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CHIEF JUDGE
UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

ABA Mid-Year Meeting
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“EMBRACING CHANGE—LOOKING BACK AND MOVING FORWARD”

FIRST OF ALL, I WANT TO THANK JOHN COOKE FOR THE KIND AND WARM INTRODUCTION. SECONDLY, I WANT TO BRING GREETINGS FROM ALL OF MY COLLEAGUES FROM THE COURT.

THIS WILL BE THE LAST TIME THAT I WILL SPEAK AT THIS LUNCHEON IN MY CAPACITY OF CHIEF JUDGE OF OUR COURT. I SHARE SOME OF THE EMOTIONS EXPRESSED THIS MORNING BY ADMIRAL MCPHERSON WHEN HE INDICATED IT WOULD BE HIS LAST REPORT TO THE MILITARY LAW COMMITTEE IN HIS CAPACITY AS THE JUDGE ADVOCATE GENERAL OF THE NAVY. IT HAS BEEN AN HONOR AND PRIVILEGE TO SERVE ON THE COURT FOR NEARLY 15 YEARS. I WILL DEARLY MISS THE WORK AND THE PEOPLE WITH WHOM I HAVE BEEN PRIVILEGED TO SERVE.

I SEE IN THIS AUDIENCE LOTS OF GOOD FRIENDS. WE HAVE SHARED SOME RICH EXPERIENCES. THANK YOU FOR PERMITTING ME TO WORK WITH YOU.

PRESENTLY LIFE AT THE COURTHOUSE IS FULL -- WITH BOTH WORK AND EMOTIONS.

WHENEVER I HAVE AN OPPORTUNITY TO SPEAK TO AN AUDIENCE LIKE THIS, IT STIMULATES ME TO REFLECT (LOOK BACK) AND PROJECT (LOOK FORWARD).

TODAY, I LOOK BACK REMEMBERING WHEN I WAS A YOUNG ARMY CAPTAIN FROM THE UNIVERSITY OF NORTH DAKOTA JUST BEGINNING THIS LIFETIME ADVENTURE. FOR ME IT HAS BEEN A WONDERFUL EXPERIENCE IN THE JOURNEY FROM THE FAMILY RANCH IN WESTERN NORTH DAKOTA TO THE PRIVILEGE OF BEING THE CHIEF JUDGE OF THE COURT.

BUT I DON'T THINK WE CAN JUST LOOK BACK. WE HAVE TO ALSO LOOK AHEAD.

I HAVE A STRONG CONVICTION THAT OUR BEST DAYS ARE AHEAD BECAUSE I HAVE SEEN A MILITARY JUSTICE SYSTEM THAT IS DYNAMIC AND EMBRACES CHANGE. TODAY IT IS APPROPRIATE TO TALK ABOUT "EMBRACING CHANGE— LOOKING BACK AND MOVING FORWARD"

LOOK BACK

FROM MAY 1967 TO APRIL 1971, I WAS PRIVILEGED TO SERVE AS A CAPTAIN IN JUDGE ADVOCATE GENERAL'S CORPS, UNITED STATES ARMY.

DURING THE FIRST PART OF MY SERVICE IN THE ARMY JAG CORPS, I PERFORMED DUTIES AS A LEGAL ASSISTANCE OFFICER AND LATER AS A TRIAL COUNSEL AND DEFENSE COUNSEL.

UNTIL AUGUST 1, 1969, THE EFFECTIVE DATE OF THE MILITARY JUSTICE OF 1968, I WAS PART OF A SYSTEM WHERE, IN SPECIAL COURTS-MARTIAL, WE HAD PEOPLE INCARCERATED FOR 6 MONTHS, FORFEITING TWO-THIRDS OF THEIR PAY AND BEING REDUCED TO THE LOWEST ENLISTED GRADE WITHOUT THE PRESENCE OF A LAW TRAINED PERSON IN THE COURTROOM. IT'S DIFFICULT FOR ME TO NOW FATHOM THAT WAS GOING ON AS LATE AS 1969.

AS A RESULT OF THE MILITARY JUSTICE ACT OF 1968, THERE WAS A NEED FOR MORE MILITARY JUDGES.

IN 1969, JUST BEFORE GOING TO VIET NAM, I ATTENDED THE MILITARY JUDGE COURSE AT THE ARMY JAG SCHOOL WAS SELECTED AS A FULL-TIME MILITARY JUDGE.

FROM DECEMBER 1969 TO DECEMBER 1970, I SERVED AS A FULL TIME MILITARY JUDGE AT THE SPECIAL COURT LEVEL IN THE REPUBLIC OF VIETNAM, PRESIDING OVER MORE THAN 500 COURTS-MARTIAL.

AS REFERENCED ABOVE, IN 1968, AT THE HEIGHT OF THE VIETNAM WAR, CONGRESS ENACTED THE MILITARY JUSTICE ACT OF 1968, MAKING MAJOR CHANGES IN COURTS-MARTIAL. THE FOLLOWING CHANGES WERE IMPLEMENTED IN THE MCM, 1969.

ARTICLE 16 WAS AMENDED TO CREATE THE POSITION OF MILITARY JUDGE AND TO REQUIRE A MILITARY JUDGE IN EVERY GENERAL COURT-MARTIAL. IT ALSO PROVIDED THAT THE MILITARY JUDGE WOULD BE THE PRESIDING OFFICER IN THE COURT MARTIAL.

ARTICLE 16 AUTHORIZED, BUT DID NOT REQUIRE, THAT A MILITARY JUDGE BE DETAILED TO SPECIAL COURTS-MARTIAL. HOWEVER, ARTICLE 19 PROVIDED THAT

A SPECIAL COURT-MARTIAL COULD NOT ADJUDGE A BAD-CONDUCT DISCHARGE UNLESS A QUALIFIED LAWYER WAS DETAILED AS DEFENSE COUNSEL, A VERBATIM RECORD OF TRIAL WAS MADE, AND A MILITARY JUDGE WAS DETAILED. THE REQUIREMENT FOR A MILITARY JUDGE AT A SPECIAL COURT-MARTIAL COULD BE AVOIDED IF A MILITARY JUDGE COULD NOT BE DETAILED "BECAUSE OF PHYSICAL CONDITIONS OR MILITARY EXIGENCIES." IN SUCH A CASE THE CONVENING AUTHORITY WAS REQUIRED TO "MAKE A DETAILED WRITTEN STATEMENT, APPENDED TO THE RECORD, STATING THE REASON OR REASONS A MILITARY JUDGE COULD NOT BE DETAILED."

FURTHERMORE, ARTICLE 16 AUTHORIZED TRIAL BY A MILITARY JUDGE SITTING ALONE. IT IS MY RECOLLECTION THAT APPROXIMATELY 90 PERCENT OF THE TRIALS THAT I PRESIDED OVER WERE JUDGE ALONE TRIALS.

ARTICLE 27 WAS AMENDED TO ENTITLE AN ACCUSED TO A LAWYER IN SPECIAL COURTS-MARTIAL.

ARTICLE 66 REPLACED THE BOARDS OF REVIEW WITH A SINGLE COURT OF MILITARY REVIEW FOR EACH SERVICE.

NOTWITHSTANDING THE DRAMATIC IMPROVEMENTS IN MILITARY JUSTICE, THERE WERE MANY WHO STILL PERCEIVED IT TO BE FUNDAMENTALLY UNFAIR. THE MASSIVE BUILD-UP DURING THE VIETNAM WAR AND STRONG ANTI-WAR SENTIMENTS HEIGHTENED CRITICISM OF MILITARY JUSTICE.

ROBERT SHERRILL PUBLISHED HIS BOOK, "MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC."

MY RESPONSE TO THIS BOOK IS THAT MY WIFE, JEANINE, AND I HAVE, FOR EACH OF THE LAST 14 YEARS, ATTENDED AT LEAST ONE PERFORMANCE OF THE MARINE CORPS' EVENING PARADE AT 8TH AND I—AND WE THINK MILITARY MUSIC IS SOMETHING TO BE PROUD OF AS WELL.

IN 1969, THE SUPREME COURT DECIDED O'CALLAHAN V. PARKER, 395 U.S. 258.

SERGEANT O'CALLAHAN WAS STATIONED IN HAWAII. WHILE ON PASS, HE BROKE INTO A HOTEL ROOM, ASSAULTED A GIRL, AND ATTEMPTED TO RAPE HER. HE

WAS TRIED AND CONVICTED BY A GENERAL COURT-MARTIAL AND SENTENCED TO A DISHONORABLE DISCHARGE, CONFINEMENT FOR 10 YEARS, AND TOTAL FORFEITURES.

THE ARMY BOARD OF REVIEW AND COURT OF MILITARY APPEALS AFFIRMED.

O'CALLAHAN FILED A PETITION FOR A WRIT OF HABEAS CORPUS IN FEDERAL DISTRICT COURT, CLAIMING THAT THE COURT-MARTIAL HAD NO JURISDICTION TO TRY HIM FOR A NON-MILITARY OFFENSE, COMMITTED OFF-POST AND OFF-DUTY. THE DISTRICT COURT DENIED RELIEF AND THE COURT OF APPEALS AFFIRMED.

THE SUPREME COURT GRANTED CERTIORARI AND REVERSED, HOLDING THAT THE COURT-MARTIAL HAD NO JURISDICTION BECAUSE THE CRIMES WERE NOT SERVICE-CONNECTED. (THE DECISION WAS 6-3, WITH HARLAN, STEWART, AND WHITE DISSENTING.) JUSTICE DOUGLAS DELIVERED THE OPINION OF THE COURT. AFTER ENUMERATING A LONG LITANY OF PERCEIVED DEFECTS IN MILITARY JUSTICE, HE COMMENTED THAT "COURTS-MARTIAL AS AN INSTITUTION ARE SINGULARLY INEPT IN DEALING

WITH THE NICE SUBTLETIES OF CONSTITUTIONAL LAW." 395 U.S. AT 265.

THE NEXT BIG STEP IN CHANGING OUR SYSTEM OF MILITARY JUSTICE WAS THE MILITARY JUSTICE ACT OF 1983 AND 1984 MANUAL FOR COURTS-MARTIAL

THE ACT MODIFIED ARTICLE 60 TO SIMPLIFY THE STAFF JUDGE ADVOCATE'S POST-TRIAL REVIEW.

ARTICLE 62 WAS AMENDED TO PERMIT THE GOVERNMENT TO APPEAL AN ADVERSE RULING OF THE MILITARY JUDGE.

ARTICLE 66 WAS AMENDED TO OVERRULE THE CHILCOTE DECISION BY SPECIFICALLY AUTHORIZING A COURT OF MILITARY REVIEW SITTING EN BANC TO RECONSIDER A PANEL DECISION.

ARTICLE 67 WAS AMENDED TO PERMIT AN APPEAL BY EITHER SIDE TO THE UNITED STATES SUPREME COURT.

SINCE THIS AMENDMENT, THE SUPREME COURT HAS GRANTED CERTIORARI IN EIGHT MILITARY CASES DECIDED BY OUR COURT (COUNTING WEISS AND HERNANDEZ AS ONE CASE):

BECAUSE THESE CASES HAVE BEEN ON THE BOOKS FOR A LONG TIME AND THE MAJORITY OF THIS AUDIENCE IS PROBABLY VERY FAMILIAR WITH THEM, I WILL JUST TOUCH BRIEFLY ON THEM:[1]

SOLORIO V. UNITED STATES, 483 U.S. 435 (1987).

SOLORIO WAS A MEMBER OF THE COAST GUARD ON ACTIVE DUTY IN JUNEAU, ALASKA. HE WAS CHARGED WITH SEXUALLY ABUSING TWO YOUNG DAUGHTERS OF A FELLOW COAST GUARD MEMBER. AT HIS COURT-MARTIAL HE MOVED TO DISMISS THE CHARGES FOR LACK OF JURISDICTION, CITING O'CALLAHAN AND ARGUING THAT HIS CRIMES WERE NOT SERVICE-CONNECTED. THE COURT-MARTIAL GRANTED THE MOTION TO DISMISS, AND THE GOVERNMENT APPEALED. THE COAST GUARD COURT OF MILITARY REVIEW REVERSED THE DISMISSAL AND REINSTATED THE CHARGES, AND THE COURT OF MILITARY APPEALS AFFIRMED, HOLDING THAT THE OFFENSES WERE SERVICE-CONNECTED.

THE SUPREME COURT GRANTED CERTIORARI. INSTEAD OF TURNING THE CASE ON THE QUESTION OF SERVICE

[1] **(DUE TO TIME LIMITATIONS, ONLY A SUMMARY OF THESE CASES WAS PRESENTED.)**

CONNECTION, THE COURT OVERRULED O'CALLAHAN. THE COURT MADE NO SPECIFIC COMMENTS ABOUT THE QUALITY OF MILITARY JUSTICE. INSTEAD, IT FAULTED THE O'CALLAHAN DECISION'S INACCURATE READING OF THE HISTORY OF COURT-MARTIAL JURISDICTION AND TURNED THE CASE ON THE AUTHORITY OF CONGRESS TO "MAKE RULES FOR THE GOVERNMENT AND REGULATION OF THE LAND AND NAVAL FORCES," AND THE PLAIN LANGUAGE OF THE UCMJ.

WEISS V. UNITED STATES, 510 US 163 (1994), INVOLVED THE QUESTIONS REGARDING THE APPOINTMENT OF AND TENURE FOR MILITARY JUDGES. THIS CASE AND A COMPANION CASE, HERNANDEZ V. UNITED STATES, AROSE IN THE MARINE CORPS. OUR COURT HAD ADDRESSED THE TENURE ISSUE IN UNITED STATES V. GRAF, 35 MJ 450 (CMA 1992), HOLDING THAT THE ABSENCE OF A FIXED TERM OF OFFICE FOR MILITARY JUDGES WAS NOT A DENIAL OF DUE PROCESS. WE HELD THAT THE UCMJ PROVIDES SUFFICIENT JUDICIAL INDEPENDENCE TO SATISFY THE DUE PROCESS CLAUSE. BEFORE THE SUPREME COURT, THE

APPELLANTS CONTENDED THAT MILITARY TRIAL AND APPELLATE JUDGES HAVE NO AUTHORITY BECAUSE THE METHOD OF THEIR APPOINTMENT BY THE JUDGE ADVOCATE GENERAL VIOLATES THE APPOINTMENTS CLAUSE OF ARTICLE II OF THE CONSTITUTION AND BECAUSE THEIR LACK OF TENURE VIOLATES THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE.

THE SUPREME COURT HELD THAT THE APPOINTMENTS CLAUSE WAS NOT VIOLATED BECAUSE ALL MILITARY JUDGES ARE ALREADY APPOINTED AS "OFFICERS OF THE UNITED STATES" BY VIRTUE OF THEIR APPOINTMENTS AS COMMISSIONED OFFICERS. THE SUPREME COURT REJECTED THE DUE PROCESS ARGUMENT, HOLDING THAT THE APPLICABLE PROVISIONS OF THE UCMJ AND CORRESPONDING SERVICE REGULATIONS SUFFICIENTLY INSULATE MILITARY JUDGES FROM THE EFFECTS OF COMMAND INFLUENCE.

DAVIS V. UNITED STATES, 512 US 452 (1994), INVOLVING AN AMBIGUOUS INVOCATION OF THE RIGHT TO COUNSEL. THE SUPREME COURT USED THE DECISION OF OUR COURT TO RESOLVE A SPLIT AMONG THE FEDERAL

CIRCUITS CONCERNING A SUSPECT'S RIGHT TO COUNSEL DURING POLICE INTERROGATION. THE FEDERAL CIRCUITS HAD SPLIT THREE WAYS. SOME CIRCUITS HELD THAT ANY MENTION OF COUNSEL REQUIRED THAT INTERROGATION STOP. OTHER CIRCUITS HELD THAT ONLY AN UNEQUIVOCAL REQUEST FOR COUNSEL REQUIRED THAT INTERROGATION STOP. OUR COURT AND SOME OTHER CIRCUITS HELD THAT AN EQUIVOCAL MENTION OF COUNSEL REQUIRED THAT INTERROGATION ABOUT THE OFFENSES STOP, BUT THAT INTERROGATORS COULD QUESTION THE SUSPECT TO CLARIFY WHETHER HE DESIRED TO INVOKE HIS RIGHTS OR CONTINUE QUESTIONING. THE SUPREME COURT TOOK A HARD LINE, HOLDING THAT INTERROGATION MAY CONTINUE UNTIL THE SUSPECT UNEQUIVOCALLY INVOKES HIS RIGHTS.

RYDER V. UNITED STATES, 515 US 177 (1995), INVOLVED THE VALIDITY OF THE APPOINTMENT OF A CIVILIAN JUDGE (CJ BAUM) TO THE COAST GUARD COURT OF MILITARY REVIEW. CJ BAUM HAD BEEN APPOINTED BY THE GENERAL COUNSEL OF THE DEPT OF TRANSPORTATION, WHO IS THE TJAG FOR THE COAST GUARD AND EMPOWERED

UNDER ARTICLE 66(A) TO APPOINT CMR JUDGES. IN A COMPANION CASE, UNITED STATES V. CARPENTER, 37 MJ 291 (CMA 1993), OUR COURT HAD HELD THAT CJ BAUM'S APPOINTMENT BY THE GENERAL COUNSEL WAS INVALID, BECAUSE THE POWER TO APPOINT "INFERIOR OFFICERS" WAS LIMITED TO THE PRESIDENT, THE HEADS OF DEPARTMENTS, AND THE COURTS OF LAW. WHILE APPELLATE REVIEW OF THE CASE WAS PENDING, THE SECRETARY OF TRANSPORTATION APPOINTED CJ BAUM TO THE COURT, IN AN EFFORT TO SATISFY THE APPOINTMENTS CLAUSE.

OUR COURT HELD THAT CJ BAUM'S APPOINTMENT BY THE GENERAL COUNSEL WAS INVALID, BUT THAT HIS ACTS HAD DE FACTO VALIDITY, RELYING ON BUCKLEY V. VALEO, 424 U.S. 1 (1976). THE SUPREME COURT REJECTED OUR DE FACTO VALIDITY RATIONALE, HELD THAT CJ BAUM'S APPOINTMENT BY THE GENERAL COUNSEL WAS INVALID, AND REMANDED THE CASE FOR FURTHER PROCEEDINGS BEFORE A PROPERLY APPOINTED COURT OF MILITARY REVIEW.

AFTER THE RYDER CASE WAS REMANDED FROM THE SUPREME COURT, OUR COURT CONCLUDED THAT IT WAS NECESSARY TO DETERMINE WHETHER THE CMR WAS PROPERLY CONSTITUTED AFTER THE SECRETARY OF TRANSPORTATION APPOINTED ITS CIVILIAN MEMBERS. WE HELD THAT THE JUDGES OF THE CMR ARE "INFERIOR OFFICERS" WITHIN THE MEANING OF THE APPOINTMENTS CLAUSE, AND THAT THE APPOINTMENT BY THE SECRETARY OF TRANSPORTATION WAS VALID. UNITED STATES V. RYDER, 44 MJ 9 (1996).

THE SUPREME COURT UPHELD OUR COURT'S CHARACTERIZATION OF CMR OFFICERS AS "INFERIOR OFFICERS" AND THE VALIDITY OF CJ BAUM'S APPOINTMENT BY THE SECRETARY OF TRANSPORTATION IN EDMOND V. UNITED STATES, 520 U.S. 651 (1997). EDMOND HAD ARGUED THAT THE AUTHORITY OF THE SECRETARY OF TRANSPORTATION UNDER 49 USC §323(A) WAS A "DEFAULT STATUTE," AND THAT ARTICLE 66(C) GAVE THE EXCLUSIVE POWER TO APPOINTMENT MILITARY JUDGES TO THE JUDGE ADVOCATE GENERAL (WHO FOR THE COAST GUARD IS THE

GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION).

THE SUPREME COURT REJECTED THAT ARGUMENT AND HELD THAT 49 USC § 323(A) GAVE THE SECRETARY OF TRANSPORTATION POWER TO APPOINT JUDGES OF THE CCA. THE SUPREME COURT DISTINGUISHED BETWEEN THE SECRETARY'S POWER TO APPOINT JUDGES AND THE JUDGE ADVOCATE GENERAL'S POWER TO ASSIGN JUDGES. ARTICLE 66(C) TALKS IN TERMS OF ASSIGNMENT, NOT APPOINTMENT.

EDMOND HAD ALSO ARGUED THAT APPELLATE MILITARY JUDGES ARE PRINCIPAL OFFICERS UNDER ARTICLE II, AND THUS MUST BE APPOINTED BY THE PRESIDENT AND CONFIRMED BY THE SENATE. AFTER AN ANALYSIS OF THE DUTIES OF APPELLATE MILITARY JUDGES, THEIR SCOPE OF AUTHORITY, AND THE FINALITY OF THEIR DECISIONS, THE SUPREME COURT CONCLUDED THAT THEY ARE "INFERIOR OFFICERS" WHO MAY BE APPOINTED BY THE SECRETARY OF A DEPARTMENT.

LOVING V. UNITED STATES, 517 US 748 (1996), INVOLVED THE CONSTITUTIONALITY OF A DEATH SENTENCE IMPOSED BY A COURT-MARTIAL. THE SPECIFIC ISSUE WAS WHETHER THE PRESIDENT INSTEAD OF THE CONGRESS COULD PRESCRIBE THE AGGRAVATING FACTORS THAT PERMIT IMPOSITION OF A DEATH SENTENCE. THE COURT HELD THAT THE PRESIDENT HAD THE AUTHORITY TO PRESCRIBE AGGRAVATING FACTORS UNDER ARTICLES 18, 56, AND 36, UCMJ, AND THAT THE CONGRESSIONAL DELEGATION OF AUTHORITY DID NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

AN INTERESTING SIDELIGHT TO THE DECISION IN LOVING IS JUSTICE STEVENS' SEPARATE CONCURRING OPINION, JOINED BY JUSTICES SOUTER, GINSBURG, AND BREYER. THESE FOUR JUSTICES RAISE THE QUESTION AND RESERVE JUDGMENT ON WHETHER SOLORIO APPLIES TO CAPITAL CASES. THEY SUGGEST THAT THEY MIGHT REQUIRE A SERVICE-CONNECTION IN CAPITAL CASES.

UNITED STATES V. SCHEFFER, 523 US 303 (1998), INVOLVED THE CONSTITUTIONALITY OF MIL. R. EVID. 707, WHICH PROHIBITS ADMISSION OF POLYGRAPH EVIDENCE IN COURTS-MARTIAL. THE SUPREME COURT REVERSED A DECISION BY OUR COURT WHERE WE HELD THAT THE RULE INFRINGED AN ACCUSED'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE. THIS WAS THE FIRST CASE IN WHICH THE SOLICITOR GENERAL OF THE UNITED STATES APPEALED TO THE SUPREME COURT TO REVERSE OUR COURT.

GOLDSMITH V. CLINTON, 526 US 529 (1999), WHERE THE SUPREME COURT REVERSED A DECISION OF OUR COURT ENJOINING THE PRESIDENT FROM DROPPING AN AIR FORCE OFFICER FROM THE ROLLS AS A RESULT OF HIS COURT-MARTIAL SENTENCE.

THERE HAVE BEEN FURTHER REFINEMENTS IN THE MILITARY JUSTICE SYSTEM.

SEPARATE CHAIN OF COMMAND FOR DEFENSE COUNSEL.

IN THE LATE 70S AND EARLY 80S, THE ARMY TESTED AND IMPLEMENTED A SEPARATE CHAIN OF COMMAND FOR DEFENSE COUNSEL AND CREATED A NEW ORGANIZATION, THE U.S. ARMY TRIAL DEFENSE SERVICE.

AT ABOUT THE SAME TIME THE AIR FORCE ESTABLISHED A CHAIN OF COMMAND COMPOSED OF REGIONAL AND CIRCUIT DEFENSE COUNSEL.

IN MAY 1998, THE NAVY CREATED A SEPARATE CHAIN OF COMMAND FOR DEFENSE COUNSEL, ASSIGNING THEM TO THE NAVY LEGAL SERVICES OFFICE (NLSO), SEPARATE FROM THE SJA AND TRIAL COUNSEL.

RULES OF EVIDENCE.

IN 1980 PRESIDENT CARTER PROMULGATED THE MILITARY RULES OF EVIDENCE. THESE RULES PARALLEL THE FEDERAL RULES OF EVIDENCE.

INDEPENDENT TRIAL JUDICIARY.

ALTHOUGH MILITARY JUDGES WERE REMOVED FROM THE COMMAND OF CONVENING AUTHORITIES MANY YEARS AGO, THEIR LACK OF TENURE HAS FROM TIME TO TIME RAISED QUESTIONS ABOUT THEIR INDEPENDENCE.

THE ISSUE REACHED THE SUPREME COURT IN WEISS V. UNITED STATES, 510 U.S. 163 (1994), DISCUSSED EARLIER. ALTHOUGH THE SUPREME COURT HELD THAT MILITARY JUDGES ARE INDEPENDENT AND INSULATED FROM UNLAWFUL COMMAND INFLUENCE, THERE IS SOME MOVEMENT AMONG THE SERVICES TO INCREASE THEIR INDEPENDENCE.

BY REGULATION, THE ARMY NOW PROVIDES A FIXED TERM OF OFFICE (3 YEARS, WITH SPECIFIED EXCEPTIONS) FOR MILITARY JUDGES. SEE ARMY REGULATION 27-10, PARAGRAPHS 8.1.G. (TRIAL JUDGES) AND 13.12 (APPELLATE JUDGES).

EXPANSION OF COURT OF MILITARY APPEALS.

IN 1989, ARTICLE 67 WAS AMENDED AND ARTICLES 141-145 WERE ADDED, TO EXPAND THE COURT OF MILITARY APPEALS FROM THREE JUDGES TO FIVE.

COURTS RENAMED.

IN 1994, THE COURTS OF MILITARY REVIEW WERE RENAMED AS COURTS OF CRIMINAL APPEALS AND THE U.S. COURT OF MILITARY APPEALS WAS RENAMED U.S. COURT OF APPEALS FOR THE ARMED FORCES. THESE NAME CHANGES WERE INTENDED TO MORE ACCURATELY REFLECT THE ROLE OF THE COURTS.

EXPANDED JURISDICTION FOR SPECIAL COURTS-MARTIAL.

THE DOD AUTHORIZATION BILL FOR FY 2000 WAS SIGNED INTO LAW BY PRESIDENT CLINTON ON OCTOBER 5, 1999. THE BILL INCLUDES AN AMENDMENT TO ARTICLE 19 THAT PERMITS SPECIAL COURTS-MARTIAL TO IMPOSE

CONFINEMENT AND FORFEITURES FOR UP TO ONE YEAR INSTEAD OF SIX MONTHS.

SELECTION OF COURT-MARTIAL MEMBERS.

SOME OBSERVERS REGARD THE SELECTION OF COURT MEMBERS BY THE CONVENING AUTHORITY AS THE ACHILLES' HEEL OF THE SYSTEM. NOT TOO LONG AGO, CONGRESS DIRECTED THE DEPARTMENT OF DEFENSE TO STUDY THE FEASIBILITY OF RANDOM SELECTION OF COURT MEMBERS. THE STUDY WAS SEVERELY CONSTRAINED, BECAUSE CONGRESS DIRECTED THAT THE STUDY CONSIDER ONLY OPTIONS THAT ARE CONSISTENT WITH ARTICLE 25. THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, WITH INPUT FROM MEMBERS OF THE CODE COMMITTEE, CONCLUDED THAT, WITHIN THE CONSTRAINTS OF ARTICLE 25, THE PRESENT METHOD OF MEMBER SELECTION IS THE MOST WORKABLE.

CHANGE IN THE NUMBER OF MEMBERS IN CAPITAL CASES. **NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2002, PUB. L. NO. 107-107, § 582(A), 115 STAT. 1012, 1124 (2001) ENACTED ARTICLE 25A, UCMJ, WHICH REQUIRES A CAPITAL TRIAL PANEL OF "NOT LESS THAN 12" MEMBERS UNLESS THAT NUMBER IS "NOT REASONABLY AVAILABLE BECAUSE OF PHYSICAL CONDITIONS OR MILITARY EXIGENCIES . . . .")**

IN 1994, 25 YEARS AFTER JUSTICE DOUGLAS' HARSH CRITICISM IN O'CALLAHAN, OUR SYSTEM RECEIVED SOME WELCOME SUPREME COURT RECOGNITION OF A MATURE, SOPHISTICATED SYSTEM.

THIS RECOGNITION CAME AS A RESULT OF THE HOLDING IN WEISS V. UNITED STATES, SUPRA. HOWEVER, IT WAS HIGHLIGHTED IN A SEPARATE CONCURRING OPINION FILED BY JUSTICE GINSBURG IN WHICH SHE MADE THE FOLLOWING OBSERVATION: "TODAY'S DECISION UPHOLDS A SYSTEM OF MILITARY JUSTICE NOTABLY MORE SENSITIVE TO DUE PROCESS CONCERNS THAN THE ONE PREVAILING

THROUGH MOST OF OUR COUNTRY'S HISTORY, WHEN MILITARY JUSTICE WAS DONE WITHOUT ANY REQUIREMENT THAT LEGALLY TRAINED OFFICERS PRESIDE OR EVEN PARTICIPATE AS JUDGES." 510 U.S. AT 194.

LOOKING BACK AT THESE CHANGES, I SEE THAT THE ABA HAS BEEN A DYNAMIC FORCE FOR CHANGE. THIS ORGANIZATION HAS BEEN THERE EVERY STEP OF THE WAY AND <u>OFTEN LEADING THE WAY</u>.

WE HAVE MADE TREMENDOUS STRIDES DURING THE LAST 40 YEARS. WHAT I SEE IS A SYSTEM THAT IS OPEN TO IMPROVEMENT—TO GIVE SERVICE MEMBERS THE BEST. IN MY VIEW THAT HAS BEEN THE REASON FOR THE GREAT STRIDES THAT WE HAVE MADE.

BECAUSE OUR MEN AND WOMEN IN UNIFORM VOLUNTEER TO PUT THEIR LIVES IN HARM'S WAY AND GIVE THEIR BEST TO PRESERVE OUR FREEDOM, WE NEED TO CONTINUE TO WORK HARD TO MAKE SURE THEY ALWAYS GET THE BEST FROM ALL OF US.

LOOKING FORWARD

IN 2001, MY GOOD FRIEND AND FORMER CHIEF JUDGE OF THE COURT OF APPEALS FOR THE ARMED FORCES — WALTER T. COX III — LED A BLUE-RIBBON PANEL THAT EXAMINED THE MILITARY JUSTICE SYSTEM. THAT PANEL ALSO INCLUDED, AMONG OTHERS, REAR ADMIRAL JOHN S. JENKINS, THE HIGHLY-REGARDED FORMER JUDGE ADVOCATE GENERAL OF THE NAVY AND, AT THAT TIME, SENIOR ASSOCIATE DEAN AT THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL.

AMONG OTHER FUNDAMENTAL ISSUES, THE COX COMMISSION EXAMINED THE ROLES OF THE CONVENING AUTHORITY AND THE MILITARY JUDGE, AND OFFERED PROPOSALS TO SHIFT SOME RESPONSIBILITIES FROM THE CONVENING AUTHORITY TO THE MILITARY JUDGE.

AS WE LOOK AHEAD, WHOM DO WE OFTEN SEE AT THE FRONT? SENIOR JUDGE EVERETT IS THERE WHERE HE AS ALWAYS BEEN. HE IS A LEADER, VISIONARY, AND DEAR FRIEND TO SO MANY OF US.

AT OUR CODE COMMITTEE MEETING IN BOTH 2004 AND 2005 HE HAS MADE SEVERAL PROPOSALS.

THE FIRST WAS TO ALLOW THE ACCUSED TO ELECT SENTENCING BY THE MILITARY JUDGE AFTER FINDINGS HAVE BEEN MADE BY COURT-MARTIAL MEMBERS.

HIS SECOND SUGGESTION WAS TO AMEND ARTICLES 18 AND 21 OF THE CODE BY ADDING WORDS REFERRING TO THE "LAW OF NATIONS" RATHER THAN THE "LAW OF WAR."

THIRD, HE RECOMMENDED THAT THE UNITED STATES COURT OF APPEALS FOR THE FIRMED FORCES BE AUTHORIZED TO CONDUCT DISCRETIONARY REVIEW OF CASES TRIED BY MILITARY TRIBUNALS.

FOURTH SENIOR JUDGE EVERETT PROPOSED THAT CONGRESS BROADEN THE AUTHORITY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES UNDER THE ALL WRITS ACT IN RESPONSE TO CLINTON V. GOLDSMITH.

FIFTH HE PROPOSED REEXAMINING THE ISSUE OF AFFORDING LIFE TENURE TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES.

SIXTH, HE SUGGESTED THE CODE COMMITTEE EXAMINE A MORE EFFECTIVE MANNER IN THE REVIEW OF ADMINISTRATIVE DISCHARGES, SPECIFICALLY OTHER THAN HONORABLE DISCHARGES.

THESE PROPOSALS ARE BEING STUDIED AND WE HOPE TO HAVE AN EVALUATION OF THEM PRESENTED AT THE NEXT CODE COMMITTEE MEETING.

BETWEEN MY SERVICE ON THE NORTH DAKOTA SUPREME COURT AND THE COURT OF APPEALS FOR THE ARMED FORCES, I HAVE NOW BEEN AN APPELLATE JUDGE FOR OVER 22 YEARS. AS THOSE OF YOU WHO HAVE APPEARED BEFORE OUR COURT KNOW, ONE THING APPELLATE JUDGES KNOW HOW TO DO IS ASK QUESTIONS.

I WOULD LIKE TO POSE SOME QUESTIONS TO YOU.

FIRST, IS IT TIME FOR A COMPREHENSIVE REEVALUATION OF THE MILITARY JUSTICE SYSTEM?

SECOND, HOW CAN TECHNOLOGY IMPROVE THE MILITARY JUSTICE SYSTEM?

THIRD, SHOULD THE STRUCTURE OF THE MILITARY TRIAL JUDICIARY BE CHANGED?

FOURTH, HOW CAN THE SERVICES CONTINUE TO MEET THE NEED TO DEVELOP OUR JUDGE ADVOCATES TO BECOME MILITARY JUSTICE PROFESSIONALS?

FIFTH, HOW WILL INTERNATIONAL CONCERNS AFFECT OUR MILITARY JUSTICE SYSTEM?

I HAVE ASKED THESE QUESTIONS BEFORE BOTH PUBLICLY AND IN WRITING. MY WRITTEN QUESTIONS AND THOUGHTS REGARDING THEM ARE PRESENTED IN 56 AIR FORCE LAW REVIEW 249 (2005)

IN A SPEECH THAT HE DELIVERED IN 2000, MAJOR GENERAL BILL MOORMAN, WHO WAS THEN THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE, ASKED SOME FUNDAMENTAL QUESTIONS ABOUT CHANGE IN THE MILITARY JUSTICE SYSTEM. HE NOTED THAT THE "CENTRAL QUESTION" WAS WHETHER THE UNIFORM CODE OF MILITARY JUSTICE NEEDED TO BE CHANGED. GENERAL MOORMAN RESPONDED, "THERE CAN BE ONLY ONE ANSWER. OF COURSE IT NEEDS TO BE CHANGED! FOR 50 YEARS, THE U.C.M.J.

AND THE MANUAL FOR COURTS-MARTIAL WHICH IMPLEMENTS IT, HAVE BEEN ANYTHING BUT STATIC DOCUMENTS."

I HAVE ALREADY COVERED HOW, SINCE ENACTING THE CURRENT MILITARY JUSTICE SYSTEM IN 1950, CONGRESS REVISITED AND REVISED THE SYSTEM IN 1968 AND 1983. THE 1968 REVISIONS WERE PARTICULARLY SUBSTANTIAL.

NOW THAT MORE THAN TWENTY YEARS HAVE PASSED SINCE THE LAST MAJOR REVISION OF OUR SYSTEM, IS IT AN APPROPRIATE TIME TO DETERMINE HOW IT IS WORKING?

CAN OUR SYSTEM WITHSTAND THE CURRENT ENHANCED PUBLIC SCRUTINY? OF COURSE IT CAN.

COULD OUR SYSTEM BE IMPROVED? SAME ANSWER—OF COURSE IT CAN.

WHILE TIME DOES NOT PERMIT ME TO ELABORATE ON MY THOUGHTS EXPRESSED IN THE FIVE QUESTIONS ARTICLE, I INVITE Y0UR ATTENTI0ON TO THEM AS WELL AS THE IDEAS SET FORTH BY THE COX COMMISSION, SENIOR JUDGE EVERETT AND ANYONE ELSE WHOSE GOAL IS TO IMPROVE OUR SYSTEM OF JUSTICE.

I PREVIOUSLY MENTIONED GENERAL MOORMAN'S SPEECH IN WHICH HE DISCUSSED CHANGE IN THE MILITARY JUSTICE SYSTEM. THE QUESTIONS I ASKED IN MY 5 QUESTIONS ARTICLE ARE POSED IN THE SAME SPIRIT AS GENERAL MOORMAN'S QUESTIONS. THEY ARE DESIGNED TO STIMULATE THINKING ABOUT — TO BORROW AN OLD ARMY RECRUITING SLOGAN — MAKING THE MILITARY JUSTICE SYSTEM ALL IT CAN BE. MY QUESTIONS ARE NOT DESIGNED TO PUSH ANY AGENDA — OTHER THAN TO CONTINUE A DIALOGUE ABOUT SOME OF THE FUNDAMENTAL ISSUES FACING OUR MILITARY JUSTICE SYSTEM. BY DISCUSSING THESE ISSUES, WE MAY DISCOVER PATHS TO AN EVEN BETTER MILITARY.

- **AS SOME OF YOU MAY KNOW, I PLAN TO JOIN THE FACULTY OF THE DWAYNE O. ANDREAS SCHOOL OF LAW OF BARRY UNIVERSITY IN ORLANDO AS DISTINGUISHED JURIST IN RESIDENCE AND COORDINATOR OF LAWYERING SKILLS AND VALUES.**
- **IN THAT CAPACITY, I WILL HAVE THE PRIVILEGE TO CONTINUE TO WORK TO IMPROVE THE CLINICAL EDUCATIONS OF FUTURE LAWYERS.**

AS I HAVE PREVIOUSLY STATED, I HAD THE PRIVILEGE OF BEING A MEMBER OF THE MILITARY JUSTICE FAMILY FROM 1967-1971. I MADE A DECISION AT THAT TIME TO LEAVE THE MILITARY.

I WAS BLESSED TO HAVE A VERY REWARDING CAREER DURING THE YEARS FROM 1971-1991.

I FEEL EXTREMELY BLESSED, HOWEVER TO HAVE HAD THE OPPORTUNITY TO RETURN TO THE MILITARY JUSTICE FAMILY IN 1991 AND TO HAVE THOROUGHLY ENJOYED IT DURING THE LAST 15 YEARS. I HAVE BEEN PRIVILEGED TO WORK WITH WONDERFUL PEOPLE AND HAVE HAD THE HONOR OF SERVING THE BEST PEOPLE ON THE PLANET.

MY HOPE IS THAT AFTER MY RETIREMENT OUR PATHS WILL CONTINUE TO CROSS AND I LOOK FORWARD TO THAT PRIVILEGE.

MY FINAL THOUGHT FOR YOU IS ONE OF OPTIMISM. I AM MOST OPTIMISTIC BECAUSE I KNOW YOU, YOUR TALENT, AND COMMITMENT TO OUR PROFESSION, THE MEN AND WOMEN THAT SERVICE OUR COUNTRY IN UNIFORM, AND OUR

NATION. OUR FUTURE IS IN YOUR STRONG HEARTS, HEADS, AND HANDS.

ANOTHER SOURCE OF MY OPTIMISM IS THAT WHEN JUDGE CRAWFORD AND I RETIRE FROM THE COURT IN SEPTEMBER, WE WILL BE LEAVING IT IN VERY CAPABLE HANDS. JUDGE EFFRON, WHO WILL BECOME CHIEF JUDGE ON OCTOBER 1, JUDGE BAKER AND JUDGE ERDMANN ARE OUTSTANDING JUDGES.

THE RUMOR MILL HAS IT THAT THERE ARE NUMEROUS APPLICANTS BEING INTERVIEWED FOR THE TWO SOON TO BE VACATED SEATS ON THE COURT. I AM CONFIDENT THAT PRESIDENT BUSH WILL APPOINT TWO VERY CAPABLE PEOPLE TO JOIN OUR THREE COLLEAGUES.

I ALSO WANT TO EXPRESS PRAISE AND APPRECIATION FOR THE STAFF WE HAVE AT OUR COURT. WE HAVE EXCELLENT PEOPLE IN CHAMBERS AS WELL AS THOSE UNDER THE SUPERVISION OF OUR CLERK OF COURT, BILL DECICCO, AND DEPUTY CLERK OF COURT, DAVE ANDERSON, BOTH EXTRAORDINARY LAWYERS AND LEADERS.

- **WHEN I WROTE PRESIDENT BUSH INFORMING HIM THAT I WOULD NOT SEEK REAPPOINTMENT, I SAID “WHEN I LOOK INTO THE EYES OF OUR MEN AND WOMEN IN UNIFORM TODAY, I AM REJUVENATED AND UPLIFTED BECAUSE I SEE THAT AMERICA’S BEST DAYS ARE YET TO COME.”**
- **I HOPE FOR ALL OF YOU THAT YOUR BEST DAYS ARE AHEAD.**
- **THANK YOU FOR LISTENING TO THIS MESSAGE FROM A MAN THAT HAS ALWAYS BEEN AND ALWAYS WILL BE “PROUD TO BE AN AMERICAN.”**