DEFENSE LEGAL POLICY BOARD

REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES

Military Justice in cases of U.S. Service members alleged to have caused the death, injury or abuse of non-combatants in Iraq or Afghanistan

FINAL REPORT

May 30, 2013

Appendix VI. Separate Statement of Board Member Eugene Fidell

I agree with a great deal of the report, but would like to comment on three of the matters where my views and those of the subcommittee diverge in either emphasis or substance.

First, the report recommends review of the current law governing direct review of courts-martial by the Supreme Court of the United States. I would go further and squarely recommend placing military personnel on an equal footing with other criminal defendants.

Every person convicted in federal and state courts and every person convicted by a military commission has the right to apply for a writ of certiorari. In contrast, only if the United States Court of Appeals for the Armed Forces (CAAF) grants discretionary review or an extraordinary writ does a court-martial become eligible for certiorari. Because it grants review or an extraordinary writ in only a fraction of the cases brought to it, and because yet other courts-martial never even qualify for CAAF review because they do not meet the threshold for review by the Service courts of criminal appeals, most military accused do not in fact enjoy access to the Nation's highest court on direct review. This is fundamentally wrong.

To make matters worse, the Solicitor General has repeatedly taken the position – indefensibly in my opinion – that even if CAAF has granted review of a case, the Supreme Court's certiorari jurisdiction extends only to the precise issues CAAF identified in its order granting review.

The justifications that have been offered for this discrimination against military personnel are without merit. Obviously, the Supreme Court grants very few certiorari petitions, and it is notoriously difficult to obtain such a grant in a military case. But military personnel should have as much right to *try* as do bank

robbers, civilian murderers, and, as the report notes, the accused 9/11 perpetrators. Equally obviously, there is some cost to the taxpayers in providing free appellate defense counsel to prepare such petitions. But our Nation does not ration justice. If a case is frivolous – not simply a long shot, but *frivolous* – appellate defense counsel will have every right, and indeed, a professional duty, to decline the matter, in which case the accused can choose to go it alone. But the accused should have that right, just like every other criminal defendant in the country. Finally, access to the district courts for writs of habeas corpus is no substitute for direct review: the hurdles that have been placed in the path of habeas petitioners are onerous. KSM will face no such hurdles.

Legislation to permit military accused equal access to the Supreme Court is the fair thing. This change is long overdue, and the board should say so.

Second, the report strongly embraces the commander's current power to decide which cases should be tried by court-martial, despite the divergent practice of other democratic nations that have moved the referral power to legally trained directors of military or service prosecutions. I would urge Congress to conduct a thorough examination of the question. The following comments identify the referral standards and address points that surfaced in the course of the subcommittee's and board's proceedings.

1. The *Manual for Courts-Martial* (2012 ed.) provides the following guidance with respect to the initial disposition of charges:

> The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the

command. The goal should be a disposition that is warranted, appropriate, and fair.

In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:

(A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;

(B) when applicable, the views of the victim as to disposition;

(C) existence of jurisdiction over the accused and the offense;

(D) availability and admissibility of evidence;

(E) the willingness of the victim or others to testify;

(F) cooperation of the accused in the apprehension or conviction of others;

(G) possible improper motives or biases of the person(s) making the allegation(s);

(H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;

(I) appropriateness of the authorized punishment to the particular accused or offense;

(J) the character and military service of the accused; and

(K) other likely issues.

R.C.M. 306(b) (Discussion), MCM at II-25. These factors can be applied intelligently by a prosecutor. "[R]ecommendations made by subordinate commanders" are among the matters currently taken into account and a reformed, non-command-centric, referral process that relied instead on an independent director of military or service prosecutions could equally well – and indeed, should – take into account the recommendations of higher commanders.

2. Among the democratic countries that have moved the power to refer military cases for trial to a legally trained head prosecutor are the United Kingdom, Ireland, Canada, Australia, New Zealand, South Africa, and Israel. Others such as the Netherlands have followed similar paths, although the details vary. It is my understanding that commanders in at least some of these countries retain the power to impose summary punishment roughly comparable to our non-judicial punishment (NJP), although in some there may also be oversight by uniformed legal personnel, civilian attorneys general or their equivalent, and in the Israeli case, by the courts. Some have moved to a director of military or service prosecutions model in response to decisions of the European Court of Human Rights. Most of the countries noted, however, are not in Europe and of course are not parties to the European Convention on Human Rights. Nor is this a matter as to which it is "too soon to tell." Most of the countries that have moved to a director of military or service prosecutions model have had sufficient experience to form a judgment as to whether good order and discipline have been degraded by the shift. Only recently, the Army's *Military Law Review* included a lecture by a British major general (and lawyer) who described his country's current arrangements. Nothing Major General Conway said to his Charlottesville audience suggested that good order and discipline had in any sense suffered as a result of the reforms instituted in our mother country – a nation to which American military justice is so deeply indebted.

3. That the American military establishment is larger and more complex than those of the countries that have moved from a command-centric model to a director of military or service prosecutions model is of no moment, since all of them maintain modern, effective fighting forces and are committed to and rely on good order and discipline.

4. Both substance and appearance are integral to public confidence in the administration of military justice, which is in turn integral to the success of our current all-volunteer military personnel policy. Vesting the referral power in a

director of military or service prosecutions would foster uniformity in disposition decisions not only from case to case, but from command to command. Doing so would also allay concerns that commanders may decline to refer cases for inappropriate reasons. This is a current concern in the area of sexual assault as well as potential war crimes and other offenses involving host state civilians. (A recent case has provoked consternation about the other end of the trial process: the convening authority's unbridled discretion to set aside findings of guilt. The referral and action powers, Arts. 34, 60, UCMJ, are two sides of the same coin and Congress should examine them together.)

5. Claims that commanders must for practical or legal reasons have control over the decision as to which cases are sent to trial have not persuaded me.

a. There is no reason to believe any of the commanders from whom the subcommittee heard were familiar with the alternative legal structure to which the UK and other allies have shifted. Hence, comparative judgments were precluded (or, to the extent they were made by implication, are not only untested but untestable). It was suggested that in one country, Poland, deployed troops may simply opt out of operations. This is irrelevant because, if there were an opt-out, it would apply whether the referral power were exercised by a commander or by a director of military prosecutions. Poland has a functioning military justice system. In any event, I have been unable to confirm that deployed Polish military personnel may opt out of either service or compliance with lawful orders. It was also suggested that some other unidentified country that has transferred the referral power to a director of military or service prosecutions has suffered a decline in good order and discipline. In the absence of specifics, it is impossible to comment. Similarly, reference was made to "caveats" that are said to degrade some sending states' commanders' ability to ensure good order and discipline, but no details were provided, apparently because of classification concerns. The "caveats" argument cannot be evaluated without the requisite information.

b. Experience teaches that effective command does not need to be tied to the referral power. After all, commanders other than operational commanders – *i.e.*, those officers with administrative control – have for years been responsible for discipline, as provided in Joint Publication 1. Similarly, the common practice has been for disciplinary decisions to be made not by a joint commander, but by the offender's commander in his or her own service. What is more, there is a strong body of opinion within the services, expressed especially by the Marine Corps' representative, that courts-martial are typically best conducted in garrison. In other words, the services' actual practices overwhelmingly refute any claim that control over the decision to send a case to trial must be made by the commander if good order and discipline are to be preserved.

c. Prof. Victor M. Hansen has cautioned about the command responsibility implications of transferring the referral power to a director of military or service prosecutions. If a country has a credible, honest and functioning military justice system, however, it is inconceivable that we would be creating the slightest *Yamashita* exposure if commanders were required to rely on such a system. Our democratic allies who have made this transition have not created any new exposure for their commanders; these countries' commitment to strict observance of the Law of Armed Conflict and the principle of command responsibility is unquestioned. That said, I agree that Congress should carefully examine this and any other direct or indirect consequences of the transition whose consideration I recommend.

6. It was suggested that Congress has rejected the idea of transferring the referral power to a director of military prosecutions. The so-called "STOP Act" (H.R. 3435) included such a provision, but only for sexual assault cases. Creating such an office for a single type of offense makes no sense, and it is not surprising that it failed to gain traction. The episode cannot plausibly be viewed as congressional rejection of the broader and more logical reform to which these remarks are addressed. Earlier proposals came over 40 years ago when Sen.

Birch Bayh and other members of the House and Senate introduced a variety of measures that would have reformed the referral process. Plainly a great deal has happened since then, and it would be wrong to read their fate as any indication of what a current Congress would or, more importantly, should do concerning this important issue. The broad public and congressional dismay over the post-trial action in *United States v. Wilkerson* confirms that the institutional issues raised by the current command-centric architecture are not confined to any particular type of case or venue.

Third, while I believe the services should have a uniform standard of proof for the imposition of NJP, I do not believe that standard should be merely a preponderance of the evidence. So far as the record shows, the United States Army has operated perfectly well using the stricter proof-beyond-a-reasonable-doubt standard. To be sure, NJP is not a criminal proceeding, but it is joined at the hip with courts-martial that clearly *are* criminal in nature. Absent evidence either that superior officers were routinely granting NJP appeals on the basis that the evidence did not satisfy the reasonable doubt standard, or that the Army Board for Correction of Military Records or federal courts were regularly setting NJPs aside on that basis, I would afford all of our men and women in uniform the benefit of the *higher* standard, especially given the significant adverse consequences that flow from NJP in the present personnel environment. In sum, I would set the bar high for all services, not lower it for Soldiers.