The Gunner's Case

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I. An Old Case

R. v. Waymouth, which I shall call *The Gunner's Case*, was a Royal Navy court-martial tried nearly 350 years ago, on 25 March 1669. It's a case about which we know from the diary of Samuel Pepys. In a way it is fitting that Pepys, chronicler of the Great Fire of 1666, should have been involved in *The Gunner's Case*, since it too involved a conflagration.

The case concerns the loss of HMS *Defiance*, 64, the fourth Royal Navy ship to bear that name. She was a third rate ship of the line, launched at Deptford in Charles II's presence on 27 March 1666. Boasting a crew of 320, *Defiance* was of 863½ tons burthen, 117' in length, with a 37' 3" beam, and drawing 15' 3". Her life was short but eventful. She saw service in the Four Days Battle in early June 1666, only a short time after she joined the fleet, but on 6 December 1668, only 30 months later, she was destroyed by fire – and I don't mean *enemy* fire – in the Medway, near Chatham. Her commanders included Sir John Kempthorne in 1666-1667 and, from 1667 to her end, Sir John Harman. At the time, the Navy as a whole was led by the Duke of York (later, James II), holding the office of Lord High Admiral. As Clerk of the Acts, Pepys was a member of the Navy Board.

So what happened, and what was Pepys's role?

The wheels of justice turned quickly. On 29 December 1668, the Duke of York appointed a court-martial to "inquire concerning the loss of his majesty's said ship *Defiance*, and to proceed to the trial and conviction of all such person or persons as shall be suspected to be any ways guilty in the loss of the said ship".[1] This was followed on 10 March 1669, by a warrant constituting the court-martial, composed of Rear-Admiral

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1 G. Penn, *Memorials of the Professional Life and Times of Sir William Penn* (1833, Vol. 2), p. 520.

Kempthorne and seven captains.[2] With a *Diary* entry for 13 March, 1669, little more than three months after the *Defiance* fire, Pepys's tells what happened next:

> [T]hat which put me in good humour, both at noon and night, is the fancy that I am this day made a Captain of one of the King's ships, Mr. Wren having this day sent me, the Duke of York's commission to be Captain of "The Jerzy," in order to my being of a Court-martiall for examining the loss of "The Defyance," and other things; which do give me occasion of much mirth, and may be of some use to me, at least I shall get a little money by it for the time I have it; it being designed that I must really be a Captain to be able to sit in this Court. . . .

It's a delightful and revealing entry. You can sense how tickled Pepys was at being made captain of HMS *Jersey*, 40, a 101' fourth-rate frigate launched in 1654. I suspect that even by 17th century standards there was something a little preposterous in this appointment – reminiscent perhaps of Sir Joseph Porter, K.C.B., Gilbert and Sullivan's fictional First Lord of the Admiralty[3] – but Pepys's pleasure seems above all to lay in the fact that he might gain some cold cash in the process. His orders to the *Jersey* were a sham; the arrangement must have been temporary and for the sole purpose of permitting him to play a formal role in the *Defiance* court-martial "and other things". The *Diary* is imprecise: the appointment was "in order to [his] being of" the court-martial. "[T]o sit in this Court" he "must really be a Captain". He functioned as an expert assessor rather than a voting member of the court-martial board,[4] and hence withdrew before the voting. He also appears, according to one detractor, to have exaggerated both the significance of his naval appointment and his role in the affair.[5]

Six days later, on Friday, 19 March, Pepys returns to the subject:

> At home to dinner, where Mr. Sheres dined with us, but after dinner I left him and my wife, and with Commissioner Middleton and Kempthorne to a Court-martiall, to which, by virtue of my late Captainship, I am called, the first I was ever at; where many Commanders, and Kempthorne president. Here was tried a difference between Sir L. Van Hemskirke, the Dutch Captain who commands "The Nonsuch," built by his direction, and his Lieutenant; a drunken kind of silly business. We ordered the Lieutenant to ask him pardon, and have resolved to lay before the Duke of York what concerns the Captain, which was striking

2 S. Pepys, *The Diary of Samuel Pepys 1668-1669* (R. Latham & W. Matthews (eds), 1976, Vol. 9), p. 481 note 1 and p. 488 note 1.

3 See generally W.S. Gilbert & A. Sullivan, *H.M.S. Pinafore; or, The Lass That Loved a Sailor* (1878).

4 Pepys, *supra* note 2, p. 481 note 1 and p. 488 note 1.

5 Penn, *supra* note 1, p. 535.

> of his Lieutenant and challenging him to fight, which comes not within any article of the laws martiall. But upon discourse the other day with Sir W. Coventry, I did advise Middleton, and he and I did forbear to give judgment, but after the debate did withdraw into another cabin, the Court being held in one of the yachts,[6] which was on purpose brought up over against St. Katharine's, it being to be feared that this precedent of our[7] being made Captains, in order to the trying of the loss of "The Defyance," wherein we are the proper persons to enquire into the want of instructions while ships do lie in harbour, evil use might be hereafter made of the precedent by putting the Duke of Buckingham, or any of these rude fellows that now are uppermost, to make packed Courts, by Captains made on purpose to serve their turns. The other cause was of the loss of "The Providence" at Tangier, where the Captain's being by chance on shore may prove very inconvenient to him, for example's sake, though the man be a good man, and one whom, for Norwood's sake, I would be kind to; but I will not offer any thing to the excusing such a miscarriage. He is at present confined, till he can bring better proofs on his behalf of the reasons of his being on shore. . . .

From this we learn, first, that other cases were to be decided by the *Defiance* court-martial, including the one just referred to concerning a quarrel between Sir Lawrence van Hemskirke, the captain of HMS *Nonsuch*, and Lieutenant William Dawson of that ship, and another arising from the loss of HMS *Providence* at Tangier.[8] Thus, while by no means a permanent court-martial, there was more than one case on the docket. Second, we learn that Pepys and Middleton sat through the deliberations but withdrew before the members voted, out of concern that a bad precedent would be set for packing a court-martial with temporary captains. Finally, we learn that, at the time, nothing criminalized an officer's challenging a superior to a duel.

The Gunner's Case came on for trial on Thursday, 25 March. Here is Pepys's account:

> Up, and by and by, about eight o'clock, come Rear-Admiral Kempthorne and seven Captains more, by the Duke of York's order, as we expected, to hold the Court-martiall about the loss of "The Defyance;" and so

6 Footnote added. The yacht was HMS *Henrietta*. Pepys, *supra* note 2, p. 488 note 4. The National Archives record summary for SP 46/137/181, www.nationalarchives.gov.uk/catalogue/displaycataloguedetails.asp?CATID=2707060&CATLN=7&accessmethod=5, incorrectly refers to HMS *Nonsuch* as HMS *Norwich*. The first ship of that name, however, was not launched until 1691.

7 Footnote added. I take this not as the "Royal we", but rather as a reference to both Pepys himself and Commissioner Thomas Middleton. He elsewhere refers to Middleton as "Colonel," the rank he held in the Parliamentary Army. See S. Pepys, *The Diary of Samuel Pepys: Companion* (R. Latham (ed.), 1983, Vol. 10), p. 245.

8 The court also tried a fourth case, from HMS *Dartmouth*. I discuss this below.

> presently we by boat to "The Charles,"[9] which lies over against Upnor Castle, and there we fell to the business; and there I did manage the business, the Duke of York having, by special order, directed them to take the assistance of Commissioner Middleton and me, forasmuch as there might be need of advice in what relates to the government of the ships in harbour. And so I did lay the law open to them, and rattle the Master Attendants[10] out of their wits almost; and made the trial last till seven at night, not eating a bit all the day; only when we had done examination, and I given my thoughts that the neglect of the Gunner of the ship was as great as I thought any neglect could be, which might by the law deserve death, but Commissioner Middleton did declare that he was against giving the sentence of death, we withdrew, as not being of the Court, and so left them to do what they pleased; and, while they were debating it, the Boatswain of the ship did bring us out of the kettle a piece of hot salt beef, and some brown bread and brandy; and there we did make a little meal, but so good as I never would desire to eat better meat while I live, only I would have cleaner dishes. By and by they had done, and called us down from the quarterdeck; and there we find they do sentence that the Gunner of "The Defyance" should stand upon "The Charles" three hours with his fault writ upon his breast, and with a halter about his neck, and so be made incapable of any office. The truth is, the man do seem, and is, I believe, a good man; but his neglect, in trusting a girl to carry fire into his cabin, is not to be pardoned.

How can you not like Pepys? In this single diary entry he discusses a court-martial (in which he unsuccessfully called for the death penalty, and boasts of managing and prolonging the proceedings and rattling witnesses), then proceeds at once to evaluate the dinner, finding the food excellent but the plates dirty.

But about the court-martial, isn't it strange? The president of the court-martial turns out to have been a former commander of *Defiance*. There

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9 Footnote added. *Sic*. The vessel's full name was the *Royal Charles*. See note 16 *infra*.

10 Footnote added. According to W. Falconer, *Dictionary of the Marine* (2004), gttp://nla.gov.au/nla.cs-ss-refs-falc-0858, p. 191, a master-attendant was

> an officer in the royal dock-yards, appointed to hasten, and assist at, the fitting-out or dismantling, removing or securing vessels of war, &c. at the port where he resides. He is particularly to observe, that his Majesty's ships are securely moored; and for this purpose he is expected frequently to review the moorings which are sunk in the harbour, and observe that they are kept in proper repair to be always ready when occasion requires. It is also his duty to visit all the ships in ordinary, and see that they are frequently cleaned and kept in order; and to attend at the general musters in the dock-yards, taking care that all the officers, artificers, and labourers, registered in the navy-books, are present at their duty.

is no mention of her captain at the time of the fire, Sir John Harman, in Pepys's account or the record of trial,[11] but the Duke of York's December 29, 1668 order named him as one of those who, like Pepys, were summoned to assist at the court-martial. The *Diary* never suggests that Sir John himself was under suspicion much less subjected to trial. At least he did not wind up as one of the seven captains who served with Admiral Kempthorne on the panel. Perhaps because of other service[12] or perhaps because he was properly away from *Defiance*, he seems not to have been penalized, as might confidently be expected in comparable circumstances today.

The master gunner, Robert Waymouth,[13] being the sole accused at the court-martial, what was his offense? The allegation was that he was negligent "in trusting a girl to carry fire into his cabin". Was that a crime?

At the time, the governing statute was 'An Act for the Establishing Articles and Orders for the regulateing and better Government of His Majesties Navies Ships of Warr & Forces by Sea', enacted in 1661.[14] Article 26 (Burning Ship or Stores; Punishment) provided: "All persons that shall willingly burn or sett fire on any Shipp or Magazine or [sto][15] of Powder or Shipp Boat Ketch Hoy or Vessell or Tackle or Furniture thereto belonging not appertaining to an Enemy or Rebell shall be punished with death".

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[11] See generally the transcription by S. Chua-Rubenfeld & D.P. Quinlan immediately after this article (hereinafter 'Transcription').

[12] A petty officer of HMS *St David* described Sir John's care on convoy duty:

> Sir John Harman he well known to Fame
> Appointed was to Guard the same;
> His care it was exceeding much,
> With them he always would keep touch:
> Make easie Sayl on Nights therefore,
> On Nights he bore the Light before
> His Chickens alwayes who close clings
> Under the shelter of his wings.
> On dayes perhaps they'l wander, yet keep sight
> Of their Rare Admirall if ought them fright
> As oft it hapneth, doth the Ravenous Kite;
> Under her wings they are at Night.

J. Baltharpe, *The Straights Voyage or St Davids Poem* (J.S. Bromley (ed.), 1959), pp. 29-30, *quoted in* N.A.M. Rodger, *The Command of the Ocean: A Naval History of Britain, 1649-1815* (2004), p. 91 note 43. Sir Peter Lely's fine portrait of Harman was among those George IV presented to Greenwich Hospital. It is now in the National Portrait Gallery.

[13] He is referred to as the "master gunner" in the record of trial. See also Pepys, *supra* note 2, p. 498 note 2. In the United States we would call him the Gunnery Officer.

[14] Articles of War, 1661, 13 Car. 2, c. 9.

[15] The word is not clear on the Roll (footnote from original; presumably "store").

Two factors suggest that a conviction was not possible under this provision. First, the death penalty was not adjudged, as the statute seems to mandate. Second, the statute requires that the offender have willingly burned or set the ship afire, a test that could scarcely be met on the facts, *i.e.*, that the girl on whom Gunner Waymouth relied, was responsible. It is also interesting that, unlike other provisions of the Articles of War, 1661, Article 26 applied to "[a]ll persons", not simply members of the Royal Navy. From this perspective, one wonders why the girl was not prosecuted.

An alternative basis for the prosecution that comes to mind is Article 33 (Misdemeanors and Disorders at Sea), which provided: "All other Faults Misdemeanors and Disorders committed att Sea not mentioned in this Act shall be punished according to the Lawes and Customes in such cases used att Sea". This seems a doubtful basis for the case against Gunner Waymouth, since the offense, if any, seems not to have been committed "at sea".

In fact, although the handwritten record of trial – which has survived and is preserved at Kew[16] – is difficult in places to decipher, the court-martial convicted Gunner Waymouth for negligent performance of duty, in violation of Article 27 (Sleeping upon Watch),[17] which provided: "No man in or belonging to the Fleet shall sleep upon his Watch or negligently performe the Duty imposed on him or forsake his station upon pain of death of other punishment as the circumstances of the Case shall require". But Gunner Waymouth's fault went beyond the shorthand account provided by Pepys. It turns out that Waymouth and the *Defiance*'s boatswain had been standing one another's duty, instead of both being aboard. On the fateful night when fire broke out in the steerage,[18] Waymouth was in the cook's room with his wife and daughter as well as the boatswain's and purser's servants. There was plainly a great deal more wrong with this picture than simply the carelessness of a girl.

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16 Record of Court Martial held on the "Royal Charles," in the Medway near Chatham, concerning the loss of the "Defiance"; and the sentence thereon. 25 March 1669, MS State Papers Domestic, Supplementary SP 46/137 f.183, The National Archives of the UK.

17 See Transcript, p. 234.

18 According to Admiral Smyth, the steerage is "that part of the ship next below the quarter-deck, immediately before the bulkhead of the great cabin in most ships of war. The portion of the 'tween-decks just before the gun-room bulkhead. In some ships the second-class passengers are called *steerage passengers*. The admiral's cabin on the middle deck of three-deckers has been called the *steerage*". W. Henry Smyth, *The Sailor's Word-Book: An Alphabetical Digest of Nautical Terms* (Edward Belcher, rev. 1867).

Considering the dire consequences for the ship and the involvement of Middleton, a "stern disciplinarian",[19] in the trial, it is surprising that Gunner Waymouth escaped the gallows. Pepys's account of the sentence is borne out by the record of trial: the accused was to "be rowed in a boat from Upnor Castle to the hulk near Chatham Dock, a drum beating before him in the boat's head, his crime writ in capital letters and affixed on his back and breast, and stand three hours on the gunwale of the said hulk with a halter about his neck and then be rowed ashore and rendered incapable of ever bearing office in any ship".[20] This was duly carried out by the Deputy Marshal of the High Court of Admiralty.[21]

The Gunner's Case was not the last to be tried by the court-martial.[22] On 1 April, Pepys and Middleton again assisted the court-martial, this time aboard the yacht *Merlin* in the Thames.[23] The case concerned a feud between two officers of HMS *Dartmouth*. Listen to Pepys:

> Up, and with Colonel Middleton, at the desire of Rear-Admiral Kempthorne, the President, for our assisting them, to the Court-martiall on board a yacht in the River here, to try the business of the Purser's complaints, Baker against Trevanion, his Commander, of "The Dartmouth." But, Lord! to see what wretched doings there were among all the Commanders to ruin the Purser, and defend the Captain in all his rogueries, be it to the prejudice of the King or Purser, no good man could bear! I confess I was pretty high, which did not at least the young gentlemen Commander like; and Middleton did the like. But could not bring it to any issue this day, sitting till two o'clock . . . .

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19 Pepys, *supra* note 7, p. 245.

20 See Transcript, p. 234 and Record of Court Martial, *supra* note 16.

21 See Certificate by Richard Selwin, Deputy Marshal of H.C.A., that Robert Weymouth [*sic*], gunner of the "Defiance," has suffered sentence of the Court, 22 Apr. 1669, Transcript, p. 238; MS State Papers Domestic, Supplementary SP 46/137 f.194a,. The National Archives of the UK. The records at Kew document not only the Navy Office's attention to such matters as claims for harm to a "Sunday coat and hat" burned during caulker Joseph Brown's night-long assistance in the vain effort to put out the fire and for pay withheld from Matthew Pengelly, *Defiance*'s cook (both claims were allowed), but also persistent efforts to sell, break up, or use as a hulk what remained of the ship. Several years later, it was decided to make the hull the basis for another warship.

22 Sir William Laird Clowes was therefore right to hedge his bets when he wrote that the *Defiance* court-martial "seems to have been the end of [Pepys's] captaincy". See W. Laird Clowes, 'Some Curiosities of Naval Promotion', 7 *United Service Magazine* 1893, p. 1209. I am grateful to John B. Nann, Associate Librarian for Reference and Instructional Services, Bibliographer for EU and UK Law, and Lecturer in Legal Research, Yale Law School, for this article.

23 Pepys, *supra* note 2, p. 505 note 1.

The circumstances were scandalous. The purser had charged Captain Richard Trevanion with assault for striking him, and the captain responded with counter-charges of fraud.[24] Pepys (to whom Baker had written to seek a speedy trial)[25] and Middleton were unimpressed, and saw it as a cabal of commanders ganging up on the purser. After a day spent on other business, the *Diary* for Saturday, 3 April, reports:

> Up, and to the Council of War again, with Middleton: but the proceedings of the Commanders so devilishly bad, and so professedly partial to the Captain, that I could endure it no longer, but took occasion to pretend business at the Office, and away, and Colonel Middleton with me, who was of the same mind, and resolved to declare our minds freely to the Duke of York about it. . . .

Pepys certainly sounds happy not to have had to spend any more time in court that day. A few days later, he reports:

> . . . I did in plain terms acquaint the Duke of York what we thought and had observed in the late Court-martiall, which the Duke did give ear to; and though he thinks not fit to revoke what is already done in this case by a Court-martiall, yet it shall bring forth some good laws in the behaviour of Captains to their under Officers for the time to come.[26]

The Duke, who issued revised instructions to commanders later that year, may have been pleased enough with the outcome of the trial,[27] but Captain Trevanion, who had been fined £17 5s,[28] was definitely not. By 10 April, Pepys learns from John Seymour, the Comptroller of Customs at London,[29] that

> Captain Trevanion do give it out every where, that I did overrule the whole Court-martiall against him, as long as I was there; and perhaps I may receive, this time, some wrong by it: but I care not, for what I did was out of my desire of doing justice.

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24 *Id.*

25 Roger Baker, purser [of the *Dartmouth*], to Pepys. Calendar of State Papers, Domestic Series, of the reign of Charles II, 1668-1669, preserved in the State Paper Department of Her Majesty's Public Record Office (M.A. Everett Green (ed.)), Vol. 9, October 1668 - December 1669, London, Her Majesty's Stationery Office, 27 February 1669, p. 214 ("I beg your assistance for a speedy trial of my business with my captain, the ship being paid, and timely notice to bring in my witnesses.").

26 *Diary*, 6 April 1669.

27 Pepys, *supra* note 2, p. 547 note 1.

28 *Id*., p. 508 note 1. The purser was both fined and dismissed from the service. *Id*. The court-martial was unanimous. *Id*.

29 *Id*., p. 514 note 1 and Pepys, *supra* note 7, p. 261.

Perhaps Pepys had inflated his own role in these proceedings. After all, as Granville Penn points out, the Duke had seen to it that the court-martial had the benefit of the Deputy Judge Advocate of the Fleet.[30] It thus had no need of non-lawyer Pepys's legal advice. Nor did the Duke disturb the results in the Trevanion trial notwithstanding what I am willing to speculate – reading between the lines – were Pepys's efforts to get him to do so. And as we know from the outcome in *The Gunner's Case* itself, as well as the frustration with the commanders' mutual protection society that led Pepys to leave the Trevanion trial prematurely on a pretext, he did not always get his way. Maybe Pepys's captain's commission did not impress the real captains on the court. Still, Captain Trevanion may have had a basis for taking offense at Pepys's expansive view of his own role in the administration of justice, especially considering his admitted inexperience in naval justice.[31]

As between Pepys and the Duke of York, His Royal Highness seems to have had a greater sense of self-restraint, although they and Middleton were confederates in what strikes me as a campaign of command influence. On the other hand, there was a certain logic in the role assigned to Pepys and Middleton: they were there, at least for the *Defiance* court-martial, not only to give advice, but also for the larger purpose of preventing such mishaps in the future. Remember, Pepys comments that "we are the proper persons to enquire into the want of instructions while ships do lie in harbor".[32] Similarly, after Pepys and Middleton reported to him about the unpleasantness aboard the *Dartmouth*, the Duke followed up with revised instructions. In other words, the purpose was not only to assign blame retrospectively, but to prevent a recurrence. Today, of course, court-martial and administrative functions are separate.

II. Some Reflections on the Present and the Future

For a military justice junkie and an Anglophile, this is great fun – but there is more to the matter.

The unpleasant truth is that although Britain has come a long way since Charles II's reign (Britain dispensed with swords at naval courts-martial

30 Penn, *supra* note 1, pp. 520-521.

31 Pepys himself notes that the *Nonsuch* court-martial was "the first [he] was ever at". Pepys, *supra* note 2, p. 488.

32 *Diary*, 19 March 1669. The records at Kew include a list of questions that were put to the master attendants at the *Defiance* court-martial. One asked "What their practice has been in lodging by turns on some of the ships at least every third night". Transcript, p. 235; MS State Papers Domestic: Supplementary, SP 46/137 f.184, The National Archives of the UK. Given his claim to have rattled the master attendants, it seems fair to speculate that Pepys framed the questions. See Transcript, p. 233, note *.

in 2004),[33] we in the United States remain subject to a system that, if not Charles II, then at least George III would recognize – even without swords. Thus, our convening authorities continue to appoint members of courts-martial, decide who shall be prosecuted for what, and perform post-trial review of courts-martial. The command-centric features of our system condemn us to an eternal struggle with unlawful command influence, whether in fact or in appearance.

Unaffected (at least directly) by Strasbourg, we in the United States have passed up numerous opportunities to keep pace with changing contemporary values. For example:

Our courts-martial still need not be unanimous except in capital cases.[34] A court of as few as three members can send a soldier to the stockade for a year, and do so by a two-thirds vote.[35]

We continue to deny to personnel attached to or embarked in a vessel the right to refuse summary trial (nonjudicial punishment).[36]

On paper at least (the issue will reach our Supreme Court before long), civilians serving with or accompanying an armed force in the field in time of declared war or a contingency operation are subject to trial by court-martial.[37] How committed are we to confining court-martial personal jurisdiction to serving members? Will our commitment apply only in peacetime?[38]

Twenty-five years have passed since we abandoned the service-connection test of *O'Callahan v. Parker*[39] in favor of a pure status test in *Solorio v. United States*.[40] This pits us against the clear trend of human rights law. *Martin*[41] involved the court-martial of a British

33 659 Parl. Deb., H.L. (5th ser.) (2004) pp. 459-461 (U.K.).

34 Art. 52 UCMJ, 10 U.S.C. § 852 (2006). See also *R. v. Twaite* [2010] EWCA Crim 2975 (Court Martial App. Ct.).

35 *Sanford v. United States*, 586 F.3d 28 (D.C. Cir. 2009).

36 Art. 15 UCMJ, 10 U.S.C. § 815 (2006).

37 Art. 2(a)(10) UCMJ, 10 U.S.C. § 802(a)(10) (2006); *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012). Whether *Ali* will survive review by the Supreme Court of the United States remains unknown at this writing.

38 See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957).

39 395 U.S. 258 (1969); see also *Relford v. Commandant*, U.S. Disciplinary Barracks, 401 U.S. 355 (1971).

40 483 U.S. 435 (1987). Under *Solorio*, it is sufficient that the accused be a member of the armed forces; the offense itself need not have anything to do with military service. Prior cases, including *O'Callahan* and *Relford*, *supra* note 39, required that the offense have some inherent connection to the military, such as having been committed on base.

41 *Martin v. United Kingdom*, Appl. No. 40426/98, judgment of 24 October 2006, 44 *E.H.R.R.* 2006, p. 31.

military dependent for a murder committed in Germany, the European Court of Human Rights found a violation of the European Convention on Human Rights on other grounds, but cautioned that "only in very exceptional circumstances" may civilians be court-martialed. "The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case." Given this strong signal, will the UK abandon jurisdiction over dependents and other civilians? Will others?

Our Supreme Court believes that due process of law does not require military judges to have the protection of a fixed term of office.[42] We therefore now have the appalling situation in which personnel tried by Army or Coast Guard judges are judged by officers with mere three-year terms of office, and those tried by judges from the other branches (the Navy, Marine Corps, and Air Force) face at-will judges. Even the disparity across service lines seems to bother no one.[43]

We continue to allow our Court of Appeals for the Armed Forces to bar the door to the Supreme Court in most cases.[44] How can that be justified – especially when foreigners convicted of terrorism in our ill-advised military commission system may seek review by our highest court in any case, whether the next lower court approves or not?[45]

I do not mean to suggest that the process of change has run its course, but rather that it is never-ending, and that no country can permit its system for the administration of justice within its armed forces to become out of touch with contemporary standards.

I've listed a few of the shortcomings that occur to me as I survey the current state of affairs in my own country. Sure, it is a far cry from what Britain had in Pepys's day. Statutes are clearer; implementing regulations are more and more detailed; military case law continues to proliferate (perhaps excessively).

But what will military justice look like 350 years from now? Perhaps it will be as different from what Britain and the United States now possess as those systems are from the one in which Pepys had a walk-on role in *The Gunner's Case*. I can only hope that as the custodians of the current systems continue in a cousinly way to work to achieve public confidence in the administration of justice, we will be mindful of how

42 *Weiss v. United States*, 510 U.S. 163 (1994).

43 *Oppermann v. United States*, 2007 U.S. Dist Lexis 43270 (D.D.C.), *aff'd mem*., 2007 U.S. App. Lexis 26169 (D.C. Cir. 2007).

44 10 U.S.C. § 867a(a) (2006); 28 U.S.C. § 1259 (2006).

45 Military Commissions Act of 2009, 10 U.S.C. § 950g.

far we have come, albeit at different speeds and by different means, as how what today seems natural, wise – indeed, inevitable – may to a future generation seem at best quaint and, at worst, hopelessly obsolete and wrong-minded. It's a humbling thought.