much time thinking about the system. My first real exposure was in my third year on active duty when I heard that a writer had compared military justice to military music. At about the same time I became aware that my staff judge advocate at Fort Belvoir, Lieutenant Colonel Robert Poydasheff, was co-authoring an article with Lieutenant Colonel Bill Suter for the Tulane Law Review on the merits of the military justice system.<sup>4</sup>

---

<sup>4</sup>Poydasheff & Suter, *Military Justice?—Definitely!*, 49 Tul. L. Rev. 588 (1975).

My perspective is broader now and is based not only upon my years of active duty in the Judge Advocate General's Corps, but also on my experiences as a civilian who has talked with many individuals over the last twenty years about military justice. I have had countless contacts with the media, military personnel, law students, and ordinary citizens—including my barber, who asked me the other day whether I thought the military justice system was fair.

## 11. LOOKING FOR RESPECT: NEGATIVE SOUND BITES

### *A. IN GENERAL*

In the process of working within the system, several attempts have been made to increase the stature and prestige of the military justice system. For example, some have suggested that the names of the military appellate courts be changed to the Army, Air Force, and Navy Court of (Military) Appeals. This change is an attempt to increase the stature of military appellate courts. In the case of the United States Court of Military Appeals, some have suggested that it be changed from an article I to an article III court. Indeed, a few years ago the name of the Court of Military Appeals was changed by Congress by adding the words "United States" to make it clear that it was a federal court and not simply a military court of appeals.

Why the search for respect? For increased prestige? In part, it is an attempt to overcome the negative image that sometimes is attached to military justice. You are no doubt aware of the use of what have become known as "sound bites," media jargon for those short, pithy, and catchy phrases that will stick with the public—those phrases that seem to say it all.

Consider the following examples of bites regarding military justice. Perhaps you have heard some of them:

"Military justice is to justice as military music is to music."<sup>2</sup>

"Courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."<sup>3</sup>

---

<sup>2</sup>J. Sherrill, *Military Justice is to Justice as Military Music is to Music* (1970). Mr. Sherrill presents a highly critical view of military justice. The title is a quote from Clemeceau.

<sup>3</sup>*O'Callahan v. Parker*, 395 U.S. 258, 265 (1969) (determining that only service-connected offenses were subject to court-martial jurisdiction).

“The court-martial is not yet an independent instrument of justice.”<sup>4</sup>

“Military justice is an oxymoron.”<sup>5</sup>

“Military Tribunals have not been and probably never can be constituted in such a way that they have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.”<sup>6</sup>

Is this the same military justice system that I have been connected with for almost twenty years and the system that you have been studying? Note that these negative bites or criticisms are about a worldwide legal system that affects directly and indirectly literally millions of United States citizens. True, there are negative impressions about civilian criminal justice systems as well. My sense, however, is that they do not run as deep as those associated with military justice.

## ***B. IDENTIFYING THE CRITICS***

Who are the critics and why are they saying negative things about military justice? Perhaps we could cut this presentation short by simply dismissing the negative sound bites as those of individuals who have no knowledge about justice generally or have nothing good to say about any system of criminal justice. Perhaps they are only quotes from a bitter parent upon learning that a son or daughter has been sentenced to prison for not following what was obviously an illegal order or for being just a little late for chow. No such luck. They are statements by commentators who have read the cases, by counsel who have worked within the system, and yes, they include statements by Supreme Court justices.

## ***C. BREADTH OF THE CRITICISM***

The true depth and breadth of the “negative bites” is unknown. As far as I know, no recent national surveys have been conducted among the citizenry about their perceptions or feelings about military justice. Nevertheless, I do feel safe in believing that a broad cross-section of intelligent people either know very little about military justice or, if they do know something about the system, they believe

---

<sup>4</sup>*Id.*

<sup>5</sup>Spak, *Military Justice: The Oxymoron of the 1980's*, 20 Cal. W.L. Rev. 436 (1984).

<sup>6</sup>*Toth v. Quarles*, 350 U.S. 11, 17 (1955).

that it is still in the dark ages, void of any full legal recognition, and certainly not deserving of a full membership in the family of enlightened jurisprudence. Clearly, it does not deserve “respect.”

## ***D. REASONS FOR THE CRITICISM***

### *1. In General*

Why the negative bites? Why the criticism? What has the military justice system done or failed to do that evokes such criticism? I believe a number of possible reasons exist for the negative impressions that many people have about military justice. Rightly or wrongly, they believe the system is unfair and inept. Some of these reasons overlap and are not the result of any poll or survey. Rather, they are the observations of one who has played on the field from time to time and has sat next to the fans in the stands to hear what they have to say about how the game is being played.

### *2. Reason One: Lack of Information*

Even the best intentioned individuals do not have all the information. This is perhaps the easiest to address because many people simply have no reason to come in contact with military justice. Presumably, once these individuals have accurate information about the system, they will be less likely to criticize it summarily.

### *3. Reason Two: Reliance on Old Data*

Some misconceptions and criticisms are based upon outdated information about the way it once was—the days when a convening authority could order a court-martial to reconsider its sentence with the hope of raising the punishment, the days when a single counsel served as both prosecutor and defense counsel, the days when the prosecutor and the defense counsel both worked for the same person, the days when judges were not present in the courtroom and the president of the court-martial was the presiding officer. As noted by Judge Cox of the Court of Military Appeals, the military justice system has evolved a great deal since that time.<sup>7</sup> Judge Kenneth Ripple, a former Navy JAGC officer who now sits on the Federal Court of Appeals for the Seventh Circuit, believes that military justice is a more “mature” system of justice.”

---

<sup>7</sup>See Cox, *The Army, The Courts, and the Constitution: Evolution of Military Justice*, 118 Mil. L. Rev. 1, 18 (1987).

“Ripple, *Foreword* to D. Schlueter, *Military Criminal Justice: Practice and Procedure* at xxiii (2d ed. 1987) (“A new maturity has come to military law”).

My first real exposure to the historical and changing roots of military justice began in a legal history course offered at the University of Virginia in the late 70's when, in fulfillment of a paper requirement, I worked my way through yellowed leaves of old codes and old treatises on military justice. I was impressed with several aspects. First, despite the fact that some features have not changed, many aspects of military justice had changed dramatically. Second, the element of "due process" had continued to expand in the military setting, and in some cases set the pace for like changes in the civilian setting.

The "unification" of military justice in the 1951 Uniform Code of Military Justice, which replaced the Articles of War, was clearly a major step forward. In the 1960's, through the efforts of individuals such as General Hodson, the system was "judicialized" by the addition of judges in the courtroom. Decisions of the Court of Military Appeals in the 1970's continued to strengthen the role of the judge. The 1980's brought what some have termed the "civilianization of military justice"—with the 1983 Military Justice Act and the 1984 Manual for Courts-Martial. Now, we might be entering a period of what I call the "legitimization" of military justice.

The system has changed—it has been improved upon in the sense that the system is fairer. Checks have been provided to ensure fairer and more just results. For many, however, the system used in the late 60's, especially in Vietnam, is the system they remember—and detest.

#### *4. Reason Three: Relying on False Data or Assumptions*

Some critics simply do not have any real frame of reference to military justice. They know only what they see on television or read in the papers. For example, consider a recent episode of the popular TV series, "LA Law."

A young Army officer was charged with disobeying an order to fire an artillery barrage on some buildings during the invasion of Panama. His reason for not firing was that he had seen civilians in the area. One of the law firm's lawyers was asked to represent him. When he was asked why he simply did not use the services of his military defense counsel, he said something to the effect that his lawyer was good, but, ". . . he wore a green uniform"—the implication being that only a civilian lawyer could see that justice was done. He was convicted and received a heavy sentence.

Without belaboring the legal points, the scenario contained several

inaccuracies, and the public was left with an incomplete and misleading picture of military justice.

### 5. Reason Four: The Experience Factor

Some of the critics of military justice have been involved with the system. Recently, the following letter appeared on the editorial page of the San Antonio Light, in a city where the military generally is held in high regard:

*Nothing Mitigates Punishment  
in Military Justice Systemz*

*Regarding the trial and sentencing of Sgt Meeks: My heart goes out to him and to his family. In July 1988, I was in the same spot. Military justice is an oxymoron—there is no justice. Once you are identified as an offender, absolutely nothing will deter the military law office from doing what it wants to do. It does not matter how good a person you are, how well you performed, the qualities of your job skills, or the number of letters of recommendation (or who wrote them). They do not care about your family circumstances.*

*Appeals and clemency appeals are your right but commanders and courts will not alter one thing. Why? the military law center continues to oppose you. They brand everything you say as a lie. Whatever they recommend is always approved by the commander because he will riot, does not, or cannot take the time to personally give the matter proper consideration.*

*But there is life after the service as long as you don't let it get you down.*

RONALD TAYLOR  
San Antonio<sup>9</sup>

As the Air Force Court of Military Review recently observed, "No man goes to the gallows with a good impression of the law."<sup>10</sup> Clearly, that young man does not have a good impression of military justice. Whether he is right or wrong is irrelevant. Anyone reading that letter to the editor was exposed to military justice for one brief "negative bite" moment.

---

<sup>9</sup>San Antonio Light, Mar. 21, 1991, at B6.

<sup>10</sup>United States v. Sloan, 30 M.J. 741, 748 (A.F.C.M.R. 1990) (quoting an 18th Century commentator on the English justice system).



### 6. Reason Five: *The Rub-Off Factor*

Some critics approach military justice with the attitude that if it belongs to, or is run by, the military then it must to be unfair. “Isn’t this the same system that serves SOS and MREs?” “Military justice. Isn’t that the system run by folks with military minds?” “Isn’t that the system that discriminates against homosexuals?” You get the picture. I have no doubt that the negative feelings toward the military that resulted from Vietnam had a direct impact on the public’s perception of military justice. Perhaps the recent military successes in the Middle East, which have enhanced the public’s view of the military in general, also will benefit military justice.

### 7. Reason Six: *The Other Alternative*

Another possibility exists. Perhaps there is some truth in what the critics see and what they say. In day-to-day JAG Corps life, it is easy to become complacent, to fail to see the forest because of the trees. We are doing what a former JAG urged us to do: “Just cut the wood that is put in front of you.” It was mentioned in the context of not worrying about getting the right assignments, working for the right people, etc. But while you are cutting the wood, it is important to examine it, to measure it, to test its worth.

## 11. RESPONSES TO THE CRITICISMS: CLOSE SCRUTINY

### A. *IN GENERAL*

There is a simple saying that when you are right, ignore the criticism. When you are wrong, listen to the criticism. Let us assume, for the purposes of argument, that some of the criticisms of the military justice system are valid. That is, if the critics are right, what should our response be?

These are not purely questions of academics. They are pragmatic questions, and any suggested solutions should have utility. Changes should not be made simply for the sake of change. Nor should changes be made simply to silence the critics, or to increase or decrease the conviction rate.

I have high regard for military justice. In my view, its benefits greatly outweigh whatever faults it may possess. Although one commen-

tator has labelled me as a “defender” of military justice,” I always have assumed that the military justice system is not perfect, that there is room for change—for improvement. I also have assumed that listening to, and thinking about, the “negative bites” is the first step to improving the system. For example, I often have pondered about what led Justice Douglas in 1960 to write that military courts are singularly inept at dealing with constitutional questions.

## ***B. WHY LISTEN TO THE CRITICS?***

Why should the military justice system pay any attention to what the critics say? Is not the system currently providing ample due process? These questions were put to me several years ago by a military judge in an audience I was addressing. Why should we care? Why should we in the military care about what a federal district judge sitting in Minnesota or Texas thinks about military justice? Let me offer several reasons why the critics may deserve our ear.

### *1. Always Subject to Scrutiny: Someone Will Listen*

First, even assuming the system is separate, it is always subject to scrutiny—either internally or externally—in Congress, in the media, or perhaps even in a federal court. It is important to remember that the greatest time of change in the military justice system usually has occurred immediately following a major war or conflict. This was particularly true after World War I, World War II, and to some extent during and after Vietnam. Granted, the federal courts today are for the most part extremely deferential on military justice matters—probably due in large part to the fact that the services are composed of voluntary enlistees. But I become concerned when I hear individuals within the system register utter disdain for civilian control of the system and suggest that civilian courts have no business second-guessing military justice. Like it or not, the system is constantly subject to scrutiny.

### *2. Not Entirely Separate From Society*

Second, although the military justice system is a “separate system of justice,” it is not entirely separate from the rest of society. It is ultimately accountable to the civilian community—not simply civilian legal review. The recent war in the Gulf pointed that out. The armed forces consist of many citizen service members—mothers, fathers, and children. That is particularly true of the reservists and National

---

<sup>11</sup>Spak, *supra* note 5, at 464 n.179.

Guard members. One day they were plowing fields, pulling teeth, or teaching classes, and the next day they were stuck in a desert far from home. They all have a potential interest in the military justice system, and it seems appropriate that the public have confidence in the system. Many of you are, or will be, active within the civilian community as Little League coaches, PTA officers, leaders in your religious organization, or members of the local bar associations. You are not entirely separate from society simply because you wear a uniform.

### *3. It Is the Right Thing to Do*

Third, like eating oatmeal, it is the right thing to do. Criticisms should not be ignored simply because they irritate or annoy us. If we are wrong, then we should listen. Those participating in any legal system have a professional and moral responsibility for policing the system. Those who are within the system should be the first to step forward and make changes where needed. In military jargon, those within the system must be “proactive,” not simply “reactive.”

## **111. FEATURES OF MILITARY JUSTICE THAT DESERVE SCRUTINY**

Assuming that we decide to heed at least some of the criticisms, where would we begin? What is a legitimate problem or issue? A number of features of the system seem most vulnerable. They are as follows:

- A. The Purpose of Military Justice
- B. The Concept of “Military Due Process”
- C. Constitutional Protections
- D. The Role of the Commander
- E. The Role of the Military Judiciary
- F. An Independent Court of Military Appeals
- G. The Role of the Legal Profession

These points are listed in no particular order or hierarchy. Although other issues may be equally important, these should serve as a good starting point.

### ***A. THE PURPOSE OF MILITARY JUSTICE: JUSTICE OR DISCIPLINE?***

In its earliest forms, the military justice system was designed to

be an instrument of discipline. Military leaders could count on the system to enforce the articles of war and their personal orders. The system was at times rough by contemporary standards of due process. It would be difficult to say that, in its early forms, the military justice system was an “independent” tool of justice—that is, a system designed to determine if a person was guilty of a particular crime.

The debate over the two concepts has continued for years and will certainly not be resolved by anything said here. I do not see the two terms as being inconsistent. There should be no doubt, however, that if military justice is to be viewed as a legitimate system of criminal justice in today’s society, it must be viewed primarily as a tool of justice.

Consider the following excerpt from a report made thirty years ago, the 1960 Powell Report—a study of the military justice system by high-ranking Army officers in a report to the Secretary of the Army on the status of the UCMJ:

Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable.

Once a case is before a court-martial it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean justice as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.<sup>12</sup>

This excerpt from the report represents a sound balance. The distinctions between “justice” and “discipline” are subtle, but crucial to whatever follows.

It seems to me that at the heart of the controversy is this ques-

---

<sup>12</sup>The Powell Report, at 11, 12 (1960).

tion: What is the purpose of the military justice system? In any given case either “justice” or “discipline” may rise to the surface as the predominant feature.

Consider the hypothetical case of Private Doakes, who is charged with possession of drugs. What is the purpose of his court-martial? What impact would his conviction and sentence have on his unit? What impact would an acquittal have on his unit? On the installation? On the armed forces? Would your answers change if he was charged with willful disobedience of his commanding officer’s order, inciting a riot, throwing butter on the mess hall ceiling, shouting insults at his first sergeant, refusing to board a plane for Saudi Arabia, or child abuse? For the most part, all of these crimes potentially affect “discipline.” In some of the charges, however, that would be less apparent.

Left unchecked, those crimes also would affect the community in which Doakes lived, but in varying degrees. If Doakes is punished for crimes involving drugs, his punishment probably will be viewed the same way as in a civilian community. “Don’t do drugs.” The same would be true for child abuse. But what about the purely military crimes, such as willful disobedience of an order? Does the military justice system work in the same way? Does it have the same effect? Perhaps. In that case, the trial of Doakes by a court-martial takes on an air of discipline because the commander’s very authority to command the respect and obedience of the troops is at stake.

From a civilian perspective, using the court-martial to try military offenses is an entirely different creature. While the community very well might rally around the prosecution of a child abuser or drug kingpin, I doubt that you will see the same support behind the prosecution of a soldier who will not soldier, is charged with AWOL, or fails to show up for morning formation.

Using the same system to meet often competing goals raises problems of interpretation and perspective. Perhaps the answers lie in separating those crimes that are purely disciplinary from those that are what we ordinarily refer to as “common-law” crimes. The military justice system always has lumped them all together because of the need or desire to handle all justice problems within a single system. I am not suggesting that any changes be made in what crimes are triable by the court-martial. The system is worldwide and, in some instances, military justice is literally the only law west of the proverbial Pecos river.

If “discipline” is viewed as the final end-all for military justice, the stereotypes will live on. As long as discipline even is listed as a goal or purpose for military justice, there is a risk that the stereotype will live on. The risk exists that if the ends are something other than “justice,” those participating in the system will view it as nothing more than a rubber stamp for the commander. It is even more troubling, however, if the community views the commander as the rubber stamp for a legal system that gives the appearance of simply serving the needs of discipline.

## ***B. THE CONCEPT OF “MILITARY DUE PROCESS”***

### *1. Due Process Generally*

The topic of “due process” is mentioned in both the fifth and the fourteenth amendments: “No person shall be deprived of life or liberty without due process of law.” In the criminal context, it requires that the right person be accused, that the right procedures be used, and that the punishment is right. The concept of due process is fluid and is more akin to a balancing test: Balancing the rights of those accused, the interests of the public, and the relative costs of providing additional procedural safeguards.<sup>13</sup>

A hierarchy exists for applying due process.<sup>14</sup> At the bottom is the United States Constitution, which provides the foundation. Generally, an accused is entitled to whatever procedural and substantive rights the Constitution requires. In the civilian community, no jurisdiction may provide less than mandated by the Constitution. That rule, as I will point out in a minute, does not necessarily apply in the military justice system. In addition to those derived from the Constitution, rights are provided by statute, the Manual for Courts-Martial, and service regulations.

A similar template is used in state courts. The state constitutions and statutes may provide greater protections than those found in the United States Constitution.

### *2. Origin of the Term “Military Lhte Process”*

So what is this term “military due process” and where did it come from? The term has been around for some time in military case law,

---

<sup>13</sup>Illinois v. Batchelder, 463 U.S. 1112, 1117 (1983)

<sup>14</sup>D. Schlueter, *supra* note 8, § 1-1(B).

but it fades in and out of everyday use.<sup>15</sup> Generally, it means due process composed of, not only the constitutional protections, but also statutory and regulatory features that provide guidance on how the military justice system should work.

Recently it was used in an opinion by the Navy-Marine Corps Court of Military Review in concluding that intentional delays in notifying the accused of pending charges violated military due process.<sup>16</sup> The court applied a two-part test: The accused must establish that Congress granted a fundamental right *and* that this right was denied during the course of the trial. The court apparently ignored the concept of fundamental fairness. In my view, that case just as easily could have been decided on grounds of lack of due process without referring to any congressional action or inaction.

### 3. *What Is the Problem? It Is Only a Term*

The term “military due process” seems relatively harmless. But it may be misleading to the extent that it connotes a form of due process that is somehow less than the process due to any defendant charged with a crime or a template different from the one outlined above. It is also problematic to the extent that it suggests that only rights granted by Congress are worthy of protection by the military courts. Because the term “Military Due Process” is potentially misleading, it should be dropped or used only after reading the proverbial warning label. Such a label might read as follows:

The term “Military Due Process” may be misleading and lead to incorrect results. Be sure to consult your copy of the Constitution, the Manual for Courts-Martial, and your Service Regulations.

Simply affixing a warning label to the term, however, will not solve the problem if the user does not believe the label or simply decides to disregard the danger signs.

---

<sup>15</sup>See Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 St. John's L. Rev. 225 (1961)

<sup>16</sup>See *United States v. Berrey*, 28 M.J. 714, 718 (N.M.C.M.R. 1989)

## *C. CONSTITUTIONAL PROTECTIONS*

### *1. Do the Constitutional Protections Apply?*

It is easy to forget that the military justice system as you see it today is in some ways a youngster in the legal systems of the world. Granted, the roots of the system of justice run back to the Roman empire, up through the common-law traditions of England, to our shores and our Constitution.<sup>17</sup> But the system as we know it, with all of its due process protections, is relatively young.

It was not all that long ago that the debate swirled around the issue of whether, and to what extent, the Bill of Rights applied to the military justice system. For example, does the fourth amendment protection against unreasonable searches and seizures apply? If so to what extent? It was not until the **1970's** that the Court of Military Appeals ruled that a service member confined before trial was entitled under the fourth amendment to an independent review of the commander's decision ordering confinement.<sup>18\*</sup>

Most of the rights are now considered applicable. Long before the courts had decided that certain constitutional protections were available, the Congress had made such rights a part of the Articles of War and then later the Uniform Code of Military Justice.

Even now, the question remains. Even assuming the protections apply, do they apply with the same force and effect as they do to the civilian community? The Supreme Court and Court of Military Appeals have indicated that the protections of the Bill of Rights apply to persons in the military except to the extent that they are overridden by demands of "discipline and duty."<sup>19</sup> Again, our answers are not purely academic. Without regard to what the Congress or the President says about the available due process protections, the Court of Military Appeals might very well make a constitutional issue out of it.

Although debate continues about the scope of protections provided by the fourth and fifth amendments, I would like to focus my comments on two particular rights that are found in civilian practice,

---

<sup>17</sup>D. Schlueter, *supra* note 8, §§ 1-4 to 1-6(c) (history of courts-martial).

<sup>18</sup>*See* Courtney v. Williams, **1 M.J. 267 (C.M.A. 1976)** (following Supreme Court's decision in *Gerstein v. Pugh*, **420 U.S. 103 (1975)**).

<sup>19</sup>*Id.* at 270 (quoting *Burns v. Wilson*, **346 U.S. 137, 140 (1953)**).



but not in military justice. They are the right to indictment by grand jury and the right to trial by jury. The first we can deal with summarily, the second requires a little more attention.

## 2. *Right to Indictment by Grand Jury*

Two rights that are conspicuously absent from the military justice system are the right to grand jury proceedings and the right to a jury trial. Both are considered essential elements of due process in the civilian community. Although their true utility and worth may be debated, they are part and parcel of American jurisprudence. Nevertheless, they are missing from military justice. Why?

In the case of indictment by grand jury, the fifth amendment explicitly exempts cases arising in the armed forces. The absence of this right is generally noncontroversial because, in some ways, the military's statutory article 32 pretrial investigation offers greater protections for the military defendant.<sup>20</sup> That is, article 32 offers the defendant the opportunity to discover the prosecution's case, the ability of the defendant and his or her counsel to be present at the hearing, the opportunity to present defense evidence, and the opportunity to cross-examine adverse witnesses.

## 3. *The Right to Jury Trial*

Another right guaranteed by the United States Constitution that is not applicable in courts-martial is the sixth amendment right to a jury trial. Consequently, an accused being tried by a special court-martial may appear before a court consisting only of three individuals. If the accused is being tried by a general court-martial, only five individuals are required for the court. In each of those instances, a verdict of guilty may be rendered on less than a unanimous vote.<sup>21</sup>

The Supreme Court in *Ballew v. Georgia*<sup>22</sup> concluded that an accused is denied his sixth amendment right to jury trial when the jury is composed of less than six persons. In *Burch v. Louisiana*,<sup>23</sup> the Court held that if the jury consists of **six**, the verdict must be

---

<sup>20</sup>Uniform Code of Military Justice, art. 32, 10 U.S.C. § 832 (1988) [hereinafter UCMJ].

<sup>21</sup>UCMJ art. 52(a)(1). A unanimous verdict is required before the court-martial may find an accused guilty of an offense for which the death penalty is a mandatory punishment.

<sup>22</sup>435 U.S. 223 (1978).

<sup>23</sup>441 U.S. 130 (1979). Nonunanimous findings are apparently permitted if the jury is composed of more than six persons.

unanimous. Nevertheless, the Supreme Court<sup>24</sup> and the military courts<sup>25</sup> have concluded that, because the sixth amendment right to jury trial does not apply to courts-martial, these cases are inapplicable. Both the Court of Military Appeals and the Supreme Court have declined to revisit the issue.

Central to the Court's conclusions in *Burch* was the fact that below a certain number of jurors, the ability of the jury to interact in a meaningful way—that is to bring out and discuss all of the pertinent issues and competing arguments—was greatly diminished. Is not the same true for military courts? At least one court has said no.<sup>26</sup>

Are there compelling arguments for the current composition of courts-martial—five members in a general court-martial and three in a special court-martial, with only two-thirds majority needed for a conviction? Why are we different? In the 1774 Articles of War, thirteen members were required in general courts-martial, but in 1776 the number was reduced to five. The reduction apparently was based upon the problem of finding sufficient officers in the units to serve as court members. Probably, tradition has had much to do with the current numbers.

But a new tradition, if that term is appropriate, may be developing. I understand that it is fairly common at some locations for the convening authority to include more than five members on general courts-martial. That practice does not seem to cause any problems.

Notwithstanding the inaction of the Supreme Court and the Court of Military Appeals, why not amend the Uniform Code of Military Justice to require a minimum of six in general courts-martial.<sup>27</sup> In capital cases make it twelve. As I have noted, for all practical purposes, more than the jurisdictional minimum number of members are being appointed at some installations. Why not simply make the emerging “tradition” a part of the Code?

---

<sup>24</sup>*O'Callahan v. Parker*, 395 U.S. 258, 261 (1969); *Reid v. Covert*, 354 U.S. 1, 37 n.68 (1957).

<sup>25</sup>*See, e.g.*, *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988); *United States v. Kemp*, 46 C.M.R. 152, 154 (C.M.A. 1973).

<sup>26</sup>*United States v. Corl*, 6 M.J. 914 (N.M.C.M.R. 1979). Interestingly, the Navy court pointed out that the Supreme Court had relied upon data derived only from civilian sources, which had no probative value in the military context. *Id.*

<sup>27</sup>Although I think similar reasoning could be used to support a court of six members for a “regular” special court-martial, the Supreme Court decisions would seem to support less than six members when the offense being tried was a “petty” offense. Because the jurisdictional limit of a regular special court-martial is six months of confinement, the requirement of only three officers for that court, and the sixth amendment guarantees of a right to trial by jury, are more in tune with each other.

The requirement of unanimity is another question. The reason usually given for not requiring unanimity is that it avoids the problem of a “hung jury.” I really doubt that in most cases that is a real problem. To be in harmony with the Supreme Court cases I mentioned earlier, any court consisting of six or less members should be required to reach a unanimous verdict. An intermediate solution would be to require a unanimous verdict, as it is currently required in capital cases, on both findings and sentence when the maximum allowable punishment on the charged offenses is above a certain minimum, such as ten years.

It seems that the sixth amendment requirement of the right to a jury trial could be applied much more liberally than it currently is without doing any great harm to the way in which the military operates. As I will note later, one of the real sticking points in military justice is, not only the composition of the court, but also the method of selecting members. A good start at tackling that overall problem would be to give very serious consideration, as a number of commentators have, to the issue of the size of the court-martial.

## ***D. THE ROLE OF THE COMMANDER***

### ***1. The Eagle***

In the hallway of the main lobby of this School hangs a picture of the head of an eagle, entitled simply “The Commander.” To me the picture symbolizes the bold leader, the fearless leader, the leader willing to take the troops to new heights of pride and esprit de corps. A symbol of freedom and liberty. To even suggest taking the commander—the eagle—out of the American military justice system sounds unpatriotic. That is probably why the most appropriate role of the commander in the military justice system is perhaps one of the toughest to address. The commander always has been at the heart of the military justice system, and to suggest removing the commander from the system, or to limit the role of the commander in any way, is viewed by some as a sure demise of the uniqueness of the system.<sup>28</sup>

Yet over the years, the commander’s role has been diminished somewhat . . . and the system has survived. For example, when I first came in the Army, the lives of young JAGs were consumed with drafting lengthy “post-trial reviews” that basically were an entire rehash

---

<sup>28</sup>See *United States v. Ralston*, 24 M.J. 709, 711 (A.C.M.R. 1987) (Appendix).

of the trial—a detailed summary of each witness’s testimony, presentation of legal issues, presentation of evidence favorable to the defendant, resolution of legal issues, and a recommendation from the SJA to the commander. The system reached the point at which form clearly was being elevated over substance.

In the Military Justice Act of 1983, those requirements were whittled down, largely because of the recognition that the posttrial review was primarily legal in nature and that lawyers could just as easily make some major decisions about the post-trial disposition of the case.

In 1983, another major change took place. The commander was no longer required to appoint the counsel or the judge to the court-martial. That task for a number of years had really been pro forma anyway.

## 2. *Selection of Court Members (Jury)*

One important change was not made in 1983; the commander still selects the members who sit on the court. That, in my view, continues to be a major problem area. Despite all the areas in which the defendant is granted more protections, the commander still picks the jury. No matter how you view it or label it, the commander picks the people who will decide whether the accused committed the offense and, if so, what the punishment should be.

In a concurring opinion in *United States v. Smith*,<sup>29</sup> a case addressing the process used to select the members for the accused’s court-martial, Judge Cox noted that those responsible for the process should reflect upon its importance as a “solemn and awesome responsibility.” The process of selecting members, he said, “is the most vulnerable aspect of the court-martial system; the easiest for the critics to attack. A fair and impartial court-martial is the most fundamental protection that an accused servicemember has from unfounded or unprovable charges.”<sup>30</sup>

Why do we still have the commander selecting the members of the court? Do not misread me. Commanders are picked for their integrity, their honor, and their respect for the law. They are the “eagle”—the nation’s **symbol**. I am intimately familiar with the argument

<sup>29</sup>27 M.J. 242 (C.M.A. 1988).

<sup>30</sup>*Id.* at 252.

(because I have used it myself) that the military “jury” is composed of top-notch people, most of them with college educations. I am aware that the commander is responsible for picking people who are mature and experienced. Despite those justifications for the present system, the selection process is subject to continual challenges. At a minimum, it looks bad. In legal parlance, the process can present an appearance of evil. The fact that the Supreme Court and the Court of Military Appeals have not ruled the process unconstitutional is no reason not to consider a revision seriously. If we were to apply a simple balancing test, would the benefit of the commander selecting the court outweigh the problems and the perceptions that it causes?

One alternative would be to go with some sort of random selection. Everything is now on computers and they have become a routine part of every legal office. The computer could be programmed to turn out a cross-section of officers and enlisted members based upon the language of article 25 and could be used to weed out those who are due to rotate assignments or those who are scheduled for TDY. I cannot believe that the same ingenuity that coordinated the massive air strikes in the Middle East could not be used to select court members for a court-martial when a service member’s liberty and property interests are at stake.

Whatever system is used, the role of the prosecutor and the commander in the selection process should be reduced, if not eliminated. Whatever administrative problems there might be, it simply has to be better than responding to allegations of stacked juries.

### 3. *Composition of the Courts*

If there is any doubt where the civilian community gets the impression that military courts are less than the paradigm of impartiality, consider a sampling of cases in the last several years in which defense counsel successfully or unsuccessfully challenged a number of court members. Notwithstanding repeated statements to the effect that trial courts should grant challenges for cause liberally, the military courts generally have hesitated to overrule trial court rulings denying a wide range of challenges for cause. Consider the following sampling of cases in which such challenges were denied.

—Members who were given efficiency ratings by other members of the court.<sup>31</sup>

---

<sup>31</sup>United States v. Murphy, 26 M.J. 454, 455-56 (C.M.A. 1988)

- Members had been victims of multiple crimes.<sup>32</sup>
- Member who had personal interest and professional interest in stopping bad checks sitting on a bad check case.<sup>33</sup>
- Member who had extensive prior civilian experience as social services counselor appointed to child abuse case.<sup>34</sup>
- Member who expressed abhorrence to sexual offense on child and acknowledged that his emotions would force him to be a little tougher on sentencing but that he could take cognizance of his emotions.<sup>35</sup>

In the process of deciding these and many similar cases, the appellate courts have concluded that court members can rehabilitate themselves through proper answers to the inquiring trial judge. At least one court has indicated that the trial judge may use leading questions in questioning the challenged court member.<sup>36</sup> It should not be too difficult for any judge worth his or her salt to obtain a statement from the member that, despite some bias toward the accused or the crime, the member will keep an open mind about the case. The system should not put either the members or the trial judge in that position. These instances and others like them are, in my view, self-inflicted wounds. Cumulatively, they present the appearance of evil.<sup>37</sup> Put yourself in the position of the accused, the accused's family, and the public generally. What is their view of the composition of the court? What would your view be if you were the accused?

The problems associated with composition of courts-martial probably need no statutory solution if those responsible for the assisting in the selection process heed Judge Cox's admonition and take extraordinary efforts to select the most objective fact-finders available.

#### 4. *Command Influence: The Mortal Enemy*

The one issue that poses the greatest threat to any attempt to in-

---

<sup>32</sup>United States v. Smith, 25 M.J. 785, 788 (A.C.M.R. 1988).

<sup>33</sup>United States v. Carns, 27 M.J. 820, 822 (A.C.M.R. 1988).

<sup>34</sup>United States v. Towers, 24 M.J. 143, 146 (C.M.A. 1987).

<sup>35</sup>United States v. Yardley, 24 M.J. 719, 723 (A.C.M.R. 1987).

<sup>36</sup>United States v. Mayes, 28 M.J. 748, 752 (A.F.C.M.R. 1989).

<sup>37</sup>United States v. Swagger, 16 M.J. 759 (A.C.M.R. 1983). Incredibly, the convening authority appointed the provost marshal to the accused's court-martial, in which he served as the president. The court noted that doing this created the appearance of evil and that individuals assigned to police duties should not be appointed to courts. *Id.* at 760.

crease the respect of the public is the proverbial problem of unlawful command influence—what the Court of Military Appeals has labelled the “mortal enemy” of military justice. Whatever means are appropriate to stop it, whether that means developing a vaccine, quarantining it, or warehousing it, we must get it off the streets. It is no friend of the Corps nor of the system. It has caused more distrust and personal turmoil than any other issue facing those running the military justice system.

Do you know it when you see it? How will you know it? Will there be an official looking memo? How do you know that you have not become an unwitting victim of its snares? What should you do when you see it?

From my personal experience, I will tell you that the issue is not always open and obvious. For example, when I was an energetic young JAGC captain serving as the Chief of Military Justice at Fort Belvoir I realized that we often had problems communicating with the members who had been selected to serve on a court-martial. They would end up calling our office to find out all sorts of information about the approximate length of the trial, where they should go, or what uniform they should wear. At about that same time, a colleague at another installation told me about a little booklet of information that they had worked up giving all of that information. I liked the idea and approached my boss with it. He objected. He pointed out to me that it was good to try to simplify the process, but that real dangers lurked in presenting “advice” or information to the members. He was concerned that anything said to the members, especially by the prosecution side of the house, might be interpreted to reflect the convening authority’s views. He also pointed out to me that the booklet I had heard about contained a brief introduction by the convening authority on the solemn duties of being a court member. Was my boss overreacting? At the time I thought he might be. My motives were good. I simply wanted to make the system more efficient. But in looking back on that incident, it serves to remind me that no matter how innocent the briefing, the memo, or the little talk might be, trouble lurks.

For the next several years, we will all be keenly aware of the personal heartache and the sense of embarrassment that can befall even the best lawyers and the best intentioned commanders. But how many remember the name—or have even heard the name—of the Commanding General at Fort Leonard Wood whose actions decades ago gave rise to what we now know as the *DuBay* hearing, or any

of the myriad other commanders or officers who said or did something that resulted in a finding of unlawful command influence? Our institutional memories can be short, and in the process each generation of new JAGs must face the threat of unlawful command influence.

### *5. Should the Commander Be Removed From the System*

I am not prepared to suggest that the commander—the eagle—should be removed totally from the system. My restraint is not based upon the fear of “civilianization” of military justice. Nor is my restraint grounded upon a belief that the commander is an indispensable element in military justice. Instead, I am restrained from suggesting complete removal because the military society—whether it be a post, camp, or station—is a “community.” Removing the commander totally from the processing of charges or the selection of court members would not necessarily stem the problem of the indignant commander who has just been informed that charges against the division’s drug lord have been dismissed on a “legal technicality.” Nor would it stem the problem of subordinate commanders saying or doing things that threaten the integrity of the court-martial.

It would be incorrect to blame the “commander” for all of the ills of command influence. If there is one clear lesson for us today, it is the responsibility of all those within the system, including lawyers, to do all that is within their power to ensure that the system exemplifies all that is right with justice in this country.

The process of scrutinizing the role of the commander must continue. The irony is that within the military, there exist the resources to combat virtually any problem that presents itself. Yet, the military cannot rid itself of this one menace.

It may be that unlawful command influence never will be eradicated and it may be that other methods will have to be found to contain it. The question is, how strongly do we feel about eradicating it? After all of these years, the Court of Military Appeals finally has taken a stronger stand on the subject, and that is bound to make some difference.

If the commander is to remain a key element in the military justice system, then what we say and do about maintaining the independence of those called upon to judge the actions of the commander takes on even greater significance.



## ***E. THE ROLE OF THE MILITARY JUDICIARY***

### *1. The Military Judge*

If there is any hope of increasing respect for military justice it is absolutely essential that the trial and appellate judiciary continue to draw from the best and the brightest.<sup>38</sup> It is the judges who are most often called upon to sort through and decide the knotty issues, such as unlawful command influence. Trial judges are at the cutting edge of the law, as they are in civilian life. Judges sitting in the trial courtroom bear an awesome responsibility to see to it that justice is done. The courtroom is where the public sees military justice in action. The military judge, sitting in the predominant position in the courtroom, is the symbol of impartiality, not discipline; of justice, not discipline; of impartiality, not bias.

For a military appellate judge, it means writing the persuasive opinion that spells out why the defendant was or was not granted a fair trial. Appellate judges are not nearly as visible to the civilian community. But the task is just as important and vital. One feature that is often overlooked is that the military appellate courts have the authority to conduct an independent factual analysis. That gives them even more responsibility than that carried by their civilian counterparts who generally are required only to review questions of law.

### *2. Assignments and Tenure*

I am aware that some have suggested that to maintain independence it is important to stabilize tours for military judges or grant some sort of tenure that ensures them that no matter how unpopular their decisions, they have some security. I am not sure that is workable, but I would be willing to consider it. Why would such a change even be necessary? To protect trial and appellate judges? Once you start down the slippery slope of protecting the players who are called upon to call the tough shots, where would we stop? The SJA who initially tells the three-star general that his regulation is unconstitutional because it is overbroad? The JAG who helped write

---

<sup>38</sup>This is a delicate matter. In the military justice system, all of the players are important. But I am afraid that, all too often, the goal of military lawyers is to be the chief lawyer in a large office. In the Army, that means a corps or division SJA. What I am suggesting is that it is just as important to promote the idea that serving in the capacity of a trial or appellate judge is "career enhancing." This is not a legislative issue; instead, it is a management issue.

it, or unsuccessfully objected to it? The defense counsel who challenged it? The Court of Military Review that reviewed it? The answer in protecting these people from retribution lies, not in granting tenure, but rather in taking appropriate action against any lawyer or commander who attempts to interfere with a trial or appellate judge's independence. All must understand that military justice is not simply a formality for deciding when the accused gets on the train for the Disciplinary Barracks. Anyone who views it in that light is doing the system a disservice.

## ***F. AN INDEPENDENT COURT OF MILITARY APPEALS***

Several years ago, I served as the reporter for the committee that studied the Court of Military Appeals. The committee itself was composed of a number of distinguished individuals who had much to contribute to an in-depth analysis of what the court was about and how it could better perform the function it was originally designed to fulfill—civilian review of the military justice system.<sup>39</sup>

Ironically, the committee was viewed by some as being a stacked deck—a handpicked committee that simply would endorse whatever the court wanted. Those of you who have read the report know that is not what happened. To the credit of Chief Judge Everett, the committee was composed of independent thinkers.

To say that the road the court has traveled since its formation in 1950 has been smooth would be to ignore the obvious. The road has been rough. From the outset, the court has been criticized, maligned, poked at, and probed. Some of its judges have contributed more than others; some of its opinions have not stood the test of time, while others have become part and parcel of military justice. Through it all, the court has strived to meet the congressional mandate for thorough, independent civilian review of courts-martial. As the committee concluded, it has done that.<sup>40</sup> The committee's suggested changes were set out in detail in the report that gained some attention in the media—especially the committee's suggestion that the court consider less travel in its plans.

One of the major issues addressed by the committee was the question of whether the court should be converted from an article I to

---

<sup>39</sup>See 25 M.J. at XCIX (1987) (announcement of court appointing committee)

<sup>40</sup>See 28 M.J. 99-102 (report of committee).

an article III court. The committee ultimately declined to take a final position on that question. Instead, it offered an alternative that would have the court remain as an article I court, with the appointed judges serving a term without years with retirement at age 70. The committee believed that the other recommendations should be in place first before the article III issue finally was decided.

Interestingly, the Department of Defense was opposed to any attempts to make the court an article III court. In an exhaustive study of the issue, the 1988 Department of Defense report on the status of the court included the following language:

Although Congress has stated its intent that COMA be a court in every sense of the word, COMA is not as fully independent as an Article III court. A COMA judge has no protection against salary reduction; does not have life tenure for good behavior; and can be removed by the President upon notice and hearing, for malfeasance in office, neglect or duty, or physical or mental disability. A sitting Chief Judge of COMA can be replaced; and COMA is still to a certain extent, dependent upon the Executive Branch for administrative support. The question which needs to be answered is whether any of these differences significantly impacts on COMA's ability to fulfil its judicial duties.<sup>41</sup>

... COMA is a limited court serving a limited need. Albeit different, COMA is not unique among Art. I courts. Like other Article I courts, COMA is not an independent instrument of justice. COMA is properly accountable to the Executive Branch, for it is the President as Commander in Chief who bears ultimate responsibility for the enforcement, through courts-martial of the congressionally-adopted rules and regulations governing the military forces.

...

... COMA is an integral part of the military justice system and should not be separate and apart from it. Care should be taken not to destroy the court's usefulness to the military judicial system.<sup>42</sup>

---

<sup>41</sup>United States Court of Military Appeals Report, Jan. 27, 1989, at F-3

<sup>42</sup>*Id.* at A-5, 6

A number of members on the committee observed that the more intransigent the Department of Defense became on the court's independence, the greater the argument for some separation from the Department of Defense—in much the same way that the federal courts finally were separated from the Department of Justice in 1939.<sup>43</sup>

For now, the marriage between the court and the Department of Defense appears stable and wholesome. It has not always been so, however, and always lurking in the background is the specter of the court facing a difficult constitutional issue that challenges a key Department of Defense policy or regulation.

Why does the Department of Defense feel uncomfortable with the suggestion of greater independence for the Court of Military Appeals? Is there a concern that the court will run away with military justice and civilianize it? Or do they fear that inexperienced and anti-military judges will be appointed? These are not unreasonable concerns. But, even as we speak, federal judges across the nation are reviewing decisions by military authorities and, for the most part, they are being deferential to the military. Finally, there is always Congress, to which the court is in more ways accountable than to the Department of Defense or to the Executive. I have no doubt that a runaway court could be held in check by Congress.

Although I advocate greater independence for the court, I do not agree that the court should be the primary shaper or legislator of military justice. Most of you were not in the service in the 1970's when the "Fletcher Court," as we now call it, was churning out weekly revisions to the military justice system. If an aspect of military justice is unconstitutional, the court should have the authority to say so, although I never have favored a wholesale revision of military justice by any court acting as a super legislature.

Whatever is said or not said about the Court of Military Appeals, it is absolutely essential that it remain as independent as it possibly can be. The court should stand as the symbol of independent civilian review. That is what Congress intended when it created it in 1950.

## ***G. THE ROLE OF THE LEGAL PROFESSION***

How many of you have been asked—What do military lawyers do

---

<sup>43</sup>One of the reasons for separating the administrative support of the federal courts from the Department of Justice was that one of the litigants appearing before those courts—the Department—had administrative control over those same courts.

for a living? The answer is that military lawyers make the military justice system work. They are the key to the success of the system. The system is only **as** good as the folks running it. I do not mean to ignore mention of the essential support staff— the legal clerks and administrators who make sure that the lawyers are working on the right file and that the record of trial is correctly assembled. For the critics, you represent the system. You are the lawyers. You are responsible for making it work well.

If the military justice system is to be respected, it is important that when we, **as** lawyers, “cut the wood placed in front of us,” we do it right. Many of the problems that I have addressed today are the result of human error. That is, the underlying statutes and regulations may have provided ample protection, but somewhere along the line an eager lawyer or commander, “cutting his or her pile of wood,” attempted to “cut” corners, “whittle” away the accused’s rights, or “stack” the court.

Other problems or issues I have discussed today are embedded in the system itself and will require lawyers to work out with fine surgical precision any changes in the system’s structure. Within a few short weeks some of you will be in a JAG office for the first time. Whether the system gets the respect it deserves will depend **as** much on you—who will be serving as trial or defense counsel—as it will on the shoulders of those here today who are in, or will be in, positions of leadership.

Aside from your duties as a JAG officer, it is important that you become involved in professional bar associations, such as the American Bar Association, the Federal Bar Association, or your state and local bar associations. In the process, you will present a positive image of military law and you **will** continue to learn about the civilian system. Write articles for civilian periodicals. Inform the public not only about what you do, but what military law is all about.

The key is to contribute. We sometimes ask our children, Are you part of the solution or are you part of the problem? Today I have raised suggested solutions to a wide variety of potential or real problems. But we must continue to ask ourselves: Are we being part of the problem, or are we part of the solution?

## 11. CONCLUSION

While there is no doubt in my mind that, at its core, the military justice system is an excellent model, it is important to discuss prob-

lem areas that deserve scrutiny. Some can be handled only through legislative efforts. Others can be addressed through slight, internal and informal changes in methodology. If the 1990's are to see any real change in the perception of military justice, some changes are needed. Quick fixes through name changes will not suffice. The system itself must be examined.

The goal of criminal justice always should be to ensure justice—not just convictions. The natural state of things is that the process will continue to evolve. But in that evolution, will military justice in the 1990's lag behind or pull ahead? With your help, it will become the best that it can be and receive the respect it deserves.