The Bar Association of the District of Columbia

March 13, 2000

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE
(The Cox Commission)

Statement of Kevin J. Barry

Judge Cox and Members of the Commission:

Good Morning.

My name is Kevin Barry. I am a retired Coast Guard Law Specialist. While on Active Duty I served in a variety of operational and legal assignments. My military justice positions included duties as trial counsel, defense counsel, staff judge advocate, and military judge. I served as Chief Trial Judge for the Coast Guard for two years, and for three years as an appellate military judge on the Coast Guard Court of Military Review.

It is a privilege for me to appear here this morning as a representative of the Bar Association of the District of Columbia, and to explain and amplify our written submissions to the Commission. We have three documents we are presenting. First is a two page "Resolution" adopted by the BADC Board of Directors which sets forth our principal issues and recommendations for change to the military justice system. The second is a 10 page document entitled "General Comments and Recommendations" which again states, and further explains the positions set forth in the Resolution. Finally, we offer a 33 page document entitled "Specific Questions, Perspectives and Matters for Consideration" which has been prepared by the BADC's Military Law Committee, which is intended not to provide any further "recommendations" or "answers," but rather to offer food for thought and to raise some of the questions that should be asked, as the Commission attempts to reach its own recommendations regarding each of the Commission's published "Topics for Consideration."

In the time I have been given, I will focus on the BADC's Resolution and on its Recommendations, which for the most part highlight concerns which have been voiced about this system for decades.

There is little doubt that in 1950, when the Uniform Code of Military Justice was enacted, it was both evolutionary and revolutionary. The reforms it put in place, while viewed with some trepidation by many practitioners of the day, proved to be ahead of their time, and we now view the UCMJ, as implemented, as the most advanced, most fair,

This story is about child abuse on a different level... This is a system where judges and juries are "conditioned" to decide the outcome "for the good of the service". The military justice system is conducted completely in-house with no objective overview!

This is a story of the rape of just one American and local family as it struggles against a system that has become so hungry for convictions and so used to covering up that it all but ignores the evidence and in fact, may even create it's own. We must endure this financial and emotional assault while watching the military brush aside it's own misconduct and in many instances, promote the wrong doers."

"Kevin refuses to give up hope that he will eventually be found innocent. His attitude and outlook on his future (whatever that may be) is a continual source of inspiration to those around him in prison and to the many families and friends that he consistently maintains contact with," writes Glenda Ewing.

"Kevin has repeatedly told me that he will NOT confess to a crime that he did not commit simply to have his sentence reduced. He says that the only thing he has left which the military cannot take away, are his honor and integrity. Having sacrificed so much, he will not give those up for anyone or any reason.

I am finding my way through life the best I can with the cards I have been dealt. I believe that God has given me an opportunity to use this terrible situation to bring help to others through our website and CAMI. It is a comfort to me that Kevin is so full of the 'peace that passes all understanding'. That of believing and trusting God for his future. As his mom, I can do no less.

If you or someone you know is suffering with the injustices of the Military Justice System, please tell them that help is available. If you would like to send a tax free donation in order to lend your support, the address is CAMI, 308 161st SW, Lynnwood, WA 98037 or visit our website at www.militaryinjustice.org".

Citizens Against Military Injustice

In its very brief existence, CAMI is already making waves, not least among the inmates and staff at the U.S. Detention Barracks in Fort Leavenworth, Kansas, where Kevin is incarcerated.

The website has provided valuable support information and competent legal resources to those in need of them and who would otherwise be in the dark. Two online forums are linked to the site: a General Discussion of Military Justice and an Inmate Support forum, both of which have been active. It also provides a great deal more detail on the Kevin Holt case and others, including press articles, suggested reading and links to related sites.

The organization was founded and continues to exist on a shoestring and is urgently seeking support, especially from the local community, to continue and expand its efforts towards meaningful reform of the military justice system. It is the only active organization of its kind in existence.

A National Shame

While this is a local story, Edmonds is far from the only town in America to have lost a son or daughter to military injustice. Probably the most shocking statistic I have heard, corroborated by qualified lawyers, is this: of the military prison population, approximately one third are innocent of the crimes for which they were convicted, one third are serving excessive sentences, and only one third are appropriately sentenced.

In the military, justice is only as just as it serves command intention. It is being ruthlessly applied, as you read this, to some of America's brightest sons and daughters "for the good of the service". This is indeed a national shame which must be uncovered, confronted and changed at any cost.

The movie "A Few Good Men" just scratched the surface of what Kevin Holt calls "America's dirty

little secret". However, it's portrayal of a convening authority (Jack Nicholson), stuck in a warring past and arrogantly oblivious to fundamental democratic principles, is chillingly accurate.

Citizens Against Military Injustice (CAMI)

This article by Lorie Hearn was published in the San Diego Union-Tribune on May 14, 1993, in response to the Kevin Holt story. Copyright ©1993 San Diego Union-Tribune. Quote:

Is military law on a different scale?
A system that often marches to own drummer.

Each year, thousands of members of the armed services worldwide are marched through the military justice system, suffering consequences ranging from extra duty to the death penalty.

It is a unique process of law and order that is designed to discipline and to punish. Separate from the civilian courts, the military justice system in many respects marches to its own drummer, and many question whether justice is as much a part of the process as it is a part of its title.

Yes, defenders assure, there are constitutional rights in the military. And some rights, they argue -- like the right to a lawyer regardless of financial status -- are more meaningful in the service than in the civilian courts.

"I do believe that on the whole, the system is designed to be fair," said David Schlueter, a former Army lawyer who is now a professor at St. Mary's University School of Law in San Antonio, Texas.

"It would be a mistake to take an incident or a group of incidents -- out of thousands and thousands of cases tried -- and say the system is not fair," Schlueter said.

Even more to the point, Camp Pendleton's Col. Mark Haiman, the Marine Corps' senior circuit judge for the western states, huffs: "To anyone who says our system is a railroad, I'll spit in their eye because it's just not true."

Complaints of unfairness

Critics, however, are not deterred by the insistence of military officials.

In papers and books with titles like "Military Justice is an Oxymoron" and "Military Justice is to Justice as Military Music is to Music," these critics complain of what they say are problems with jury selection, unlawful influence of top commanders, inexperienced defense attorneys and the questionable independence of military judges.

Says Robert Rivkin, a former Army lawyer, who is now in private military practice in San Francisco: "I find the system to be incorrigibly corrupt."

Like cases in civilian court, the sexy, serious crimes are the military offenses that make headlines.

For example, beginning tomorrow, attention will once again be focused on Marine Lance Cpl. Kevin Holt, who was convicted of murdering a fellow Marine from Camp Pendleton last spring. He will appear for sentencing before the jury that found him guilty last month, and could receive the death penalty.

In Tokyo, the general court-martial of Navy Airman Apprentice Terry Helvey, set for next month, has attracted international interest for its undertones of gay-bashing. Helvey is accused of beating to death a homosexual sailor in a restroom near the U.S. naval base in southwestern Japan.

And then there is the Tailhook scandal, the sexual-abuse debacle for which as many as 180 officers may be punished. The final investigative report, naming alleged offenders, has been held up until a secretary of the Navy is nominated by President Clinton, officials say.

A different set of laws

The penal code governing service personnel is the Uniform Code of Military Justice, which describes different punishments and leaves wide discretion with commanding officers to decide what charges should be filed and how they should be litigated.

The code contains 58 articles that deal with two kinds of offenses: those that are similar to civilian crimes, such as murder and rape; and those that are unique to the military, like "conduct unbecoming an officer and a gentleman," "improper hazarding of a vessel" and "misbehavior before the enemy."

Eleven offenses, including murder, rape and war crimes, can result in the death penalty, which is carried out by lethal injection.

The least harsh punishment is non-punitive and can be a lecture, extra duty, or a letter or reprimand. The next step is non-judicial punishment, which results in an Article 15 hearing by a superior officer to sort the facts, decide guilt and impose punishments limited to restriction, reduction in pay grade or docked pay.

Criminal cases of escalating seriousness are usually handled in courts-martial, which come in three forms: summary, for petty offenses; special for offenses that are similar to misdemeanors; and general, for felon-type offenses.

A commanding officer, after consultation with lawyers, decides which court-martial is appropriate. Each carries varying degrees of punishment, up to life in prison or death.

In the early stages, an accused offender is assigned military defense counsel. The accused also can request an available military lawyer from any service branch or hire a private lawyer.

Once a commander "prefers" charges, or recommends them in writing, an Article 32 investigation is called. This investigation, similar to a federal grand jury proceeding or a state preliminary hearing, is held to determine through witnesses and evidence if there is enough evidence to warrant a trial.

Unlike a grand jury proceeding, the accused is present with counsel during the hearing and can question witnesses and present evidence. If the evidence is adequate, the process moves to trial by military judge or jury, or to a negotiated guilty plea.

Jurors, called court members, decide both guilt and sentence. They are allowed to ask questions through the judge of witnesses, a practice that is not allowed in civilian courts.

There must be five people on a jury at a general court-martial, though there may be more. Only a two-thirds vote is generally necessary to convict.

That can work in favor of the accused because if there is less than a two-thirds vote to convict, the accused is automatically found not guilty. Deadlocked juries, common in civilian cases, are almost unheard of in military trials.

In a second phase of the court-martial, the jury votes on a sentence.

More rights than in civilian courts

Defenders of the military system, like Haiman of Camp Pendleton and San Diego Navy Cmdr. Stephen Epstein, can provide lists of rights that apply more extensively to the accused in the services than those in civilian courts.

They cite the rights of free counsel through appeal, mandatory appeal in serious cases, extensive access to prosecutors' evidence, truly speedy trials and full participation in pretrial investigative hearings as among the most significant safeguards.

Critics, however, look at overall justice and attack what they see as deferential treatment of high-ranking officers. While defenders deny that this is consistently the case, detractors contend that superior officers often are dealt with in administrative ways for offenses that would earn a lower-ranking service member a court-martial.

Critics also repeatedly assail what is referred to as unlawful command influence, which is illegal influencing of a trial by a commanding officer. Backers of the system say this is not commonplace, and not always intentional.

Rivkin and others, however, say that hundreds of convictions have been reversed on appeal because of unlawful command influence, and they argue that they can find no case of a commanding officer who, in turn, has suffered prosecution for the act.

Haiman says he makes sure defense attorneys, who some say may be less than effective because of promotion pressures, are doing their jobs zealously.

And as far as his judges' independence, which is questioned for the same reasons, Haiman says: "I tell the (judges he assigns to cases) that if anyone approaches you, you come and tell your Uncle Mark because I'll have their hearts out of their body."

One aspect of the system that draws the most fire from critics is the jury-selection process.

In the military, the commanding officer, the one who has recommended criminal charges, selects the jury members based on such things as age, rank and experience. Although the jurors can be challenged by the attorneys and removed by a judge, some detractors insist the end result is a panel hand-picked by the commander.

Calls for reform

Though supporters say military juries are "blue-ribbon panels" of well-educated officers who take their jobs seriously, even some supporters of the system concede that a change in the jury-selection process might be warranted.

For example, Schlueter suggested in a speech to the Judge Advocate General's School in 1991 that a commander's influence in picking potential jury members at least "looks bad."

He suggested a random computer-selection process among qualified officers, something roughly akin to the civilian court

practice. Schlueter said, "I cannot believe that the same ingenuity that coordinated the massive airstrike 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."

Letter to C.A.M.I.

September 10,2000

Dear C.A.M.I.,

My name is Kevin Holt and I was a marine. I have been confined at the United States Disciplinary Barracks in Fort Leavenworth Kansas for almost nine years. I was tried and convicted of premeditated murder and sentenced to confinement for life.

What, you may ask, is so extraordinary about that? I was convicted on the testimony of two fellow marines, one of which was facing other charges, and their wives who testified that I told them I did it and one piece of evidence the appeals court has stated was "obviously" tampered with.

Not enough? How about eleven marines who were best friends with the deceased and had never met me before the trial testifying on my behalf that I could not have committed the crime because they either saw, spoke with, and in one case even ate breakfast with the deceased after the prosecution claims I murdered him.

Still not enough? How about the fact that the police seized over forty-two items including my Chevy Blazer, and turned them over to the army's own crime lab who could find NOTHING of evidentiary value using sophisticated techniques and multiple examiners, prompting the prosecutor to find a "..hired gun, liar for hire, a Frankenstein monster" as stated by Dr. Herbert MacDonnell, America's preeminent forensic scientist,. The man who wrote the book on forensics.

I do not have enough room in my cell to accommodate my entire record of trial so I sent it to my attorney to keep from paying the costs of having it copied. Until a couple of months ago, I kept all briefs by both sides and the decisions from the courts for each level. A copy of the record for myself would have been redundant as we were pursuing the top eight issues of my case. These eight were the most important and we felt that if the courts weren't going to see justice done with them, then there would be no justice. At the present time it seems the court has decided against justice in favor of the government's image of infallibility.

Please keep in mind that I was only a young marine when I was arrested and while I did get around, as far as this whole judicial thing goes I am completely lost. I haven't had the best of help with my lawyers but my recent one, Bill Cassara, seems to be working hard to the best of his abilities with a screwed up system. I assume that most people think that when you get locked up you instantly know all about the law. That is not the case. I've tried and all the double speak in the law books confuses and angers me. Try as I might, I can't seem to understand how the decisions from the court make sense.

Some people have a very hard time understanding why I make the decisions I make or behave the way I do. I spoke with a reporter once and he told my mom he thought I was guilty because I wasn't yelling and screaming. I am not a person who wears his emotions on his sleeve. I do not believe that that is what being a man is all about. I also don't see any benefit to screaming at the walls and beating my head against the cell door. It does not change the situation one bit and only creates more stress that only does damage. I read of a man once who screamed his heart out and was finally released only to die of a heart attack shortly after.

My view on life seems to be against the grain of the general populace and seems to upset people or to make them look at me queerly. I hope that reading this may help you to understand a little about who I am and what C.A.M.I is all about. My honor means more to me than my freedom. I could probably get out of prison much sooner but to do so I would have to sell myself out and I won't do that. I will never admit to something I didn't do. Each morning when I get up, I must look at myself in the mirror. I must be able to live with what I see. What good is freedom if you can't even look yourself in the face without disgust. Some people probably wouldn't care. I do. I do not try to sway people with how I act. I only ask people to look at the facts in my case and judge me by them.

Why didn't the eleven marines scream for my release after I was found guilty? I assume it is because they didn't see the trial and bought into the belief that if I was convicted, there must have been evidence to support it, the prosecution merely being wrong about the time of the murder. But then again, these are good marines and we believe what they were told because the government wouldn't lie to us. I don't believe that anyone ever contacted them or the jury to show them the discrepancies with the "expert" witnesses that lied about their credentials or for that matter were never qualified in the field in which they testified. Wouldn't that be fun? I wonder what they would say.

My chasers (guards) that sat with me for all the sessions were outraged with the decision and decided to get out of the military. Why not get involved? Look around you. As long as people have food to shove in their faces and television to watch they are happy and complacent. Why rock the boat? Why get involved in something that doesn't affect their lives. That is your answer. People are lazy.

The San Diego Coroner's office did an autopsy but surprise, surprise; they recorded over the tapes so they were not available for a capitol punishment murder case. The report was written by memory and very sketchy. Samples were taken but never tested. Ocular fluid could have easily given a time of death but it was not tested even though a sample was taken. The body was never checked for a temperature, only the coroners hand on the body and the result of "cool to the touch" was given. I could go into rigor mortis but that would take more pages and my mom has already done that study. We've become experts in time of death study. Not something I ever wanted to learn.

As to how they came to the forty-four minute time frame, it was the only period of time that entire weekend that I was alone without an alibi. But even that shouldn't have mattered because it takes more than forty-four minutes to drive to the murder scene and back while speeding and making all the lights let alone stopping to murder someone and then washing up. Luckily for the government, facts are irrelevant in their courts.

As far as the murder weapons go, ...Yes, I did say WEAPONS. One knife was about six and one half inches long with a blade on one side and flat on the other, thought to be a bayonet while the other was about four and one half inches long, sharpened on both sides. Oddly enough, exactly like a boot knife that one of the marines that testified against me, stabbed a man in Memphis with, but that seems to keep getting overlooked.

What would I do if I had six months of freedom knowing that at the end I would be returned to prison? I'd track down every investigative reporter that I could find and sit on their doorstep until they listened to me. Other than that, I do not know. Who do you go to when the government has committed a crime against you and you have no money? I guess you would have

to rely on the populace's greed for intrigue and governmental misdeed to get a reporter to create pressure.

My congressmen and senators are only interested in their careers, not what's right. But that is pretty much what political animals are all about. They don't make a move unless it makes them look good to the masses. Politics is about the many, not the few. Our country has gotten away from the idea of letting a few guilty go free to ensure that no innocent man goes to prison. Now we throw them all away and let an overworked court system figure it out.

I used to love America. I used to believe we were a great nation. I believed in this country so much that I was willing to die for it. Now I see the rot eating at the core. I'm not as cynical as you might think or filled with hate for what has been done to me. I just choose to open my eyes to the reality of what is happening to our country instead of being spoon fed the trash people watch on TV. I still love this country, I just don't respect it or it's leaders anymore.

I don't ask you to believe a word I say. I would prefer if you looked at everything in my case as if you were pro-government. Do not listen to my opinions or my family's. Look for yourself and make your own decisions. Read both sides and weigh it for yourself. I have made sure that both the prosecution's and defense's arguments throughout my appeals were recorded verbatim on this web site not only to prove that I have nothing to hide but also that you, the public, can see what a travesty the military has made of the legal system, condemned by their own words. (Find those documents here).

I hope that you will read the things written on this site with the thought of " How would I feel if this were my son/daughter?" If any of you have friends or family in the military it could very easily happen to you and them also. Remember, the military is only interested in what is good for the service, not justice. I seem to remember being taught that our country was founded on freedom, justice, and rights that protected us from oppressive government.

If you feel anger, good. It should anger you. It should make you see the insidious evil in a judicial system run by the military with little or no oversight by our **REAL** judicial system. My hope is that you will get involved and show your disapproval and disgust in this system, not for me but for your families, friends, and any young person thinking of joining the military. We need a change and only by **YOU** getting involved will that happen. **C.A.M.I.** is not about or for me. It is too late for me but not for others. Don't let this system destroy the life of someone you know.

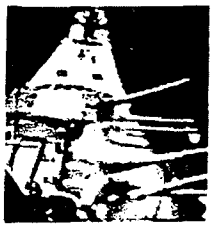
Take care and God bless.

Sincerely,
Kevin M. Holt

Recipe of a Navy Cover-up:

1. Blame it on a dead sailor;
2. Lie, saying he was gay to drum up anti-gay sentiment;
3. Ruin the guy who saved the ship and crew;
4. Allow a U.S. naval officer to lie to Spanish dignitaries through a translator;
5. And promote the naval officers who caused it all...

Shame on you Navy!!



In an effort to let the world know America was "back" militarily speaking, old WWII battleships were brought out of mothballs for duty on the high seas because of the awesome power these battlewagons could deliver. Military observers say there is nothing more devastating, short of a nuclear blast, than an all night naval bombardment. A row of battleships has the ability to literally change the contours of the land. One of the mightiest of these dreadnoughts was the USS IOWA and she was underway April 19, 1989. It was a day that many would never forget and others would never live through. It started off as a great day for Clayton Hartwig. His tour of duty was over and he was going home. His sea bag was packed as he awaited a helicopter for his departure. To keep him from impatiently pacing the floor, the Senior Chief Zieggler (Clay's supervisor) asked Clayton if he would go to gun turret #2 and show Lawrence, his replacement, what his duties were for one last training session.

There were unauthorized experiments that were approved by Admiral Milligan concerning, among other things, the chemistry of the gunpowder. The ships captain, Fred Moosally, and John Mullahy were unaware of the experiments being conducted. Bags that held the gunpowder were originally designed to be the detonating device having a red patch on one end that was the primer. In that important function, the bags that contained the gun powder played a critical role in launching 2700 lb. projectiles 25 miles. Crazy as it sounds, no bags had been manufactured since 1954. Master Chief Skelly, acting with the approval of Adm. Milligan conducted 31 unauthorized experiments that were prohibited in 1939; this according to the books; "Explosion Aboard the Iowa" by Richard Schwoebel and "A Glimpse of Hell" by Charles Thompson. Mullahy was not aware of the experiments until six months after the explosion. The gunpowder was blended in Hawthorne, Nevada with older black powder, some of which had been manufactured 75 years prior in 1917. (I'm not kidding) An investigation later would reveal that a floating barge of gunpowder in bags were left in the sun for several days contributing to their instability. Old bags (meaning old detonating devices) and, mixed gunpowder with crap that was 75 years old; became a recipe for disaster. Gun turret #2 exploded aboard the battleship USS IOWA; actually, there were three explosions which ultimately claimed the lives of 47 men. Master Chief Skelly was the subject of an Article 15 hearing where he was fined 1 month's pay that was suspended. (one month's pay suspended for his involvement in the loss of 47 lives and millions of dollars in damage to the ship)

John Mullahy was in turret #2 moving ammunition in a magazine, six decks underneath. While others in the area scrambled for safety, Mullahy beat opened hatches to release three men trapped in a compartment full of fire and smoke. Immediately following their escape, a secondary explosion occurred that surely would have killed all three. Mullahy then carried Lt. Blackie who had passed out from the smoke and gas fumes from damage control central to the forward battle station saving yet another life. He then groped and crawled through smoke to activate sprinklers and flood the powder room. It was an act, people say, saved the ship and a crew of over a thousand lives. John would later be awarded the Navy & Marine Corps Medal for saving Lt. Blackie. He was never recognized for saving the other three men. Mullahy was never fully credited for what he did that day. USCOVA feels his heroism and quick thinking ranks right up there with Congressional Medal of Honor recipients. And, while he was receiving accolades from one part of the Navy; he was receiving a belly full of harassment from an out-of-control

female commanding officer in another part of the Navy.

Ironically, Mullahy should not have been certified to move munitions aboard Iowa because he had just recently been let out of jail (brig, in navy jargon) prior to reporting to the USS IOWA. What in the world was John doing in jail? His wife decided to bug out in a cowardly way after he departed on a cruise with the USS Forrestal some years back. She lied to the court telling the judge that she did not know where here husband was. She knew where he was an what ship he was on. Not knowing he was divorced, Mullahy was not eligible for the extra housing allowance offered to married personnel. When he finally became aware he wife had divorced him, he obtained copies of the divorce decree. In typical bureaucratic fashion, Navy officials refused to accept his paperwork because they were not originals. Frustrated with trying to do the right thing - John said, "What the hell - I give up" and continued to collect the extra housing allowance. It would become a legal tripwire that would bite John badly.

Turn the clock back a bit further and let's introduce Lt Cmdr. Patricia Rios, only child of Admiral Barrow. In 1986, Mullahy was stationed at a Spanish military base in Cartagena, Spain. His commanding officer was Lt. Cmdr. Rios who, one day, ordered Mullahy to paint over warning signs on dangerous explosives an move them in his own car without a highway escort, in direct violation of U.S. military and Spanish regulations. His refusal exposed Rios to be bumbling and inept, something she would not soon forget. USCOVA is in possession of a statement by Lcdr. Perry D. Driver who investigated the overall explosive ordinance handling and safety program for Naval Station Rota, Spain and the Cartagena Detachment. Inspector Driver slammed Patricia Rios in a 25 count indictment citing violations of international laws, Navy regulations and the breaking of the Treaty between the United States and Spain. It was enough to relieve Rios of her command but send her to jail as well.

Rios saw her opportunity to get even in several ways. As the OIC of the Cartagena detachment, Rios, just for spite, denied Mullay's wife a dependents ID card. This is noted in another sworn statement by Navy lawyer, Eric Johnson. Then, she really went out of control when she ordered Mullahy court-martialed for $3,800 of married housing allowance she stated was fraudulently received. Rios also ordered that Mullahy pay back TAD (temporary additional duty) funds. Mullahy was on a TAD assignment from Cartagena, Spain to NAS Rota waiting to be court-martialed; 550 miles away. He was TAD for 8 months, when manual says that naval personnel may only be on a TAD assignment for a maximum of 6 months. Mullahy was being docked $100/mo. to pay his debt back but that wasn't good enough. Rios ordered $2900 be returned to John so the Navy could court-martial him. In reality, Mullahy did not owe $3800; he only owed the difference which was $900. While John M. Mullahy was recognized for his heroic efforts to save the USS Iowa, Patricia Rios was doing her level best to destroy him for reporting her incompetence to naval inspectors. This demonstrates what can happen when a commanding officer is hell bent on getting even. The only reason any of this has come to light is because of Mullahy's efforts to save the entire crew by getting to those sprinklers before the rest of the gunpowder blew up. Remember what happened to the USS Arizona in Pearl Harbor when a bomb hit her forward magazine. In less than a few minutes she was sent to the bottom.

For those of you who served, or, are serving in the Navy — think very hard; when is the last time you ever heard of anyone being sent to a general court-martial who did not receive at least a BCD (bad conduct discharge). Mullahy was the only sailor at the Philadelphia Brig who was ever returned to duty as far back as USCOVA can remember! Do you think the Navy knew this was a personal vendetta and just went along with it. Based on the Navy's track record alone, this case really stinks of a system that caters to the whim of any officer who is out to punish someone for personal reasons. Patricia used the military judicial system, and sadly, the system allowed her to use judicial powers granted to her by her rank to destroy this good American.

The Iowa incident wasn't the only place Mullahy distinguished himself. On page 110 of the record of trial, during Mullahy's court martial, there was a stipulation to another heroic event which occurred during the Vietnamese refuge evacuation. As people were boarding a truck a wire was tripped connected to a hand grenade. It was booby trapped to kill. Mullahy dove for the grenade catching it before the spoon came up. He never received any medal for that life saving action but there was a brief mention of it in his court-martial proceeding.

Now, if you know nothing else from USCOVA's website, you should know how America's military judicial system can be twisted to yield any desired result. They threatened and bullied Mullahy to confess to something he really felt he was not guilty of. The conviction rate in the U.S. military is 95-98%, which happens to be the same rate of convictions in China, another totalitarian regime. Off he went to jail for 5 months. Mullahy has the distinction of being the only sailor in American history who received a commendation while in jail for his outstanding work while incarcerated in a naval brig. After his stint in the "big house," Mullahy was transferred to the USS Iowa in Norfolk, VA in 1988. The Navy was not through beating up on John; ordering him to reimburse the Navy for cash advances he received for food and housing while awaiting his court-martial. Part of his punishment also included a reduction in pay grade. Demands for reimbursement whittled his paycheck down to nothing. Within two years of retirement, the

Navy wanted even more "blood" from John Mullahy. Lt. Cmdr. Rios decided to administratively discharge Mullahy as an "undesirable" because he was found guilty at a court-martial; a court-martial she conjured up. Rios decided to blow off her chain of command and go directly to Washington to make the discharge a reality; the mark of a fine naval officer. By bypassing the chain of command, she was unaware of Mullahy heroic efforts on the USS Iowa which saved the American dreadnought.

After news accounts of his heroic action from the explosions on the Iowa surfaced, the Navy started to realize the stupid mistakes they had done. On orders from the Pentagon Mullahy was immediately promoted. Captain Lang, a Navy lawyer filed motions on his behalf in an Illinois court to move the date of his divorce from 1982 to 1987 when he was notified that he was indeed divorced. Sadly and wrongfully, his court-martial was never reversed and he retired as gunner's mate 1st class. The Navy attempted to bribe him with an additional promotion to the pay grade of chief petty officer if he would suborn perjury and say that Clayton Hartwig was a gay sailor who committed suicide. The truth was, unauthorized experiments and leaving the gunpowder on barges in the sun created an unstable chemistry and whammy; 47 souls are lost. The Navy, scrambling to hide their own misconduct put the admiral in charge of the investigation who signed off on the unauthorized experiments. It's the old game of the fox guarding the hen house. Hey, let's blame it on a dead sailor, nobody will know. But people discovered the deception. Hartwig's family got an attorney and the FBI crime lab stated they could find no detonation device in the wreckage that allegedly was used by Clayton Hartwig to commit suicide and take everyone with him. Like a submarine, Navy's lies were starting to surface.

John Mullahy retired from the Navy and settled down in Spain. He is married to a citizen of Spain who is a nurse. He got a job and, except being denied a well deserved promotion to chief petty officer; life was pretty good. Suddenly, without warning, his retirement checks stopped! It turns out someone fraudulently reported him dead. He believes and USCOVA believes it was either Rios or one of her father's friends who did the dirty deed. Adm. Barrow dropped dead of a heart attack in 1990 while running around the Pentagon. After months of hassles trying to prove to the world that you're still alive, Ms. Shirley Higgins of Congressman Bass's office, Concord, NH was successful in restoring Mullahy's retirement checks.

Newly promoted, "Captain" Patricia Rios, who is married to a Spanish Naval officer, got final revenge. At a huge gathering of dignitaries, Rios persuaded one of her friends, Ms. Armeda Tommasi, who was the official translator for the 6th Fleet, to make outrageous and false statements before a crowd of dignitaries designed to slander and impugn the good name of John Mullahy who lived and worked in the city. In other words, all the "movers and shakers" of the area were fed a pack of lies by translator Tommasi who relied on her friend's (Rios) information as being correct. Tommasi made the false statements saying that she had obtained the information from an "Official of the United States Government" and a "representative of the Naval Investigative Service." She was referring to her friend Capt. Patricia Rios. But those lies paled in comparison to the lie that followed. Incredibly, Tommasi spoke into the microphone for all the dignitaries to hear, blaming the deaths of the Iowa's 47 dead on John M. Mullahy.

Instead of praising John, she condemned him with the following words; *"I AM THE OFFICIAL U.S. NAVY REPRESENTATIVE AND THIS IS THE OFFICIAL POSITION OF THE UNITED STATES NAVY AND THE NAVAL INVESTIGATIVE SERVICE THAT JOHN MULLAHY WAS A SUSPECT IN THE MASS MURDER OF 47 MEN IN GUN TURRET #2 ON THE USS IOWA BB-61."* In attendance at the party were the U.S. Ambassador, Commander U.S. 6th Fleet, the mayor and numerous other important local and foreign officials. Upon hearing what happened, the Naval Investigative Service, denying Rios was their representative, asked Tommasi where she received her outrageously false information. Tommasi told investigators she got her information from Captain Patricia Rios. Within 7 hours of that statement, two days before Christmas 1994, John Mullahy was fired from his job. To USCOVA's best information; as a result of the evil plan of Patricia Rios, Mullahy is still struggling financially to this day. Tommasi received formal counseling for her involvement in perpetrating the lies and Mullahy received an apology from the commanding officer of Naval Station Rota, Spain.

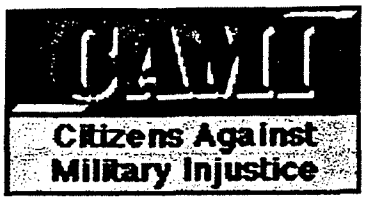
The United States Navy tried to cover-up the Iowa disaster with; a bogus investigation by a Navy admiral; by suborning perjury in attempting to bribe Mullahy to support the official assertion that Hartwig was gay and suicidal, by allowing a navy captain and a civil service employee to mislead the Great Nation of Spain. Adding insult to injury, the Navy promoted Rios regardless of what she did or said. What a country! Doesn't it make you proud to be an American?

United States Navy Captain, Patricia Rios, is a bald face liar. She deserves to have *her* retirement checks stopped. Even the commanding officer of the USS Iowa said her statement was preposterous. When John Mullahy checked aboard the USS Iowa fresh out of jail, the commanding officer told him, if you do a good job here, we'll forget about what happened in the past. Iowa's commanding officer never reneged on this commitment and has continued to support Mullahy to this day. In a report sent from Atlantic Fleet commander, Adm. Powell Carter to the Commander of US Forces Europe, the inspector general, Rear Adm. Paul G. Chabot wrote that Lt. Cmdr. Patricia Rios, "made deliberate efforts to ruin the career and reputation of John M. Mullahy when he was assigned to her command two years ago."

Lessons learned? **If you are not in the military, don't go in. If you are in, get out.** Until real reforms are made to preclude someone like Rios or her daddy's friends from attacking good men like John Mullahy; the military of the United States is not a healthy place to be either physically, mentally, or financially. John Mullahy had never even heard of the Military Whistleblowers Protection Act until he contacted USCOVA in November 2000. What the hell good is a law when no one knows of its existence and those who know about it refuse to enforce the will of Congress. You see, the law was passed to make it look like our government supports the efforts of whistleblowers. The reality is quite different. For those who would like to write John Mullahy: johnmu@teleline.es

You can write to your Congressional representative -- **letters do count**. Don't write to them to inform them; they already know. Their staffers hear all the ugly stories and pass the information on to their respective Member of Congress. It's more important to write, not to inform but, to let them know that you know what happened and that you're not happy about it. If enough letters are written, things will change. One or two letters are ignored but millions of letters are seriously considered. Write one a month. The message there is that you are mad this month and you were mad last month. Elected officials count on the public having a "short memory." If you have a long memory and remind them of it every month until something changes; things will change.

Note: John M. Mullahy is submitting a sworn statement to USCOVA categorically stating that all the information provided above is the truth. We invite Capt. Rios and her friend Ms. Tommasi to submit sworn statements as well. USCOVA is in possession of a letter written by the commanding officer of the USS Iowa at the time of the explosion and quoted relevant segments. Additionally, we invite the United States Navy or anyone having personal knowledge of the Iowa incident or issues concerning John M. Mullahy to submit sworn statements either supporting or rebutting his assertions.



(Posted Nov 4, 2000). USS IOWA- ACCUSED READY TO DIE FOR THE TRUTH!

I don't know if anything can be done in my case or not, but at least one more person knows about it. I hope the below letter that I sent to SECNAV last year does not make me sound like I'm crazy, but it's the truth. It can be checked out and verified in several places. It still goes on as I am still unemployed, It is even mentioned in the book "A GLIMPSE OF HELL" By Charles Thompson. If you are interested let me know at JOHNPAULA@ONO.COM or

John M. Mullahy
Jimenez De La Espada N31-4A
30203 Cartagena, Spain
telephone: 34-968-081356

Rios and officers like Rios are allowed to get away with everything, because there is nothing in place to protect some one reporting a senior officer. I have been fighting the Navy for years and I cannot give into them.

Secretary of the Navy
2000 Navy Pentagon
Washington D.C. 20350-2000
U.S.A.

8 October 1999

Mr. Secretary,

As you are well aware there is a personnel vendetta that has been waged against me and I am the Victim. Enough is Enough, I and my wife and two children, John and Paula have paid dearly over the years, But No More!

The Navy's position is to not answer any correspondence from my Senator (Senator Robert Smith, N.H.) who was really not too interested in the first place, a member of his staff a Mr. James Downs said he would not help me. Which shocked me because the request for his assistance came from Congressman Bass. Also you have not replied to my Congressman's (Congressman Charles Bass, of Concord, N.H.) request and inquires, Mrs. S. Higgins of the Congressman's Concord office said even though every one in and out of the Navy has said this is indeed a vendetta and that I have told the TRUTH there is nothing more the Congressman's office can do. This is unacceptable.

You have not replied to any of my correspondence including my letter of 8 May 1998 to you when I returned All my Medals, Ribbons, Awards, Citations and Insignias to you, and my Children's United States Passports back to the Department of State all because of this Vendetta. You could have at least acknowledged receipt as Professional Courtesy. On June 1, 1999 I tried to solicit the assistance of RADM John Hutson the Navy Judge Advocate General,.but as normal I received No response.

The Navy's position is basically ignore him and he will go away, you can never be more wrong. I CAN

AND WILL NOT WALK AWAY OR GO AWAY. Too much has been said and done to my family and myself for that to happen. Even in the recent released book by Charles Thompson "A GLIMPSE OF HELL" on pages 263, 264 and 265 that in 1989 Admiral Ming Chang (the Navy Inspector General) and Rear Admiral Paul G. Chabot (Inspector General CINCLANTFLT) informed Admirals Trost, Frank Kelso, Mike Boorda, Leon Eddeny and Admiral Richard Milligan that Lt. Cmdr Patricia Rios "**Made deliberate efforts to Ruin the Career and Reputation of Gunners Mate John M. Mullahy Jr.**" that I told the truth and that this was a personnel vendetta being carried out by Lt. Cmdr. Patricia Rios. Yet nothing was done to stop this from continuing and putting an end to it all or to correct the injustices that have been done to me. Instead the Navy chose to do nothing and let it continue and turn a blind eye on the whole matter. Admiral Barrow, Rios's father I know at the time had some influence on the matter. It should also be noted that Admiral Barrow was a classmate of both Admirals Trost; Kelso and Eddney. How convenient!

I was sent to a General Court Martial for Misappropriation of Government Funds (collecting Married BEQ). My first wife left while I was on a 6 Month Mediterranean Deployment on the U.S.S. Forrestal. She, my first wife, divorced me **without my knowledge or any notification.** So I collected Married BEQ until I found out about the Divorce. I tried on several occasions to stop my BEQ (see statements of CDR Carol Hiers, GMTC George Haight, Senior Chief Tim Schoulting which you have) and was told I could not stop my Married BEQ without the Original Divorce papers, which I did not have.

I was told the morning of my Court-Martial that I was going to be found Guilty because I did not write a Personal Letter to the Commanding Officer of Naval Finance Center Cleveland and I would get Two Years in the Brig and a Bad Conduct Discharge or Pled Guilty and get only 6 months in the Brig and be allowed to retire. Even though $2900.00 of $4000.00 of the Married BEQ was paid back Rios gave me back the $2900.00 that payback was not possible not even in a lump sum. (JAG Investigation) My Father-in-Law even offered to write a check or pay cash, but was told No by Rios that I was to be Court-Martailed. I did not have a Captains Mast or any counseling I went straight to a General Court-Martial. When I was at TPU Norfolk after the Iowa Accident Naval Finance Center Cleveland stated that I did Not have to repay the Married BEQ as it was NOT MY FAULT as I tried to comply with NAVPERS 1070/602 BAQ/VHA entitlements. So where the Crime, JAG says I'M Guilty and Naval Finance says its not my fault. So what was the Misappropriation if Cleveland has made this ruling in 1989 about my case?

The day I returned from my Honeymoon I was sent to Naval Station Rota on Technical Arrest Orders and waited 8 Months for my Court-Martial. The maximum time for Technical Arrest Orders is 6 Months, I was Court-Martialed any way. My HazMat Certification pulled by Rios, ALL my schools canceled by Rios (JAG Investigation). The day my ex-wife divorced me I was off the coast of Lebanon. Where there was a 40 mm explosion on the U.S.S. Forrestal, I was in surgery having scrap metal removed from the right side of my body. Notification of my divorce was printed in the Zion, Ill. Press which is printed on Fridays only. The Soldiers and Sailors Relief Act was waived to Court-Martial me.

In 1975 during the fall of Vietnam I was TAD to Special Operations (EOD/UDT). I was stationed at Security (Jungle Patrol) NAVMAG Subic. Near the end of a covert operation I jumped on a grenade in a truck that we were getting into and saved 4 other sailor's lives (Court-Martial transcripts page 110). I caught the grenade in the air before the spoon came up. It was wired to the gas tank. I then wrapped my belt around it for disposal (I never received the medal I was told I was going to get for that). In 1987 Lcdr. Rios told everyone that I was crazy for what I did. That normal people don't do stupid things. My second Attorney for my one and only Court-Martial looked at it as I saved lives and it should count for some thing.

The day of my Court-Martial my wife was given 24 hours to vacate our 3-bedroom house not by housing

but by Rios so my wife was put out on the street. Lcdr. Rios told JAG Investigation that she changed my 3-bedroom house into a barracks with no one to put in it of course. According to your JAG Investigation my wife should never have been removed, but stayed there until I received new orders after the Brig.

The day of my Court-Martial NONE of my witnesses could be located in the Navy. But ALL came forward after the news of the Iowa Accident and ALL still very much in the Navy. This is another reason why I pled guilty. No witnesses to prove that I tried to stop my BEQ (JAG Investigation). The day before my Court-Martial my lawyer was changed because Lt. Johnson was ordered to stop trying to help me so much and if he continued he was going to be transferred to Legal Aid (JAG Investigation). Plus my civilian lawyer was not allowed on the base the morning of my Court-Martial.

Lcdr.. Rios denied my wife a Dependents ID Card, Exchange, Commissary and ALL other privileges (JAG Investigation) (my wife comes from a Spanish Navy Officers family) and my wife works then and now in the Spanish Navy Hospital. Lcdr. Rios REFUSED to give sponsorship to my wife. So therefore I paid to relocate my wife when I was in the Brig. Tommasi (one of Rios's friends) made false statements to Naval Station Rota Staff Judge Advocate about me All her statements were disregarded.

The JAG Investigations that were completed by CINCNAVEUR are above criminal actions, not counting two statements made by one of the Investigating Officers, a Lcdr.. Perry Driver, which confirmed EVERYTHING.

As you know I appeared before the Investigations Subcommittee of the Armed Services Committee in December 1989. The Chairman Nichias Mavroules wrote "there appears to be interference in his personal life, allegedly by a Military Officer, that goes well beyond what is proper. All of this has occurred under the cloud of his charging this superior officer with violations of ammunition safety procedures and possible violation of the status of forces agreement in Spain" (I was as you know the Weapons Officer in Cartagena). This letter was sent to your office and I did not ask for his assistance, but it was welcomed.

I have been refused Navy Legal Assistance in this matter from Naval Station Rota "I don't want to get involved in this nightmare, sorry"

I am not left with a way out or any options, so now I will do what I have to do. For the Officers I have listed above will attest to that I have done every thing I have said I will do. I hope that something is done so this never happens to anyone ever again in the Navy.

This is not a game and it is definitely not any way amusing as some of your people may think, because I do not see anything funny about this situation at all. You have taken away my livelihood and ALL prospects of me ever being employed here again. You have marked me as a MASS MURDERER OF 47 OF MY FELLOW SHIPMATES, and said that "I BLEW-UP TURRET TWO on the U.S.S. IOWA BB-61.

I received a letter from the Commanding Officer of Naval Station Rota, Spain apologizing for the False and Misleading Statements made by Ms. Aremda Tommasi (she Ms Tommasi stated in your own JAG Investigation said that she received ALL her information about me from Cmdr. Patricia B. Rios), however I lost my job about 7 hours after these statements were made about me. Nothing was done to correct the damage that was done in all the Communities (Cartagena & Benidorm) that Ms Tommasi told these LIES to was informed that they were in fact lies. So therefore I lost my Job.

This includes a Formal Function between the United States Navy and the Spanish Navy where Sixth Fleet was present in person at this occasion. Ms Tommasi stated at this function to all she came in contact with: "THAT I AM THE OFFICIAL U.S. NAVY REPRESENTATIVE AND THIS IS THE

OFFICIAL POSITION OF THE U.S. NAVY AND THE NAVAL INVESTIGATIVE SERVICE" THAT I (JOHN MULLAHY) WAS A SUSPECTED MASS MURDERER AND THAT I BLEW UP TURRET TWO ON THE U.S.S. IOWA BB-61 AND SEVERAL FALSE ACCUSATIONS. (SEE JAG INVESTIGATION) This is why NO ONE will hire me until this is cleared up. Now my children will be dragged into this nightmare and this is why I am writing this letter so that the truth will once and for all come out either willingly or not. The choice is yours to correct the injustices that have been committed.

You have twice taken everything we own and put us in a life of poverty. We have been DENIED our supposed benefits as a result of this vendetta. I was even denied to mail a letter with the correct postage on it, and just prior to Christmas of 1997 I was reported dead and my pay stopped and it is extremely important that nothing happens to my Retired Pay as it goes to buy medicine for my son, and the benefits I don't have but should have were stopped. (Congressman Bass's Office Mrs. S. Higgins got my retirement pay restarted for me), INCREDIBLE!

Cmdr Rios wrote to ALL my Creditors (see JAG Investigation) and told them that because of my Court-Martial I was now a Convicted Felon (Ford took my truck, I was three payments ahead. Sears, J.C. Pennys, my Bank, Visa to name some but not all). She opened ALL my Mail for what I don't know (again see JAG Investigation). My wife refused a Dependents ID card from Rios (again JAG Investigation). All because I refused an illegal order from Lcdr. Rios that started this witch-hunt.

I was ordered in front of 8 other military personnel to go to San Javier Airport and direct a C130 U.S. Air Force aircraft from the Hot spot to the Civilian Terminal and not to tell anyone what I was doing. Spray Paint over ALL EXPLOSIVE MARKINGS and place the explosives in my personal pick-up truck (Ford F-150). Drive the explosives (C4 Plastic Explosive NALC M757 approx. 2000 lbs., blasting caps NALC M131, approx. 50 each, Small Arms Ammo approx. 10,000 rounds of 9mm and 7.62 and some hand grenades). Rios forgot to get Diplomatic Clearance for the aircraft. I was also ordered to move the above explosives over Spanish roads WITHOUT informing the Spanish Government for escorts and No placards, from San Javier to Cartagena approx. 35 miles, needless to say I refused the order and reported the matter to Captain Kennedy at CINCNAVEUR who called Rios to London.

When Rios returned from London it all started and has never stopped (JAG Investigation and "A GLIMPSE OF HELL" pages 263 and 264). All though I do not agree with everything your Investigations say (as they are sanitized or watered down) they ALL have said I have told the truth. This is why I do not understand the Navy's position, one would think the Navy would want to clear it up, and make good what was done in the Navy's name and on Official Functions it would be good PR.

I have kept my word to try and find a peaceful solution to this nightmare but time has run out. I have tried by going to the Navy and its JAG Investigations. I have gone to lawyers at my own expense, I have tried going to my Senator and my Congressman, but to no avail. I am quite sure you will ask what happened the best way is to ask people who have first hand knowledge: Captain Shrecengaust (Ret.), Captain Paul Hanley (Ret), Captain Fred Moosally (Ret), Captain Deborah Burnette (Ret), Admiral Ellis (Ret JAG) to name a few.

So now this has two ways it can go! I either come out even or I lose. There are no in-betweens, there's is no compromise. I get what I have lost as a direct result of Rios and Tommasi's vendetta and lies, which everyone in the Navy has acknowledged, is true, that is why I can't understand what the problem is to repair the damage that has been done. My Court-Martial overturned and restore me to the rank I should have been, get or give me employment at the same salary I was when I was fired ($43,000.00 a year), recoup my lost wages ($217,000.00 for lost wages, $630 Lawyers fees, $7,000.00 phone bills and $14,000.00 for my Pick-up truck).

If I lose the United States Navy WILL HAVE TO KILL ME, so that the truth will come out for my children. This has got to end— it cannot go on like this. The truth WILL come out one way or another for my children's sake; there is NO WAY they become involved in this mess. On each occasion they seek me out, as Cartagena is 550 miles from Naval Station Rota. They receive counseling and I pay through the nose. I cannot understand why the Navy does not think that it is a little strange that this was all done by the same two people before and after my Court-Martial.

Rios came after me while I was in the Brig, on the U.S.S. IOWA, while I was at TPU Norfolk, on the U.S.S. Kennedy and after I retired from the Navy. This vendetta has continued to the present day. The Navy either condones Rios and Tommasi's actions or just turns a blind eye to the whole matter. Do you think it is too much of a coincidence that all these things where done by the SAME TWO PEOPLE, and nobody can see there is something a tad wrong with this situation. Special Agent Tom Goodman says "what a nightmare" But either way I live or die it is your decision! But it ends NOW!

The above is not everything that has happened as you can see from your own JAG Investigations. I am finished with all your Investigations as nothing ever happens except that I am always the loser, and they get counseled.

If your decision is that the U.S.Navy will have to kill me, then I am willing to die over all that has been done. There is no other way that I can protect my family and to fight back. If I do not hear from you in a reasonable amount of time I will take it, as your decision is that I lose. I pray that when my children are old enough they will avenge me. This situation will go on NO more.

John M. Mullahy Jr.

DONNELLY

MASSACHUSETTS

ELEVENTH DISTRICT

March 23, 1990

Honorable H. Lawrence Garrett
Secretary
Navy Department
The Pentagon
Washington, D.C. 202:50-1000

RE: GMGI John M. Mullahy, Jr. SS# 025 44 1321

Dear Mr.. Secretary:

I am writing on behalf of John M. requesting my assistance.
Mullahy who has recently contacted me

GMGI Mullahy is seeking to be considered for the rank of Chief. I know that you are aware of his
gallant action in the gun turret aboard the
U.S.S. Iowa last April. It is my belief that a series of events have occurred in his Naval career over
which he had no control. While serving in Spain prior to his assignment to the Iowa, he had alleged
wrongdoing on the part of a superior officer in handling munitions and armaments. It is my understanding
this investigation is ongoing, and that GMGI Mullahy's accusations are proving to be true. As a result of
his action retalitory action was taken against him by his superior officer resulting in a court martial and a
confinement in the brig despite his offers to rectify any indebtedness he might have had to the Navy.

GMGI Mullahy's job performance throughout his career has been outstanding and his loyalty to the Navy
is above reproach. His bravery last April 19 indicates to me that he is an individual we can take pride
in having in our Armed Forces. I firmly believe that the disciplinary actions that had been taken
against him should be rectified and that he should be given the chance to advance as if this had

never occurred.

I would appreciate any comments you might have regarding this matter. Thank you for your attention to
this matter.

Sincerely,

BRIAN DONNELLY
Member of Congress

436 CANNON HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
9202) 225-3215
2301 JOHN F. KENNEDY FEDERAL BUILDING
805 ~ON. MA. 02203
(617; 223-0036
47 WASHINGTON STREET
OUINCY, MA. 02189
(617) 472-1800
Cl MAIN STREET
~ROCKTON. MA. 02401
~617P 583-6300
TOLL-FREE LINE TO
WASHINGTON
1-800-424-9112

JOHN M. MULLAHY JR
CIRAMON Y CAJAL N22-7G
30204 CARTAGENA, MURCIA SPAIN

SECRETARY OF THE NAVY
2000 NAVY PENTAGON
WASHiNGTON D.C. 20350-2000

VIA: CHIEF OF NAVAL PERSONEL, 2000 NAVY PENTAGON, WASHINGTON
D.C.
COMNAVSTHFFT, U.S.S. LA SALLE, iN PORT CARTAGENA SPAIN

IT IS WITH DEEP REGRET THAT I RETURN TO YOU THE NAVY & MARINE CORPS MEDAL AND CITATION ALONG WITH THE BELOW LIST OF MEDALS, CITATIONS, RIBBONS AND INSIGNIAS. SINCE I HAVE BEEN LABLED BY MS ARMEDA TOMMASI, A CIVILIAN EMPLOYEE OF THE MORALE, WELFARE, AND RECREATION DEPARTMENT, OF NAVAL STATION ROTA AS A SUSPECTED MASS MURDERER, THAT I BLEW UP TURRET TWO ON THE U.S.S. IOWA BB-61, AND SEVERAL OTHER FALSE ACCUSATIONS ALL DONE IN THE NAME OF THE UNiTED STATES NAVY, WHILE ON AN OFFICAL U.S. NAVY FUNCTION. THE NAVY HAD INVESTAGATED ALL OF THIS AND SENT ME AN APOLOGY. HOWEVER AN APOLOGY DOES NOT GET ME MY JOB BACK, NOR DOES IT RESTORE MY REPUTATION iN BOTH CARTAGENA AND BENJDORM FORM THE LIES SHE (MS TOMMASI) HAS BEEN TELLiNG (EVEN FROM YOUR OWN MS AND JAG 1NVESTAGATIONS BOTH FOUND TO BE TRUE) AND REPLACE THE LOST INCOME ($167,000.00 TO PRESENT DATE) THAT I AND MY FAMILY HAVE LOST. SINCE I WAS REPORTED DEAD JUST BEFORE CHRISTMAS OF LAST YEAR MY PAY & BENIFITS STOPED (MY PAY WOULD NOT HAVE BEEN RESTORED AS FAST AS IT WAS IF IT HAD NOT BEEN FOR THE ASSISTANCE MS HIGGINS OF CONGRESSMAN BASS'S CONCORD N.H. OFFICE) I WAS NOT TOLD WHO REPORTED ME DEAD BUT I HAVE MY OWN SUSPICIONS.

I HAVE APPLIED FOR MY NEW SPANISH RES1DENCIA WITH THE REASON OF POLITICAL PROSECUTION FROM THE UNITED STATES NAVY AND HAS BEEN APPROVED.I HAVE RETURNED MY CHILDRENS PASSPORTS TO THE DEPARTMENT OF STATE.

WE WILL BE MOVING AT THE END OF THE SUMMER I WILL NOT GIVE A FORWARDING ADDRESS TO THE NAVY FOR THE PROTECTION OF MY CHILDREN.

WHEN I DIE I DO NOT WANT A UNITED STATES FLAG PUT ON MY COFFIN

I WAS TAUGHT THE FLAG WAS TO BE RESPECTED AND NOT SOMETHING TO BE ASHAMED OF.

WHEN THE NAVY REPAIRS THE DAMAGE THAT WAS DONE, RECUPE MY LOSES AND WHEN I AM
EMPLOYED YOU CAN RETURN THE ABOVE.
I AM PRESENTLY TALKING TO MR.PEDRO GARCIA-PREFASI A REPORTER FOR ONE OF THE NATIONAL SPANISH NEWSPAPERS IT WILL NOT BE A PLEASENT STORY.

INSIGNIA, MEDALS, AND RIBBONS:
ENLISTED SURFACE WARFARE INSIGNIA
AIR WARFARE INSIGNIA
NAVY & MARINE CORPS MEDAL & CITATION
NAVY ACHIEVEMANT MEDAL & CITATION
GOOD CONDUCT MEDAL W/THREE BRONZE STARS
NAVY EXPEDITIONARY MEDAL W/ONE BRONZE STAR
NATIONAL DEFENSE SERVICE MEDAL W/ONE BRONZE STAR
ARMED FORCES EXPEDITIONARY MEDAL
VIET-NAM SERVICE MEDAL WITHREE BRONZE STARS
HUMANITARIAN SERVICE MEDAL W/ONE BRONZE STAR
MULTINATIONAL FORCE AND OBSERVERS MEDAL
VIET-NAM CAMPAIGN MEDAL
VIET-NAM CROSS OF GALLANTRY MEDAL
SOUTHWEST ASIAN SERVICE MEDAL
KUWAIT LIBERATION MEDAL (SAUDI ARABIA)
KUWAIT LIBERATION MEDAL (KUWAIT)
PISTOL EXPERT MEDAL
RIFLE EXPERT MEDAL
COMBAT ACTION RIBBON
PRESIDENTIAL UNIT COMMENDATION RIBBON
NAVY UNIT COMMENDATION RIBBON
MERITORIOUS UNIT COMMENDATION RIBBON
BATTLE "E" RIBBON
OVERSEAS SERVICE RIBBON
SEA SERVICE RIBBON W/SILVER STAR
NAVY RECRUITING RIBBON
NAVY RECRUITING BADGE W /TWO BRONZE STARS
I AM ALSO ENCLOSING SOME OTHER CORRESPONDENCE THAT I SENT TO MY
SENATO AND CONGRESSMAN

50 MEMBER'S LAST NAME, INITIALS 51 SSN

PERIOD OF REPORT

MULLIAHY, J. M. JR. •25-44-1321 52From 89FE5281

54 DUTIES AND RESPONSIBILITIES A

CLEANLINESS AND PRESERVATION OF TURRET TWO A 1G/5~ TRIPLE GUM T INCLUDE MAGAZINE SECURITY PATROL INPORT AND UNDERWAY.

LTARYDUTIES

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55 SPECIAL ACHIEVEMENTS SHIPS EMPLOYMENT INCLUDE:

FLEETEX 3-89, PVST ST MARTEN, NEW ORLEANS

56 EVALUATION COMMENTS PETTY OFFICER

MULLAHY IS AN EXTREMELY DEPENDABLE AND ENTHUSIASTIC WORKER. HE HAS AN EXCELLENT PROFESSIONAL BACKGROUND"AND PUTS THIS KNOWLEDGE AND EXPERIENCE TO GOOD USE WHEN CONFRONTED WITH NOT ONLY EVERYDAY PROBLEMS, BUT SITUATIONS WHICH ARE UNUSUAL. PETTY OFFICER MULLAHY IS LEVEL, HEADED AND INITIATES ALL REQUIRED ACTION IN A CALM, COLLECTED AND CONFIDENT' MANNER. HE CONTINUOUSLY DEMONSTRATES AN EXCEPTIONALLY HIGH DEGREE OF PROFESSIONALISM. • '•

HIS SPECIFIC ACCOMPLISHMENTS INCLUDE:,

- SINGLED HANDEDLY RESCUED THREE SHIPMATES FROM THE~FIRE AND SMOKE-FILLED ANNULAR SPACE DURING THE FIRE FIGHTING EFFORT FOLLOWING THE EXPLOSION IN TURRET'TWO.

- FOUND HIS WAY THROUGH NUMEROUS SMOKE~FILLED COMPARTMENTS DOWN TO DAMAGE CONTROL CENTRAL TO ACTIVATE SPRINKLERS TO TURRET TWO MAGAZINES AND POWDERS FLATS, WITHOUT.ANY TYPE OF BREATHING DEVICE AFTER DAMAGE CONTROL CENTRAL AND BEEN ORDERED TO EVACUATE DUE TO SMOKE.

- FOLLOWING THE TURRET TWO EXPLOSION, HE VOLUNTEERED FOR CASUALTY IDENTIFICATION ~ A TASK HE COMPLETED WITH COMPLETE PROFESSIONALISM. -'

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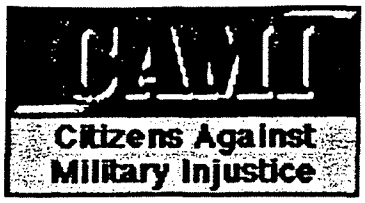
- COORDINATED LOGISTICS FOR REPAIR: TEAMS DURING AFTERMATH Ofj TURRET, 2.. EXPLOSION AND SUPERVISED THREE TURRET REPAIR TEAMS.

- TRAINED ALL REPAIR PARTIES ONBOARD IOWA IN THE OPERATION OF ALL THREE TURRET SPRINKLERS SYSTEMS.

- MERITORIOUSLY ADVANCED TO GUNNERS 'MATE GUNS SECOND CLASS FOR ACTIONS DEMONSTRATED DURING THE EXPLOSION AND AFTERMATH OF TURRET TWO.

PETTY OFFICER MULLAHY LEAVES IOWA KNOWING HE MADE SIGNIFICANT CONTRIBUTIONS TO MAIN BATTERY IN THE SHORT TIME HE WAS STATIONED ABOARD~BATTLESIIIP IOWA. HE DISTINGUISHED HIMSELF AMONG THE FINEST OF BATTLESHIP SAILORS. IN THIS HE DISPLAYED LEADERSHIP SKILLS EXHIBITED BY THE FINEST PROFESSIONALS. PETTY OFFICER MULLAHY HAS EARNED MY HIGHEST RECOMMENDATION FOR POSITIONS OF GREATER RESPONSIBILITY AND IS STRONGLY RECOMMENDED RETENTION IN UNITED STATES NAVAL SERVICE.



www.militaryinjustice.org

(October 27, 2000). Crushing the Family - the Military Method.

My husband, a Navy Physician with a 20 year stellar record was convicted of rape with no physical, witness or evidentiary testimony. Two of our daughters have been labeled "victim witnesses" while 3 of our other children are allowed to write, talk and visit with their father. The sixth child (a girl) and the only minor, wanted to visit but when my husband requested that he was told she had to write to Leavenworth to request the right to visit.

Now get this one- they have declared me a Victim Witness also. When Leavenworth was asked why by my husband's lawyer they were told "she is an indirect victim". The reason they were asked about this is that they used this excuse to cut me off from my husband by phone, letters and mail. This is despite the fact I was allowed to visit along with my three daughters at the Brig in Norfolk. It has been over one year now since we have been allowed any contact. It will be almost another whole year till he is home and we can see each other. His sentence was recently suspended for 6 months. We are now going for appeal.

NCIS took my husband and my three daughters and myself over the coals with no help from anyone. My husband's CO even drove us to NCIS. We received no support from anyone and were in a foreign country at the time. There is a lot more to what happened to us but due to pending appeal with the Navy-Marine Court of Appeal I will not go into it now. I do not want to do anything to hurt my husband's chances as he IS an innocent man. He has 3 Meritorious Service medals plus many more medals and ribbons. When he was SMO on the USS Constellation they got 100% on their Medical IG. That was the first and last time in history.

Many high ranking officers came to testify on his behalf even when called by the prosecutor to try to get something negative against him. There was no success at that. The prosecutor harassed and threatened our three daughters and myself and constantly called our other three children who are in their late 20's and early 30's even though they have not lived with us for years. Two of those children told her where to go in different terms. She found one who could be intimidated and worked on him. The first time I talked to the prosecutor she mentioned the probability my husband would go to jail for life!!! Since we were told the most he might be charged with if at all (quote from NCIS) I was devastated and totally confused. Turned out she charged him with two counts of rape among 5 other charges (only 4 of which he was found guilty of). None of which he should have been found guilty of.

Anyway the prosecutor set about threatening us and making our lives miserable. She turned one of our daughters into a basket case and who is only beginning to recover. The prosecutor continued to threaten me with charges of Obstruction of Justice which she conveyed to me through one son, my husband's lawyer and by threats to my three daughters and myself. She started this before we even met or before she even talked to any of us. She harassed my husband's parents also. We were threatened and harassed during the whole process. She used civilian social services in three states to harass us also. They were given lies which were confirmed through our civilian lawyer. They were surprised. A charge of kidnapping was threatened against me indirectly because I took our three girls to Pennsylvania for Christmas and to spend time with their grandparents so I could go and support my husband during a horrific time.

I want to say you can not imagine the terror we went through but I know there are many of you out there who can imagine and I would like to see this stop so no one has to go through this again. NCIS took my daughter's computer and my own computer which had no evidence of anything in them and yet they are still at NCIS offices in Iceland. Most inquiries about the computers were ignored by the prosecutor and the assistant prosecutor when our civilian lawyer repeatedly attempted to get them returned. My husband's lawyer has been able to find they never left Iceland. We still do not have them back or any of the other items that were not used for evidence or in court. Those include every single thing they took from us as NONE of it showed any evidence of the charges.

The military doctor wrote a false report on at least one of my daughters. I was in with her and I know what she said. He lied on the witness stand. Despite the fact my husband was charged with no crime against me I was not allowed to sit in on the court martial to give him support. My husband has bipolar depression II and has Parkinson's which the Navy did not want to diagnose or treat him for (the Parkinson's that is). I used most of my inheritance money (which was a very large amount) to get my husband medical treatment and a good civilian lawyer. I am using what is left to defend his honor all the way to the Supreme Court if I have to.

Family Devastation: My husband is going to be 56 in November. He has both a Ph.D. and an M.D. He will never be able to work again which is all right with us but hard on him. The prosecutor asked the court first for a life sentence, dismissal from the military and removal of all medals and ribbons and to end his pay. By the end of the trial she was asking for 8 years and all the rest. He got 3 years and lost everything else.

His drugs for his bipolar depression can cost as much as $1,000 a month. We have one daughter in college who may have to quit unless she can get a job good enough to pay her tuition and living costs. She is the one they hammered the most trying to get her to testify against her father. She carries the emotional scars from all of this. Three of our daughters no longer trust anyone. One breaks into tears if she hears someone raise their voice as if they might argue with someone. Another spent almost two years before she would even go into another aisle in a store without leaving my side. All three of these girls were very outgoing before and made friends of all ages easily and were popular and well liked by all who met them.

People need to realize - anyone we can all reach - that not only the military members are being mistreated (quite an understatement) but also the wives, husbands, parents, children , etc. POW's have the Geneva Convention - our military guys and gals held in Leavenworth do not have any rights.

One point I find interesting (knowing this from working for years in Navy Relief) if you are married for 10 years of military service to your military spouse and you divorce them or they divorce you the military member has to pay 1/2 their pay to you (this is retirement pay-assuming they are already retired). If your military spouse is charged and convicted (railroaded as so aptly put) you get nothing along with your children who are still minors getting nothing. By the way- none of my daughters have received any money from any so called- Victim Witness program. Surprised -surprise!! :-) It has been made known to me if I try to contact my husband he WILL be punished. Nice isn't it?!

It certainly makes you proud to be an American and to know you dedicated 20 years of your life and that of your family to serve your country. My husband has been respected by all who know him from the lowest enlisted rank to the highest senior ranking officers. This all started from an anonymous letter in which my husband's name was spelled wrong (giving somewhat of a clue as to who might have done this.) Both my husband, my daughters and I were denied the right to see the letter. The UCMJ states you have the right to face your accusers. This does not afford you that right.

How can the Senate and Congress deny all of this. It is time to put all of this on national news programs- a Blitz if you will. Somehow people need to unite in "numbers too big to ignore". My daughters and I receive absolutely no information on my husband from Leavenworth. They ignore us as

if we do not exist which they probably do to many others. Thank you for the chance to get part of our story out.

This is the first time we have found a source for support other than all of our friends who never left our sides during all of this. To know all of my husband's friends and colleagues supported him and us all the way mean more to us than any of them will ever know. I hope none of this ever happens to them (although one has been called in by NCIS recently for an old issue which was supposed to have been settled many years ago). She is in the Navy (of course) and she spent the whole court martial period with us there and helped both my husband and myself and our daughters the whole two weeks. She was sent by her CO who didn't even know us and told he would send her TAD and to stay and support all of us until we didn't need her anymore. He is the kind of Navy Officer who lets you know there might still be good people in the senior ranks of the Military.

One last note- my husband and I have been happily married for 34 years now. After 33 years of marriage we have been separated and completely shut off from each other by the military. Not only has my husband lost his rights but my daughters and I have as well. What crime did any of us commit? I can tell you- we have all stood up to the military at times and called them on things they were doing wrong or illegally. This is a quote from my husband - who over the 20 years kept saying-" you have to watch what you say because they can come back and hurt you more- they will destroy my career." He says "No good deed will go unpunished!!"

The anonymous letter, by the way, used his time in Indonesia to try to accuse him of the trumped up charges. My husband had a Top Secret Clearance done only the year or so before by the same NCIS who questioned and harassed and threatened all of us. Isn't it strange they gave him the top secret clearance and yet charged him with things that would have shown up under investigation if they had really happened?

Mom vs. the United States

Below is the legal breakdown of what happened when Lee's mother (remarried under the name of Mrs. Elain Kitowski) tried to hold the United States Navy accountable for her son's death. If you learn nothing else from this tragic incident -- know that the government of the United States will allow your son or daughter to be murdered with absolutely no accountability whatsoever for those who were the perpetrators. The Supreme Court slogan of "Equal Justice Under Law" simply does not apply to members of our armed forces.

Kitowski v. United States. No. 90-3744 (11th Cir.May 29, 1991)(per Lively,J. (designated); Anderson & Roney, JJ., concur), 931 F2d 1526 FTCA: Frees Doctrine. Plaintiff's son, a Navy airman recruit, died from cardiac failure during a simulated water rescue drill in which his instructors held him under water until he turned blue. The district court dismissed plaintiff's wrongful death action, holding that the claim was Feres-barred as arising out of activity incident to service. Plaintiff has appealed, resting principally on the claim that the Supreme Court has recognized an exception to Feres for "egregious conduct." The court disagrees, noting that plaintiff's interpretation draws its only support from the dissent of Justice Sandra Day O'Connor in Stanley, infra. Although as many as three members of the Stanley court might agree to this exception in an FTCA case, this is not the majority opinion of the High Court, and hence this court is unable to recognize it. Since the decedent clearly died while on active duty in a drill that was incident to service, the claim is barred, despite the extreme circumstances surrounding his death.

For appellant: Martin H. Levin, Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, 226 S. Palafax St., Pensacola, FL 32581 (904) 435-7000

For appellee: Michael P. Finney, AUSA, 100 N. Palafox St.,
Pensacola, FL 32501 (904) 434-3251

Cases Discussed:
Feres v. U.S., 340 U.S. 135 (1950)
U.S. v. Johnson, 481 U.S. 681, 15 MLR 2214 (1987)
U.S. v. Stanley, 483 U.S. 669, 15 MLR 2320 (1987)

Before ANDERSON, Circuit Judge, and RONEY and LIVELY, Senior Circuit Judges.

LIVELY, Senior Circuit Judge:
This is a suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-80 (1988), by the mother of a Navy enlisted man who died during a training exercise. The complaint sought damages for wrongful death. The district court determined that it laced subject matter jurisdiction and dismissed the action. The district court reached this conclusion by applying the holding in

Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), which states that the FTCA does not permit claims for injuries to active duty military personnel that "arise out of or are in the course of activity incident to service." Id. At 146, 71 S. Ct. at 159. On appeal the plaintiff argues that the Feres doctrine does not bar an action under the FTCA when the acts causing injury to active duty military personnel are "egregious." Finding no authority for such an exception Feres, we affirm.

The facts are not in dispute. Lee Mirecki was an Airman Recruit in the United States Navy. He died on March 2, 1988, while participating in sea rescue training at the Naval Air Station in Pensacola, Florida. Mirecki enlisted in the Navy and entered active duty in 1987. Under his enlistment contract, he was guaranteed specialized training as an Aviation Anti-Submarine Warfare Operator (AW). According to this agreement, if Mirecki became ineligible to continue the specialized training due to some personal fact of which he was unaware, he could choose either to be reassigned to another program or to be separated from the Navy.

As part of his specialized training as an AW, Mirecki was required to complete a program at the Rescue Swimmer School (RSS) at the Naval Air Station in Pensacola. Before beginning the course at the RSS, he signed an agreement that permitted him to drop the course on request at any time, generally referred to as "drop-on-request" or "DOR." If he dropped the course, he would no longer be eligible for AW training and would have to decide at that time whether he wished reassignment or discharge from the Navy. The RSS program involved rigorous training to prepare recruits for retrieving downed aircraft carrier-based airmen under wartime conditions.

As part of the RSS program, the recruits must participate in a drill known as "sharks and daisies," in which students, wearing only swim fins and no safety equipment, swim in a circle with their hands behind their backs. Instructors grab the students in either a front or rear head hold in an attempt to simulate panicking victims in need of rescue. If a student correctly performs the release procedure, he continues swimming in a circle and other instructors repeat the scenario. If a student fails to perform the maneuver correctly, he is given additional instruction.

Mirecki had a fear acquired in childhood of being held under the water, and this fear prevented him from succeeding in the sharks and daisies drill. In February 1988 Mirecki was unable to complete the drill and voluntarily withdrew from the RSS. At that time, he underwent a series of physical and psychological exams and was placed on "medical hold." Soon thereafter, Mirecki exercised his option to return to the RSS program, allegedly because of pressure from RSS instructors. Mirecki was re-enrolled in the RSS class, and on the day of his death, March 2, 1988, he was once again undergoing the rigors of the sharks and daisies drill. According to the plaintiff, at least two of the instructors on duty that day were aware of Mirecki's earlier problem with the drill. Once again, Mirecki had extreme difficulty with the drill and requested that he be dropped from the course and not be forced to re-enter the pool. Instead of honoring his request, the instructors seized him and forced him back into the water, and began "smurfing" him—holding him under the water until he was unconscious and had turned blue. At this time, other recruits were commanded to line up, turn their backs and sing the national anthem. After being held under the water for a considerable length of time, Mirecki died from heart arrhythmia, ventricular fibrillation and decreased oxygen.

In addition to the foregoing facts surrounding Mirecki's death, the complaint alleged that for two months after Mirecki's death, the Navy maintained that his death was caused by accidental drowning. After hearing from other trainees who were present that day at the pool that the navy was not revealing all the circumstances of Mirecki's death, the family contacted members of Congress and the press. After several inquiries from the press and members of Congress, the Navy finally admitted the circumstances surrounding Mirecki's death. On January 25, 1990, Mirecki's mother, Elain Kitowski, as personal representative of his estate, filed this wrongful death action under the Federal Tort Claims Act in district court for the Southern District of Florida. She appeals from the judgment of dismissal.

In Feres the Supreme Court held that the government "is not liable under the Federal Tort Claims

Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S. Ct. at 159. Feres announced a judicially created immunity doctrine that had the effect of limiting the general waiver of governmental immunity for tort established by the FTCA.

In applying Feres, this court has identified three factors to be considered in determining whether the particular activity of a member of a military service at the time of injury is "incident to service." These factors are...

(1) the duty status of the service member
(2) the place where the injury occurred
(3) the activity the serviceman was engaged in at the time of injury

Pierce v. United States, 813F.2d 349, 353 (11th Cir.1987); Parker v. United States, 611 F.2d 1007, 1013 (5th Cir.1980) (The Eleventh Circuit in Boner v. City of Richard, 661 F.2d 1206, 1207 (11th Cir.1981) (en ban) adopted as precedents decisions of the former Fifth Circuit rendered prior to October 1, 1981.) In this case the district court held, "the undisputed facts establish that decedent was on active duty participating in training exercises at NAS when the fatal injury was inflicted, and thus such injuries were obviously incident to his duties in the USN.

The plaintiff makes three arguments on appeal: (1) that her son had been effectively discharged at the time of his death; (2) that the Supreme Court has recognized an exception to the Feres doctrine where the conduct of military superiors is egregious; and (3)that Feres should be overruled.

A. Turning to the third argument first, we clearly have no authority to overrule a decision of the Supreme Court. In Feres, Justice Jackson noted that if the Court had misinterpreted the FTCA, "at least Congress possesses a ready remedy." 340U.S. at 138, 71 S. Ct. at 155. In the more than forty years since Feres, Congress has not indicated that Feres misinterpreted the Act. Furthermore, the Supreme Court has continued to apply Feres strictly when lower courts have sought to give the "doctrine" more elasticity in cases where the facts were different from those considered in Feres. See, e.g., United States v. Johnson, 481 U.S. 681, 107 S. Ct. 2063, 95 L.Ed.2d648 (1987); United States v. Stanley, 483 U.S.669, 107 S. Ct. 3054, 97 L.Ed.2d 550 (1987). It is true that there now appears to be some support on the Supreme Court for overruling Feres. See Justice Scalia's dissent in Johnson, 481 U.S. at6i92-703, 107 S. Ct. at 2069-2075. It seems clear, however, that a majority of the Justices do not agree at this time.

B. With respect to the first argument, the only conclusion can be that Mirecki was on active duty at the time he started RSS training again on March 2, 1988. He had not been discharged from the Navy or even transferred from the RSS program. If we assume that his oral request to "DOR" was effective to remove him from the program, he continued be a Navy serviceman until a decision was made either to discharge him or to transfer him to other duties. He could not effect his discharge unilaterally by merely withdrawing from the RSS program.

C. In making his second argument—that there is an exception Feres where egregious conduct causes an injury—the plaintiff contends that a careful reading of recent Supreme Court decisions supports her position. We disagree. Justice O'Connor, dissenting in Stanley, wrote that, in her view, "conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission." 483 UK. S. at 709, 107 S. Ct. at 3065. The conduct referred to was subjecting a soldier to medical

experimentation without his knowledge or consent.

The Supreme Court considered Stanley only as a direct action for violation of constitutional rights as recognized in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971), not as an FTCA case. The majority in Stanley, however, did not apply the Feres rationale and held that "no Bivens remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'" 483 U.S. at 684, 107 S. Ct. at 3064. Thus, Stanley forecloses a direct Bivens-type action by a member of the military if the injury results from an activity incident to service. Justice O'Connor would hold that injury resulting from conduct "beyond the abounds of human decency" just cannot be considered "incident to service" because such conduct is not part of the military mission.

Presumably Justice O'Connor would apply the same reasoning to similar conduct in an FTCA case. Furthermore, Justices Marshall and Stevens, who joined Justice Brennan's dissent in Stanley on the ground that military discipline should not be a "special factor counseling hesitation" when a remedy is required for a constitutional violation, might agree to an "egregious conduct" exception to Feres. Nevertheless, a majority of the Supreme Court has not established such an exception and this court is powerless to do so.

Three separate appeals were decided in Feres. The common denominator of the cases was that a person on active duty had "sustained injury due to negligence of other in the armed forces." 340 U.S. at 138, 71 S. Ct. at 155. Although the instructors intentionally subjected Mirecki to "smurfin," his death resulted from their negligence in persisting in that exercise, not from an intention kill him. The Supreme Court and the lower federal courts have wrestled with the application of the "doctrine" in numerous cases since it was announced. Despite the extreme circumstances surrounding Mirecki's death, we cannot escape the fact his death arose out of an activity incident to his military service. All three factors applied by this court in determining whether an activity is incident to service were present: Mirecki was on active duty; his death occurred on a Navy base; and he was engaged in a prescribed training exercise. AFFIRM.

Comments by a legal beagle (name withheld) to those conducting their own research...

Bivens is the name of the plaintiff (person suing) in a landmark U.S. Supreme Court case that permits suits for money damages to be filed against federal officials for violations of constitutional rights. There has been a number of subsequent U.S. Supreme Court decisions involving "Bivens-type" cases since the original Bivens decision. The problem with a military member trying to use a "Bivens-type" case to go after another military member is that the U.S. Supreme Court pretty much appears to have shut down this line of attack by using the rationale of the Feres doctrine. The case in which this was done was Chappell v. Wallace, a 1983 Supreme Court case concerning enlisted military personnel who tried to sue superior officers for money damages for constitutional violations. The legal citation to Chappell is 462 U.S. 296 (1983). The legal citation to Bivens v. Six Unknown Federal Narcotics Agents is 403 U.S. 388 (1971). Anyone in the military thinking about a "Bivens-type" case should also read United States v. Stanley, 483 U.S. 669 (1987), the Supreme Court decision that shut down the law suit of the former Army sergeant who was unknowingly given LSD in military experiments testing the effects of the mind bending drug on human subjects.

There is a terrific Web site named Findlaw that has (among other things) free copies of U.S. Supreme Court decisions from 1893 to present. Anyone interested in reading the law should consider researching this web site. What's really needed is a comprehensive, legally savvy Web page (with statutes, DOD Directives, regulations, court cases, whistleblower info, articles, etc) for military personnel who find themselves in conflict with the system--but that would take a lot of time to do and keep current). Suggestion: check out Findlaw. On the Findlaw search form for Supreme Court case law, type in the citation for Chappell, and take a look at the case. If you are historically inclined, take a look at Parker v. Levy, 417 U.S. 733 (1974), to see what happened to an Army doctor during the Vietnam era.

Citizens Against Military Injustice (CAMI)

This article by Jack Anderson and Michael Binstein appeared in the Washington Post on April 14, 1994.

Military Injustice

by Jack Anderson and Michael Binstein

Air Force Capt. Carla Lancaster learned the hard way that taking your medicine in the military can get you thrown in jail. For taking medication prescribed by her dentist, Lancaster was sentenced to six months in jail by a military justice system that allows the military authorities to play accuser, judge and jury.

Lancaster's crime: swallowing two pain pills, left over from earlier wisdom-tooth surgery, to ease suffering from a hip injury. Under military justice, that amounted to illegal use of a controlled substance.

Lancaster was just one victim of a military justice system that convicts 95 percent of the people it tries - a rate on par with that of communist China.

As Congress debates the crime bill this week - amid a clamor to stop coddling criminals - military justice stands in Draconian contrast to the civilian system.

Carolyn Dock, executive director of Members Opposed to the Maltreatment of Service Members, hears daily from up to six families of people in the service who relate miscarriages of justice under military law. Many families who have had a taste of the system charge that it gives military commanders czar-like power.

"The problem is that the system is susceptible to abuse," one retired naval judge told our associate, Andrew Conte. "I sat on a number of cases where the commander's influence was painfully obvious to me... improper command influence is possible and occurs with disturbing frequency when the commander gets interested in a case."

Commanders should be motivated by concerns for discipline. But they can be blinded by petty politics and personal pique. The commander who convenes a court-martial also selects the jury members, who often serve under him and whose promotions he controls.

Officers accused of certain crimes are treated more delicately than enlisted members. An Air Force lieutenant general who was found guilty in 1990 of sexual misconduct with a subordinate - a crime that typically carries a bad conduct charge, jail time and a federal conviction - was allowed to quietly resign.

The three Navy admirals who failed to investigate the Tailhook scandal, a military crime in itself, also were allowed to resign without receiving a court-martial.

Congress has not enacted changes to the Uniform Code of Military Justice since the early 1980s. "Congress does nothing," Dock told us. "I cannot quite figure it out."

Rep. John Conyers Jr. (D-Mich.), chairman of the Government Operations Committee, has been working at reforming the military justice system case by case, and is considering hearings on overhauling the system. "If the services want to continue to recruit the best people," he told us, "there must be confidence that the military justice system is fair. To have a strong military in America cannot mean to deny people their rights under due process."

After Lancaster served one month of her sentence in the stockade, a military appeals court overturned the conviction. "I don't think it's an unfair system, to tell you the truth," a pentagon spokesman told us. "I don't think it's that much different from the civilian system... You do need... a

set of laws by which people must abide, and you need to be able to enforce those laws."

Karen (Dwyer) Tew
Lt. Col., U.S. Air Force

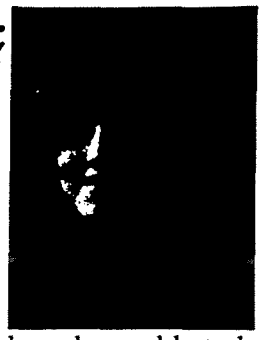
No sadder tale was ever told than the story of Karen Tew. We cannot begin to tell her story better than this web site: http://members.aol.com/mkraft2233/ Take your time please, and read all of what has been made available concerning the horrible story that drove a good woman and military officer to take her own life.

Looking at the loss of a military career and a truly deserved military pension all over a love affair gone bad was too much for Karen to accept. The military did what they could to drag her personal life out for all the world to see and label her as being "dishonorable" even though she told the truth. The military "blood sport" of exposure always seems to be more fun to military prosecutors when a woman is in the cross-hairs. The higher percentage of prosecutions of women as opposed to men are a testament to this fact.

The Air Force will, predictably, counter with, "She was not a good military officer - her admission of guilt proved it." Well, my right wing friends, that just won't cut it, because USCOVA knows what goes on in Washington DC. We know of the sexual games being done all over the world by military officers who are the same ones convening court-martials against people like Karen. Until the military and Congress remove from their ranks (senior ranks) all of the adulterers and fraternizers, they have no standing to pass judgment on anyone. USCOVA remembers vividly when one of the members of the CMA (court of military appeals) was arrested in Washington for propositioning a male prostitute in a washroom. What a joke! The American People need to wake up and view the harm being committed in their name.

Note: ***We are not affiliated with any other web site other than to recommend that our readers check other sites to possibly obtain additional information that we are not privy to. If you have any additional information or you see something which is incorrect anywhere in the USCOVA web site, please contact us immediately:*** uscova@earthlink.net

Meet Lt. Col. Karen Dwyer Tew, USAF



This college picture is the first picture we have been able to locate. Karen attended college from 1974-78.
(If anyone has more photos of Karen he or she can share , we would be extremely grateful for any help.
Also, if there is a way to access official military photos of personnel, please, e-mail us - Thank You, in advance.)

Lt. Col. Karen Dwyer Tew worked diligently for the U.S. Air Force for nearly twenty years until she was ruthlessly court martialled for adultery and committed suicide to save her family and the balance of dignity the Air Force did not rob from her. Meanwhile, others higher ranking in the military, up to and including the Commander in Chief of the Armed Forces, suffer punishment far less severe for more serious infractions than lower ranking officers. This inequality in the distribution of Justice is further illustration of the need for change. This Website is dedicated to her memory and to the assurance that never again will women in the Air Force be singled out for persecution because they are frail human beings instead of the robots the Air Force would have them be.

"Never doubt that a small group of thoughtful citizens can change the world. Indeed, it is the only thing that ever has."
Margaret Mead

Make a Difference!

9/1/00 Update Notice: We have linked out site to two new organizations, USCOVA.org and MilitaryCorruption.com. Both these organizations have endorsed our efforts in Karen's memory and both are operated by former and retired military personnel. They have a wealth of experience to share and a visit to their respective sites is well worth your while. Our other links, such as STAMP and Military Whistleblowers are still working very hard to make the lives of our military personnel better. This effort requires the participation of all our fellow citizens.
Please, let your voices be heard.
Michael

Dateline NBC May 26, 1998 Transcript

Time Magazine Article June 1997

Fed News April 17, 1997

Recent evidence of change to the Adultery Policy!
Military May Soften Adultery Policy (A/P Wire) July 19, 1998
Pentagon May Change Adultery Policy (A/P Wire) July 20, 1998

Weeks later, regrettably, the Department of Defense canceled these progressive initiatives officially, but trends suggest that there is progress on an effective basis, but the decision is left to the commanding officers. This is not a policy change from the top.

Our Letter to Senator James Inhofe(R-Ok)

Our Request for Air Force Information through Senator Inhofe's office
(Still no answers or even response as of this update.)

What we know
What we don't know
Our positions
How you can help
How to contact me
What the world thinks
Links

What we know

- Karen Dwyer was born on November 12, 1955 in St. Charles, Missouri (St. Louis area).
- She was married to Randy Tew.
- She was the first woman accepted into the Air Force Academy two years before the first female cadets attended classes.
- She had two daughters.
- Karen Tew pleaded guilty to all charges against her on March 11, 1997 and was convicted after 38 minutes of deliberation by an Air Force court martial jury.
- Karen Tew died March 16, 1997, five days after her court-martial conviction for two counts of Adultery, one count of Sodomy, and one count of Fraternization.
- Karen Tew is buried in Memorial Gardens, in her hometown of St. Charles, Missouri. In February, 1999, her family were finally able to persuade the military to mark her grave site with proper "foot stone" grave marker.

What we don't know

- Why women in the Air Force are prosecuted for Adultery at a rate 3 times that of men.
- Why, if Lt. Col. Tew was charged with Adultery, Sodomy and Fraternization was she not also charged with Conduct Unbecoming an Officer? If Adultery will earn an officer a dismissal from the

Air Force and a dishonorable discharge, why is it not conduct unbecoming an officer?

- Why, after one and a half years, is Karen Tew buried in an unmarked grave after receiving a funeral with "full military honors"?
- Was Karen Tew more valuable dead than alive?
- Why has the Air Force refused to respond to ANY of our inquiries?

Our Positions

1.) Adultery must be removed from the Uniform Code of Military Justice.
Adultery, as a criminal offense which can subject a defendant to thousands of dollars in fines, dismissal from service without benefits and even years of imprisonment is not, in and of itself the type of offense the military should be pursuing with tax dollars.
This is not to say that we support or condone adultery, we simply believe limited tax dollar resources are better spent on other things. Adultery is an issue between spouses for which there is ample redress through the civil courts.
The investigation and prosecution of Karen Tew for Adultery did not support and may have detracted from American military readiness because the Air Force squandered her talents and tax dollars.

2.) Sodomy must be removed from the Uniform Code of Military Justice.
Sodomy, as defined in the Uniform Code of Military Justice as any unnatural sexual act, with partners of the opposite sex, the same sex, or sex with animals. In 1997 and 1998, Sodomy, under this definition, is a crime for which there are not enough penal institutions to accommodate all the lawbreakers. Today, Sodomy is a criminal offense principally incorporated in a series of charges, utilized strategically by the prosecution to humiliate and demoralize defendants. Who among us would be pleased to have one's intimate sexual behavior graphically recounted in open court before friends and family?
The investigation and prosecution of Karen Tew for Sodomy did not support and may have detracted from American military readiness because the Air Force squandered her talents and tax dollars.

3.) Fraternization must be amended as a criminal offense in the Uniform Code of Military Justice to be reserved for cases of overreaching.
Overreaching is behavior of one person in a relationship using his superior rank in order to gain undue influence over the other person which results in a detriment to the military branch or has an affect on morale of in either persons' unit or department.
Concerning Karen Tew, no breach of confidentiality was argued or proven. No violation of military efficiency was argued or proven. No impact on the morale of the parties or others was argued or proven, and no influence over either party by the other was attempted, exercised, argued or proven. No breach or potential breach of national security was argued or proven by the Air Force prosecutors.
The investigation and prosecution of Karen Tew for Fraternization did not support and may have detracted from American military readiness because the Air Force squandered her talents and tax dollars.

What the world thinks

Hail to the Chief but help the Wretched Souls, Daily News
Sydney Morning Herald Features
ABC News Poll

How you can help

- First, please, take the time to read all the information on this site.
- Download and copy the sample letter to your political representatives. Send letters to

each of your representatives emphasizing your support of our positions.

- Email copies of your correspondence to us so that we can show support for our positions to our political representatives.
- Call your congressional representatives to follow up on your letters.
- Visit this website regularly to keep informed about updates to this issue.
- Tell your friends about our effort. Send this website address to your friends.
  Sample letter to your government representative

- Find your Senator or Representative
- Find your Senator or Representative (by state)
- Write to Congress

Useful and Important Links

- USCOVA - Council of Veterans Affairs
- Military Corruption
- STAMP (Survivors Take Action Against Abuse by Military Personnel)
- Military Law and Justice (non-Department of Defense site)
- SUICIDE PREVENTION, American Foundation for Suicide Prevention
- Women and Suicide
- Pleiades Networks (An Internet Resource for Women)
- NOW (National Organization of Women) and the Military
- Court-Martial of Kelly Flinn, Lt., USAF
- Airminder Website - (Lots of Links)
- Before you enlist in the military Consider This!
- Military Whistleblowers (People Organizing for Whistleblower Rights)
- Scott AFB
- Freedom of Information Act
- Uniform Code of Military Justice
- Adultery and History

Interesting Reading

Beyond the Scope of Justice by Jeffery A. Trueman
Military Justice is to Justice as Military Music is to Music by Robert Sherrill

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How to contact me

Sometimes one person must speak out to make others aware of an injustice. Karen Tew's story could be any American. Unless we work together to cause change in the treatment of military women, Lt. Col. Tew will have given up her life for nothing. Please, assist my friends and me in convincing our government representatives that the military have no business in our private lives, even when we choose to defend our country. Those who join the military need not give up their rights to be happy citizens as well as

productive defenders of democracy. We can make this change together.

I can be reached at mkraft2233@aol.com.
Please bookmark this site and pass it on to a friend.

[Dateline Transcript | Time Mag | Fed News | Sen Inhofe | Karen Tew Home page]

This page has been visited by [redacted] patriotic Americans.

This web page created by S Kraft and Adobe PageMill on Macintosh Computers. Last update 9/3/00.

Peter Cole, Major, U.S. Army

When Cole was a young cadet, a high ranking officer put it to him straight. "Pete," he said, "you're smart enough. If you keep your mouth shut for 20 years, you'll become a General.' But Cole didn't heed his advice.

At West Point, he turned in fellow cadets for drug use. This is something all cadets were required to do. Few others at West Point viewed the code of conduct as importantly as Peter Cole. It was a matter of honor; a matter of right and wrong. This belief system ultimately created a confrontation that landed him in the psychiatric ward at Walter Reed Army Hospital in Washington D.C. He retained a military attorney who fought to have his record cleared.

Eventually, he was assigned as a battalion logistics officer in Germany, where he investigated the loss of combat equipment. He found evidence of massive theft that affected the combat readiness of the troops stationed there. Cole was forced to go over the head of his superior to report his findings.

Instead of praise for his diligence, he was abruptly relieved of his duties and reassigned to nonexistent Army positions. He was given a poor officer evaluation and threatened with court-martial proceedings. But the DOD inspector general, having been alerted, investigated Cole's charges. They turned out to be not only true but it revealed the same type of thievery was occurring Army wide. More than $118 million worth of war material was missing. And that was just the tip of the iceberg.

This, of course, embarrassed the Army generals whose outrage was directed not at the thieves but at the officer who exposed it. One general wrote to another: "If you decide to keep him (Cole), he will probably will require extensive psychiatric counseling." It wasn't Cole's mental health that concerned them. The behavior of his supervisors caused Cole to suspect they would delight in his political and professional demise and probably his actual demise. Under pressure, he resigned. But, he regretted his action to quit and began a legal battle for reinstatement. USCOVA never heard the end of the story. The last we heard, and that was years ago, he was serving as an Army major in the Texas National Guard.

Peter Cole was invited along with Michael Tufariello to testify on Capitol Hill in an effort to get legislation passed to prevent unwarranted psychiatric examinations. Peter, like so many, believed in the ideals that he was taught of duty, honor and country. The reality is that no one in Washington believes in those ideals or Peter would have been promoted as one of the Joint Chiefs. It's just like the illegal immigration into the United States. It hasn't stopped; not because we can't stop it, it's because no one wants to stop it. Can you think of a more thankless job than to be a Border Patrol Agent working for a government who just is using you to make the American people believe that "we're working on this problem." The same is true for graft and corruption in the military. The American government just wants to convey an image to the American people that they have a viable military who can handle any foe. USCOVA can tell you they can't do it with disappearing military equipment. It hasn't stopped because our Congress and Senate doesn't not want it to stop. Like it or not, we have to deal with facts.

What is upsetting, however, is watching good and decent men and women being savaged by the very government that they pledged their lives to protect. And the American people stand idly by

and allow these abuses to go on over and over again. Hell, you can't even get people to vote anymore. Those who endured World War II, the Korean War and Vietnam; it just makes them sick to their stomachs to witness such apathy. Peter Cole please contact USCOVA. We want an update to your story. We honor you sir.

Portions of the Peter Cole Story were taken from a Parade Magazine article by Jack Anderson entitled: "How they Punish Heros"

THE MURDER OF PFC. BARRY WINCHELL (October 29, 2000).

From Calvin N. Glover

I grew up in Sulphur and Sterling Oklahoma, and was legally emancipated by court action at age 16. At age 17, I was paroled from a juvenile detention facility directly into the US Army. Until my parole ended, at age 18, I reported monthly by phone to my Arizona parole officer.

About eight months after entering the Army (and 3 months or so after arriving at Fort Campbell); PFC. Barry Winchell's roommate, SPC. Justin R. Fisher, came to my room to ask me to kill him. That was the night of 4-5 July 1999. I was already in bed, though not yet asleep.

SPC. Fisher put the request to kill Winchell in terms of a team effort, but mainly to help me save face in my unit, because of a fight Winchell and I had had the day before, 3 July 1999. Perhaps unknown to Fisher; Winchell and I had reconciled the following day, 4 July 1999 (the night of which Fisher approached me to kill Winchell). In fact, Winchell was even teaching me how to juggle.

We had been drinking throughout the day 4 July 1999. I'd gone home, and was already in bed, when Fisher appeared (I didn't even know he knew where I lived). SPC. Fisher invited me to go back to his room, where he had some more beers available. When we got to his section, I saw Winchell sleeping outside the room on a cot. I didn't think anything of it at the time, though I'd never seen or heard of anyone doing that. I was told later Winchell was watching the mascot, a dog, but I never saw the dog anywhere.

Fisher and I went in, and Fisher gave me a beer, which I believe was drugged. Fisher continued to taunt me. As I was drinking the beer; Fisher told me to go out and kill Winchell, handed me a bat, and told me to "go to it." I didn't want to do it alone; and I told him so, picking up the nearest weapon to me and handing it to Fisher. I was so drunk I handed him an umbrella! Then, I sat back down and kept drinking my beer. In what couldn't have been more than a few minutes' time, I found myself standing over Winchell, with the bat

raised over my head, ready to strike.

I wasn't the only one to strike Winchell, though. Evidently concerned I hadn't killed Winchell, or inflicted fatal injuries, Fisher clubbed Winchell himself. I personally witnessed this.

This is only a fragment of a much larger story alleging command-sanctioned murder of military "undesirables", please bookmark this page before following this external link.

FRATERNIZING A CRIME? (Nov 10, 2000)

Navy Pilot selected for promotion to LCDR. Stationed on Naval Reserve Base. Was a TAR officer (Training and Administration of Reserves = TAR) Court-martialed 1985. Convicted; one count of fraternization, one count of improperly submitting a $75.51 travel claim. Sentence; Dishonorable Discharge. Chances are very good that I was targeted and victimized by all those things that CAMI battles against including unlawful command influence.

Attempted to use aviation skills and obtained all my necessary ratings to fly commercial aircraft but -- no air carrier would hire me saying the insurance carrier would not allow a convicted felon in the cockpit. In 1980, Ronald Regan signed in a new manual for courts-martial which increased the maximum punishment for fraternization from one year to two years thereby making the infraction a "crime" and a felony conviction. For both the fraternization and the travel claim I could have gotten 7 years or so, I was told.

In what I believe to be a cowardly act, the military has refused to give me something in writing indicating my actual discharge. They said it was a "dismissal" but my gov't assigned attorney said it was indeed a dishonorable discharge.

I have asked the Pentagon to produce the numbers of officers, broken down by service branch, who have been court-martialed where one of the charges was either fraternization or adultery under the Clinton Administration. I have yet to get that information.

All I ask of CAMI is to expose the hypocrisy of making fraternization a "crime."

STILL FIGHTING FOR JUSTICE AFTER 30 YEARS! (Nov 6, 2000)

For over the past 30 years I have been fighting for my rights that were totally ignored by the Air Force when I was in from May-12-70 to June-8-70. Even though I was accepted into the military and found in good sound condition to serve my country I was discharged 28 days later with a reenlistment code on my DD214 of RE-2 which means medically unfit to serve. Now for so many years I have been fighting an uphill battle against the V.A. and the BVA and now finally in the Court Of Veterans Appeals.

I contend that I was accepted into the Air Force and 28 days later I come out with a discharge that I did not want or ask for. If I am of sound condition when I am enlisted into the military and I come out about 28 days later with a reenlistment code that means medically unfit to serve, then would it not leave you to believe that I was medically unfit to serve while I was in the military? If so then I should be entitled to my service connected disability. BUT NO WAY!!

For the V.A. and the Air Force Board Of Correction Of Military Records and the BVA and now COVA have all twisted and turned the facts to deny me the justice that I have so long been entitled to. To see what so many other veterans like myself have been put through please go to http://www.firebase.net

I just wish that I had had a good quality legal counsel that was standing up for me and my rights that have been totally ignored for so many years. Thanks much.

A Proud And Angry Veteran, Rick Kelley.

V.A. ABUSE (Oct 29, 2000)

My husband was a WWll POW for a year. He was wounded by a German tank and taken prisoner and the German surgeon removed his right arm. He past away Sept. 12 of this year in the VA Hospital in Atlanta.

The VA called me around 6 am on the morning of the 12th and told me my husband was getting worse. I called my children and they met me there. Only to be informed that he passed away during the night sometime before 3 am. The man that was sharing the room with my husband was very upset. He told me that they let my husband die. And that he and my husband turned on their lights to call the nurse and no one would come. He then got out of bed went to the nurses' station and still no one came for at least another hour.

ENDURING MYSTERY FROM WW1 (Oct 28, 2000)

Right after the first world war, my uncle enlisted in the army lying about his age. He was only 17. He was accused of being AWOL and sentenced to Fort Leavenworth, TX. While being transported from Fort Bliss the army told my grandparents that he was shot in the leg trying to escape. My grandparents never heard from him again.

There have been letters over the years from the war dept., governors, even one from the president, but nothing was ever settled. My grandmother went to her grave never knowing what happened to her young son.

My mother is now 84 and her one wish is to find out what happened to her brother. His name was Marvin Shrote, but he enlisted under the name of Marvin Ridgely. (Ridgely was his step fathers name).

I have several documents and letters which are yellow with age. I came upon them while cleaning out my mother's house. I have put her in a nursing home. As I said, I want her to find out what happened. I will be

more than happy to give you more information should you think you may be able to help. I know it has
been a long time ago.

Thanks for your time. There is more to the story, but it would take too much time to write all of it.

If you have any information on this continuing case, please contact Vel Reid

UNCONSTITUTIONAL PROCESS - INAPPROPRIATE SENTENCING

My husband was sentenced to serve 12 years at the USDB on January 15th 1998. My husband is guilty of his charges. We typically don't divulge the nature of his crime, due to its nature and society's response to it.

My complaint is this. That had he been a civilian he would have more than likely only gotten probation or maybe 3 years imprisonment (which is Kansas law for his crime). Why is it a person who has served without incident for 18 years of their lives, and has accepted full responsibility for his actions, is sentenced so harshly?

It is because he is investigated, prosecuted , defended, judged and imprisoned all by the same entity: the United States Military. In addition, the US Military gets the inmate's pension and slave labor for several more years.

When we discussed with the ADC (Area Defense Counsel) the possibility of getting a civilian attorney we were discouraged. We of course had no idea where to find one that would not be a waste of money. The ADC did not start working on my husband's case until 2 weeks before his court-martial. The ADC also refused to allow me to participate in the preparation. After the court-martial, the ADC switched back to the JAG office (Judge Advocate Generals). This, in my mind, is not a fair and impartial trial which in this country is everyone's constitutional right, with the exception of Military members.

What is even more disturbing is that there are people imprisoned at the USDB who were charged with a similar crime as my husband's. But these prisoners have never pled guilty, and claim to this day their innocence, but are incarcerated for 30 or more years. They have less chance for parole because they "refuse to take responsibility" for their crime. The accusations are more times than not a "he said/ she said", and yet they find themselves incarcerated for the better part of the rest of their lives.

What ever happened to innocent until proven guilty beyond a reasonable doubt. In the Military it is guilty until proven innocent.

There is yet another disturbing fact that I have witnessed in my 2 years here in Leavenworth. The Guards apparently need to further punish the inmates. These youngsters, who in most case were not even born when my husband enlisted, believe it is their right to further punish the inmates with mind games and harassment, as well as harassing the inmate's family members.

My understanding from my husband's court-martial was he was sentenced to 12 years imprisonment. Not 12 years plus mind games and harassment or even life-threatening situations.

The life-threatening situations I am speaking of, in case some of you do not know, is that the USDB is literally crumbling. There have been incidents of inmates being injured by falling ceilings. There is toxic lead in the water. Some inmates have to work with asbestos without proper protection.

The circulation fans on top of the wings in most cases don't have a motor or the motor does not work. In the summer months it typically reaches 103 or more degrees, then add in the heat index it then reaches 115 degrees. It makes one wonder why is it illegal to leave an animal locked in a car for maybe 10 minutes in the summer, yet these men/women live in a similar situation 24 hours a day.

When these issues are raised to the Senate and Congress, we are told that there is nothing they can do. Yet they are the ones who developed the UCMJ (Uniform Code of Military Justice) and we the families are looked upon as "cry babies" . The UCMJ has not been amended for more than 30 years. I think it is time that someone takes the time to seriously look at the injustice in the Military Court system.

Summary: I served 3 years in the United States Army. Fr.Drum was my first duty assignment. It was the worst place to be in. I have horrible feelings toward the military and their leaders as well as officers.

>

> I became pregnant in 1999. Prior to becoming pregnant, I began to have severe back pains. I thought that it was from the baby's weight. The military doctor's told me that it was part of pregnancy and I believed them. Soon after my child birth in Nov 99, I continued to have back problems. This is when I brought it to the attention of the military doctors. I was evulated and within a 6 month period, I had gotten worst. My husband was deployed to Bosnia during my pregnancy and deployed to Westpoint after his arrival back from Bosnia. I tried to get help from the Community Health Nurse on Ft. Drum. I tried to get support from my chain-of-command. From the beginning, my chain-of-command would give me problems about going to sick call anytime I was hurt or felt sick. I understand that our mission was first. But no one was going to live my life for me after I got out the military. Anyway, I was harrassed about my profiles. My chain-of-command made it possible that I w!
> as given a hard time in my career. My doctor, recommended a permenant profile after all alternatives were exhausted. I had a very strict profile. It had me walking only at my own pace and no lifting up to 20 lbs as well as an maximum of working 8 hours in a 24 hour period. My chain-of-command became ferious of this. They made me feel that I was not hurting. And the harrassment esculated. My platoon sgt started checking up on my appointments. I was seeing military doctors and civilian doctors. I could not take all these things going on in my career, I became very depressed along with anxiety. I tried to get help with after work child care. No one could help me, I asked my chain-of-command if it was possible of sending my husband back from Westpoint. Nothing that I asked was granted. At the time I had a no lifting over 10 lbs porfile. My baby was over this limit. Anyway, it became very bitter in Aug 2000. My supervisor tried to get me to pull a 24 hour staff d!
> uty . I told him that I could not pull this duty due to my profile (8 hour work day) he told my platoon sgt and commander that I was disrespectful and was not taking his orders. The following morning (the day of staff duty) I was called out by my commander and he asked me "If I went to my doctor the day before to have him put the restriction on my profile?" I asked him , "what he was trying to pull?" I didn't understand what he was trying to do. He made me feel that I ordered a medical officer to alter my profile. He immediately, became upset and ordered me to go to his office. In his offce was my supervisor, platoon sgt, and myself. I was ready to sit down but he said that I had to stand. He began yelling at me and asked me why I was questioning his Integrity. I replied by saying "Where is my integrity?" He went on to say that I was just a specialist and that I had no say in anything. He was an officer and could do anything with me. I stood there crying. When!

> I tried to explain myself he became ferious and told me to stand at parade rest and not say a word. He went on saying that if I continued on with what I was doing that the chain-of-command was not going to care. All this was with pointing fingers. I felt intimitated and belittled like I was a prisoner. I told my supervisor, platoon sgt, and commander that I didn't appreciate how they treated me since my medical problems started. My supervisor told the commander in my face that everything that I said was untrue. The commander said he was calling the Troop Medical Center and was going to talk to my doctor. My orders was I was pulling duty regardless. I cried hard and wanted to go AWOL. I was afraid to talk to any senior NCO's. My first sgt had no idea what was going on. He was the one that was to know what was going on with his soldiers. When I left the office, all three shut the door and who knows what was discussed. I immediately met with the battalion EO repre!
> sentative and she contacted IG. It all came down that I was removed from my workplace temporarily and put in another platoon in our battalion. There was an informal investigation. A month passed, the Battalion commander called me in his office to read his findings to the investigation. He told me that I got away with alot in my previous workplace and that I was trying to pull a tantrum when I didn't get what I wanted. He believed that I was not harrassed and that I was a soldier. I had to do my duties. I got nothing out this investigation. To me this was so that I could be quiet about my situation and keep it on the down low, where I wouldn't get anyone in trouble. By the way, he said that I was going to permentantly stay in my new platoon. If he didn't think anything was wrong why did he move me? He had to know that there was something going on within the chain-of-command. They were all buddies. In my new platoon, my supervisor abided to my 8 hour work schedule. !
> He made sure I was out of there by 3pm. I am now out. I was given an honorable discharge medically. I feel that I was harrassed, discriminated and treated unfairly. I have very bitter feelings of the Armed Forces.

Summary:

My Daughter SPC-4 _____; was brutally murdered on March 17, 1987; while stationed at Fort Carson, Colorado.In 1996 we filed for a copy of the CID report under Freedom of Information; and received a partial copy. On page 098 of this report it states; that " 10 days after her death ; a soldier confessed to trial counsel, admitting that he had killed SPC-4 _____. Trial counsel then told a second Trial Counsel, and the second told a third Trial Counsel;_____Would not dislose the names of the other counsels involved in releasing the information because the CLIENT/ATTORNEY relationship had been breached". So now, years later_____states that" CID was ERRONEOUS at the time of events, and wrote a FALSE REPORT". Does the Army truly think that we would believe this HOGWASH? Would You?

I am sooooo glad that there is finally a place for the people of the DB and railroaded Military can speak out!!! I spent three years at the DB and I than was transferred to the federal system. I have heard cadre say that the DB is worse than the Federal system I am here to say that they are a liar.. I always thought that the military was totally disregarding everyone's rights,,, now that I have something to compare it to... I KNOW THAT THE MILITARY DISREGAURDED EVERYONES RIGHTS.... If I was to spend the rest of my time in the military prison I would still.. to this day be in the hole there...with lost good time for violations.. (what violations you ask????) well horrible things like having a magazine with my name not on it.. or maybe Ill forget to take medicine or if I feel real rebellious I might not shave.. yes I lost about three to four months for such violations.. I kept them to prove to my family that I was telling the truth about what was going on.. right now I am finishing up my time in a halfway house, I have a computer job and I am making a comfortable transition to the real world.. I don't see the DB ever helping me or the other inmates as much as I have at the federal system I haven't been in trouble within the system since I got out of the DB (while at the DB I couldn't go a month and sometimes a week with out some garbage violation).

Summary:

My husband and I have some photos that were left to my husband by his Dad before he passed away in 1980. These photos portray circumstances surrounding Gen. Billy Mitchell. We have only been doing research on these photos for about 1 1/2 yrs. In this time, we have reason to believe that these photos, which are very graphic crash scenes, would have been very useful in his defense, if he had been able to have evidence presented in his 1925 trial. We have also discovered that he was given a "General Courtmartial" for insubordination, and not a "Summary courtmartial." The government was probably going to hang him but for the outcry of the American people, he was spared this punishment. Also we have discovered that Gen. Mitchell had no accuser that was mentioned in the transcript, even though his lawyers had ask for the accusers to come forward and none came and the lawyers then ask for Calvin Coolidge to come forward which the Pres. denied coming. A General Court! > martial requires all court judges to say "yea" for conviction, in Gen. Mitchell's case there was 1 abstention.

> Gen. Mitchell died in 1936, in 1946 Pres. Truman had Congress approve a Patriotic medal to bestow on Gen. Mitchell's family and a promotion to Maj. Gen. but Pres. Truman did not take it to the full extent to have Gen. Mitchell's name cleared.

>

> In 1957, Wm. Mitchell Jr. went before Congress to have his Dad's name cleared, the Congress sent him to the Sec. of the Air Force where he was denied.

>

> Our question to you is, if there was no seperate Air Force established in 1925, (only Gen. Mitchell's dream of one), how can this decision be left in the hands of the Air Force Sec. when Gen. Mitchell was in the U.S. Army at the time of his Courtmartial. From where we stand and from what we have researched his Courtmartial was illegal and should have never taken place. We are sincerely trying to see what we can do to have this overturned and give dignity and honor back to his heirs. We have contacted hundreds of people on the internet and have had fantastic response expect through Military channels! I know that Gen. Mitchell was very outspoken with his Superiors but his men meant more and so did the Security of the USA. His predictions on the attack on Pearl Harbor were only 15 mins. off and this was years before it actually happened. In his trial he was labeled as a "reader of tea leaves" for the predictions. SUCH A WASTE! SO MANY LIVES LOST BECAUSE OF STUPIDITY.

>

> Is there any way that your organization may be able to help us or direct us in the right direction? We have contacted state officials and have heard nothing back.

>

> We have 71 photos in our possession and they tell a story. We have the Handley page bomber 0/400 #62448 that Billy Mitchell used to bomb the "Ostfriesland" and a picture of the kicking mule and hat in the ring. The Aircraft crashes are awful and when one lady historian at an Air Force base saw them, she laughed and said "Isn't that funny," No! it wasn't men died and a very patriotic man gave up his career to prove that AMerica's aircraft was obsolete and "Flying coffins." So Sad!

Summary: I was court marshaled in 1995 for approximately 15 charges. Most of the charges were for illegal possession of prescription pills. The rest the charges are for B&E into an AFFES warehouse and Golf Pro Shop. After nine months of investigation I was tried and convicted on all but one charge. I was sentenanced to six years confinement at the USDB. I spent four years four months there. The last eight months were served in the hole. Prior to my crime I was an Air Force Security Police officer (Law Enforcement). I did break into the warehouse, but I did not commit the remainder of the crimes I was convicted of. I found out very quickly what kind of a justice system I worked for. Lies cover-ups, blatant disregard for anyone's rights was and is the norm. My record prior to the crime was exceptional. I received 5's on all my EPR's. I served in Desert Storm, Clam and Sword. I participated in almost every unit and base event. The reason I mention these things is to indicate I !
> was not a "duffle bag" soldier. When story lines and events did not fit into the investigators version of events, they "made them fit". My fellow SP's were threatened as was anyone having anything to do with me. Most of the evidence against me was in the form of "hear say" evidence. Meaning one person heard something from another person about me. Some of the story is so far out I have trouble believing it even happened to me. The worst charge is the drug possession. A roommate and fellow SP was apprehended because these prescription drugs were found in his locker. SP investigators were tipped off the drugs were there by his ex girlfriend (another SP). When she was informed she could get in trouble as well (for knowing the drugs were there and not doing her duty) she shut her and went to see a lawyer. My roommate did the same. A week later they both came back to the investigators. They told them the drugs were mine and I had taken them from a Random Vehicle Inspection. At t!
> his point anything someone said about me was true. I supposedly buried bodies on the 1st, 4th and 9th holes of the golf course. Evidence that could had of cleared me was destroyed by investigators. Prints were taken from the Golf course B&E. They were destroyed after my lawyer asked that they be matched against my prints. It was viewed as a simple mistake. There is a great deal more of this story to tell, but it takes a lot out of me in telling it. The USDB.... well that's another story as well. What an ugly place. Fascists are alive and well...in our US Military. More to follow.

This is all relatively new to me, my husband was involved in the system for a long time before I met him. His original charges were from when he was 18 and I met him when he was on parole. We were married three months before he got picked up on violations, which was also a real convienent time for the USDB to be making some money from the feds. But I see a lot of good in what has happened, you mentioned God. I have been a Christian since I was about 18, and Mike (my husband) was born again at age 12, lost for a long time and is now strongly on the path again. He is actually counseling three men that he is with and helping them to get with God. I know that God is in control of everything, I have given Him all my problems and I don't worry so very much. I do however miss my husband something awful, my kids miss him. Somehow I feel that I am supposed to be doing something, I get so frustrated when I don't get answers from senators, congress or the media...there is so many stories to tell and so much reform that has to happen. I want to do what I can to change this system. I'll write letters until the cows come home, and I sign my name to all of them. I'm scared of the system, I'm scared of the AF and the head guy up in DC..I don't want Mike to be punished for my actions, but I also am tired of being punished so much for his. He has paid a huge debt to society. He was charged unfairly and convicted of the wrong crimes. He did commit crimes, there's no doubt of that, but it wasn't what he was convicted of, that he didn't do. They know that...they made an example out of him, and they gave him 30 years to think about it. I'll tell you the story sometime Glenda, I do trust you, or I wouldn't have come as far here as I have. I'm scared of the system, and that's part of what drives me, cuz I shouldn't have to be scared of them. I'm an American, a law abiding American, and I'm scared of my government, that's scary. Glenda I will do what I can to help CAMI, I really hope that you contact the Human Rights Watch Group, I think you are educated more than I am on this and it's a critical moment that I am scared to mess up. If you have anything that I can do, sittin here at this computer let me know, I'm up for it, I work full time, have two kids and I write letters to my husband everyday...but I have time to help with this, it's very important to me, not just for me and Mike and my kids, but for everyone that has been, is currently and will someday be affected by an awful system that ruins lives.

Thanks a lot and please let me know what I can do for CAMI. Also, I haven't responded to the woman at the Human Rights place, are you going to comunicate with her, or shall I?

>

C.A.M.I. (Citizens Against Military Injustice)

Written Comments by John M. Mullahy

Submitted By C.A.M.I for The United States Council of Veteran Affairs (USCOVA)

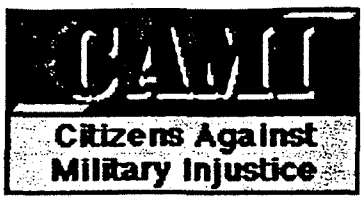
March 13, 2001

To the:

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

(The Cox Commission)

To: The Honorable Walter T. Cox, III, Senior Judge, United States Court of Appeals for the Armed Forces, Chair, and the Honorable Members, of the Commission on the fiftieth Anniversary of the Uniform Code of Military Justice.



(Posted Nov 4, 2000). USS IOWA- ACCUSED READY TO DIE FOR THE TRUTH!

I don't know if anything can be done in my case or not, but at least one more person knows about it. I hope the below letter that I sent to SECNAV last year does not make me sound like I'm crazy, but it's the truth. It can be checked out and verified in several places. It still goes on as I am still unemployed, It is even mentioned in the book "A GLIMPSE OF HELL" By Charles Thompson. If you are interested let me know at JOHNPAULA@ONO.COM or

John M. Mullahy
Jimenez De La Espada N31-4A
30203 Cartagena, Spain
telephone: 34-968-081356

Rios and officers like Rios are allowed to get away with everything, because there is nothing in place to protect some one reporting a senior officer. I have been fighting the Navy for years and I cannot give into them.

Secretary of the Navy
2000 Navy Pentagon
Washington D.C. 20350-2000
U.S.A.

8 October 1999

Mr. Secretary,

As you are well aware there is a personnel vendetta that has been waged against me and I am the Victim. Enough is Enough, I and my wife and two children, John and Paula have paid dearly over the years, But No More!

The Navy's position is to not answer any correspondence from my Senator (Senator Robert Smith, N.H.) who was really not too interested in the first place, a member of his staff a Mr. James Downs said he would not help me. Which shocked me because the request for his assistance came from Congressman Bass. Also you have not replied to my Congressman's (Congressman Charles Bass, of Concord, N.H.) request and inquires, Mrs. S. Higgins of the Congressman's Concord office said even though every one in and out of the Navy has said this is indeed a vendetta and that I have told the TRUTH there is nothing more the Congressman's office can do. This is unacceptable.

You have not replied to any of my correspondence including my letter of 8 May 1998 to you when I returned All my Medals, Ribbons, Awards, Citations and Insignias to you, and my Children's United States Passports back to the Department of State all because of this Vendetta. You could have at least acknowledged receipt as Professional Courtesy. On June 1, 1999 I tried to solicit the assistance of RADM John Hutson the Navy Judge Advocate General, but as normal I received No response.

The Navy's position is basically ignore him and he will go away, you can never be more wrong. I CAN

AND WILL NOT WALK AWAY OR GO AWAY. Too much has been said and done to my family and myself for that to happen. Even in the recent released book by Charles Thompson "A GLIMPSE OF HELL" on pages 263, 264 and 265 that in 1989 Admiral Ming Chang (the Navy Inspector General) and Rear Admiral Paul G. Chabot (Inspector General CINCLANTFLT) informed Admirals Trost, Frank Kelso, Mike Boorda, Leon Eddeny and Admiral Richard Milligan that Lt. Cmdr Patricia Rios "**Made deliberate efforts to Ruin the Career and Reputation of Gunners Mate John M. Mullahy Jr.**" that I told the truth and that this was a personnel vendetta being carried out by Lt. Cmdr. Patricia Rios. Yet nothing was done to stop this from continuing and putting an end to it all or to correct the injustices that have been done to me. Instead the Navy chose to do nothing and let it continue and turn a blind eye on the whole matter. Admiral Barrow, Rios's father I know at the time had some influence on the matter. It should also be noted that Admiral Barrow was a classmate of both Admirals Trost; Kelso and Eddney. How convenient!

I was sent to a General Court Martial for Misappropriation of Government Funds (collecting Married BEQ). My first wife left while I was on a 6 Month Mediterranean Deployment on the U.S.S. Forrestal. She, my first wife, divorced me **without my knowledge or any notification.** So I collected Married BEQ until I found out about the Divorce. I tried on several occasions to stop my BEQ (see statements of CDR Carol Hiers, GMTC George Haight, Senior Chief Tim Schoulting which you have) and was told I could not stop my Married BEQ without the Original Divorce papers, which I did not have.

I was told the morning of my Court-Martial that I was going to be found Guilty because I did not write a Personal Letter to the Commanding Officer of Naval Finance Center Cleveland and I would get Two Years in the Brig and a Bad Conduct Discharge or Pled Guilty and get only 6 months in the Brig and be allowed to retire. Even though $2900.00 of $4000.00 of the Married BEQ was paid back Rios gave me back the $2900.00 that payback was not possible not even in a lump sum. (JAG Investigation) My Father-in-Law even offered to write a check or pay cash, but was told No by Rios that I was to be Court-Martailed. I did not have a Captains Mast or any counseling I went straight to a General Court-Martial. When I was at TPU Norfolk after the Iowa Accident Naval Finance Center Cleveland stated that I did Not have to repay the Married BEQ as it was NOT MY FAULT as I tried to comply with NAVPERS 1070/602 BAQ/VHA entitlements. So where the Crime, JAG says I'M Guilty and Naval Finance says its not my fault. So what was the Misappropriation if Cleveland has made this ruling in 1989 about my case?

The day I returned from my Honeymoon I was sent to Naval Station Rota on Technical Arrest Orders and waited 8 Months for my Court-Martial. The maximum time for Technical Arrest Orders is 6 Months, I was Court-Martialed any way. My HazMat Certification pulled by Rios, ALL my schools canceled by Rios (JAG Investigation). The day my ex-wife divorced me I was off the coast of Lebanon. Where there was a 40 mm explosion on the U.S.S. Forrestal, I was in surgery having scrap metal removed from the right side of my body. Notification of my divorce was printed in the Zion, Ill. Press which is printed on Fridays only. The Soldiers and Sailors Relief Act was waived to Court-Martial me.

In 1975 during the fall of Vietnam I was TAD to Special Operations (EOD/UDT). I was stationed at Security (Jungle Patrol) NAVMAG Subic. Near the end of a covert operation I jumped on a grenade in a truck that we were getting into and saved 4 other sailor's lives (Court-Martial transcripts page 110). I caught the grenade in the air before the spoon came up. It was wired to the gas tank. I then wrapped my belt around it for disposal (I never received the medal I was told I was going to get for that). In 1987 Lcdr. Rios told everyone that I was crazy for what I did. That normal people don't do stupid things. My second Attorney for my one and only Court-Martial looked at it as I saved lives and it should count for some thing.

The day of my Court-Martial my wife was given 24 hours to vacate our 3-bedroom house not by housing

but by Rios so my wife was put out on the street. Lcdr. Rios told JAG Investigation that she changed my 3-bedroom house into a barracks with no one to put in it of course. According to your JAG Investigation my wife should never have been removed, but stayed there until I received new orders after the Brig.

The day of my Court-Martial NONE of my witnesses could be located in the Navy. But ALL came forward after the news of the Iowa Accident and ALL still very much in the Navy. This is another reason why I pled guilty. No witnesses to prove that I tried to stop my BEQ (JAG Investigation). The day before my Court-Martial my lawyer was changed because Lt. Johnson was ordered to stop trying to help me so much and if he continued he was going to be transferred to Legal Aid (JAG Investigation). Plus my civilian lawyer was not allowed on the base the morning of my Court-Martial.

Lcdr.. Rios denied my wife a Dependents ID Card, Exchange, Commissary and ALL other privileges (JAG Investigation) (my wife comes from a Spanish Navy Officers family) and my wife works then and now in the Spanish Navy Hospital. Lcdr. Rios REFUSED to give sponsorship to my wife. So therefore I paid to relocate my wife when I was in the Brig. Tommasi (one of Rios's friends) made false statements to Naval Station Rota Staff Judge Advocate about me All her statements were disregarded.

The JAG Investigations that were completed by CINCNAVEUR are above criminal actions, not counting two statements made by one of the Investigating Officers, a Lcdr.. Perry Driver, which confirmed EVERYTHING.

As you know I appeared before the Investigations Subcommittee of the Armed Services Committee in December 1989. The Chairman Nichias Mavroules wrote "there appears to be interference in his personal life, allegedly by a Military Officer, that goes well beyond what is proper. All of this has occurred under the cloud of his charging this superior officer with violations of ammunition safety procedures and possible violation of the status of forces agreement in Spain" (I was as you know the Weapons Officer in Cartagena). This letter was sent to your office and I did not ask for his assistance, but it was welcomed.

I have been refused Navy Legal Assistance in this matter from Naval Station Rota "I don't want to get involved in this nightmare, sorry"

I am not left with a way out or any options, so now I will do what I have to do. For the Officers I have listed above will attest to that I have done every thing I have said I will do. I hope that something is done so this never happens to anyone ever again in the Navy.

This is not a game and it is definitely not any way amusing as some of your people may think, because I do not see anything funny about this situation at all. You have taken away my livelihood and ALL prospects of me ever being employed here again. You have marked me as a MASS MURDERER OF 47 OF MY FELLOW SHIPMATES, and said that "I BLEW-UP TURRET TWO on the U.S.S. IOWA BB-61.

I received a letter from the Commanding Officer of Naval Station Rota, Spain apologizing for the False and Misleading Statements made by Ms. Aremda Tommasi (she Ms Tommasi stated in your own JAG Investigation said that she received ALL her information about me from Cmdr. Patricia B. Rios), however I lost my job about 7 hours after these statements were made about me. Nothing was done to correct the damage that was done in all the Communities (Cartagena & Benidorm) that Ms Tommasi told these LIES to was informed that they were in fact lies. So therefore I lost my Job.

This includes a Formal Function between the United States Navy and the Spanish Navy where Sixth Fleet was present in person at this occasion. Ms Tommasi stated at this function to all she came in contact with: "THAT I AM THE OFFICIAL U.S. NAVY REPRESENTATIVE AND THIS IS THE

OFFICIAL POSITION OF THE U.S. NAVY AND THE NAVAL INVESTIGATIVE SERVICE" THAT I (JOHN MULLAHY) WAS A SUSPECTED MASS MURDERER AND THAT I BLEW UP TURRET TWO ON THE U.S.S. IOWA BB-61 AND SEVERAL FALSE ACCUSATIONS. (SEE JAG INVESTIGATION) This is why NO ONE will hire me until this is cleared up. Now my children will be dragged into this nightmare and this is why I am writing this letter so that the truth will once and for all come out either willingly or not. The choice is yours to correct the injustices that have been committed.

You have twice taken everything we own and put us in a life of poverty. We have been DENIED our supposed benefits as a result of this vendetta. I was even denied to mail a letter with the correct postage on it, and just prior to Christmas of 1997 I was reported dead and my pay stopped and it is extremely important that nothing happens to my Retired Pay as it goes to buy medicine for my son, and the benefits I don't have but should have were stopped. (Congressman Bass's Office Mrs. S. Higgins got my retirement pay restarted for me), INCREDIBLE!

Cmdr Rios wrote to ALL my Creditors (see JAG Investigation) and told them that because of my Court-Martial I was now a Convicted Felon (Ford took my truck, I was three payments ahead. Sears, J.C. Pennys, my Bank, Visa to name some but not all). She opened ALL my Mail for what I don't know (again see JAG Investigation). My wife refused a Dependents ID card from Rios (again JAG Investigation). All because I refused an illegal order from Lcdr. Rios that started this witch-hunt.

I was ordered in front of 8 other military personnel to go to San Javier Airport and direct a C130 U.S. Air Force aircraft from the Hot spot to the Civilian Terminal and not to tell anyone what I was doing. Spray Paint over ALL EXPLOSIVE MARKINGS and place the explosives in my personal pick-up truck (Ford F-150). Drive the explosives (C4 Plastic Explosive NALC M757 approx. 2000 lbs., blasting caps NALC M131, approx. 50 each, Small Arms Ammo approx. 10,000 rounds of 9mm and 7.62 and some hand grenades). Rios forgot to get Diplomatic Clearance for the aircraft. I was also ordered to move the above explosives over Spanish roads WITHOUT informing the Spanish Government for escorts and No placards, from San Javier to Cartagena approx. 35 miles, needless to say I refused the order and reported the matter to Captain Kennedy at CINCNAVEUR who called Rios to London.

When Rios returned from London it all started and has never stopped (JAG Investigation and "A GLIMPSE OF HELL" pages 263 and 264). All though I do not agree with everything your Investigations say (as they are sanitized or watered down) they ALL have said I have told the truth. This is why I do not understand the Navy's position, one would think the Navy would want to clear it up, and make good what was done in the Navy's name and on Official Functions it would be good PR.

I have kept my word to try and find a peaceful solution to this nightmare but time has run out. I have tried by going to the Navy and its JAG Investigations. I have gone to lawyers at my own expense, I have tried going to my Senator and my Congressman, but to no avail. I am quite sure you will ask what happened the best way is to ask people who have first hand knowledge: Captain Shrecengaust (Ret.), Captain Paul Hanley (Ret), Captain Fred Moosally (Ret), Captain Deborah Burnette (Ret), Admiral Ellis (Ret JAG) to name a few.

So now this has two ways it can go! I either come out even or I lose. There are no in-betweens, there's is no compromise. I get what I have lost as a direct result of Rios and Tommasi's vendetta and lies, which everyone in the Navy has acknowledged, is true, that is why I can't understand what the problem is to repair the damage that has been done. My Court-Martial overturned and restore me to the rank I should have been, get or give me employment at the same salary I was when I was fired ($43,000.00 a year), recoup my lost wages ($217,000.00 for lost wages, $630 Lawyers fees, $7,000.00 phone bills and $14,000.00 for my Pick-up truck).

If I lose the United States Navy WILL HAVE TO KILL ME, so that the truth will come out for my children. This has got to end— it cannot go on like this. The truth WILL come out one way or another for my children's sake; there is NO WAY they become involved in this mess. On each occasion they seek me out, as Cartagena is 550 miles from Naval Station Rota. They receive counseling and I pay through the nose. I cannot understand why the Navy does not think that it is a little strange that this was all done by the same two people before and after my Court-Martial.

Rios came after me while I was in the Brig, on the U.S.S. IOWA, while I was at TPU Norfolk, on the U.S.S. Kennedy and after I retired from the Navy. This vendetta has continued to the present day. The Navy either condones Rios and Tommasi's actions or just turns a blind eye to the whole matter. Do you think it is too much of a coincidence that all these things where done by the SAME TWO PEOPLE, and nobody can see there is something a tad wrong with this situation. Special Agent Tom Goodman says "what a nightmare" But either way I live or die it is your decision! But it ends NOW!

The above is not everything that has happened as you can see from your own JAG Investigations. I am finished with all your Investigations as nothing ever happens except that I am always the loser, and they get counseled.

If your decision is that the U.S.Navy will have to kill me, then I am willing to die over all that has been done. There is no other way that I can protect my family and to fight back. If I do not hear from you in a reasonable amount of time I will take it, as your decision is that I lose. I pray that when my children are old enough they will avenge me. This situation will go on NO more.

John M. Mullahy Jr.

JOHN M. MULLAHY JR
CIRAMON Y CAJAL N22-7G
30204 CARTAGENA, MURCIA SPAIN

SECRETARY OF THE NAVY
2000 NAVY PENTAGON
WASHiNGTON D.C. 20350-2000

VIA: CHIEF OF NAVAL PERSONEL, 2000 NAVY PENTAGON, WASHINGTON
D.C.
COMNAVSTHFFT, U.S.S. LA SALLE, iN PORT CARTAGENA SPAIN

IT IS WITH DEEP REGRET THAT I RETURN TO YOU THE NAVY & MARINE CORPS MEDAL AND CITATION ALONG WITH THE BELOW LIST OF MEDALS, CITATIONS, RIBBONS AND INSIGNIAS. SINCE I HAVE BEEN LABLED BY MS ARMEDA TOMMASI, A CIVILIAN EMPLOYEE OF THE MORALE, WELFARE, AND RECREATION DEPARTMENT, OF NAVAL STATION ROTA AS A SUSPECTED MASS MURDERER, THAT I BLEW UP TURRET TWO ON THE U.S.S. IOWA BB-61, AND SEVERAL OTHER FALSE ACCUSATIONS ALL DONE IN THE NAME OF THE UNiTED STATES NAVY, WHILE ON AN OFFICAL U.S. NAVY FUNCTION. THE NAVY HAD INVESTAGATED ALL OF THIS AND SENT ME AN APOLOGY. HOWEVER AN APOLOGY DOES NOT GET ME MY JOB BACK, NOR DOES IT RESTORE MY REPUTATION iN BOTH CARTAGENA AND BENJDORM FORM THE LIES SHE (MS TOMMASI) HAS BEEN TELLiNG (EVEN FROM YOUR OWN MS AND JAG 1NVESTAGATIONS BOTH FOUND TO BE TRUE) AND REPLACE THE LOST INCOME ($167,000.00 TO PRESENT DATE) THAT I AND MY FAMILY HAVE LOST. SINCE I WAS REPORTED DEAD JUST BEFORE CHRISTMAS OF LAST YEAR MY PAY & BENIFITS STOPED (MY PAY WOULD NOT HAVE BEEN RESTORED AS FAST AS IT WAS IF IT HAD NOT BEEN FOR THE ASSISTANCE MS HIGGINS OF CONGRESSMAN BASS'S CONCORD N.H. OFFICE) I WAS NOT TOLD WHO REPORTED ME DEAD BUT I HAVE MY OWN SUSPICIONS.

I HAVE APPLIED FOR MY NEW SPANISH RES1DENCIA WITH THE REASON OF POLITICAL PROSECUTION FROM THE UNITED STATES NAVY AND HAS BEEN APPROVED.I HAVE RETURNED MY CHILDRENS PASSPORTS TO THE DEPARTMENT OF STATE.

WE WILL BE MOVING AT THE END OF THE SUMMER I WILL NOT GIVE A FORWARDING ADDRESS TO THE NAVY FOR THE PROTECTION OF MY CHILDREN.

WHEN I DIE I DO NOT WANT A UNITED STATES FLAG PUT ON MY COFFIN

I WAS TAUGHT THE FLAG WAS TO BE RESPECTED AND NOT SOMETHING TO BE ASHAMED OF.

WHEN THE NAVY REPAIRS THE DAMAGE THAT WAS DONE, RECUPE MY LOSES AND WHEN I AM
EMPLOYED YOU CAN RETURN THE ABOVE.
I AM PRESENTLY TALKING TO MR.PEDRO GARCIA-PREFASI A REPORTER FOR ONE OF THE NATIONAL SPANISH NEWSPAPERS IT WILL NOT BE A PLEASENT STORY.

INSIGNIA, MEDALS, AND RIBBONS:
ENLISTED SURFACE WARFARE INSIGNIA
AIR WARFARE INSIGNIA
NAVY & MARINE CORPS MEDAL & CITATION
NAVY ACHIEVEMANT MEDAL & CITATION
GOOD CONDUCT MEDAL W/THREE BRONZE STARS
NAVY EXPEDITIONARY MEDAL W/ONE BRONZE STAR
NATIONAL DEFENSE SERVICE MEDAL W/ONE BRONZE STAR
ARMED FORCES EXPEDITIONARY MEDAL
VIET-NAM SERVICE MEDAL WITHREE BRONZE STARS
HUMANITARIAN SERVICE MEDAL W/ONE BRONZE STAR
MULTINATIONAL FORCE AND OBSERVERS MEDAL
VIET-NAM CAMPAIGN MEDAL
VIET-NAM CROSS OF GALLANTRY MEDAL
SOUTHWEST ASIAN SERVICE MEDAL
KUWAIT LIBERATION MEDAL (SAUDI ARABIA)
KUWAIT LIBERATION MEDAL (KUWAIT)
PISTOL EXPERT MEDAL
RIFLE EXPERT MEDAL
COMBAT ACTION RIBBON
PRESIDENTIAL UNIT COMMENDATION RIBBON
NAVY UNIT COMMENDATION RIBBON
MERITORIOUS UNIT COMMENDATION RIBBON
BATTLE "E" RIBBON
OVERSEAS SERVICE RIBBON
SEA SERVICE RIBBON W/SILVER STAR
NAVY RECRUITING RIBBON
NAVY RECRUITING BADGE W /TWO BRONZE STARS
I AM ALSO ENCLOSING SOME OTHER CORRESPONDENCE THAT I SENT TO MY
SENATO AND CONGRESSMAN

DONNELLY . -

MASSACHUSETTS

ELEVENTH DISTRICT

March 23, 1990

Honorable H. Lawrence Garrett
Secretary
Navy Department
The Pentagon
Washington, D.C. 202:50-1000

RE: GMGI John M. Mullahy, Jr. SS# 025 44 1321

Dear Mr.. Secretary:

I am writing on behalf of John M. requesting my assistance.
Mullahy who has recently contacted me

GMGI Mullahy is seeking to be considered for the rank of Chief. I know that you are aware of his
gallant action in the gun turret aboard the
U.S.S. Iowa last April. It is my belief that a series of events have occurred in his Naval career over
which he had no control. While serving in Spain prior to his assignment to the Iowa, he had alleged
wrongdoing on the part of a superior officer in handling munitions and armaments. It is my understanding
this investigation is ongoing, and that GMGI Mullahy's accusations are proving to be true. As a result of
his action retalitory action was taken against him by his superior officer resulting in a court martial and a
confinement in the brig despite his offers to rectify any indebtedness he might have had to the Navy.

GMGI Mullahy's job performance throughout his career has been outstanding and his loyalty to the Navy
is above reproach. His bravery last April 19 indicates to me that he is an individual we can take pride
in having in our Armed Forces. I firmly believe that the disciplinary actions that had been taken
against him should be rectified and that he should be given the chance to advance as if this had

never occurred.

I would appreciate any comments you might have regarding this matter. Thank you for your attention to
this matter.

Sincerely,

BRIAN DONNELLY
Member of Congress

436 CANNON HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
9202) 225-3215
2301 JOHN F. KENNEDY FEDERAL BUILDING
805 ~ON. MA. 02203
(617; 223-0036
47 WASHINGTON STREET
OUINCY, MA. 02189
(617) 472-1800
Cl MAIN STREET
~ROCKTON. MA. 02401
~617P 583-6300
TOLL-FREE LINE TO
WASHINGTON
1-800-424-9112

50 MEMBER'S LAST NAME, INITIALS 51 SSN

PERIOD OF REPORT

MULLIAHY, J. M. JR. •25-44-1321 52From 89FE5281

54 DUTIES AND RESPONSIBILITIES A

CLEANLINESS AND PRESERVATION OF TURRET TWO A 1G/5~ TRIPLE GUM T INCLUDE MAGAZINE SECURITY PATROL INPORT AND UNDERWAY.

LTARYDUTIES

4~I

55 SPECIAL ACHIEVEMENTS SHIPS EMPLOYMENT INCLUDE:

FLEETEX 3-89, PVST ST MARTEN, NEW ORLEANS

56 EVALUATION COMMENTS PETTY OFFICER

MULLAHY IS AN EXTREMELY DEPENDABLE AND ENTHUSIASTIC WORKER. HE HAS AN EXCELLENT PROFESSIONAL BACKGROUND"AND PUTS THIS KNOWLEDGE AND EXPERIENCE TO GOOD USE WHEN CONFRONTED WITH NOT ONLY EVERYDAY PROBLEMS, BUT SITUATIONS WHICH ARE UNUSUAL. PETTY OFFICER MULLAHY IS LEVEL, HEADED AND INITIATES ALL REQUIRED ACTION IN A CALM, COLLECTED AND CONFIDENT' MANNER. HE CONTINUOUSLY DEMONSTRATES AN EXCEPTIONALLY HIGH DEGREE OF PROFESSIONALISM. • '•

HIS SPECIFIC ACCOMPLISHMENTS INCLUDE:,

- SINGLED HANDEDLY RESCUED THREE SHIPMATES FROM THE~FIRE AND SMOKE-FILLED ANNULAR SPACE DURING THE FIRE FIGHTING EFFORT FOLLOWING THE EXPLOSION IN TURRET'TWO.

- FOUND HIS WAY THROUGH NUMEROUS SMOKE~FILLED COMPARTMENTS DOWN TO DAMAGE CONTROL CENTRAL TO ACTIVATE SPRINKLERS TO TURRET TWO MAGAZINES AND POWDERS FLATS, WITHOUT.ANY TYPE OF BREATHING DEVICE AFTER DAMAGE CONTROL CENTRAL AND BEEN ORDERED TO EVACUATE DUE TO SMOKE.

- FOLLOWING THE TURRET TWO EXPLOSION, HE VOLUNTEERED FOR CASUALTY IDENTIFICATION ~ A TASK HE COMPLETED WITH COMPLETE PROFESSIONALISM. -'

I I

- COORDINATED LOGISTICS FOR REPAIR: TEAMS DURING AFTERMATH Ofj TURRET, 2.. EXPLOSION AND SUPERVISED THREE TURRET REPAIR TEAMS.

- TRAINED ALL REPAIR PARTIES ONBOARD IOWA IN THE OPERATION OF ALL THREE TURRET SPRINKLERS SYSTEMS.

- MERITORIOUSLY ADVANCED TO GUNNERS 'MATE GUNS SECOND CLASS FOR ACTIONS DEMONSTRATED DURING THE EXPLOSION AND AFTERMATH OF TURRET TWO.

PETTY OFFICER MULLAHY LEAVES IOWA KNOWING HE MADE SIGNIFICANT CONTRIBUTIONS TO MAIN BATTERY IN THE SHORT TIME HE WAS STATIONED ABOARD~BATTLESIIIP IOWA. HE DISTINGUISHED HIMSELF AMONG THE FINEST OF BATTLESHIP SAILORS. IN THIS HE DISPLAYED LEADERSHIP SKILLS EXHIBITED BY THE FINEST PROFESSIONALS. PETTY OFFICER MULLAHY HAS EARNED MY HIGHEST RECOMMENDATION FOR POSITIONS OF GREATER RESPONSIBILITY AND IS STRONGLY RECOMMENDED RETENTION IN UNITED STATES NAVAL SERVICE.

C.A.M.I. (Citizens Against Military Injustice)

Written Comments by John Harry Watson

Submitted By C.A.M.I

March 13, 2001

To the:

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

(The Cox Commission)

To: The Honorable Walter T. Cox, III, Senior Judge, United States Court of Appeals for the Armed Forces, Chair, and the Honorable Members, of the Commission on the fiftieth Anniversary of the Uniform Code of Military Justice.

Citizens Against Military Injustice (CAMI)

This article by John Harry Watson was published August 3, 2000 in Kevin Holt's hometown newspaper, The Edmonds Paper.

Local Mother Fights Back Against Military Justice System
by John Harry Watson.

On May 17, 1992, 21-year-old U.S. Marine Corps Lance Corporal Kevin Holt was home in Edmonds on leave from Camp Pendleton, California. He was to be married three days later and the future looked bright indeed for the young Gulf War veteran.

In the morning, he and his fiancée attended Westgate Chapel, where Kevin had been an active member of the choir and congregation. After services, they went shopping for their wedding rings. His brother stated that he had never seen Kevin so happy and light hearted.

About 5 p.m., the couple set out toward his father's house for a barbecue. Kevin noticed that a police car was following them. He asked his fiancée if he had run a stop sign or something. She said she didn't think so. Obligingly he pulled over to the side of the road.

Kevin had no reason to be alarmed until police surrounded his car and took him to the ground at gunpoint &endash; beginning a living nightmare which continues more than 8 years later.

Holt was arrested and charged by the San Diego Sheriff's department for the brutal slaying of a fellow Marine at Camp Pendleton. The victim had been stabbed 46 times.

His principal accuser was another Marine, an erstwhile "friend", who, although absent without leave and in possession of the victim's stolen motorcycle at the time of the arrest, was granted full immunity by the government to testify against Kevin. Even the prosecutor called him a "slimeball who was not used to telling the truth".

In a still controversial move, the San Diego Sheriff's department, after its initial crime scene investigation (which was in an unincorporated area outside the Camp Pendleton perimeters), turned the case over to the military &endash; the beginning of the end for Kevin, who was subsequently convicted on all charges and, narrowly escaping the death penalty, was sentenced to life in prison without the possibility of parole. He is now 29 years old.

Court-Martial

The investigations, hearings and court-martial offer a horrifying picture of a "justice" system carefully insulated from public scrutiny which produces a 95% conviction rate in more than 10,000 cases per year &endash; numbers equaled only by the People's Republic of China!

The full details of the Holt case require a book (which is in the works). Following are just a few of the salient points:

• The government contended that the murder took place in a 44 minute window on a Friday evening before Kevin was to return home on leave. No less than eleven Marines, who knew the victim but did not know Kevin personally, testified that they had seen the victim (one even had breakfast with him) on the following Saturday and Sunday, when Kevin's whereabouts were fully accounted for.

The government dismissed all eleven out of hand as "Elvis sightings."

• Immediately after Holt's arrest, police seized 42 items from his mother's home, including his car and the pair of jeans he allegedly wore at the murder scene. After careful forensic analysis, the jeans were found to be devoid of any blood or fiber evidence by both the San Diego Sheriff's department and the U.S. Army's own high-tech crime lab.

Faced with this setback, the government paid $25,000 to a civilian "blood spatter expert" who, sure

enough, "found" blood stains. When the jeans appeared at court-martial they exhibited an obvious large brown spot in the crotch area and their condition differed in several important ways from that testified to by the original crime lab technicians, even including the contents of the pockets.

Dr. Herbert McDonnell, a world-wide authority on blood spatter analysis who provided initial training to the government's "blood spatter expert", later described him as a "Frankenstein monster, liar for hire, whore and charlatan," and noted that he "has no scientific background."

At the time of the post-trial investigation, this same "expert" was under investigation by a Grand Jury for allegedly tampering with evidence and accepting bribes in an unrelated civilian case.

• The two key government witnesses, self-confessed liars and thieves, testified that Holt had voluntarily confessed to them a full account of the murder including the detail that he was "covered with blood" afterwards. Other than the jeans as noted above, no blood was found on any of Holt's clothing, possessions or in his car, which was literally torn apart for forensic examination and had not been cleaned in several weeks.

In interviews conducted as part of a post-trial investigation by an independent attorney, these two witnesses were less sure about Kevin's confession and each pointed the finger at the other as the possible perpetrator!

• The victim was required to be at formation on the Saturday morning following his alleged murder. Formation attendance is routinely recorded in the unit diary. Interestingly, said diary was "missing" at the court-martial. Had it been presented in evidence, of course, it would have blown the government's entire case.

The anomalies go on and on. In the words of that same attorney: "To point out every conceivable error committed in this trial and all matters properly to be raised before appellate courts would turn this submission into a book."

Even a book would not have made any difference in the subsequent appeals through the military system: each court dismissed the appeals and upheld the sentence. Holt's attorney, William Cassara of Augusta, Georgia, has requested an appeal to the United States Supreme Court.

Reality Check

Readers, especially those who have served or are serving in the military, may find this story incredible. Indeed, one of the most alarming aspects of the military justice system is how little is known about it, even by service members. A recent message from another victim of military injustice begins, "I had been in the Air Force for 19 years with an outstanding service record and quite frankly, had no knowledge of the military injustice system." That's how it is!

A Mother Speaks Out

In "An Open Letter to the Parents of Graduates and the Community of Edmonds", Kevin's mother, Glenda Ewing, writes:

"After nine years of intimidation by the Military, I have decided to bring to the attention of the public a story so outrageous that it defies the imagination. Remembering that someone had once said to me, "don't get mad, get even", I have taken the heartbreak and the knowledge that I have learned and have formed an organization called CAMI (Citizens Against Military Injustice), dedicated to providing help, resources and information to anyone who may find themselves where I did on May 17th, 1992. Our web address is www.militaryinjustice.org.

This story will affect thousands of Americans as it will bring insight to the fact that if their son or daughter should at some point decide to go into the military, they will need to know, as I did not, that civil rights as we know them, go out the window with the stroke of the pen!

This story is about child abuse on a different level... This is a system where judges and juries are "conditioned" to decide the outcome "for the good of the service". The military justice system is conducted completely in-house with no objective overview!

This is a story of the rape of just one American and local family as it struggles against a system that has become so hungry for convictions and so used to covering up that it all but ignores the evidence and in fact, may even create it's own. We must endure this financial and emotional assault while watching the military brush aside it's own misconduct and in many instances, promote the wrong doers."

"Kevin refuses to give up hope that he will eventually be found innocent. His attitude and outlook on his future (whatever that may be) is a continual source of inspiration to those around him in prison and to the many families and friends that he consistently maintains contact with," writes Glenda Ewing.

"Kevin has repeatedly told me that he will NOT confess to a crime that he did not commit simply to have his sentence reduced. He says that the only thing he has left which the military cannot take away, are his honor and integrity. Having sacrificed so much, he will not give those up for anyone or any reason.

I am finding my way through life the best I can with the cards I have been dealt. I believe that God has given me an opportunity to use this terrible situation to bring help to others through our website and CAMI. It is a comfort to me that Kevin is so full of the 'peace that passes all understanding'. That of believing and trusting God for his future. As his mom, I can do no less.

If you or someone you know is suffering with the injustices of the Military Justice System, please tell them that help is available. If you would like to send a tax free donation in order to lend your support, the address is CAMI, 308 161st SW, Lynnwood, WA 98037 or visit our website at www.militaryinjustice.org".

Citizens Against Military Injustice

In its very brief existence, CAMI is already making waves, not least among the inmates and staff at the U.S. Detention Barracks in Fort Leavenworth, Kansas, where Kevin is incarcerated.

The website has provided valuable support information and competent legal resources to those in need of them and who would otherwise be in the dark. Two online forums are linked to the site: a General Discussion of Military Justice and an Inmate Support forum, both of which have been active. It also provides a great deal more detail on the Kevin Holt case and others, including press articles, suggested reading and links to related sites.

The organization was founded and continues to exist on a shoestring and is urgently seeking support, especially from the local community, to continue and expand its efforts towards meaningful reform of the military justice system. It is the only active organization of its kind in existence.

A National Shame

While this is a local story, Edmonds is far from the only town in America to have lost a son or daughter to military injustice. Probably the most shocking statistic I have heard, corroborated by qualified lawyers, is this: of the military prison population, approximately one third are innocent of the crimes for which they were convicted, one third are serving excessive sentences, and only one third are appropriately sentenced.

In the military, justice is only as just as it serves command intention. It is being ruthlessly applied, as you read this, to some of America's brightest sons and daughters "for the good of the service". This is indeed a national shame which must be uncovered, confronted and changed at any cost.

The movie "A Few Good Men" just scratched the surface of what Kevin Holt calls "America's dirty

little secret". However, it's portrayal of a convening authority (Jack Nicholson), stuck in a warring past and arrogantly oblivious to fundamental democratic principles, is chillingly accurate.

C.A.M.I. (Citizens Against Military Injustice)

Written Comments by Kevin Holt

Submitted By C.A.M.I

March 13, 2001

To the:

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

(The Cox Commission)

To: The Honorable Walter T. Cox, III, Senior Judge, United States Court of Appeals for the Armed Forces, Chair, and the Honorable Members, of the Commission on the fiftieth Anniversary of the Uniform Code of Military Justice.

Letter to C.A.M.I.

September 10,2000

Dear C.A.M.I.,

My name is Kevin Holt and I was a marine. I have been confined at the United States Disciplinary Barracks in Fort Leavenworth Kansas for almost nine years. I was tried and convicted of premeditated murder and sentenced to confinement for life. What, you may ask, is so extraordinary about that? I was convicted on the testimony of two fellow marines, one of which was facing other charges, and their wives who testified that I told them I did it and one piece of evidence the appeals court has stated were "obviously" tampered with. Not enough? How about eleven marines who were best friends with the deceased and had never met me before the trail testifying on my behalf that I could not have committed the crime because they either saw, spoke with, and in one case even ate breakfast with the deceased after the prosecution claims I murdered him.

Still not enough? How about the fact that the police seized over forty-two items including my Chevy Blazer, and turned them over to the army's own crime lab who could find **NOTHING** of evidentiary value using sophisticated techniques and multiple examiners, prompting the prosecutor to find a "..hired gun, liar for hire, a Frankenstein monster" as stated by Dr. Herbert MacDonnell, America's preeminent forensic scientist,. The man who wrote the book on forensics.

I do not have enough room in my cell to accommodate my entire record of trial so I sent it to my attorney to keep from paying the costs of having it copied. Until a couple of months ago, I kept all briefs by both sides and the decisions from the courts for each level. A copy of the record for myself would have been redundant as we were pursuing

the top eight issues of my case. These eight were the most important and we felt that if the courts weren't going to see justice done with them, then there would be no justice. At the present time it seems the court has decided against justice in favor of the government's image of infallibility.

Please keep in mind that I was only a young marine when I was arrested and while I did get around, as far as this whole judicial thing goes I am completely lost. I haven't had the best of help with my lawyers but my recent one, Bill Cassara, seems to be working hard to the best of his abilities with a screwed up system. I assume that most people think that when you get locked up you instantly know all about the law. That is not the case. I've tried and all the double speak in the law books confuses and angers me. Try as I might, I can't seem to understand how the decisions from the court make sense.

Some people have a very hard time understanding why I make the decisions I make or behave the way I do. I spoke with a reporter once and he told my mom he thought I was guilty because I wasn't yelling and screaming. I am not a person who wears his emotions on his sleeve. I do not believe that that is what being a man is all about. I also don't see any benefit to screaming at the walls and beating my head against the cell door. It does not change the situation one bit and only creates more stress that only does damage. I read of a man once who screamed his heart out and was finally released only to die of a heart attack shortly after. My view on life seems to be against the grain of the general populace and seems to upset people or to make them look at me queerly. I hope that reading this may help you to understand a little about who I am and what C.A.M.I is all about. My honor means more to me than my freedom. I could probably get out of prison much sooner but to do so I would have to sell myself out and I

won't do that. I will never admit to something I didn't do. Each morning when I get up, I must look at myself in the mirror. I must be able to live with what I see. What good is freedom if you can't even look yourself in the face without disgust. Some people probably wouldn't care. I do. I do not try to sway people with how I act. I only ask people to look at the facts in my case and judge me by them.

Why didn't the eleven marines scream for my release after I was found guilty? I assume it is because they didn't see the trial and bought into the belief that if I was convicted, there must have been evidence to support it, the prosecution merely being wrong about the time of the murder. But then again, these are good marines and we believe what they were told because the government wouldn't lie to us. I don't believe that anyone ever contacted them or the jury to show them the discrepancies with the "expert" witnesses that lied about their credentials or for that matter were never qualified in the field in which they testified. Wouldn't that be fun? I wonder what they would say. My chasers (guards) that sat with me for all the sessions were outraged with the decision and decided to get out of the military. Why not get involved? Look around you. As long as people have food to shove in their faces and television to watch they are happy and complacent. Why rock the boat? Why get involved in something that doesn't affect their lives. That is your answer. People are lazy.

The San Diego Coroner's office did an autopsy but surprise, surprise; they recorded over the tapes so they were not available for a capitol punishment murder case. The report was written by memory and very sketchy. Samples were taken but never tested. Ocular fluid could have easily given a time of death but it was not tested even though a sample was taken. The body was never checked for a temperature, only the

coroners hand on the body and the result of "cool to the touch" was given. I could go into rigor mortis but that would take more pages and my mom has already done that study. We've become experts in time of death study. Not something I ever wanted to learn. As to how they came to the forty-four minute time frame, it was the only period of time that entire weekend that I was alone without an alibi. But even that shouldn't have mattered because it takes more than forty-four minutes to drive to the murder scene and back while speeding and making all the lights let alone stopping to murder someone and then washing up. Luckily for the government, facts are irrelevant in their courts.

As far as the murder weapons go, ...Yes, I did say WEAPONS. One knife was about six and one half inches long with a blade on one side and flat on the other, thought to be a bayonet while the other was about four and one half inches long, sharpened on both sides. Oddly enough, exactly like a boot knife that Chuck Sheldon, one of the marines that testified against me, stabbed a man in Memphis with, but that seems to keep getting overlooked.

What would I do if I had six months of freedom knowing that at the end I would be returned to prison? I'd track down every investigative reporter that I could find and sit on their doorstep until they listened to me. Other than that, I do not know. Who do you go to when the government has committed a crime against you and you have no money? I guess you would have to rely on the populace's greed for intrigue and governmental misdeed to get a reporter to create pressure. My congressmen and senators are only interested in their careers, not what's right. But that is pretty much what political animals are all about. They don't make a move unless it makes them look good to the masses. Politics is about the many, not the few. Our country has gotten away from the idea of

letting a few guilty go free to ensure that no innocent man goes to prison. Now we throw them all away and let an overworked court system figure it out.

I used to love America. I used to believe we were a great nation. I believed in this country so much that I was willing to die for it. Now I see the rot eating at the core. I'm not as cynical as you might think or filled with hate for what has been done to me. I just choose to open my eyes to the reality of what is happening to our country instead of being spoon fed the trash people watch on TV. I still love this country, I just don't respect it or it's leaders anymore.

I don't ask you to believe a word I say. I would prefer if you looked at everything in my case as if you were pro-government. Do not listen to my opinions or my family's. Look for yourself and make your own decisions. Read both sides and weigh it for yourself. I have made sure that both the prosecution's and defense's arguments throughout my appeals were recorded verbatim on this web site not only to prove that I have nothing to hide but also that you, the public, can see what a travesty the military has made of the legal system, condemned by their own words.

I hope that you will read the things written on this site with the thought of " How would I feel if this were my son/daughter?" If any of you have friends or family in the military it could very easily happen to you and them also. Remember, the military is only interested in what is good for the service, not justice. I seem to remember being taught that our country was founded on freedom, justice, and rights that protected us from oppressive government. If you feel anger, good. It should anger you. It should make you see the insidious evil in a judicial system run by the military with little or no oversight by our **REAL** judicial system. My hope is that you will get involved and show your

disapproval and disgust in this system, not for me but for your families, friends, and any young person thinking of joining the military. We need a change and only by **YOU** getting involved will that happen. **C.A.M.I.** is not about or for me. It is too late for me but not for others. Don't let this system destroy the life of someone you know.

Take care and God bless.

Sincerely,

Kevin M. Holt

C.A.M.I. (Citizens Against Military Injustice)

Written Comments

Submitted By Jose Luis Rodriguez

March 13, 2001

To the:

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

(The Cox Commission)

To: The Honorable Walter T. Cox, III, Senior Judge, United States Court of Appeals for the Armed Forces, Chair, and the Honorable Members, of the Commission on the fiftieth Anniversary of the Uniform Code of Military Justice.

Jose Luis Rodriguez
Box 77015
310 McPherson Ave.
Ft. Leavenworth, KS 66027
February 28, 2001

C.A. M.I.
308 161 St., S.W.
#A
Lynwood, WA 98037-6611

Dear Sir/Ma'am:

This letter serves as a "voice" for congressional review of the Commission on the 50th Anniversary of the Uniform Code of Military Justice. Currently, I'm incarcerated at a military penal institution. I have responded with suggestions to a few questions which will be addresed for review.

I'm not a lawyer or legal assistant of any kind, but I am taking this time to study the law and will soon be proficient as a legal assistant. I have been doing many self-taught courses. I'm also actively involved in the issues with military law, the military court system, and inmate concerns and issues. It is this reason that I'm forwarding some suggestions to you so that maybe a positive change for future problems may be resolved expediently and justifiable.

The sheet for topics for discussion circulated in our domiciles at a very late time. We have received notice that the date for considerations has been extended to March 1, 2001. Of course there is no way this letter will meet this deadline. But it has been

rumored that consideration is allowed up to March 13, 2001. It is my hope this extension is made available so that my suggestions may be considered. If this is not possible then it is my sincerest hope that my suggestions may be used positively by your organization. Either way, I hope my input is not in vain, but will make some sort of certain impact.

I would like to take this opportunity to ask for any pamphlets or reading material that may help me and the inmate population for future crisis in the injustices that arise in the military judicial system. I would like to know more about your organization and it's purpose.

Thank you for your assistance on this matter and the voice of advocate on our behalf.

Sincerely,

Jose Luis Rodriguez

Reg. # 77015

USDB, Ft. Leavenworth, KS

66027-1363

Should the accused have the option of being tried by a court-martial of members on the guilt or innocense but sentenced by a military judge in the event of a conviction?

In court-martial cases there are two types of trials: jury trials and bench trials. In a jury trial, the jury is the finder of fact. In a bench trial, the judge is the finder of fact. Both types of trials follow the same steps. The accused through guidance from his attorney chooses the type of trial to be the fact finder in the case. The jury is charged to reach a verdict once the judge reads the instruction to the jury and deliberations have taken place. Here the judgment will be read to the accused after the fact that he/she was judged by a panel of his/her peers. Eventhough the panel has more than likely no law experience, they reach a verdict based on the law the judge provided. If the judge provides the jury instruction based on law, the jury carries limited tools to reach the verdict. Depending on the complexity of the case, the task may be overwhelming. Regardless of the task, the jury carries the burden of establishing a conviction of guilt or render an acquittal.

The judge on the other hand is an experienced individual when it comes to question of law. A military judge is ultimately responsible for insuring that the accused receives a fair trial. Among the many duties, the court-martial results should appear fair to effectively further cause of good order and discipline in the armed forces. Through this duty and experience of upholding proper justice a military judge should be optioned by an accused to render a proper sentence to be served.

Should an accuse decide to take this option of sentencing, it may alleviate jury members from deliberating a proper sentence. Therefore shortening the time spand for a court-martial. And it also allows commanders and enlisted members to return to their perspective units to care for the operation of their units conduct the job they serve for in each branch of service

This option will save money, time, and serve proper justice throughout the military community. It can also alleviate the time spent on the appellate system fighting for severity of sentence appropriateness in post trial matters.

VI - Should a military judge have the right to suspend a sentence and adjudge a probationary [illegible]th

Imposition of probation is governed by the Sentencing Reform Act of 1984, which applies to all defendants convicted of crimes committed on or after November 1, 1987. The federal courts' authority to impose a sentence of probation is conferred solely by statute (18 U.S.C. §§ 3551-3673, 28 U.S.C. §§ 991-998 (1994 & Supp. II 1996)). The Act treats probation as a sentence in its own right rather than as a suspension of sentence. By explicitly defining the types of offenses for which probation is authorized, the Act limits a court's discretion to grant probation. The Act governs imposition and duration of a term of probation, specifies a number of mandatory and discretionary conditions to impose on probationers, and dictates when probation may be revoked. Since the guidelines are established and are conditional upon a defendant the military judge should have the option to establish or adjudge a probationary sentence to a defendant since most court-martials deal with first time offenders. The reality that most accuseds do not become repeat offenders should also be a consideration for this authorization.

Would adoption of any sentencing guidelines be fruitless in light of the reality that most accuseds do not become repeat offenders due to separation proceedings?

The civilian federal court system uses Federal Sentencing Guidelines promulgated by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984. The Guidelines became effective on November 1, 1987, and apply to offenders who commit crimes on or after that date. In Mistretta v United States, 488 U.S. 361 (1989), the Supreme Court upheld the constitutionality of both the Sentencing Commission and the Guidelines. The Guidelines ensure fair and reasonable sentencing for those convicted of federal offenses. Military courts do not have sentencing guidelines. This lack of sentencing guidance leads to an unfair disparity between courts-martials sentences for similar crimes. The federal court chooses the appropriate sentencing range by identifying the range in the sentencing table that corresponds to the defendant's total offense level and criminal history category.

VIII B. Should the Courts of Criminal Appeals be eliminated or their function reduced reviewing the record for sentence appropriateness?

Court of Criminal Appeals have a statutory obligation to ensure justice and preserve both the reality and appearance of fairness of the military justice system. Under Article 66 UCMJ, 10 U.S.C. § 866, the court has described their broad authority as an "awesome, planery, de novo power of review..." Their function to ensure proper justice requires arguments from both the appellant and appellee. This standard of review in determining sentence appropriateness involves judicial function of assuring that justice is done and that accused gets punishment he/she deserves.

VIII H. Should a decision of a Court of Criminal Appeals ever be rendered by fewer than three judges?

The Court of Criminal Appeals will affirm, reverse or modify the intermediate appellate court order and take or direct some appropriate corrective action. When sitting in panel, a majority of the judges assigned to that panel constitutes a quorum for the purpose of hearing or determining any matter referred to the panel. The determination of any matter referred to the panel shall be according to the opinion of a majority of the judges participating in the decision.

A de novo approach is taken by appellate courts in reviewing a trial judge's determination in questions of their ruling in a court-martial proceeding. If there is a decision to be rendered for an accused or appellant, the number of judges should be three, keeping the proper sentence to be fair and impartial.

C.A.M.I. (Citizens Against Military Injustice)

Written Comments by Mrs. Mary Latorre

Submitted By C.A.M.I

March 13, 2001

To the:

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

(The Cox Commission)

To: The Honorable Walter T. Cox, III, Senior Judge, United States Court of Appeals for the Armed Forces, Chair, and the Honorable Members, of the Commission on the fiftieth Anniversary of the Uniform Code of Military Justice.

UNCONSTITUTIONAL PROCESS - INAPPROPRIATE SENTENCING

My husband was sentenced to serve 12 years at the USDB on January 15th 1998. My husband is guilty of his charges. We typically don't divulge the nature of his crime, due to its nature and society's response to it.

My complaint is this. That had he been a civilian he would have more than likely only gotten probation or maybe 3 years imprisonment (which is Kansas law for his crime). Why is it a person who has served without incident for 18 years of their lives, and has accepted full responsibility for his actions, is sentenced so harshly?

It is because he is investigated, prosecuted , defended, judged and imprisoned all by the same entity: the United States Military. In addition, the US Military gets the inmate's pension and slave labor for several more years.

When we discussed with the ADC (Area Defense Counsel) the possibility of getting a civilian attorney we were discouraged. We of course had no idea where to find one that would not be a waste of money. The ADC did not start working on my husband's case until 2 weeks before his court-martial. The ADC also refused to allow me to participate in the preparation. After the court-martial, the ADC switched back to the JAG office (Judge Advocate Generals). This, in my mind, is not a fair and impartial trial which in this country is everyone's constitutional right, with the exception of Military members.

What is even more disturbing is that there are people imprisoned at the USDB who were charged with a similar crime as my husband's. But these prisoners have never pled guilty, and claim to this day their innocence, but are incarcerated for 30 or more years. They have less chance for parole because they "refuse to take responsibility" for their crime. The accusations are more times than not a "he said/ she said", and yet they find themselves incarcerated for the better part of the rest of their lives.

What ever happened to innocent until proven guilty beyond a reasonable doubt. In the Military it is guilty until proven innocent.

There is yet another disturbing fact that I have witnessed in my 2 years here in Leavenworth. The Guards apparently need to further punish the inmates. These youngsters, who in most case were not even born when my husband enlisted, believe it is their right to further punish the inmates with mind games and harassment, as well as harassing the inmate's family members.

My understanding from my husband's court-martial was he was sentenced to 12 years imprisonment. Not 12 years plus mind games and harassment or even life-threatening situations.

The life-threatening situations I am speaking of, in case some of you do not know, is that the USDB is literally crumbling. There have been incidents of inmates being injured by falling ceilings. There is toxic lead in the water. Some inmates have to work with asbestos without proper protection.

The circulation fans on top of the wings in most cases don't have a motor or the motor does not work. In the summer months it typically reaches 103 or more degrees, then add in the heat index it then reaches 115 degrees. It makes one wonder why is it illegal to leave an animal locked in a car for maybe 10 minutes in the summer, yet these men/women live in a similar situation 24 hours a day.

When these issues are raised to the Senate and Congress, we are told that there is nothing they can do. Yet they are the ones who developed the UCMJ (Uniform Code of Military Justice) and we the families are looked upon as "cry babies" . The UCMJ has not been amended for more than 30 years. I think it is time that someone takes the time to seriously look at the injustice in the Military Court system.

HARASSMENT CONTINUES AFTER DISCHARGE

In 1993, after over 19 years of outstanding service with the US Air Force I was accused of sexual misconduct with my stepdaughter. This supposedly had been going on for several years in our home with my wife (ex-wife now) and three other children in the household. The case was word against word. No physical or medical evidence, no witnesses, no nothing, because it simply did not happen.

I had been in the Air Force for 19 years and quite frankly, had no knowledge of the military injustice system. I was overseas at the time the allegations were made and was assigned a military "attorney" which was 2000 miles away. After I realized that I would not get the assistance I needed through a military attorney, I attempted to take leave back to the US to retain civilian legal assistance and my leave was denied.

My military attorney came in for the Article 32 hearing and the court-martial but did nothing in defense other than assure me they had no case. I was convicted of most of the charges and specifications despite the fact that there was nothing other than her word against mine. As a result I was confined for over three years, and dishonorably discharged.

I have attempted over the past three years to put all of this behind me and move on with my life but I have been severely hampered by the walls placed before me.

The Air Force, a year after discharge and release from confinement, came up with a notice that I was over paid and demanded payment of $2000. When I attempted to obtain info they forwarded it to a collection agency and therefore it shows up on my credit report, further impacting my ability to get on with my life. I figure that they "stole" my retirement which could be estimated at $500,000 and now are hassling me for money that I do not owe them. The IRS, forwarded my income tax return to DFAS against the alleged debt that I do not owe.

Yes I want to do anything in my power to bring the Military Injustice System to the eyes of the public,
through Congressional investigations or whatever other means available.

C.A.M.I. (Citizens Against Military Injustice)

Written Comments by Teresa Bramlett Mansanai

Submitted By C.A.M.I

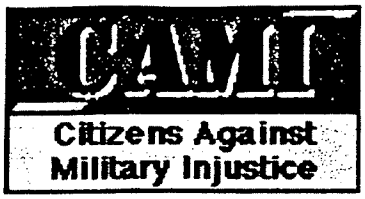
March 13, 2001

To the:

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

(The Cox Commission)

To: The Honorable Walter T. Cox, III, Senior Judge, United States Court of Appeals for the Armed Forces, Chair, and the Honorable Members, of the Commission on the fiftieth Anniversary of the Uniform Code of Military Justice.



www.militaryinjustice.org

A Mother's Nightmare in Vancouver, Washington

My son was in the Navy, stationed at NAS Bahrain (in the Persian Gulf). He was falsely accused of rape, found guilty, and sentenced to 9 years. He is now in Fort Leavenworth.

This is a young man who has helped many single mothers and single women; from buying a car for a young mother and her children, to buying $200 worth of Girl Scout cookies to help a young scout. There are many such stories. All those he helped - most had known him for 10 years or more - were willing to testify on his behalf but only I was approved to fly to Bahrain to testify.

As I tell you OUR story, you be the judge and decide if my son received a fair trial and who are the real victims.

Rape is a serious crime and I do not wish to make light of it. However, as I said before, this is OUR story because it affects our whole family - and most of our family has been or is still in the military.
If I would have found CAMI before the Article 32 Hearing, and know what I now know, I think the outcome would have been different. But since we trusted the military justice system, we went through EXACTLY what CAMI describes.

To begin with, the 31-year-old "victim" NEVER called police. Instead she called a married Navy guy she was having regular sex with. This becomes significant later on!

This fellow then called Navy Security who then contacted the Bahrain police. They then held my son for some time (with no other Americans around), then released him back to the U.S. Navy. During this time, his 5th Amendment rights were trampled on and this was used against him at court-martial. We have this fully documented in black and white!

Less than 48 hours after he was accused, an e-mail was sent to ALL personnel on the base, with my son's name, saying he was accused of rape and requesting witness information. The e-mail included the plainly prejudicial statement, "There is no greater shame than one of ours gone bad."

After 6 hours, the "victim" was allowed to go. She went directly to the married guy's apartment and stayed there while he was at work. My son's roommate, trying to get to the bottom of this, went over to the apartment. She answered the door and invited him in with a smile. As she was telling him her story, she was cleaning this guy's apartment and cooking his dinner. She was clearly HAPPY to be in this man's home! The roommate later testified on my son's behalf.

At trial, the married Navy man, who had made no secret of his adulterous affair to his buddies, flat out lied! The truth would have incriminated him for adultery. And that was acceptable to my son's defense counsel!

Less than 2 days later, our "victim" had a date with yet another Navy man and had sex with him. After the event, this guy read the e-mail which had been broadcast and tracked down my son, whom he'd never met and they had a long conversation. He then went to talk to the investigator. 24 hours later he came back to talk to my son; he was scared and said that he didn't want to get involved and, if

called to the stand, would neither confirm nor deny. Who has the power to scare someone that badly? My son's defense counsel wanted him to take a 3-year plea bargain. At this point my son contacted a Bahraini lawyer who sent her private investigator for a long discussion with my son. The next day he came back after talking to the "victim".

She was willing to drop all charges for $13,000 U.S. or if my son would marry her and bring her to the States! The prosecution and defense counsel were informed of this. However, even with a witness, this was never brought up in the Article 32 hearing or the court-martial!

The "victim" is Lebanese and reads, writes and speaks English very well. She had only lived in Bahrain for 11 months when the alleged rape took place. And since there was NO forced entry, her words, she always slept with her door unlocked. Her neighbors in that building always locked their doors. Again, this was used as evidence against my son!

Now her next-door neighbor - yet another Navy man - who stated he could hear her TV and hear her talking on the phone, testified he heard nothing on the morning in question.

At the court-martial the "victim" was asked by a juror if she ever told my son "No". Her reply was "NO". She never told my son no! To make matters worse she was caught lying on the stand MANY TIMES!

And here's one that no one caught except me, the mother. With all the so-called evidence used against my son, with her name all over it, it was spelled seven different ways; in two cases changing her name totally! Didn't anyone check her ID or passport? Didn't the prosecution or even the defense care or even notice the different spellings?

On the third day of the court-martial, the president of the jury and the presiding judge (both officers) had lunch together and were in close conversation all the way back to the courtroom. I have never seen that in our American court system. But then again the military court system is different.

Right now we are preparing for an appeal, so I can't say too much. But there are MANY key factors in my son's case that should never have even gone to an Article 32, much less a court-martial. I have always thought that the military was a branch of the United States Government and should have the same justice system. Boy, was I wrong! It's a whole different ball game, with a set of rules all its own.

Before I let another family member, loved one or friend join the military, I will tell them about my son and about CAMI. I strongly urge all of you to do the same, or at least have them visit the web site.
We need to slow down the enlistment rate or bring it to a stop until we can get at least a congressional investigation into military injustice.

Do not wait until this happens to you! It is a living nightmare!

My son was willing to lay down his life for OUR country, OUR freedom, OUR way of life, and OUR justice system. If my child was willing to die for OUR country, then shouldn't he be entitled to the SAME justice system that he would lay down his life for?

FOR THE
COX COMMISSION

DONALD D. BRAMLETT
CASE

Presented by C.A.M.I.

Speaker

Glenda Ewing

For The
Honorable Judge Cox
and
Commission

Let me start with telling you, that I come from a long line of military. My father pulled 22 years in the Air Force and my brother is a Navy Veteran. I had Aunts, Uncles, and cousins in the military. Since this has happen to my son, Donald Bramlett, our family is finishing up their time in the military and NOT re-enlisting. And our other family members are no longer thinking about joining. Our long line of military heritage has now STOP!!! No one is now enlisting. And we are now spreading the word NOT to enlist until the UCMJ can be corrected.

I will be specific on how the UCMJ is being used in my son's case. This way you can see for yourself and know what I am telling you is true.

1. The charge of Adultery needs to be removed out of the hands of the military. This is a personal matter between a husband and wife. It should be left up to the spouse how they want to handle this matter. You will find in most cases the spouse forgives the one who is cheating and tries to move on with their life.

***In my son's case - the 31 year old victim, who was having regular sex with a married Navy man....that she decided to call HIM instead of the police. In fact she had NO intention of getting the Bahrain Police involved. She wanted the attention of the married Navy man.

In the court-martial and Article 32, this man lied under oath, saying he never slept with this woman. HER re-action was, she started crying, she was hurt! But this man told my son, he had no choice, for if he would have told the truth the Navy would have court-martial him for adultery. This was acceptable to my son's defence counsel. They didn't want to get this man in trouble!

Now you have an idea how the adultery charge works!

2. My son is placed in a one man line up (just HIM). As we already know, this does NOT happen in our American court system. It is against the law! Can someone please explain why this is okay in the military justice system?

3. The violation of the Geneva Convention of 1961. Why does the military not know this?

***The married Navy man that's my son under his custody, calls the Security Department, then they decided without NO authoritzation to contact the the Bahrain Police, turn my son over to a foreign government with NO Americans present. When the victim herself did NOT want the Bahrain Police involved!!!

Please Note: The victim was NOT from Bahrain, she was from Lebanon. An important point that will come to light later on.

4. A statement that was taken from a foreign government under EXTREME duress and coercion (refer to Exhibit 2, page 1, article 3) was exceptable in the court-martial, ruled by the Judge saying my son would have made a statement anyway. NOT TRUE!!! Once back in the hands of the Navy (some 6 or 8 hours later), my son was then read his rights and chose to remain silent and wanted an attorney. ALL of this is documented!

5. Less that 24 hours later and e-mail went through the Security Department and later was the talk of the WHOLE base (refer to Exhibit 3), with my son's name on it, the charges, and a highly prejudicial statement "There is no greater shame than one of our gone bad".

***Knowing this the Judge ruled against a change of venus. Saying my son can recieved a fair trial there!!! Ladies and Gentlemen you can see for yourself in black and white. Now you be the judge for yourself. The base is the size of a football stadium and it's 11 months before the court-martial. When I was there, beside my son, during the court-martial, NOT ONE PERSON passed by my son without a comment to him. "Keep your head up. I'm praying for you. This is not right. ETC., ETC." And my son was to recieve a fair trial there. What do you think?

6. EXTORTION - (refer to Exhibit 1 in bold lettering and Exhibit 2, page 1, article 2), I think this speaks for it's self. Having witnesses that the victim herself talked too, was NEVER introduce in as evidence to clear my son and his name.

***Please note that during the 11 months before court-martial, Donny was giving leave to come home in October of 1998 and again in December of 1998. And still return to where he was station after his leave BOTH times to face court-martial. Does this sound like a guilty person or one who is trying to clear his name?

7. Evidence and the victim's name - I have brought forward for you to see for yourself in black and white, only 10 pages, but there are MANY more. (refer to Exhibit 4, pages 1 thru 10) This is evidence used against my son in his court-martial.

***Let me start with first helping to educate you through what I have found out through my own investigation. I contacted the Bahrain government. This victim is from Lebanon, she went to Bahrain and had to registry with the country for alien status, in order to work there. Through she is from an Islam country and allow formal and informal spelling of there name, she CANNOT use that in there country. She can only use the name that she registry with, that's it!!! (refer to Exhibit 4, page 7)

As you can see for yourselves, her name was spelled a few different ways. In Exhibit 4, page 8 - she had the chance to correct anything on her statement. Check the top of this page and then she how she signed it. This is a swore statement. Now turn to Exhibit 4, page 10 - she has been sworn in under oath and she how she spells her name now.

Ladies and Gentlemen in the American court system our "i's" have to be dotted and our "t's" have to be crossed. There is no excuse for messy paperwork. By looking at this evidence doesn't it make you wonder two questions? First, did anyone see or check the I.D. of this person? And two, who REALLY is the identity of this person?

8. Command Influence - Refer to Exhibit 1, page 1, paragraph 11. This is another Navy man, who did not know my son, saw the e-mail and came forward. Two days AFTER the the so-called crime had occur. He had a date with the victim, had sex, and by his account the victim was in good spirits. However, someone in command this scared this man. And he never came forward in my son's defence. And he had first hand knowledge and evidence that could have clear my son.

In Closing.....

If we cannot remove the UCMJ from the military, then is there any way that a committee could be set-up to monitor the actions of the justice system in the military? One that is NOT involved with the military, but still knows the laws?

If we cannot help those who have already gone through this, can we some how help others BEFORE they go through this? Or at least help to protect the military men and women from their civil and constitutional rights being violated?

Young men and women join the Armed Forces everyday. Do you think they would join if they know that they no longer have any civil or constitutional rights? Or their rights will be walk all over on?

As you can see for yourselves, the UCMJ is NOT working the way it was meant too. And until it does, I will help to educate as many people as I can about the injustice in the military. And help to slow down the enlist rate until something can be done about the military injustice. There are others and WE the American people are becoming an Army!!!

Thank You for your time.
Sincerely,

Teresa B. Masaniai

Teresa Bramlett Masaniai

A Mother's Nightmare

Download PDF [PDF]

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EXHIBIT 1

most just, system of military justice then existing in the world. The United States did what it has so often done in its history: it established itself as the leader, setting the standard for military justice systems for years to come.

The reforms enacted in 1968 further advanced this system, establishing a military judiciary to oversee the system, and extending attorney counsel rights to all special and general courts-martial. The system had grown and matured, and continued to serve as a model for all the world to follow.

However, even though we may view it as the best military justice system of its day, it is quite clear that even in the late 1960's and early 1970's, this was a seriously flawed and deficient system. In 1972, the leading military justice system authority of his day, and arguably of the last 50 years, Major General Kenneth Hodson, wrote several law review articles strongly urging substantial further reform to this system. One he titled "Abolish or Change." It seems clear that he believed that we either needed to fundamentally change the system, or abandon it entirely. What is scary is that we have done neither. Most of his urgent reforms remain today no more than aspirations.

The Bar Association of the District of Columbia urges that there be a serious review of this system by the Administration and by Congress, and that General Hodson's recommendations be the starting point for that effort. We join with the American Bar Association in adding a key recommendation to General Hodson's list, that a moratorium on capital punishment be imposed until this system can be brought up to a standard which will justify the conclusion that the system operates fairly and justly in accordance with the ABA's several standards and guidelines.

What are the principal recommendations? Let me summarize.

First, in this system, the convening authority, the commander who exercises prosecutorial discretion, still hand picks the court-martial "panel," the jury which decides guilt or innocence and determines the punishment. The analogy would be for the United States Attorney, the government's chief prosecutor, to be able to hand pick the actual members of the jury for a criminal trial in federal district court, and to do so entirely from employees of the Department of Justice, indeed from employees on his or her own staff. Of course, we all intuitively know that such an arrangement would be so outrageously illegal and unfair as to be not only unethical, but unconstitutional as well. Any attorney who even attempted to influence the venire would be subject to professional discipline if not criminal prosecution. Yet, in the military justice system, the attorney who advises the convening authority, and who supervises the trial counsel, typically hand picks the entire panel, and presents that list of prospective members to the convening authority, who either selects from that list, or approves the list as presented. And this has been held to be legal. The question is, whether the American people view it as either fair or just. We

do not believe that they do.

This is a system still without standing courts, and without judges who are appointed by the President with terms of office, salary protection, and full judicial powers.

This is a system which still makes court rules utilizing a small Department of Defense committee which operates largely in secret.

There is a test I suggest, to evaluate just how flawed this system is. This is it. If any of the inmates at the Disciplinary Barracks at Fort. Leavenworth were able to appeal his conviction under the constitutional criminal justice standards applicable to persons tried in federal district court or in every state in this nation, the conviction would be set aside. Every single one.

But of course, this is not a civilian system; it is military, and the rules are different. So consider this.

If any of those same inmates were able to appeal her conviction under the norms of justice and fairness applicable to the military justice systems operated by the United Kingdom, or Canada, or Australia, or Turkey, or many of the rest of the world's civilized nations, the conviction would be set aside. If it had jurisdiction, the European Court of Human Rights would find our system as unfair and unjust as it found Britain's former system, which was fundamentally identical to our current system.

If the minimum standards of fundamental fairness applicable in every other criminal justice system in this country, and in most of our allies' military justice systems were applied, Leavenworth would be a ghost town! Not a single conviction could be sustained. That to me is shocking.

And what about the six members on death row at Leavenworth? Will we one day execute one or more of them, convicted under such deplorably inadequate and outdated procedures? When they would be guaranteed a new trial in all those other systems? That thought should make your heart stop.

And even if these are determined to be legal and valid convictions, as they are being found by the Court of Appeals for the Armed Forces and the Supreme Court, can we say with any degree of certainty and reliability that these members would have been sentenced to death had they had more experienced and qualified defense teams which met the ABA guidelines? Or can we say that the sentence would have been affirmed had these members not suffered from the "ungoverned revolving door" of appellate defense counsel such as was condemned by Judge Wiss in his dissent in *Loving*? I challenge all

who consider this system to answer these questions candidly, and I absolutely suggest that the necessary certainty and reliability regarding the death sentence is simply not present.

I believe that this is the only justice system specifically excepted by the ABA from its guidelines for qualifications of counsel in capital cases. I also understand that that exception was put into place because it was viewed at the time as too difficult and costly for the services to be able to meet the guidelines. Well much water has gone under the keel in the last two decades. I suspect that if those guidelines were to be adopted today, an exception to allow capital cases in this system for its convenience, or due to the perceived cost, would not be included. Saving the military services the dollars and resources that would be needed to adequately train their attorneys is a poor excuse when the cost is that someone would face death who might not have with a better trained and more experienced lawyer.

We all believe we have the best armed forces in the world: the best Navy and Army, the best Air Force, the best Marine Corps and, of course, a Coast Guard which stands as the model for Coast Guards around the world. This is as it should be. Once, on a day we now celebrate 50 years later, we also had the best military justice system, a model for all to follow. But we have now lost that position, and in the last two decades this system has gone to the bottom of the pile - to a position so low that our procedures would be held to violate fundamental human rights if applied in most other modern military justice systems. Yet, as you noted in your recent message Judge Cox, you've heard from many in the "establishment" who will not testify here today, but who have communicated with you that they are "satisfied with the status quo." I'm sure if these current and former members did come today, they would tell you that the system "ain't broke" so "don't fix it." Well, those who would say that are terribly wrong.

This Commission is the first non-governmental organization to review this system in at least three decades, and is probably the first comprehensive review of this system in its 50 year history. It is sorely needed and long overdue. We trust that your work will lead to further in-depth studies by others, including the Administration and the Congress, and that the end result will be that we will no longer have to hold our heads in shame at how far we have fallen, but rather will be what we want to be, and say we are. What we want to be is a model for the world to emulate. What we say we are is a system of real JUSTICE. Regrettably, right now we are neither.

Thank you very much.

The Bar Association of the District of Columbia
Military Law Committee

Cox Commission Statement for the Record of

Philip D. Cave, CDR, JAGC, USN (Ret.)
107 North Payne St.
Alexandria, VA 22314

March 13, 2001

Commission on the 50th Anniversary Of the Uniform Code of Military Justice
(The "Cox Commission)

Good morning. Judge Cox, Members of the Commission, I am pleased to be here on behalf of the Bar Association of the District of Columbia, and on behalf of the men and women who serve in the armed forces of the United States.

As you know, I am a retired Navy judge advocate, now in private practice in Alexandria, Virginia.

I have been associated with military justice for more than 23 years.

I have served a total of almost nine years as a trial counsel, defense counsel, and a supervising attorney while on active duty. I have also served three years as the Deputy Director of the Navy-Marine Corps Appellate Defense Division. At other times I have been a staff judge advocate advising commanders. In the last years of my service I was involved with military justice policy and practice, particularly through the DoD Joint Service Committee on Military Justice and the Navy Clemency & Parole Board.

The recent tragic events surrounding the collision of the USS GREENVILLE has drawn media attention once again. And so too has the case involving Petty Officer Daniel King.

1. The Virginia Pilot reports that a legal defense fund has been set up for Commander Scott Waddle, CO of USS GREENVILLE - Because "While Waddle has been furnished legal representation by the Navy, he believes that counsel is inexperienced and inadequate, his appeal for different counsel (read IMC) has been denied. He has since retained civilian counsel. (March 3, 2001, *Legal Fund Created for Commander of Sub Greeneville*, the Virginian-pilot.)

The underlying issue here is the right to Individual Military Counsel, which as Captain Barry has pointed out, has been reduced to no meaningful right at all. Further, is the experience level of the judge advocates, and the persons who supervise and/or train them.

2. The Christian Science Monitor Asks "How Just Is Military Justice?" (Brad Knickerbocker, *How Just Is Us Military Justice?* Christian Science Monitor, 03/05/2001.)

3. Petty Officer King was released a few days ago after about 18 months in pretrial confinement. Along the way there were significant issues of the prosecution denying King access to his counsel. There were other issues involving the classified nature of the evidence and materials involved in the case. Several points: Compare that to the current situation involving FBI agent Hanssen. Plato Catcheris and another experienced attorney, *judge* recently issued a protective order under the Classified Information Procedures Act (CIPA).

Supreme Court Justice Oliver Wendell Holmes said that. "A System of Justice must Not Only Be Good, but it must Be Seen to Be Good."

MGen Kenneth J. Hodson, *Perspective: the Manual for Courts-martial – 1984*, 57 Mil. L. Rev. 7 (197x). "Discipline is enhanced far more by a belief that a soldier can get fair treatment than it is by any system of iron-fisted military justice which appears to be unfair."

In each of those cases the treatment of a senior officer has led to the questioning of the fairness of military justice. Today we want to speak to you on behalf of the service-member who doesn't normally have that opportunity to speak.

Captain Barry has spoken primarily about the history and philosophy surrounding what we know as the Uniform Code of Military Justice and Military Justice. I want to focus my remarks more toward the practical aspects of how we might achieve a more just system. For the first 175 years the military judicial system was intended to secure obedience to the commander. The form of justice was different to that ordinarily found in civilian criminal trials. That is no longer true for many of the courts-martials held today. Not all of these cases affect good order and discipline.

☆ There are two systems a disciplinary (justice) and a criminal (justice) system. The existence of the two systems has very different and very substantial consequences for the service-member accused of an offense. My remarks today focus on the court-martial system, the criminal justice system. Some system of immediate

and prompt discipline is necessary and appropriate. Those service-members charged with minor offenses and who have potential for further service do end up in the disciplinary justice system. Alternatively, those charged with serious offenses are effectively "discharged" from the unit and put into the criminal justice system. At that point the commander's interest in good order and discipline is minimal. Excising the accused from the unit and assuring a prosecution is the most the commander does and can do.

☆ The commander, to the greatest extent possible must be removed from any part, let alone influence in a court-martial, once the decision is made to seek a court-martial.

☆ Jurisdiction should be strictly limited to cases occurring overseas, in military ships, or on military aircraft. In addition, jurisdiction should be limited to cases where another service-member is the victim or the crime is against military property.

Once the commander has decided on a criminal trial the case must be transferred to an independent prosecuting authority who will act in the same manner as the United States Attorney. However, that attorney's role in the defense counsel preparation and presentation of a case should be removed.

Administration of the court-martial process should fall to an independent administrative officer and clerk of court, in the same manner as found in the United States District Court. They could, but need not, be the same entity.

The accused should have access to an independent defense counsel, possibly from a "joint defense command." That defense counsel should be supervised by an experienced litigator who has the funding and the authority to ensure proper resources are provided to the defense counsel. At a minimum this should include access to an independent investigator, who has a badge and who has access to data. There is a general recognition amongst the Service judge advocates that the cases heard are more complex and that their counsel do not always have the requisite experience. Therefore the IMC right should be expanded closer to what it used to be (worldwide, based purely on scheduling).

The Ungoverned Revolving Door of Defense Counsel should be addressed. In *United States V. Loving*, 41 M.j. 213, 320 (199)(Wiss, J., dissenting), seven appellate counsel represented appellant in the court of military review; five others represented him in this court. it is unclear at times who was the lead counsel in the court of military review because counsel is not required by that court's rules of practice and procedure or by the court's internal operating procedure (see rule 26, Court of Military Review Rules of Practice And

Procedure, 22 M.J. CXXXVIII) to file a motion for leave to withdraw if the reason for withdrawal was reassignment outside the defense appellate division and if the chief of that division assigns new counsel from within the division.

☆☆ There should be a standing judiciary where judges, with tenure, are assigned to a judicial circuit. There should be two levels of judge. A military magistrate judge should be permitted to decide all pretrial issues, including search authorizations, suppression motions, confinement hearings, and Article 32 investigations. The military magistrate judge should be permitted to accept guilty pleas and impose a sentence in certain cases.

A second tier trial judiciary, with tenure, should then be available. The judiciary could be composed of a combination of military officers, civilians, and judge advocate recalled for the purpose.

☆ The trial judge should retain jurisdication over the case from start to end. The end being docketing at the Court of Criminal Appeals. The trial judge should have the power to issue orders and writs to ensure the fair and orderly process of the trial and to ensure the fair and orderly process of the post-trial processing of the case. The trial judge should be able to hold post-trial hearings for any reason including a motion for a new trial or for post-trial release from confinement.

The second, and only other input, of the commander to a court-martial should be a decision on executive clemency, to include return to duty. We have addressed in detail in our written submissions the need to make punishments more flexible, less stigmatizing, and with a shorter term effect.

The present post-trial review process should be retained, but with significant improvement, not the least being tenure for the judges. Lost in the humor of the telling, was a not too subtle point of Judge James Baker's anecdote about his reserve officer commission. "How do I give up my commission?" -- because I am very conscious that this Court is a civilian court. (Retirement of Hon. Thomas A. Granahan, Clerk, U.S. Court of Appeals for the Armed Forces, CAAF, 1 March 2001.)

☆ The ability of the military member to seek federal review of her court-martial via *habeas corpus* petitions should be retained. An Article III court hears the case, and the substantial benefits of the Federal Rules of Civil Procedure are available in such actions.

TESTIMONY FOR THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

by Laura Murphy
Director
Washington Office
American Civil Liberties Union
122 Maryland Avenue, N.E.
Washington, DC 20002
202-544-1681

Dwight H. Sullivan
Managing Attorney
American Civil Liberties Union of Maryland
2219 St. Paul Street
Baltimore, MD 21218
410-889-8555

Re: Topics III.C.6; V.A; VII.D; VII.E (Military Death Penalty)

I. The ACLU's Interest

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members. Since its founding in 1920, the ACLU has devoted its resources and energies to protecting the constitutional rights and individual liberties of all Americans. The ACLU has sought to protect servicmembers' rights by providing a civilian perspective on the military justice system. The ACLU has participated as *amicus curiae* in many important military cases and has testified before Congress on a number of military justice matters, including Senator Ervin's 1996 hearings on servicemembers' constitutional rights. The ACLU of Maryland is particularly concerned with protecting the rights of servicemembers who are tried in capital cases because one of the six servicemembers on military death row is from Maryland.

II. Should Capital Punishment be Eliminated for Peacetime Offenses? (Topic V.A)

The ACLU recommends the elimination of capital punishment for peacetime offenses. A peacetime death penalty is unnecessary for maintaining good order and discipline, diverts military justice resources that would be better used for other purposes, and subjects servicemembers to the ultimate criminal sanction without the benefit of important constitutional protections they would enjoy in civilian proceedings. The availability of life without parole further diminishes any justification for a peacetime military death penalty.

A. *The military death penalty is unnecessary for good order and discipline*

The United States Marine Corps has not carried out an execution since 1817. LIEUTENANT COLONEL GARY D. SOLIS, USMC, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 7 (1989). In the years since, the Marine Corps has developed a world-wide reputation for good order and discipline. The Marine Corps example belies any notion that the death penalty is necessary to build and maintain an effective fighting force.

Throughout this nation's history, peacetime military executions have been exceedingly rare. Since the end of the Korean conflict, the U.S. military has executed only 12 servicemembers, none since 1961. The military death penalty is simply not the linchpin of good order and discipline.

B. *The military death penalty consumes huge quantities of military justice resources*

Several of the Commission members are personally familiar with the enormous investment of military justice resources that have been sunk into capital cases. The military has received little in return. Since the military death penalty was revived in 1984, the Court of Appeals for the Armed Forces has affirmed two death sentences (*Loving* and *Gray*), while setting aside four (*Thomas*, *Simoy*, *Curtis*, and *Murphy*) and affirming an intermediate appellate court ruling setting aside a fifth (*Dock*). The resources that were devoted to these and other failed capital prosecutions would have been better spent ensuring speedy trial and review for other servicemembers. The resulting needless system-wide delay also harms the armed services themselves, as their available end strengths are reduced by the number of servicemembers on appellate leave at the end of each fiscal year. Without each military death penalty case consuming literally thousands of hours each year, backlogs would be reduced and processing times reduced.

C. *The military death penalty is not limited by important procedural safeguards*

The military justice system is, overall, fair and accurate. On a day-to-day basis, the military justice system dispenses justice better than do many, if not most, state criminal courts. The military justice system, however, has its peculiarities, several of which threaten its ability to impose the death penalty fairly. Chief among these are the lack of a right to a randomly-selected jury and the lack of a right to a twelve-member jury. Commentators are in virtually complete accord that the greatest fault of the military justice system is the convening authority's selection of court-martial members. As the Chairman of the Commission has noted, it is "the most vulnerable aspect of the court-martial system; the easiest for the critics to attack." *United States v. Smith*, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring). Regardless of whether courts-martial handpicked by the convening authority are fair enough to convict and confine servicemembers, they are not sufficiently fair to take a servicemember's life. In a capital case, the accused does not have the option of being tried by an independent military judge. *See* UCMJ art. 18, 10 U.S.C. § 818 (2000). Rather, he or she must be tried by members personally selected by the same general or admiral who chose to seek a death sentence. Convening authorities or their staffs have

sometimes misused the power to select court-martial panels. *See, e.g.*, *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991); *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988). The particularly egregious court stacking in *Smith* "would never have been uncovered if the [convening authority's] legal clerk had not been taking a college course from the civilian defense counsel." *Id.* at 252 (Cox, J., concurring). Such a fortuity is unlikely to occur in many cases. A system so vulnerable to surreptitious manipulation lacks the appearance of fairness necessary to take a person's life.

Most military capital offenses could be tried capitally either in a U.S. district court or a state court. A recent federal law even extends U.S. district court jurisdiction to offenses committed by servicemembers overseas. *See* 18 U.S.C. §§ 3261-3267 (2000). Thus, for some overseas military capital offenses, the United States could seek a death sentence by administratively discharging the servicemember, *see id.* at § 3261(d)(1), and trying him or her in a U.S. district court, where all of the Bill of Rights' protections are fully available.

D. *Life without parole is a viable alternative to the military death penalty*

For potentially-capital offenses committed since November 1997, the punishment of life without possibility of parole is available. *See* UCMJ art. 56a, 10 U.S.C. § 56a (2000). Since Congress adopted the life without parole option, no servicemember has been sentenced to death. The availability of life without parole and the possibility of civilian capital prosecution for many death-eligible military offenses render the military death penalty unnecessary.

III. Should Courts-Martial Be Required to Have 12 Members for Capital Cases? (Topics III.C.6, VII.E)

The ACLU recommends that capital courts-martial have a fixed number of members and that the number be set at twelve.

A. *Capital court-martial panels should have twelve members*

While some states use juries with as few as six members in ordinary criminal cases, "no State provides for less than 12 jurors [in capital cases]—a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty." *Williams v. Florida*, 399 U.S. 78, 103 (1970). Capital courts-martial, however, have no fixed size. The only size requirements are that at least five members sit in the case and, if an enlisted accused so requests, at least one-third of the members be enlisted. In practice, the size of capital court-martial panels varies considerably. The panels that condemned the six servicemembers on military death row today ranged in size from six to twelve members.

The military's departure from the universal civilian practice is particularly worrisome because some empirical studies have suggested that twelve-member juries are more likely to reach accurate results than are smaller juries. *See generally* David Kaye, *And Then There Were Twelve:*

Statistical Reasoning, the Supreme Court, and the Size of the Jury, 68 CALIF. L. REV. 1004, 1019-21 (1980). A five-member civilian jury would be unconstitutional in any trial that could result in more than six months' confinement. *See Ballew v. Georgia*, 435 U.S. 223 (1978); *Baldwin v. New York*, 399 U.S. 66 (1970). Yet a five-member court-martial can impose death.

Five-member courts-martial have not always been permissible. The 1775 Articles of War governing the Continental Army required that general courts-martial consist of thirteen officers. Articles of War of June 30, 1775, art. 33, 2 J. Cont. Cong. 111, 117 (1775). Congress authorized courts-martial with as few as five members in 1786, after finding that some Army detachments had an insufficient number of officers to convene a thirteen-member court-martial. Articles of May 31, 1786, 30 J. Cont. Cong. 316 (1786). At that time, when only commissioned officers could serve as court-martial members, the entire Army contained fewer than forty officers. Richard Kohn, *Eagle and Sword* 70 (1975). While five-member courts-martial were a necessity in 1786, they are not today. The authorized strength for Department of Defense active duty forces on September 30, 2000 was 1,385,432. Nat'l Def. Auth. Act for Fiscal Year 2000, Pub. L. No. 106-65, § 401, 113 Stat. 512, 585 (1999). Obtaining twelve court-martial members from among well more than one million active duty personnel, including approximately 200,000 commissioned officers, would pose no burden on the American military.

Requiring twelve-member capital panels would also be consistent with Congress' preference for military procedural rules that mirror those used in U.S. district courts. *See* UCMJ art. 36, 10 U.S.C. § 836.

B. *Capital court-martial panels should be of fixed size*

A particularly disturbing aspect of the current court-martial size rules is the lack of a fixed number of members, whatever that fixed number may be. A death sentence can result only if the members unanimously convict the accused of a death-eligible offense, unanimously find the existence of a designated aggravating factor, unanimously conclude that the aggravating circumstances substantially outweigh the mitigating circumstances, and unanimously conclude that death is the appropriate punishment. *See United States v. Simoy*, 50 M.J. 1, 2 (1998). Thus, with a twelve-member court-martial, the government must win forty-eight votes to obtain a death sentence. Where only six members sit on the panel the government need win only twenty-four votes. The crucial impact of panel size is apparent. *See United States v. Simoy*, 46 M.J. 592, 625 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring), *rev'd*, 50 M.J. 1 (1998).

The combination of the requirement for unanimity and the variable panel size creates an inherent bias for the government in the impaneling process. Because smaller panels favor the government, the government has an incentive to voir dire the members and exercise challenges vigorously. The defense, on the other hand, has an incentive not to engage in voir dire or challenges. The system transforms the facially-neutral voir dire and challenge procedures into weapons wielded exclusively by the trial counsel. Capital court-martial panels tilting toward the government are the inevitable result.

In addition to producing biased panels, the lack of a fixed number of members allows an arbitrary factor to influence who is sentenced to death. Common sense suggests that the number of members impaneled at the end of voir dire and challenges will vary directly with the number of members originally detailed to the court-martial. But convening authorities have no guidance concerning how many members to appoint to capital cases beyond the requirement that the final panel include at least five members. The variable nature of court-martial panel size also introduces an arbitrary and irrational factor into the death penalty sentencing decision. Imagine two co-conspirators being tried for the same murder. What if one was tried before a six-member panel while the other was tried before a twelve-member panel? The resulting unfairness is facially obvious, yet such a scenario could easily occur in the military justice system. The likelihood of a military defendant being sentenced to death is impacted greatly by the convening authority's unconstrained discretion, the very definition of arbitrariness.

Accordingly, either a Rule for Court-Martial or a UCMJ amendment should be adopted setting a fixed size for capital court-martial panels. In keeping with universal civilian practice, that fixed number should be twelve.

IV. Should Racial Justice Act Instructions Be Required in Capital Cases? (Topic VII.D)

The ACLU recommends that an anti-discrimination instruction be required in military capital cases. The percentage of minorities on military death row is higher than in any state in the country, and is only six-tenths of one percent lower than on federal death row. *See* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (Winter 2001). The racial disparity on federal death row has prompted a study by the Department of Justice. No comparable study has been conducted of the racial disparity on military death row. Measures must be adopted to address the military death penalty system's persistent racial disparity.

Of the six servicemembers on death row, four are African-American, one is a native Pacific Islander, and one is white. Thus, an incredible 83.34 percent of the military death row inmates are racial minorities. Such over representation of minorities on military death row has persisted for decades. For example, in 1983, when the Court of Military Appeals' *Matthews* decision led to the reversal of every military death sentence, seven servicemembers were on military death row. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW, U.S.A. 598 (Dec. 20, 1983). Five were African-American, one was Latino, and only one was white, *id.*, a startlingly similar demographic breakdown to military death row today. Of the twelve servicemembers executed since the Uniform Code of Military Justice's adoption, eleven were African-American. *See* Dwight Sullivan, *Military Death Row: Separate, Not Equal*, NAT'L L.J., Nov. 6, 1995, at A19-A20. Even during World War II, when African-Americans constituted only a small percentage of the military, 55 of 70 U.S. servicemembers executed in Europe were African-American. *See generally* J. Robert Lilly, *Dirty Details: Executing U.S. Soldiers During World War II*, 42 CRIME & DELINQUENCY 491 (1996). Thus, for more than half a century, minorities have comprised a disproportionate percentage of the military accused sentenced to death and a disproportionate percentage of the servicemembers who have actually been executed.

The military death penalty system also demonstrates a second racial disparity: the records in military death penalty cases establish that every servicemember on death row today was

convicted of killing a white person. This is consistent with civilian studies establishing that the victim's race is one of the key factors in determining who is sentenced to life and who is sentenced to death. In its comprehensive review of empirical research on race and capital punishment, the General Accounting Office (GAO) found, "In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks." GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990), *reprinted at* 136 CONG. REC. 12267, 12268 (1990). The GAO concluded that the evidence shows a "pattern" of "racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision." *Id.* at 5, 136 CONG. REC. at 12268.

Nothing could be more debilitating to any system of justice than the existence of racial discrimination. Even the mere appearance of racial discrimination can scuttle the public's confidence in a justice system. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 442 U.S. 545, 555 (1979). Protecting the criminal justice system from racism is particularly important in the military. As Judge Wiss wrote, "Racial discrimination is anathema to the military justice system. It ought not—and it will not—be tolerated in any form. Courts of law may not be able to cure the personal bedevilment of racial prejudice; but courts of law can and must ensure that such human bigotry and insensitivity do not rot public and governmental institutions." *United States v. Greene*, 36 M.J. 274, 282 (C.M.A. 1993) (Wiss, J., concurring).

One step in addressing the military death penalty system's persistent racial disparities would be to require an instruction that race may not be taken into account in capital courts-martial. Two separate federal statutes require an anti-discrimination instruction in civilian capital cases tried in U.S. district courts. In the Anti-Drug Abuse Act of 1988, Congress required that in capital cases prosecuted under that statute, "the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race . . . of the defendant or the victim." 21 U.S.C. § 848(o) (2000). Congress further required the judge to instruct the jury that it may not "recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race . . . of the defendant, or the victim, may be." *Id.* Finally, Congress required each juror to sign a certificate stating that he or she did not consider prohibited factors, including race, and that his or her sentencing decision would have been the same regardless of the defendant's and victim's race. *Id.* Congress was so concerned with the effect of race on federal death sentences that six years later, it required federal district court judges to give an anti-discrimination instruction in all capital jury trials as a "[s]pecial precaution to ensure against discrimination." 18 U.S.C. § 3593(f) (2000).

Neither of those statutes applies directly to the military. However, in *United States v. Curtis*, the Court of Military Appeals indicated that the instruction mandated by 21 U.S.C. § 848(o) "certainly seems desirable." 32 M.J. 252, 268 n.21 (C.M.A.), *cert. denied*, 502 U.S. 952 (1991). The Commission should recommend that either the President or Congress require a similar instruction in military justice cases. The Commission should also consider other means of addressing the persistent racial disparities on military death row, including calling for a multiple regression analysis to more carefully scrutinize the effect of the accused's and the victim's race on military death sentences.

Testimony of William Galvin
Center on Conscience & War
(NISBCO)

I am testifying concerning item I B 12 on the agenda: Do evolving International Human Rights Standards indicate a need for revisiting the code?

Article 18 of the Universal Declaration of Human Rights (adopted in 1948) declares "Everyone shall have the right to freedom of thought, conscience and religion". In 1966, this human right was codified in Article 18 of the International Covenant on Civil and Political Rights. This is a treaty which was signed by the US, confirmed by the Senate, and is therefore binding on military courts as is any act of Congress. (U.S. Constitution, Article VI)

In 1993, the UN Human Rights Committee (which was established to interpret the legal implications of the International Covenants), ruled *inter alia* that "a right of conscientious objection can be derived from Article 18 and that, when this right is recognized by law...there should be no discrimination against conscientious objectors because they have failed to perform military service." [General Comment (No.22(48)) of the United Nations Human Rights Committee, adopted at its 48th session in 1993.] This was affirmed by the Human Rights Commission (by consensus) on March 8, 1995. (E/CN.4/RES/1995/83)

According to US military policy, conscientious objectors(CO) who make proper application and document their claim should be discharged. It is a rather lengthy process, which includes written application, several interviews, and reports going up the chain of command. The process usually takes at least six months, although a year or longer is not unusual. During this time, according to military regulations, conscientious objectors are required to obey all lawful orders, and perform their duties as expected.

Military regulations do provide that, whenever possible, a conscientious objector should be placed in duties that conflict as little as possible with their stated beliefs. But military necessity is always of primary concern. Under current policies conscientious objectors do not have the right to insist that they be assigned to certain duties, although they can submit a request for particular assignments they would find less objectionable. But they cannot demand a transfer to another unit, and they may not be able to prevent their transfer to another duty station or deployment to a combat zone.

Courts have, upon occasion, ruled in favor of conscientious objectors who have disobeyed orders that violated their beliefs. But courts have provided this protection only in certain, very limited circumstances. [See U. S. v. Noyd, 18 U.S.C. M. A. 483, 40 C. M. R. 195 (1967). Parisi v. Davidson, 405 U.S. 34 (1972)]

This situation often results in severe conflicts of conscience for conscientious objectors while their claims are pending. They know that failure to obey lawful orders will result in loss of veterans' benefits, but it may also result in court martial, and will probably result in their

conscientious objector applications being put on hold while charges for violating the UCMJ are being processed.

Some conscientious objectors even fear that obeying orders that are given to them may be seen as evidence of their insincerity as conscientious objectors. Although a conscientious objector application cannot be turned down simply because the applicant obeyed orders, this is nevertheless a real dilemma for some.

Conscientious objectors in America have faced varying degrees of harassment and abuse since colonial times. During World War I alone, at least 17 conscientious objectors died in US military prisons, mostly because of abuse or neglect. While the current policy of discharging conscientious objectors is a vast improvement over policies in effect prior to 1962, current military policies still fall short of international human rights standards. Here are a few examples that demonstrate the problem.

In the case of Cole v. Commanding Officer [747 F. 2d 217 (4th Cir. 1984)(en banc)], after applying and going through all of her interviews, Leslie Cole was recommended for discharge as a conscientious objector. While her claim was pending, she refused to wear the uniform and obey orders to perform noncombatant duties, because any continuing participation in the military violated her beliefs. She was court-martialed, and once in prison, not allowed to wear her civilian clothes. Because she refused to wear the uniform, she was held in prison wrapped in a sheet. She was not allowed visitors (including clergy and, initially, legal counsel) because she didn't have clothes on.

But her main problem was that *the Navy stopped processing her conscientious objector claim.* Her choices were either to violate military regulations to be faithful to her beliefs, or to obey orders that violated her beliefs so that the Navy would process her for discharge as a conscientious objector. She ultimately received a Bad Conduct Discharge after confinement for refusing an order.

During the Gulf War, discharge processing for any reason, including conscientious objection, was suspended under the "Stop-Loss Order". This forced many conscientious objectors who had been struggling with the conflicts between 'duty to God' and 'duty to country' to violate military law. George Morse was among those who were court martialed for refusing to obey orders, specifically an order to assist his unit in preparing for deployment to the Gulf. In an interview Morse stated that he had become a CO after his re-enlistment four years earlier, but that he had been prepared to serve his full term until he received orders to Saudi Arabia.

George Morse was the first Gulf War conscientious objector to be adopted by Amnesty International as a prisoner of conscience. When Amnesty International announced its decision to adopt George and other Gulf War COs, it stated that the UN Commission on Human Rights had recognized conscientious objection to military service as a legitimate exercise of the right to freedom of thought, conscience, and religion. "We believe that is a right at all times—before joining the army, while in training, or even during war," Amnesty International said. AI later adopted other Gulf War conscientious objectors, including some of the 26 conscientious objectors imprisoned at Camp LeJeune.

In U.S. v. Morse [34 M.J. 677 (ACMR, 1992)] the court looked at very specific Army regulations relating to conscientious objection. The standing regulation governing CO discharges (AR 600-43 paragraph 2-10) reads in part, "persons who have submitted applications for conscientious objector status will be retained in their units and assigned duties providing minimum practicable conflicts with their asserted beliefs, pending a final decision on their applications. Reassignment orders received after the submission of an application will be delayed until the approval authority makes a final determination....A person who receives orders for reassignment but has not submitted the application, ... may not apply for conscientious objector status until he or she arrives at the new permanent duty station."

To implement the "Stop-Loss Order", the Army issued a special message in October of 1990: Desert Shield Personnel Message #31-Personnel Applying for Conscientious Objector Status. The message provided that for the purposes of AR 600-43 paragraph 2-10c, the term reassignment includes "the deployment of personnel away from their present duty location." It further provided "Notice of 'reassignment' to include an alert for deployment, temporarily precludes soldiers from submitting applications for conscientious objector status until after they have arrived at their new duty location." Simply stated, that meant that conscientious objectors were required to report to the Gulf before they were able to apply for discharge.

George Morse's conviction for refusing orders was ultimately upheld. The court ruled that the 'Special Personnel Message' requiring deployment before being able to apply for conscientious objector discharge was legitimate. George served five months in confinement and received a Bad Conduct Discharge.

The court decisions upholding the military's suspension of CO discharge processing during the Gulf War created tremendous problems for scores of military service members, in all branches, who ended up in military jails. Most COs felt they had no choice other than to violate the law. Many of these conscientious objectors reported harassment and abuse, some even reported being beat up. (See attachment- letter from James E. Summers) In the cases of Eric Larsen and Kevin Sparrock (two of the 26 COs imprisoned at LeJeune) the Marine prosecutors requested the death penalty for desertion in time of war.

There is probably no way to know exactly how many conscientious objectors were affected by this policy. The Boston Globe reported at the time that there were over 2,500 COs seeking discharge from the US military!

More recently, the case of Dr. Dennis Lipton demonstrates how current military law falls short of international human rights standards when it comes to protecting the rights of conscientious objectors. In 1993, Dennis Lipton signed an agreement with the Air Force by which his medical school expenses were paid in exchange for service after he became a doctor. During his third year of Medical School, working in an inner city emergency room, he saw firsthand the effects of violence on the human body while treating gunshot and knife wounds. In January 1997, he treated a World War II fighter pilot who had never fully recovered from his experiences.

In May of 1997, while listening to a sermon in church, Dr. Lipton's conscientious objector beliefs crystalized. He realized that his Christian faith would not permit him to continue serving

in an institution that caused the destruction of human life, and shortly thereafter he applied for discharge as a conscientious objector. Although he received a positive report from the chaplain, the investigating officer felt he was insincere. Ultimately his claim was turned down, and while his petition for a writ of habeas corpus was pending, Dr. Lipton was ordered to report for active duty. He reported, but refused to wear the uniform or to train. He was court-martialed and sentenced to five days confinement, given a dismissal, and fined $60,000. After the Air Force turned down Dr. Lipton's CO application, he filed a petition for a writ of habeas corpus which the district court denied. The Court of Appeals later affirmed. [Lipton v. Peters, No. 00-50200 (5th Cir. Dec. 1, 2000)]

In one currently pending conscientious objector case of which I am personally aware, the command has consistently provided inaccurate information to the conscientious objector applicant. The command seemed to be making up its own standards for what should qualify. Even though the record clearly demonstrates that he is a conscientious objector, and both his investigating officer and his commanding officer have written in their reports that he is sincere in his CO beliefs, they are both recommending that his claim be denied. Hopefully those further up the chain of command will look at this and see that the record indicates this young man should in fact be discharged. But in the meantime, while his claim is pending, his commander is now threatening to transfer him to duty on a combat ship. Should that happen, he will feel compelled by his conscience to refuse the order. He would then be facing all of the penalties mentioned above: loss of veterans' benefits, court-martial, and suspension of processing on his conscientious objector claim.

The UCMJ should be revisited in light of evolving international human rights standards. Ideally, an article should be added to the UCMJ that reflects International Human Rights Law, specifically, "there should be no discrimination against conscientious objectors because they have failed to perform military service." However, this commission should be aware that adoption of conscientious objection as an affirmative defense to refusing orders (item IV D on the agenda) would be a substantial step in the right direction. I urge you to ensure that this kind of protection is included in your official recommendations for revision of the UCMJ.

Respectfully submitted,

William Galvin
Counseling Coordinator
Center on Conscience & War
1830 Connecticut Ave. NW
Washington, DC 20009
202-483-2220
202-483-1246(fax)
nisbco@nisbco.org

Excerpts from a letter written in March, 1991, by one of the conscientious objectors being held at Camp LeJeune

My name is James E. Summers, Jr. I am a Lance Corporal in the United States Marine Reserves. I joined the reserves two and a half years ago at the age of eighteen. I was a senior in high school at the time.

Within the last two years, I have had a strong change within my conscience. I do not believe in taking another man's life. Because of these deeply held feelings, I applied for conscientious objector status on November 27, 1990. My reserve unit was mobilized and sent to Saudi Arabia.

I tried to report to my reserve unit and be processed as a CO, but my superior officers threatened to "beat me and see if I was really a conscientious objector." I felt that my life would be in danger. I could not report.

I turned myself in to the mercy of the Marine Corps on December 26, 1990 at my reserve center in Jacksonville, Florida. My command immediately flew me to Camp Lejeune, North Carolina. I have been confined here ever since. I am far from completing the CO process.
My commanding general, General Cooper, has openly said that he would like to see all of the conscientious objectors get the maximum amount of time in federal prison.

During the first week of January 1991, my parents received an extremely threatening letter at their motel while visiting me at Camp Lejeune. This letter threatened my family's lives as well as mine. My family immediately packed their belongings and went home.

Three of the conscientious objectors being confined here at Camp Lejeune have had nervous breakdowns because of the extreme amount of mental torture that we face on a daily basis.

On March 8, 1991, 1 was forcefully taken to the brig. My superior NCOs did not tell me why I was going to prison, nor did they call my attorneys to inform them of the situation. I spent five days in a maximum security cell.

The prison guards were constantly making fun of me because I was a conscientious objector. I was considered dangerous and an escape risk. There were always four guards escorting me within the prison. I always had leg irons and hand cuffs on. My arms were chained around my waist.

After five days of being in maximum security I had an investigating officer hearing. During this hearing the appointed investigating officer concluded that I should have never been there in the first place. I was released from prison and sent back to my holding unit on the base.

I believe in the freedom our country was founded upon and that every American citizen has the right to life, liberty, and pursuit of happiness.

Yes, I did sign a contract with the military, however, I am willing to fulfill the remainder of my contract in any civilian government job as long as it does not conflict with my beliefs or support the"war machine."

On June 5 James Summers received a 14 month sentence in the brig at Camp LeJeune

Commission on the 50th Anniversary of the Uniform Code of Military Justice (UCMJ)

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POINT PAPER

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PRESENTATION BY

Jeffrey A. Trueman
Founder/President
Veterans Equal Rights Protection Advocacy
~VERPA~
Duluth, Minnesota 55803
"Veterans For Equal Justice Under Law"
Inc. December 1999
Web Site: www.verpa.tpub.com

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Presentation Exhibits

- Exhibit (1):

"Beyond the Scope of Justice: The Chilling Effects of the Feres Doctrine in the United States Armed Forces"

- Exhibit (2):

VERPA's Nationwide Petition to Reform/Repeal the Feres Doctrine

Commission on the 50th Anniversary of the Uniform Code of Military Justice (UCMJ)

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VERPA POINT PAPER

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I. Introduction

Good morning Commission members.

I am here today to provide a **"Point Paper"** with respect to the Commission's topic issue:

> **"Should decisions of the Boards for Correction of Military and Naval Records be reviewable by the United States Court of Appeals for the Armed Forces?"**

Due to time constraints, I will be brief with this Introduction.

I am Jeffrey A. Trueman, founder of **"VERPA"**. We are a collaboration of American citizens, to include veterans, our families and friends, who believe the military system of justice is unfair and lacks accountability.

For the record, I do not claim to be an expert in military justice, however, having served honorably for 11 1/2 years in the United States Navy and in my work as a veterans' rights advocate, I speak on behalf of many veterans and their loved ones. Real people, with real Constitutional issues denied redress by the federal courts and the United States Congress, arising out of "military service".

To advocate our point for reform of the military's system of justice, our present mission is to educate the American People of the **"Feres Doctrine"**. In summary, we believe the ***"Doctrine"*** denies servicemembers **"equal protection"** under the ***United States Constitution*** and allows human and civil rights abuses in the Armed Forces to go unchecked.

If it interests this Commission, and the Public, a complete explanation of VERPA and our mission can be reviewed at our web site: **www.verpa.tpub.com.**

Now that I have briefly explained VERPA, there is a nexus between the *"Feres Doctrine"* and the administration of justice under the ***Uniform Code of Military Justice (UCMJ).*** The two laws are intertwined.

For the Commission's information, I have attached to this point paper two exhibits we feel are pertinent and relevant for true reforms of the UCMJ to be undertaken. These our, (1), VERPA's nationwide petition to reform or repeal the "Doctrine" and (2), VERPA's first book, ***"Beyond the Scope of Justice: The Chilling Effects of the Feres Doctrine."***

I would like to thank the Commission, and all other organizations who made this historical event possible so that I could speak here today, on behalf of my brother and sister veterans and their families.

II. Nexus Between The UCMJ & BCMRs

A. Purpose Of The UCMJ

The UCMJ was designed to insure a military judicial system which balanced the need to maintain discipline in the armed forces and the desire to give servicemembers accused of crime rights, paralleling as nearly as possible the rights enjoyed by accused persons in the civilian community.

Moreover, the UCMJ and its "administrative" system of justice exists to provide commanders and supervisors the means necessary to ensure military core values, and to remove those who are "disruptive to good order and discipline".

To connect the UCMJ and BCMR systems for the purposes of this presentation, let me pose a brief hypothetical question. This question will tie in with our answer to the Commission's topic issue and proposed reforms in the later.

> ***"If a military member with an "exemplary record" proceeds under Article 138 of the UCMJ and alleges a commander is abusing his or her powers, and unfavorable personnel actions in violation of federal law (re: The Military Whistleblower Protection Act), are undertaken by the commander, thus, results in the member's wrongful termination from the armed forces, where does that member seek justice?"***

The answer, under existing federal law, is that the member must proceed to the BCMRs. Let me explain briefly the "mandate" of Boards:

B. Mandate Of The Board For Correction Of Military Records (BCMRs)

According to ***Public Law, Title 10, U.S.C. Sections 1034 and 1552***, the function of the BCMRs is to determine the existence of material error or injustice in the military records of current or former members of the United States Armed Forces. Hence, the Boards' mandate is to decide by a preponderance of the evidence before it, whether a petitioner's claim of material error or injustice merits correction.

Obviously, for the Commission to include the topic issue as to whether oversight of the BCMRs are necessary, I am guessing, many other veterans who petitioned these Boards feel they were denied justice.

It is VERPA's position that indeed, these Boards are in desperate need of oversight.

For example, these Boards are claimed to be an ***"independent"*** administrative review authority under Congressional mandate, to correct material error or injustice in a servicemember's record. The legal "yardstick" to determine an error or injustice in a military records is predicated on the ***"preponderance of the evidence"***. For those active duty military personnel, veterans and citizens who do not know what this means, let me explain:

> ***"Preponderance of the evidence is a general standard of proof in civil cases. Evidence preponderate where it is more convincing to the trier [of facts] than the opposing evidence." Evidence Sec. 339 (4th Ed. 1992). It thus, refers to proof which leads the trier of facts to find that the existence of the fact in issue is more probably than not."***

Having stated the above, let me now address the Commission's topic issue.

III. Commission's Topic Issue

To address the Commission's topic issue as to whether or not, the decisions of the BCMRs should be reviewed by an appellant authority, mainly, the United States Court of Appeals for the Armed Forces, the short answer is "YES".

It is the position of the Pentagon that ***"even the appearance of improprieties"*** will not be tolerated. Let me proceed, keeping in mind the "hypothetical question" I presented in Discussion Topic I A.

Upon a wrongful discharge a veteran must apply for correction at the BCMR, unless, proceeding with that remedy would be futile.

Going back to the hypothetical question. The military member was discharged for proceeding under Article 138 and follow on communications under the Military Whistleblower Act. Let me point out one serious conflict of interest that the veteran will face under the present system.

- In the Article 138 process, the final determining authority as to the merits of a charge of abuse of power is the Assistant Secretary, Manpower & Reserve Affairs (M&RA), for each uniform department. If the complainant is denied redress, it is a dead issue under the UCMJ.

Now, the conflict.

Although, BCMRs are allegedly "independent" as I previously stated, are they really? For the record, BCMRs are "supervised" by the Assistant Secretary, M&RA for their respective departments. Is this not a conflict of interest?

Overall, for a veteran to obtain "justice" at a BCMR in the wake of a retaliatory discharge, and who utilizes the Article 138 UCMJ process and Military Whistleblower Protection Act, the BCMR would have to overturn its supervisory officials' findings. This is without question highly unlikely.

My point, BCMRs are controlled by the "rule of rank" versus the "rule of law". If this charge seems "out of line", I can only suggest this Commission send out surveys to all veterans who sought justice under the BCMR system.

I am 100% confident, issues of denial of ***"due process"*** under this system, be it failure of evidence to be introduced into the record, false information accepted by the Boards to defend their departments, etc., etc., only due to the lack of "checks and balances" on these Boards, is a very genuine justice issue.

Therefore, in short, oversight of these Boards are long overdue.

IV. Proposed Reforms Under The UCMJ & BCMRs Systems Of Justice

The following proposed reforms are respectfully submitted to the Commission for consideration and potential incorporation into its Report to the President and Congress of the United States. They are intended to strengthen the administration of justice within the United States Armed Forces.

I will be brief on each proposed reform. However, if the Commission would like a more precise explanation, I will be glad to provide this information in the future.

A. Repeal Of UCMJ Article 138

With the enactment of the ***Military Whistleblower Protection Act (MWBPA), Public Law, Title 10, U.S.C. Section 1034***, this Article is null and void. Under the MWBPA, servicemembers are provided a legal right to circumvent their chain of commands and report **fraud, waste and abuse** directly to the **Department of Defense Inspector General.**

B. Consolidation of BMCRs

The present system allows for too many conflicts of interest. Hence, the BCMRs should be consolidate under the command and its decisions must be reviewed by the United States Court of Appeals for the Armed Forces. Moreover, "term limits" of BCMR' members must be instituted.

C. Consolidation of Military Inspectors Generals (IG)

The present system allows for too many conflicts of interests, lack of "independence" with regard to investigating claims of fraud, waste and abuse. The system, is severely undermanned and financially wasteful. Hence, all military departmental IG should be consolidated under the direct supervision of the Department of Defense Inspector General.

D. Amendments to the Military Whistleblower Protection Act

(1) Rename the Act to ***"Military Ethical Resisters Act"***. The reason being the term "Whistleblower" is associated with terms like "nark, rat". Military "Ethical Resisters" place **"duty, honor, country"** first, over their own personal careers and safety.

(2) Amend the Act to state; "If a correction board fails to act within 180 days of application, automatic appeal to the United States Court of Appeals for the Armed Forces is authorized." In the event of a failed appeal, servicemembers may proceed to the United States Supreme Court for final decision.

(3) Evidence reflecting a member of a BCMR has obstructed the administration of justice, petitioner granted the right to file a criminal complaint with the Department of Justice. (Re: ***Inspectors General Act of 1978***)

(4) Enlisted members reinstated in the wake of wrongful discharge under the Act, are granted full military pay and benefits, retroactive to the date of their wrongful termination. Military officials who are found to have violated a servicemember's rights under this statute, are to be ordered to stand trial at a general courts martial or if retired, recalled to active duty to stand trial. In the event, a military official is found guilty of violating the Act, in addition to any punitive sentence by the courts martial, that member will be required to pay the costs associated with investigating the claim under the Act.

(5) Disseminate at semiannual **"Military Rights & Responsibility"** seminars, confidential command surveys to determine a precise number of military personnel who reasonably believe fraud, waste or abuse is present at their respective commands. Consolidate command surveys under the jurisdiction of the **Department of Defense Inspectors General, Office of Special Inquires Directorate.**

Although, many more proposed amendments to the present law can be instituted, the above proposed reforms can be easily instituted, to ensure "checks and balances" within the military's administrative justice system.

D. Conclusion

Military Justice & The Feres Doctrine

For as long as the Pentagon has been standing, as long as the Uniform Code of Military Justice has been the governing law of the military, the "Feres Doctrine" has been a cover for the "lack of accountability" for high ranking officials who abuse their power in the United States Armed Forces.

For an overwhelming majority of Americans to include active duty and reserve military personnel, veterans and their loved ones, the "Feres Doctrine" is virtually an unknown law. And this is the way, those in government want it to be! To sum it up, it is simply an unjust law that has allowed for half-a-century of human or constitutional rights abuses of our loved ones serving this nation.

As for the nexus between military justice and the "Doctrine", as long as this law remains on the books, continued systemic abuses within the military's criminal and administrative disciplinary systems and the denial of servicemembers' guaranteed right to "due process" under the Fifth Amendment of the United States Constitution, will continue.

Of course, we at VERPA intend to change this for the "good of the nation". As cited in the Exhibits of this "Point Paper", we will allow both our nationwide petition and our first book, "Beyond the Scope of Justice", to be the vehicle for the American people to decide, if the "Feres Doctrine" should be reformed or repealed.

Are we not all here for the same reason? To ensure "justice" in the United States Armed Forces is always a top priority for the good of our nation.

I can assure the American People this much ... to ignore the "Feres Doctrine" and the many injustices it has brought with it, from atomic testing of the 1950, to the present "anthrax injustice", it just might effect you one day. For example, the "draft" is being considered once again.

For many millions of us veterans and our loved ones, the damage is done. We have lost many liberty interests, including the ultimate liberty interest, "the human life", due to the United States Congress' failure to act and reform the "Feres Doctrine".

If true reforms of the military justice system is to be undertaken, the wrongs of the past must be righted. To obtain a full understanding of the wrongs I speak about, go to our on-line petition at www.verpa.tpub.com. You be the judge.

Many have asked me, if VERPA's petition demanding compensation for 50 years of injustices

under the "Feres Doctrine" is it realistic? My simple response is this; "If we can send other nations billions of dollars each year for whatever reasons we do, then, yes, there is money to compensate veterans or their surviving loved ones who have faced "grave injustices" under the "Feres Doctrine".

Now, that I have spoken on behalf of all honorable men and woman in the United States Armed Forces and my "adopted" brothers and sisters in the "veterans community", too many to name, but none forgotten, I would like to close this presentation on a personal note.

On January 13, 1994, after serving my country for 11 1/2 years, with a meritorious record, the Clinton Navy Department claimed I was no longer fit to serve my country. The reason being, I suffered from an alleged "parinoid thought process" brought on by the abuse of alcohol. So be it. I found out too late about the Feres Doctrine.

However, little did those who maliciously attacked my character and and career, realize that just prior to my enlisting into the United States Navy in Philadelphia, Pennsylvania, I had a talk with my mentor, Vietnam Veteran and "adopted big brother", Stephen C. Condi.

In short, Steve told me the pros and cons of military life. He further told me that I did not have to go in the military and be a tough guy or a hero, just to learn something I could use in civilian life if I left the service. Getting to the point. He also told me something I carried with me throughout my career and that is; "If you ever become a "leader, always take care of those under your direction."

Well, on the evening of January 13, 1994, just hours after I was wrongfully terminated from the Navy Department, I went to see Steve to tell him the news. Thirty seconds after arriving at his work, I heard the following words, "Oh my God, they just found Steve dead in his apartment."

From that very moment, I vowed to do my part to make a change for the good of future miiltary members and their families. I am simply quarterbacking the "effort" on behalf of many others who have been betrayed by those who held and still hold power in the United States government.

In closing, I find it quite appropriate to quote the greatest Commander-in-Chief in the history of our nation. General George Washington.

In 1775, at the New York Legislature, General Washington stated these words:

"When we assumed the Solider, we did not lay aside the Citizen."

God bless America and God Bless those honorable men and women serving our nation and the American Veteran and Our Loved Ones!

Respectfully submitted,

Jeffrey A. Trueman
Founder/President
VERPA

The Nationwide Petition Drive To Reform/Repeal The Feres Doctrine

Petition to **President/Congress of the United States**
Sponsored by: **Veterans Equal Rights Protection Advoc.**

Sign Petition | View Signatures | Tell a Friend

Since December 1950, American servicemembers have been denied "equal protection" under the United States Constitution as a result of the U.S. Supreme Court's decision known as the "Feres Doctrine". This law, prohibits servicemembers with legitimate claims of "intentional torts and medical malpractice", arising from service to our nation, access to the federal judiciary to address these type of injuries/injustices. In all, the doctrine allows for human/constitutional rights violations and corruption within the United States Armed Forces to go unchecked.

Our goal is to reform the "Feres Doctrine" by educating the American public of its virtually unknown existance, by initiating a five year, fifty state, petition drive. Our specific goals include, (1), compelling the U. S. Congress and President to reform the law to prevent future human/constitutional rights violations of servicemembers who report fraud, waste and abuse for the good of the nation, and (2), passage of "special legislation" to financially compensate servicemembers and/or their surviving family members, who can prove a bona fide injury/injustice by the preponderance of the evidence, under the doctrine was denied judicial review, due to this wrongly decided U.S. Supreme Court decision.

For example, some issues we believe are directly connected to the doctrine's "incident to service" bar on "intentional torts and medical malpractice" include, but are not limited to the following: (1) Atomic testing, (2) LSD testing, (3) Agent Orange, (4), Anthrax vaccines, and (5), human rights abuses within the military's mental health system to silence and discredit servicemembers who report fraud, waste and abuse for the good of the nation. Overall, it is estimated that hundreds of thousands if not millions of former military personnel, have been denied equal protection under the U.S. Constitution to protect their careers and liberty interests, due to malicious "political decisions" of military/civilian leaders in the Department of Defense, in the wake of the "Feres" decision.

Upon the completion of our Petition drive, its demands and signatures will be forwarded to the Congress and President of the United States for appropriate action.

EXHIBIT

The Nationwide Petition Drive To Reform/Repeal The Feres Doctrine

Sponsored by: Veterans Equal Rights Protection Advoc.

Join us in fighting for reforms and/or repeal of the "Feres Doctrine" by signing our Petition, to prevent human/constitutional rights violations of American citizens serving in the United States Armed Forces.

Read Petition | View Signatures | Tell a Friend

To sign your name under this petition, please fill out the following form (items in **bold** are required):

Full Name: Gerald J Pescaro

Email Address:
(e.g. your_email@some.host.com)

Street Address: 13930 Waterport Carlton Rd

City: Albion

State/Province: N.Y. 14411

Zip/Postal Code: 14411

Country: USA

Phone Number: 716-682-0414

Web site: http://

Comments:
(up to 500 characters)

By submitting this form you express your support of this petition and give your permission to publish on the electronic List of Signatures the following information you provided: a) your **name**, b) **city**, **state** and **country** of your residence, c) link to your **web site**, and d) your **comment**. If you do not want some of this information to be made public, you should not provide it on this form.

Submit Signature

Gerald J Pescaro

If you have a question about this petition, please contact the sponsor directly.

This petition is sponsored by

Veterans Equal Rights Protection Advoc.
P.O Box 3213, Duluth, Minnesota 55803, USA
Phone: 218-728-0718
http://hometown.aol.com/tverpa/myhomepage/index.html

STATEMENT BEFORE THE

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

SPONSORED BY

NATIONAL INSTITUTE FOR MILITARY JUSTICE

AND THE

GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

BY

ROBERT VINSON BRANNUM
PRESIDENT & CHIEF EXECUTIVE OFFICER
THE BLOOMINGDALE FUND, INC.
P. O. BOX 91773
WASHINGTON, DC 20090-1773
202•232•5850 • 202•328•7611 - FAX

13 MARCH 2001

Good morning Chairman Judge Cox and members of the Commission. I am happy to join you and others this morning to address the issue of military justice fifty years later after the codification of the Uniform Code of Military Justice.

Mr. Chairman, my name is Robert V. Brannum, I am president of The Bloomingdale Fund, a 501 (c)(3), community service organization. The mission of the Fund originally was to promote and to support educational, religious and other community service activities. However, in response to personal observations and conversations with others in the military, the issue of military justice has become an important issue. The Fund is pleased to join the efforts of the National Institute for Military Justice as an advocate for a "fair, equitable, effective military justice system."

My comments will address the broad issue of the unfairness and unconstitutionality of UCMJ Nonjudicial Punishment proceedings. However, I must preface my remarks by strongly commending the National Institute for Military Justice and the George Washington School of Law for bringing together this Commission and opening it to the public for comment. Your actions are in contrast to those of The Code Committee and The Joint Service on Military Justice, which have not displayed any concrete openness for public participation in its deliberations. Their meetings are not open to the public and they do not permit oral public comments.

I am certain there are many senior military officers and military commanders around the world who would rather this Commission was not meeting and or that the works of this Commission is limited in its circulation and impact. If there is one commitment I make today is to pledge that at the end of the day I will continue

my efforts for military justice for all, without regard to the awful four-letter word that begins with "R" – RANK as well as RACE.

Mr. Chairman, members of the Commission, the time has come for military justice to receive the same attention as a military quality of life issue as pay, housing, training, weapon system or other matters relating to the national defense. America's military justice system has been corrupted by undue command influence and an outdated, if not unwarranted view that a commander's judgment cannot be second- guessed. You may ask the question, "On what basis do I make this statement?" Let me say respond this way, according to the Secretary of the Air Force, the Air Force Inspector General and the Air Force Chief of Military Law, that Air Force members do not have an explicit right to know the name their accuser and may be mislead about the name of their accuser. This is now the written Air Force policy regarding military justice.

Mr. Chairman, members of the Commission, it is time that the members of the United States Senate and the House of Representatives realize that America's military justice system is flawed and portions, such as the Non Judicial Punishment proceedings are, in my judgment applied unequally and unconstitutionally. It is time military command convening authorities realize that the Uniform Code of Military Justice is not comprised into separate and unequal volumes to be applied separately and unconstitutionally. It is time that military commanders end the practice of issuing Article 15 without regard to truth, fairness and justice merely because their personal ego has been offended. It is time that every military commander and every military officer realized that if he or she spent as much time fight for justice for all and challenged his officer kin-folk, publicly for their offenses against lower ranking members, there would be less injustice in the military.

It is time our nation's civilian and military leaders understood that colonels and generals do not display courage, character and integrity by making "examples" of those at the bottom, while making deals with those at top of the military chain of command. It is time we all recognized that higher pay and better housing may help in recruitment, but a stronger display of a fair military system of justice is what will help retention.

Mr. Chairman it is intellectually dishonest and morally bankrupt for any military commander to expect that those who serve in America's military should be expected to sacrifice certain privileges of citizenship and their lives defending freedom, democracy and justice for others, but not for themselves. It is the supreme act of hypocrisy for any military commander or officer to order subordinates into battles around the world in the name of democracy, only to hijack it from him or her at home.

If it is wrong for the President of Bosnia to order others to commence the execution of defenseless people, then it is equally wrong for the Commander of the 12th Air Force, Davis Monthan Air Force base, AZ to declare someone guilty before trial and all the evidence has been presented. If it is wrong for China to impose punishment on those who have not been found guilty of any crime, then it is equally wrong for the Commander of the 49th Support Group, Holloman Air Force Base, NM. If it is wrong for the leaders of Iraq, Cuba, Russia and North Korea to subject its people unlawful arrest and detainment, then it is equally wrong for military commanders of the Air Combat Command, Langley Air Force Base, VA, Seymour Johnson Air Force Base, NC, Holloman Air For Base, and other military officers in the United States Air Force.

If the rule of law, respect for America's civilian and military justice systems, and an unwavering commitment to the fundamental principle of justice are the bedrock upon which this nation is founded, then when on behalf of the Secretary of the Air Force, the Chief of the Air Force Military Justice Division asserts, as a matter of UCMJ policy that the Air Force does not have a requirement to disclose the name of the accuser to any defendant in non judicial punishment proceedings under the Uniform Code of Military Justice -- it must be condemned uniformly.

Mr. Chairman, our elected and appointed officers who stand before the American people and visit military installations around the world professing support for America's military, yet close their eyes and hardened their hearts to military injustice are charlatans. Military Staff Judge Advocates who support or are silent to undue command influence and military injustice and refuse to honor their commitment to the law and to the principle of justice, dishonor not only Madison, Jefferson, Washington and Lincoln, they dishonor the legacies of their mothers and their fathers. Senior military commanders who will offer a subordinate to the alter of injustice to protect his or her ego, the status quo and ascension to power is neither a faithful servant to his country or to his God. Groping for testosterone should not be confused with defending the Testaments.

Mr. Chairman, the challenge for this Commission is not to meet and to make recommendations to improve the overall administration of the military justice system. I submit the real challenges will come later when the Commission's recommendations are faced with an entrenched military culture resistant to change and that fight any modifications to its base of power. Even the various services boards of military correction and review lack the authoritative ability to provide true service-wide military justice. While correction boards may correct one

member's record, no correction is binding on any commander. In other-words, a commander at base B may conduct the same offense toward service member B, even after the correction board has over the wrongful acts of the commander at base A against service member A.

The recommendations that are drawn from the discussions and statements made today will be meaningless unless there is an admission by those who benefit by maintaining the status quo that the system is flawed. Not only is it evident that Chairman Hugh Shelton and Vice Chairman Richard Myers of the Joint Chiefs, General Eric K. Shinseki, Army Chief, General James. L. Jones, Commandant, Marine Corps, General Michael E.Ryan, Air Force Chief, and Admiral Vern Clark, Chief, Naval Operations have turned their backs toward military justice, but also and appallingly so too have the traditional private military support organizations who claim to fight for the men and women in uniform.

Is military justice not an important issue to the members of "The Military Coalition?" Do organizations such as the Air Force Association, the Enlisted Association of the National Guard of the United States, the National Guard Association of the United States, the Marine Corps League, Reserve Officers Association, Veterans of Foreign Wars, Air Force Sergeants Association, Association of the United States Army, Navy League of the United States, and the Retired Officers Association feel that there is not any military injustice? It is ironic that the same military support organizations that back in November 2000 were sending letters to any Florida official they could find, holding press conferences and appearing on friendly talk shows declaring the right of every service member to have his or her vote counted are silent on the issue of justice for everyone in the military. It is further ironic that those who campaigned on a

platform of a strong military and pledged to enhance the military quality of life for those in the military and only in office for 53 days have decided that no one within the Department of Defense has any time to meet and to discuss military justice.

In 1954 the United States Supreme Court ruled educational segregation in the public school system to be unequal and unconstitutional. Yet, in 2001, for many school systems the goal of equal education is still a struggle, just as in the military the goal of military justice. The Supreme Court was able to change the law; however, the Supreme Court was not able to change the hearts of those resistant to the principles of justice and equality. Those who are silent to military injustice, regardless of rank and position are just as guilty as the person who engages in military injustice. Sadly and similarly as in the Dred Scott decision, in this new millennium and in today's military, there are many military commanders who feel there are no rights that any commander is bound to respect. It is obvious today our military leaders have failed in their responsibilities to defend justice insofar our military personnel are concerned.

While extolling the virtues of character, integrity and honor in their public statements, behind closed doors our leaders have undermined the principles of due process, equal protection and fairness. Many commanders and higher military officials have conspired to manipulate the military justice system to the disadvantage of the unsuspecting service member. Through deception and concealment military commanders have abused their position to deny America's military the kind of justice system they defend around the world.

What can we do? If, among us there is new found commitment to military justice, then we can and we must resist. We must call and write to the members of

the Senate and House Armed Services committees. We must call and write to the Secretary of the Defense and the Chairman of the Joint Chiefs of Staff. We must let them know that military justice is an important issue and is critical to our national defense. When the President names his nominees to be Secretary of the Air Force and Army, as well as his selections for promotion to 1-4 star general, we must let Senator Trent Lott, Senate Majority Leader, and Senator John Warner, Chair of the Senate Armed Services Committee, that each must be questioned about their commitment to military justice. Mr. Chairman, I find it odd that Senators Lott and Warner are able to the need and the importance to write to the Secretary of Defense to express their concerns about all Army soldiers wearing Black Berets, but they can't find the ink and paper to express any concern about military justice.

We can also write letters to the editors and place advertisements in national publications serving the military community (Air Force Times, Army Times, and Navy Times). We should also contact the David Martins of CBS News, the Jamie McIntyres of CNN as well as the Army, Air Force, and Navy Times that military justice is an important issue to inform the American people.

Mr. Chairman, we all come here today joined in one simple purpose – to support justice for all in the military. The fight for military justice, as is the fight for racial justice, will not be easy. Both adversaries and friends will tell us we can win against an entrenched military culture opposed to change. But if I understand the American system of government correctly, it is the people that govern the military - not the other way around. If I understand the American system of government right, it is the people who elect the members of the Congress to work for us – not the other way around. We can no longer let our political and military

leaders remain silent to the issue of military justice. We must always fight for what is right. And everyone in the Air Force, Army, Marines Corps, Navy, and the Coast Guard has a right to justice. Kalil Gibran wrote that mercy is to be given to the guilty; justice is all an innocent man requires.

We must see to it that our military commanders don't forget it.

AirForceTimes
26 February 2001 www.airforcetimes.com

Opinion

YOUR VIEWS AND OUR VIEWS

Letters

MILITARY JUSTICE FOR ALL

Our new senior civilian and military leaders must focus on military justice as a national defense concern. Defense Secretary Donald Rumsfeld should direct each branch of service to conduct a serious top-down review of the military justice system. Now is the time that the issue of military justice receives as much attention as the issues of military pay, veterans' benefits, housing, education, military readiness, mobility requirements, recruiting and retention.

As the Supreme Court has indicated, those who serve in uniform do not abrogate any of their constitutional rights to due process, equal protection and justice while defending freedom and democracy for others. Military commanders are not divine beings whose rulings are apostolic finalities. A subordinate's obedience to any higher military authority does not give a commander the right to disregard his protected rights under the Constitution and to ignore the principals of justice and fairness contained in the Uniform Code of Military Justice.

To attract the brightest and maintain the best in the military, the new defense secretary must focus on the lack of a fair, equitable and effective military justice system. Rumsfeld must extend his intellectual outreach past the traditional protected few sustaining a system that protects abusive commanders from accountability. The current institutional structure will resist any change that provides greater due-process protections to service members. Initiating and introducing new policies that will alter the wrongful behavior of commanders will come up against powerful resistance.

However, if the military is to serve as a beacon of moral values, personal integrity and character, then those who command cannot lead without them.

Justice is a military quality-of-life and national defense issue. Ignoring it is a threat to national security.

Robert V. Brannum
President, The Bloomingdale Fund
Washington, D.C.

See **LETTERS** *next page*

ADVERTISEMENT

An open letter as a public service to Department of Defense Secretary William S. Cohen, Air Force Secretary F. Whitten Peters, Air Force Chief of Staff General Michael E. Ryan, Headquarters, Air Combat Command General John P. Jumper, and other U. S. Air Force General Officers

Justice Is A Military Quality of Life Issue

Sirs and General Officers, the U.S. Supreme Court has ruled, *"Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."* In spite of that, some commanders, in protecting their self-interests have ignored Air Force service members' Constitutional due process rights and other rights under the armed forces Uniform Code of Military Justice.

Justice as a military quality of life issue has been disregarded, not solely because some Air Force commanders are blind to military injustices, but rather out of fear. They fear any change would challenge their sacred and outdated interpretation that a commander's judgment must never be questioned. Particularly by lower ranking personnel.

A past study revealed many enlisted and junior officers hold little respect for their senior commanders. Many are viewed as too willing to run over their mothers with a bus to advance their military careers. Sadly, very few commanders are willing to censure fellow commanders.

Ladies and Gentlemen, if you will not act now to defend and support basic Constitutional due process rights for all of America's Air Force members, who will? If now is not the time, when? The struggle for justice and freedom never ends and it is not always easy. What will you do?

The Bloomingdale Fund, Inc.
P. O. Box 91773 • Washington, DC 20090-1773
Email: bloomfund@aol.com

Statement of Robinson O. Everett

Before Cox Commission on Military Justice

Judge Cox and members of the Commission: I feel privileged to be allowed to discuss with you today some possible changes in military justice. You have undertaken an important study and at a crucial time. There have been no congressional hearings on military justice in the recent past; and now that we are nearing the completion of fifty years since the Uniform Code took effect in May 1951, a review is in order. Moreover, in recent months there have been some high visibility investigations and trials with military justice implications. Finally, some recent changes made in military justice systems in several other countries provide significant alternatives that should be considered for our own system. Hopefully, you will achieve some significant results just as Senator Ervin did in the 1960's when his Subcommittee on Constitutional Rights studied military justice - a study for which I served as a counsel and later as a consultant..

In any event, I have some suggestions to make. The first is that a change be made in the current UCMJ provisions whereunder in general and special courts-martial an accused either is tried by the court martial members and, if convicted, sentenced by these members or else is tried by the military judge and, if convicted, sentenced by the judge. The Uniform Code provides no specific option for an accused to be tried by the members and, if convicted, to be sentenced then by the judge.

I am not advocating now that in all cases sentencing be done by the military judge, but only that the accused be provided the <u>option</u> to have his or her guilt determined by the members and, if convicted, nonetheless choose to have any sentencing done by the judge. You may ask me why not go further and have all sentences determined by the judge- as occurs in criminal trials in federal district courts and in most state courts? Perhaps to some extent I am a traditionalist in wishing to retain for an accused the opportunity to be sentenced by his comrades if they have found him guilty, rather than to be sentenced by a judge who may be unfamiliar with local conditions and may even come from another Armed Service. In any event, for the present I would prefer giving the accused the choice I have suggested, rather than eliminating all sentencing by court-martial members.

Some might argue that an accused already has an implicit right to waive sentencing by the court-martial members or, at the least, that an accused may enter an agreement with the Government - with the military judge's consent-for sentencing to be done by the judge, although guilt has been determined by the court martial members. Even if this contention is accepted, it would still be best to have this option clearly authorized by the Uniform Code.

What are the disadvantages of providing this option to an accused? Some may contend that it will discourage an accused from electing to waive trial by court members in order to assure sentencing will be done by a judge if the accused is convicted. I would reply that this is an inadequate justification and that an accused who disputes his or her guilt should not be under pressure to waive trial by court-martial members in order to obtain sentencing by a military judge.

In connection with sentencing, I should note that when sentencing is done by a military judge, I have no objection if the judge refers to the sentencing guidelines used in the federal courts for analogous crimes, but I oppose the suggestion some have made that mandatory sentencing guidelines should be used in courts-martial in order to provide predictability. In my view such predictability would come at too high a price and I would prefer to continue the present system which places reliance on the judgment and experience of court-martial members and military judges - with the additional safeguard that appropriateness of sentences is subject to review by the Courts of Criminal Appeals.

Random selection of court-martial members has been recommended by some but was not favored by a Department of Defense commission that recently made a report on the subject. To some extent I share that commission's apparent concern about possible interference with military operations if court members are selected randomly. I suspect, however, that this ongoing prospect of interference has been exaggerated. For the present I would suggest that random selection be specifically authorized for use by a convening authority who chooses to do so instead of using the criteria for selection set out in the Uniform Code. Perhaps a convening authority already has the power to use random selection; and I believe that random selection has been used a few times on a test basis. However, if so, the convening authority's power should be made more explicit. Let me also emphasize that I strongly favor decisions of the Court of Appeals for the Armed Forces which discourage a convening authority from selecting court members with a purpose to achieve a particular result - a practice which I believe was widespread in earlier times.

In its consideration of petitions for review the Court of Military Appeals - now the Court of Appeals for the Armed Forces-has been paternalistic in many ways. Frequently it has considered issues not specifically raised by an accused or his counsel; and the doctrine of waiver has not been vigorously applied with respect to errors unassigned by the defense counsel. Some have criticized this practice; but I believe that it accords with Congressional intent and helps maintain confidence in the fairness of the military justice system.

For many years the Court of Military Appeals - now Court of Appeals for the Armed Forces - considered that Congress had assigned it a supervisory power and responsibility with respect to the military justice system. Perhaps the pioneer opinion in that regard was rendered in United States v. Bevilacqua. 18 USCMA 10, 39 CMR 10 (1968). I took a similar view in Unger v. Ziemniak,27 M.J. 349 (1989), which involved the court-martial of a female naval officer who

refused to provide a urine specimen for analysis. The accused was being tried by a special court-martial and therefore, if convicted, was not facing a sentence which would have made her case eligible for appellate review by our Court. Lt. Unger petitioned our Court for an extraordinary writ to prohibit her trial, and relying in part on the All Writs Act, 28 U.S.C. § 1651 (a), our Court considered the petition but denied it on the merits.

Another case involving a petition for extraordinary relief arose when the members of the Navy-Marine Corps Court of Military Review sought and obtained from the Court of Military Appeals an extraordinary writ prohibiting the Secretary of Defense or his subordinates from questioning these military appellate judges about their reasons for setting aside the homicide convictions of Dr. Billig, a naval surgeon, several of whose patients had died at Bethesda Naval Hospital. United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (CMA 1988). See also Cooke v. Orser, 12 M.J. 335 (CMA 1982); McPhail v. U.S., 1 M.J. 457, 460 (CMA 1976); U.S. v. Frischholz, 16 USCMA 150, 151-2, 36 CMR 306, 307-8 (1966).

A recent decision by the Supreme Court in Clinton v. Goldsmith 119 S.Ct. 1538 (1999), has created uncertainty as to the scope of the authority of the Court of Appeals for the Armed Forces in cases like this. Perhaps because I wrote the opinion reversed in the Goldsmith case, see 48 M.J. 84 (CMA 1998) I disagree with the result reached there; and I think that even under the existing provisions of the Uniform Code of Military Justice, a strong argument can be made that the Court of Appeals for the Armed Forces had implicit authority to issue the writ that was ultimately set aside. cf Dames and Moore v. Regan, U.S. 453 U.S. 654 (1981) More important, I would suggest that Congress should now explicitly confer upon that Court a broad supervisory role as to military justice and provide it broad power to grant extraordinary relief as to any court-martial proceeding or Article 32 investigation. In California and some other states extraordinary writs -such as writs of mandamus and writs of prohibition - are an important part of the judicial review process. I would recommend that the Court of Appeals for the Armed Forces be granted similar powers to those exercised by appellate courts in those states.

Admittedly, conferring explicit supervisory responsibility over military justice would increase the Court's workload. However, my examination of the current workload-as reflected in the attachment hereto - indicates to me that this increase would not result in an undue burden on the Court.

I have two other proposals related to the Court of Appeals for the Armed Forces. First, I would recommend that centralized judicial review be provided as to military administrative action and that such review be channeled through the Correction Boards directly to the Court of Appeals for the Armed Forces. My analogy would be to the procedure for review of personnel action involving federal employees, whereunder a Board conducts initial review and appeal is directly to the Federal Circuit.

Currently there is often great confusion as to the proper procedure to be employed by a servicemember who believes he or she has been wronged by military administrative actions concerning such matters as promotion, separation, and characterization of a discharge. As was recently acknowledged by a DOD Commission established at the direction of Congress, currently

there is confusion as to the proper forum, exhaustion of remedies, and other matters relating to such claims. In my view centralized review of such claims would be fairer and more expeditious - especially if the centralized review included discretionary judicial review by the Court of Appeals for the Armed Forces. The expertise of that Court as to matters affecting servicemembers and the experience of its judges and staff would facilitate fair and quick consideration of errors in military administrative actions affecting servicemembers. Although the workload of the Court would be increased, I believe that this increase could also be accommodated.

Finally, to resurrect a proposal that goes back to a time even preceding enactment of the Uniform Code, I would urge that the judges of the Court of Appeals for the Armed Forces be granted Article III status - i.e., life tenure. Since the judges' pay during active service already is equivalent to that of Federal Circuit Court judges, no extra cost would result in that regard; but the judges would not face the current uncertainty as to reappointment. Moreover, if given Article III status, the judges would participate in the Judicial Conference and be brought more fully into the federal judicial mainstream.

Those then are a few suggestions that I hope will be of some value. Let me close by reiterating my appreciation of the important service this commission is rendering and of the opportunity to appear before you.

Attachment To Everett Statement

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

450 E Street, Northwest
Washington, DC 20442-0001

Attachment to Everett Statement

William A. DeCicco
Clerk

TEL: (202) 761-5210
FAX: (202) 761-7004

March 7, 2001

BY FAX

MEMORANDUM FOR SENIOR JUDGE EVERETT

Dear Senior Judge Everett,

Judge Sullivan asked me to forward statistics to you regarding the number of oral arguments and opinions issued by the Court for the past 15 years. The following is provided:

Fiscal Year	Oral Arguments	Opinions Issued
2001	81 (completed & scheduled)	9 (to date)
2000	113	110
1999	116	123
1998	131	129
1997	115	113
1996	116	118
1995	112	111
1994	144	144
1993	122	129
1992	124	129
1991	112	125
1990	100	105
1989	89	120
1988	86	130
1987	112	134
1986	82	105
1985	102	76

I hope this is information is responsive to your inquiry. Bar graphs of the above can be found at 50 MJ XCI-XCII and 53 MJ CXI-CXII.

Sincerely,

Bill DeCicco

William A. DeCicco
Clerk of Court

Comments Submitted By Servicemembers Legal Defense Network to the Cox Commission on the 50th Anniversary of the Uniform Code of Military Justice

I. Introduction and Summary

Servicemembers Legal Defense Network (SLDN) respectfully submits the following comments urging the Cox Commission to recommend repeal of Article 125 of the Uniform Code of Military Justice, 10 U.S.C. §925, criminalizing consensual sodomy (oral and anal sex) between adults. The comments specifically address the following Topics for Consideration posed by the Commission:

I. Need for Congressional Review

B. Do[es any or all of the] following indicate a need for revisiting the Code?
12. Evolving international human rights standards
16. Evolving standards of privacy/sexuality

IV. Crimes and Offenses

C. Should Congress enact a modern criminal sexual misconduct statute similar to the Model Penal Code and repeal the current statutes on rape and sodomy?

K. Should consensual sodomy be decriminalized?

The Commission should recommend decriminalization of Article 125 because it undermines good order, discipline and morale in our armed services. Article 125 disrupts unit cohesion by prohibiting sexual conduct engaged in by the majority of service members and because it is selectively enforced against service members. Our military commanders should not devote scarce military resources to policing the bedrooms of those who defend our country.

Article 125 is a throwback to English common law that has long since been abandoned by the militaries of the original NATO countries, including Great Britain on whose law ours relies.

Repeal of Article 125 in no way impedes our military from punishing sexual misconduct under other Articles, including assault, harassment, or sexual conduct committed under aggravating circumstances. Assault, harassment, rape, and sex in the barracks clearly disrupt the unit and should be prohibited. Consensual adult conduct done in private, however, should not be proscribed. Indeed, repealing an archaic law out of step with evolving standards of international human rights, privacy and sexuality will legitimize the UCMJ as a continued source of fair and appropriate law governing our armed forces.

Servicemembers Legal Defense Network, founded in 1993, is a legal aid and watch dog organization for those harmed by "Don't Ask, Don't Tell, Don't Pursue, Don't Harass," 10 U.S.C. §624. SLDN has directly assisted 2600 service members since 1993[1] who have faced harassment, investigation, and discharge under the policy, often times in direct violation of the investigative limits contained in current law.[2] SLDN has also assisted service members who have been criminally prosecuted or threatened with criminal prosecution for consensual sexual conduct, including sodomy.[3] SLDN's experience in matters of military justice leads us to conclude that the Cox Commission should recommend to Congress the repeal of Article 125.

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[1] SLDN successfully pressed for accountability for the murder of PFC Barry Winchell. *See G.I. Who Killed Gay is Sentenced to Life*, N.Y. Times, Dec. 10, 1999. SLDN also successfully litigated the attempted discharge of Master Chief Petty Officer Timothy McVeigh who allegedly held an anonymous America Online account containing a profile with the word "gay" in it. *See* Elaine Herscher, *Navy Barred from Booting Sailor It Says is Gay*, S.F. Chron., Jan. 27, 1998, at A3.

[2] *See* STACEY L. SOBEL ET AL., CONDUCT UNBECOMING: THE SEVENTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS," "*Executive Summary*," 1-7 (2001).

[3] *See* C. DIXON OSBURN, ET AL., CONDUCT UNBECOMING: THE THIRD ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS," p.13 (1997).

II. Article 125 Prohibits Conduct Engaged in by the Majority of Service Members

A. Article 125 Definition of Sodomy

Article 125 prohibits conduct engaged in by the majority of service members. While sodomy, including oral sex, is not the same thing as heterosexuality, the vast majority of heterosexuals engage in sodomy as defined in Article 125[4] and the Manual for Courts-Martial.[5] Article 125 prohibits both same gender and opposite gender oral and anal sex, regardless of whether activity is in private, between consenting adults, or even between husband and wife.[6]

The penalties under Article 125 are severe. Consensual sodomy is punishable by "[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years."[7] This is equivalent to the punishment for such serious offenses as arson of a value of more than $100 and housebreaking.[8] The punishment for sodomy is *more* severe than the punishment for negligent homicide, extortion, assault upon a child under 16 years, and aggravated assault with a means other than a loaded firearm.[9]

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[4] Article 125 provides:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

10 U.S.C. § 925

[5] Manual for Courts- Martial, United States, Pt. IV, ¶51e(2) at IV-76 (1995 ed.).

[6] *See, United States v. Scoby,* 5 M.J. 160 (C.M.A. 1978); *United States v. Harris,* 8 M.J. 52 (C.M.A. 1979).

[7] Manual for Courts-Martial, United States, Pt. IV, ¶51e(4), at IV-79 (2000 ed.).

[8] *Id.* at ¶52e(2)(a), at IV-80; *id.* at ¶56e, at IV-88.

[9] *Id.* at ¶85e, at IV-110 ; *id.* at ¶53e, at IV-81; *id.* at ¶54e(7), (8), at IV-85.

B. *Article 125 Conduct is Engaged in by a Majority of Service Members*

The sexual acts proscribed by Article 125 are normal, healthy sexual activities regularly engaged in by most service members. According to the RAND Institute, one of the most preeminent military research institutes, the vast majority of American men and women engage in oral sex.[10] A significant number also engage in anal sex.[11] According to RAND, it is reasonable to assume that the majority of military personnel, both married and unmarried, engage in sodomy.[12]

C. *Article 125 Undermines Good Order, Discipline and Morale Because the Law Is Inconsistent with Practice*

Military laws that are not consistent with military practice undermine good order, discipline and morale. There is a wide gulf between what Article 125 prohibits and what service members actually do. The tension between law and practice delegitimizes the law.

D. *Article 125 Undermines Good Order, Discipline and Morale By Forcing Service Members To Lie*

Article 125 also undermines good order, discipline and morale by forcing service members to hide, lie, evade and dissemble about their sexual conduct.[13] Service honor codes

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[10] Sexual Orientation and U.S. Military Personnel Policy: Options and Assessments, RAND pp. 56 (1993); Evan Wolfson and Robert S. Mower, *When The Police Are In Our Bedrooms, Shouldn't the Courts Go In After Them?: An Update on The Fight Against "Sodomy" Laws*, 21 Fordham Urb. L.J.997, 1029 (1994). *See also* Robert Mitchell et al., *Sex in America* 139-141 (1994).

[11] Sexual Orientation and U.S. Military Personnel Policy: Options and Assessments, RAND pp. at 60-61 (1993)(Approximately 20% of men engage in anal sex).

[12] *Id.* at 58

[13] *See* Diane H. Mazur, *Sex and Lies: Rules of Ethics, Rules of Evidence, and Our Conflicted Views on the Significance of Honesty*, 14 ND J.L. Ethic & Pub Pol'y 679, 688-690 (2000).

stress the importance of honor, integrity and candor.[14] It makes a mockery of instilling honesty and integrity when most service members frequently commit what the UCMJ views as a serious offense subject to severe punishment. Service members receive the message that honesty and integrity are selective virtues – that hypocrisy is sometimes acceptable. Retaining the sodomy offense strongly contradicts and negates the armed services reliance on honesty and integrity.

III. Selective Enforcement Undermines the Legitimacy of the UCMJ

Since the vast majority of service members are engaging in sexual acts prohibited by Article 125, there is little room to dispute that the provision is selectively enforced. Indeed, the military has conceded that Article 125 is selectively enforced.[15]

Selective enforcement leads to abuse of the provision. It is too easy for a jilted lover or an angry roommate to bring allegations of sodomy and end the career of a service member for engaging in consensual sexual activity.[16] Commanders too may abuse Article 125 by forcing service members to resign, not re-enlist, or face administrative discharge in lieu of criminal charges for consensual sexual conduct. Article 125 becomes the Damocles sword hanging over every service member's head if they cross someone.

Permitting some service members to violate Article 125 and punishing others runs counter to basic concepts of military functioning. Rules in the military are not discretionary. It is vital to good order and discipline in the armed services that lawful rules and orders be followed without question and without exception.[17] Article 125, however, is a rule that is not

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[14] Army: "Integrity: Do What's Right, Legally and Morally" at www.army.mil/95div/values/army_values.htm; Air Force: "Integrity First" at www.af.mil/lib/policy/letters/p197-03.htm; Navy: "Honor: Be honest and truthful in our dealings with each other" at www.chinfo.navy.mil/navpalib/traditions/html/corvalu.html.
[15] *See generally Hatheway v. Secretary of the Army*, 641 F.2d 1376 (1981) *cert. den.* 454 U.S. 864 (1981).
[16] *See U.S. v. Fagg, supra; U.S. v. Hall, supra.*
[17] *See* 10 U.S.C.§888-892.

followed and that is not universally enforced. This selective enforcement delegitimazes Article 125 and with it the UCMJ.

IV. Sexual Mores Have Changed Making Article 125 Obsolete

The beliefs about sexuality that lead to the prohibition against consensual sodomy have long since been abandoned. As discussed above, most people engage in acts prohibited by Article 125 and consider them normal, sexual activity. The historical underpinnings of Article 125 have also eroded, rendering the law irrelevant today.

In 1775, the Continental Congress adopted, without much analysis, the British Articles of War *totidem verbis* to guide our nascent Army and Navy.[18] The British Articles of War incorporated by use and custom British common law which included the felonies of murder, suicide, manslaughter, burglary, arson, robbery, larceny, rape, sodomy and mayhem.[19] The United States armed forces did not explicitly criminalize sodomy until it adopted the Articles of War in the 1920's. In the 1920's, the Articles of War began to expressly list the common law felonies.[20] The armed forces made no findings regarding sodomy, but simply adopted the earlier reliance on British common law and custom.

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[18] Valle, J, *Rocks and Shoals, Order and Discipline in the Old Navy 1800-1861*, p 40-41.

[19] LaFave and Scott, *Criminal Law*, Page 59, Section 9 (West, 1972); Winthrop, William, *Military Law and Precedents*, 2nd edition, 1886, 671-672

[20] The 1928 *Army Manual for Courts Martial*, in the Articles of War lists the chargeable offenses under Article 93 :

> Any persons subject to military law who commit manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument or other thing, or assault with intent to do bodily harm, shall be punished as court martial may direct.

In adopting the UCMJ, 50 years ago, Congress also made no findings regarding the need to eliminate privately performed consensual sexual acts.[21] Once again, the drafters of the UCMJ were simply attempting to make the punitive articles of the military codes uniform and reflective of current law. The drafters looked to current military law and the laws of Maryland and the District of Colombia.[22] Indeed, express reference was made to the D.C. Code and some of the language of the D.C. Code section prohibiting sodomy was used in Article 125.[23] In 1949, when Article 125 was drafted and proposed, Maryland and D.C. had prohibitions against sodomy, as did all 50 states.

Times have changed. Today, 34 states, including significantly Maryland and D.C., have gotten rid of the prohibitions against sodomy. Only 16 states continue to have prohibitions against sodomy – with challenges to the prohibition in 2 of those states.[24] Most of the original NATO countries no longer have prohibitions against sodomy, including the United Kingdom, a key source of the original prohibition against sodomy in the armed forces.[25] The Model Penal Code too has disapproved the regulation of consensual sex between adults, including acts currently prohibited by Article 125.[26]

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[21] *Scoby*, 5 M.J. at 165.
[22] *Harris*, 8 M.J. at 58.
[23] *Id.*
[24] Lambda Legal Defense and Education Fund, *State by State Sodomy Law Update*, (2000)(at http:// lambdalegal.org/cgi-bin/pages/documents/record?record=275). Four States have sodomy provisions that address only same gendered partners: Arkansas, Kansas, Oklahoma, and Texas (a Texas Court of Appeals overturned the Sodomy Law in 2000, that case is being appealed). Twelve States have provisions that address same and cross gendered partners: Alabama, Arizona, Florida, Idaho, Louisiana, Massachusetts, Minnesota, Mississippi, North Carolina, South Carolina, Utah and Virginia.
[25] *See* International Gay and Lesbian Human Rights Commission , *Sodomy Fact Sheet: A Global Overview : Criminalization and Decriminalization of Homosexual Acts*, (1999)(*at* www.iglhrc.org); Aaron Belkin and R. L. Evans, The Effects of Including Gay and Lesbian Soldiers in the British Armed Forces: Appraising the Evidence, pg 9 (Nov. 2000) (unpublished manuscript on file with the Center for the Study of Sexual Minorities in the Military, University of California at Santa Barbara and www.gaymilitary.ucsb.edu).
[26] *See* II Model Penal Code § 213.2 at 357 *et seq.* (1980 Revised Comments).

As one military court opined[27]:

> Perhaps the time has come to change Article 125, perhaps not. But this court is not in the position to answer Justice Holmes's eloquent and oft-quoted plaint: ' It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds laid down have vanished long since, and the rule simply persists from the blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897)...As the Court of Military Appeals and we have said in circumstances similar to these, such decisions are for Congress, not this court. [citations omitted][28]

It is time for Congress to review the prohibition against sodomy. It is time now for this old chestnut within the UCMJ to go the way of flogging and rum rations and be removed.

V. Conclusion

There is no legitimate military purpose for regulating consensual private sexual behavior. The military's mission requires the maintenance of good order and discipline. Prohibiting consensual, private, non-commercial sexual acts between adults does not serve this purpose. The military does have a legitimate interest in prohibiting sexual acts that do effect good order and discipline, such as assault, sexual harassment and sexual conduct committed under aggravating circumstances. Article 125's prohibitions are overly broad to achieve this purpose. In light of the significant problems of selective enforcement created by Article 125, the fact that the sexual acts prohibited by Article 125 are normal, healthy behaviors engaged in by most service

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[27] *United States v. Hall*, 34 M.J. 695 (A.C.M.R. 1991) The court upheld the conviction of a male officer for sodomy with a woman. The key factual question before both military judge and the appellate body was whether the video tape used as evidence against the army officer depicted him engaging in vaginal intercourse by means of rear entry or anal intercourse.

[28] *Id.* at 704. *See also United States v. Henderson*, 34 M.J. 174 (C.M.A 1992)(The court found that a service member could be convicted of an Article 125 offense for engaging in private, noncommercial, consensual heterosexual fellatio. The court, in noting it did not have the authority to strike down Article 125, also noted that "[t]he Legislative Branch is free to modify its statute if it chooses, and the Executive could limit prosecution."); *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992)(The court upheld the Article 125 conviction of an airman for consensual, private, noncommercial, adult oral sex noting "we may sympathize with the accused regarding this

members and the fact that most of the States and NATO countries have repealed sodomy provisions, it is clear that the time has come to repeal the UCMJ's prohibition of consensual sodomy.

Respectfully submitted,

Servicemembers Legal Defense Network
PO Box 65301 ~ Washington DC 20035-5301
202.328.3244 ~ fax 202.797.1635
sldn@sldn.org ~ http://www.sldn.org

Bridget Wilson
Rosenstein, Wilson & Dean
1901 First Ave., Suite 300
San Diego, CA 92101
(619) 232-8377- (619) 238-8376
bjwlaw@aol.com

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particular conviction for what was unquestionable consensual conduct. Nevertheless, we detect no indication from the Supreme Court which permits us to override the intent of Congress.")

CAMI

Citizens Against Military Injustice

C.A.M.I.
308 161st. SW #A
Lynnwood, Wa.
98037-6611

"Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."

-Marting Luther King, Jr.
Letter from the Birmingham Jail

CAMI was established as a non-profit organization in May of 2000 and founded by Glenda Ewing of Washington State. CAMI's mission is to provide pertinent information, resources, help and support to all military personnel who have been or about to be charged with a crime under the Military System of Justice and further, to assist inmates, loved ones and family members whose lives have been affected by the justice system of the United States Military.

CAMI is supported by friends, family members concerned citizens, professional and non-professional alike, and who are in agreement to the individual rights of every citizen of the United States under the XIV Amendment of the Constitution, regardless of military involvement, and believe that each citizen should and indeed must, be entitled to a fair and unbiased trial by his peers according to rank and which would include the proper defense by a qualified and experienced trial attorney without fear of retaliation or loss of rank.

In remembering the Military Justice Act of 1968, signed by President Lyndon B. Johnson, he stated and we quote **"the man who dons the uniform of this country today, does not discard the right to fair treatment under law".** In recent years, the meaning behind this statement seems to have been overlooked or set aside and the progress of reformed court-martial has sunk to an all time low.
Our goals are to remove any undue command influence from the Commanding Officer in the quest for truth,

WWW.MILITARYINJUSTICE.ORG

cami98037@yahoo.com

and to bring accountability to the Criminal Investigative Division and in addition, to provide service men/ women with a better trained and unbiased Inspector General, especially in the area of law. To have separation between the prosecution and defense teams so as not to be influenced in the pursuit of justice or by the real or implied threat of retaliation by loss of rank.

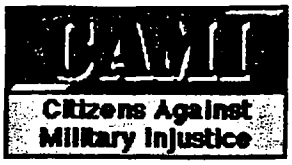
CAMI joins with the United States Council of Veteran Affairs (USCOVA .org) and Military Corruption . com in applauding this commission for undertaking the solemn and awesome responsibility of thoroughly examining the UCMJ and initiating the change that will finally bring the code and the military justice system into the 21 century. After a fifty-year history, the time for change is now.

In the presentation to follow, I will cite comments from citizens of this country directly affected by the military justice system and list the highlights of their stories of indignation. In doing so, I believe we can affirm with an resounding YES to answer the first of the commissions questions on whether there is a need for a congressional review of the military justice system and in fact, a complete overhaul.

Respectfully,

Glenda Ewing

Director of C.A.M.I.



Mission Statement

To provide pertinent information, resources, help and support to all military personal who have been charged or are about to charged with a crime under the Military System of Justice. To assist and provide information to inmates, loved ones and family members whose lives have been affected by the Justice System of the United States Military

Who We Are-What We Believe In

We are friends, family members and concerned citizens, professional and non-professional alike who are in agreement to the individual rights of every citizen of the United States regardless of military involvement and believe that each individual should and indeed *must* be entitled to a fair and unbiased trial by his peers according to rank and which would include the proper defense by a qualified and experienced trial attorney without fear of retaliation or loss of rank. We are loyal and patriotic citizens who do not wish to diminish the importance of or the integrity of the Armed Forces of the united States.

1. We believe that every member of the military has the right, as a citizen of the United States of America, to a fair and impartial trial by a 12 member jury of their peers (according to rank).

2. We believe that the accused has the right and the military has the obligation to provide an experienced and qualified legal defense team *without* the undue influence of the commanding officer.

3. We believe the accused has the right to a defense team not regulated or influenced by the senior rank of the prosecution and as such should be a separate entity.

4. We believe that the practice of Court-Martial is unconstitutional under it's present guidelines.

5. We believe that *every* member of the military is innocent until proven guilty by a fair and impartial military justice system.

Our Goal

1. Through the portal of our website, to attract the attention of the media and all concerned citizens in a combined effort to bring about sweeping change to the current system of military justice.

2. To remove undue influence from commanding officers in the pursuit of finding truth.

3. To bring accountability to the Criminal Investigative Division (C.I.D.) and in addition, to provide service members with a better trained and

unbiased Inspector General, especially in the area of Law, to serve all levels of troops.

4. To separate the prosecution and the defense teams so as not to be influenced in the pursuit of justice or by the implied threat of retaliation by loss of rank.

5. To create a system of justice the protects the rights of the accused as well as those of the victim.

6. To affirm the right of every invidual that one is innocent until proven guilty.

Summary of Presentation

To the:

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

(The Cox Commission)

1. Introduction
2. A System That Marches To It's Own Drummer
3. Command Influence
4. Unlawfully Influencing Action of the Court
5. Real Life Examples
6. United States V. Holt
7. Recipe Of A Navy Cover-up/ John Mullahy
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13. Disclosure?
14. Closing

My name is Glenda Ewing, and I come before you today with the privilege of giving a voice to countless Americans who have none. The name of my organization is CAMI, Citizens Against Military Injustice. Born out of grief, fueled by anger, watered with tears, and sustained by passion. Each day, stories of abuse by the system, destroyed and financially devastated families, heartbreak and loss of family life pour into our site over the Internet. I am today, not without the dream that with the help of other organizations such as Military Corruption and The United States Council of Veteran Affairs, committed to truth and justice that change in the UCMJ will be affected. Our country was founded on the principals of justice and equality under the law. What we are seeing today is quite a different reality.

The bible says, that if we have faith as a mustard seed, we have the power within us to move mountains. The justice system of the United States Military is my mountain, gentlemen, and I am here today with one purpose and that is to move you.

Our country is hopelessly divided, angered beyond reason and quickly becoming immune to the stories that unfold in our daily newspapers and the media. Even more so, with the Internet, as story after story of injustice in our military system and government surfaces from the highest levels of authority.

Military justice for the majority is prefabricated according to the wishes of the local Commander, and the "trial" is tantamount to a verdict of guilty. How could any trial be considered fair, when the Convening Authority by right, of title is given the power to select the judge, the attorneys and the jury members. It may go unsaid, but the mentality is that if the Convening Authority, sees fit to bring about a court-martial, the accused, can be assumed to be guilty.

These are the conditions under which countless Americans are subjected to each year.

Is Military Law On A Different Scale?

A system that often marches to its own drummer

In an article published in the San Diego Union Tribune on March 14, 1993 just 3 days before a 20 year old Lcpl. was to be sentenced in the first capital murder case at Camp Pendleton in 27 years, David Schlueter, a former Army lawyer who was then a professor at St Mary's University School of Law in San Antonio, Texas, was quoted as saying **"I do believe that on the whole, the system is DESIGNED to be fair. It would be a mistake to take an incident or a group of incidents out of thousands and thousands of cases tried and say the system is not fair."**

More to the point, Camp Pendleton's Col. Mark Haiman, Marine Corp senior circuit judge and appointed to hear the landmark case, states: **"To anyone who says our system is a railroad, I'll spit in their eye because it's just not true."** Critics however, are not deterred by the insistence of military officials.
Says Robert Rivkin, a former Army lawyer who is now in private military practice, **"I find the system to be incorrigibly corrupt."** He goes on with others to say that hundred of convictions have been reversed on appeal because of unlawful command influence and they argue that **they can find no case of a commanding officer who, in turn, has suffered prosecution for the act.**

What it says to others and me is that for the military, there are two distinct sets of law. You're either in a category that is above it or beneath it. **What does that do to the families of these men and women?** It destroys them. It shatters their lives. It depletes their life savings, it forces wives and children into the streets and onto the welfare rolls, it causes a bitterness deep within the soul of humanity that feels powerless against the mighty forces within our military system that seek to destroy the very roots of the constitution on which this country was founded. There seems to be no end to the lies and deception that we, as American citizens are asked to swallow as a bitter pill everyday of our lives. When will it end? Who will have the courage to stand up against these mighty

powers that appear to have no oversight and say ENOUGH! Abraham Lincoln had a dream to free the slaves. John F. Kennedy had a dream for justice. Martin Luther King had a dream to bring equality to this country. Although a bullet brought these men down and a country to it's knees, the dream will not be stopped. Military Corruption, USCOVA and CAMI all have a dream. Our dream is for the injustice in our military system to stop and the rights and lives of men and women to be restored. We ask that a Government that asks the ultimate from it's citizens in the taking of their youngest and brightest young people, to fight for this country on foreign shores, will at the very least protect them and afford them the best possible defense as is the right of every American citizen. If the military cannot or will not provide well-trained and experienced counsel, then they have NO business in the business of court-martial. Innocent until PROVEN guilty by an impartial judge, and jury whose only goal is to seek out the truth without fear of retaliation, loss of rank or undue command influence.

FOR THE ACCUSED there is no

1. **Bail**
2. **No trial by peers**
3. **No guarantee of an impartial judge or jury**
4. **No guarantee of an experienced defense attorney**

Command Influence

Definition of:

Unlawful command influence has been called "the mortal enemy of Military justice" and it is certainly the scourge of a system that requires Commander involvement at all levels and in every disciplinary action that can be taken against a soldier.

It is defined as the unlawful assertion of authority that interferes with the fair and just administration of military justice under the UCMJ. Article 37, UCMJ, was written into the Uniform Code of Military Justice to ensure that commanders did not unlawfully influence the disposition of charges or otherwise poison the justice process. It acknowledges that commanders do have a wide range of authority in the military justice arena but requires that they act with discretion and independence when enforcing good order and discipline.

Most of all in this area:

Commanders must remember that they are judicial authorities and that some of the judgments and practices on which they rely in the operational setting are inappropriate or counter-productive to the fair administration of Justice under the UCMJ.

There are three populations that commanders should keep in mind when considering whether their conduct has the potential to unlawfully influence the judicial process: subordinate commanders, court-martial panel members, and potential witnesses. Subordinate commanders are required to make independent recommendations regarding the disposition of cases or to make the decisions to dispose of them at their levels, as the Manual for Courts-Martial requires that all cases be disposed of at the lowest appropriate level.

EXAMPLES:

Subordinates were complaining about the way a superior officer had handled a certain matter. Later it was found that a junior officer was sitting in the courtroom relaying all testimony to the commander. ALL who testified said they were NOT inhibited in their testimony. **WHO ARE WE TRYING TO KID?**

In another case, a general wrote a scathing letter about DWI's on post, saying "there will be NO second chances". Naturally, EVERY commander said they did not take that as pressuring them to take a certain action on DWI's. **AGAIN, WHO ARE THEY KIDDING?**

Article 37 of the Code of Military Justice

UNLAWFULLY INFLUENCING ACTION OF COURT

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

We would suggest that in serious crimes, the accused be completely removed from all possibilities of the assumption of command influence by implementing a separate and distinct **criminal** justice system. Point of view being that the convening authority that refers charges for court-martial, also hand picks the judge, panel members, defense and prosecution. *How can anyone even suggest that fairness and impartiality will be imparted to the accused?*

In a speech to the Judge advocates General's School in 1991, David Schlueter suggested that a commander's influence in picking potential jury members **at the very least looks bad.**

Real life examples of command influence alive, well and flourishing in America today:

(See attached documents to be submitted for the record)

1. VICTIM: Died March 2, 1988 while forced to participate in sea rescue training at the Naval Air Station in Pensacola, Florida.

2. VICTIM: sentenced to 6 months for taking medication prescribed by her dentist by a military justice system that allows authorities to play accuser, judge and jury. (Article by Jack Anderson and Michael Binstein, appeared in the Washington Post on April 14, 1994)

3. VICTIM: Arrested by civilian authorities off base after an accusation of rape by a female soldier. After sworn testimony and absence of evidence from a rape kit test, the case was thrown out. The commander aggressively pursued the matter and the accused was brought to a court-martial where he was found guilty of rape.

4. **VICTIM:** Looking at the loss of a military career and deserved pension over a love affair gone bad, she eventually took her own life after the military drug her personal life out for all the world to see and labeled her "dishonorable" even though she told the truth.

5. **VICTIM:** While assigned as a battalion logistics officer in Germany, he investigated the loss of combat equipment. Upon finding evidence of massive

theft that affected combat readiness, he was forced to go over the head of his superior to report his findings. He was relieved of his duties, reassigned, given a poor evaluation and threatened with court-martial.

6. **VICTIM:** with a twenty-year stellar record, convicted of rape with no physical, witness or evidentiary testimony. Wife and daughters are labeled "victim witnesses" and unable to have contact with him.

7. **VICTIM:** Accused of rape while stationed in Bahrain and sentenced to 9 years at Fort Leavenworth. Accuser had regular sex with several individuals including a married Navy man, fearful of charges of adultery with the woman, he denied the relationship and together they accused.

8. **VICTIM:** Began serving a 30-year prison term for the rape and stabbing of a woman near Quantico. A shocking miscarriage of justice that pinned the black marine with the crime. Court-martialed and convicted, Scott maintained his innocence but his pleas went unanswered until a civil rights activist, Lori Jackson (now deceased) together with Scott's attorney, went to war against the US Marine Corp to acquit the man who was railroaded by a racist military system.

9. **VICTIM:** Accused by an AWOL marine who was granted immunity, and later convicted on pre-meditated murder and conspiracy and sentenced to life imprisonment at Fort Leavenworth, Ks. Eyewitness testimony of eleven marines were called "Elvis Sightings" by the prosecution.

10. **John Mullahy;** A classic example of how the military's judicial system is manipulated by officers with personal vendettas.

11. **Walter Fitzpatrick III, former Lt. Commander of the USS Mars;** falsely accused and convicted of misappropriation of funds after receiving approval to send

staff members to the commanders funeral in Greece who had been assassinated while touring there. With evidence in hand to send TOP military officials to prison, he is still fighting the system to have his name cleared after ten long years.

Nine years ago this May, my family and I were living what most would call a normal life. We worked hard, we paid our taxes, and we were living in our new home. We anxiously awaited the homecoming our youngest son, a proud Marine who was on his way home to be married. In my worst nightmare I could not begin to know the terror that filled my life that warm day in May when he was arrested and falsely accused of the murder of a fellow Marine. Little did I know then that the nightmare, which began with the accusation of an AWOL Marine, would eventually propel me into attempting to find an explanation for the injustice and the horror of witnessing a military court-martial where the life of my son hung in the balance of a capital conviction?

Known Facts

- 11 eye witness marines immediately came forward with their statements
- 45 minutes of unaccounted for time
- 44 minutes of driving time alone
- 42 items taken from car and sent to the U.S. Army crime lab.
- No signs of blood found on clothes or in the car
- No weapon found
- A commanding officer who stated that EVERYONE on base KNEW he was guilty
- A government witness who gave false credentials and, who was denounced by his superiors, as a liar for hire, yet was paid $25000 for his testimony.
- 5 accusers known to each other chose to say nothing until the body was discovered. Two did not come forward until 4 months later

- Levis that were found to be void of blood and unwashed upon examination by the Army crime lab, mysteriously show up in court 8 months after sitting in an evidence locker smelling freshly laundered with visible signs of blood. Blood by the way which could NOT be typed and was not DNA tested.
- A victim who was only slightly known to the accused, well known to the accusers, and stabbed 46 times. A body drained of blood but little to none found at the scene.
- An autopsy that failed to conduct specific and crucial tests, took no body temperature, and washed away any forensics evidence, stated that the victim had been dead POSSIBLY longer than 24 hours but not LIKELY.
- A body that was found almost 70 hours after the government alleges he died yet amazingly, still in a state of rigor mortis, and untouched in an area crawling with coyotes.
- An investigating officer who held the article 32 hearing, stepped out of his role of impartiality when he gave the prosecution, the card of a forensics blood specialist and suggested that they bring him in to examine the jeans for blood even though the Governments own army crime lab found none, and the California state police and highway patrol refused to look at the evidence upon hearing of the initial findings. The defense was not notified of this specialist until just before he appeared at trial and only on appeal was it learned by the defense of the role of the investigating officer.
- Who just prior to his arrest and upon seeing flashing lights in his rear view mirror innocently asked his fiancée if he had run a stop sign or something?

I must ask a question. What is the meaning of **REASONABLE DOUBT?**

I need not go on. I suppose we should consider ourselves lucky. He missed receiving the death penalty by 2 votes. He is currently serving a life sentence at Fort Leavenworth. His defense counsel was promoted to Major. Trial counsel was promoted to a full colonel. The judge retired with honors.

On March 18 on the FOX channel, the network premier showing of the made for TV movie, A Glimpse of Hell based on the book by Charles Thompson will air. It's the story and cover-up of the explosion in gun turret #2 aboard the battleship USS IOWA in which 3 explosions ultimately claimed the lives of 47 men.

John Mullahy

RECIPE of a Navy Cover-up

1.Blame it on a dead soldier whose name was Clayton Hartwig.
2. Lie, saying he was Gay to drum up anti-gay sentiment
3.Destroy the life and career of the man who risked his life to save the ship and crew.
4.Allow a US Navel officer to lie to Spanish dignitaries through a translator.
5.Promote the naval offices that caused it all.

The explosion aboard the USS Iowa is not unlike what happens in the lives of countless Americans each year as family members and loved ones of the military's accused are court-martialed in this country at the unbelievable rate of 10,000+ a year with a conviction rate of 95 to 98%. On a par, gentlemen with communist China.

In Closing

Suspicion, Distrust, iron fisted, secretive, out of control, fearful, not to be trusted, arrogant, single minded, tyrannical. Are these words being used to describe some third world power or government? No. These words are being used throughout this country to describe the current conditions and beliefs held by its citizens about the military justice system.

Over the years, serious flaws in the military system of justice have given rise to the attention of congress and the desperate need for reform. Indeed, decrees and judgments handed down by the Supreme Court have seriously attempted to halt the miscarriage of justice running rampant and seemingly beyond control in this country. All but a precious few of these "patches" to the system have been altered and their effectiveness seriously diminished. Year after year, day after day, story after story, we are witnesses to the callousness, indifference and general attitude of "catch me if you can" by our military. We hear of the minor and major indiscretions of the commands from one part of the world to another. We listen in shock and unbelief as cover-up after cover-up, one lie at a time assaults our senses and ultimately gives rise in the deepest part of our souls to outrage and indignation! Then comes the clincher. The military then hands us up their version of the biblical sacrificial lamb. Usually, the lowest rank on the totem pole of power to be held publicly accountable for all of the sins of the current situation. Should he or she attempt to deny the charges brought against them, the tyrant swings into action, using every power available to them to destroying everything and every explanation in it's path that is accusatory to their version of the facts. The "lamb" has no chance of survival. He is sacrificed for the openly held belief of "for the good and discipline of the service". The sacrificial lamb I charge is your son, daughter or grandchild or mine. Your life has just come to an end but you don't know it yet. Everything you believed to be true, all that you've sacrificed for thru the years is trashed, but you don't know it yet. All of your attempts to find truth and justice for your sacrificed loved one are useless, but you don't yet know that. For you, the light at the end of the tunnel is the speeding train called court-martial powered by the unlimited resources of fuel and unchallenged power of the military justice system.

I am not a learned scholar. I do not have a background in law, I am not trained as a public speaker but I cannot be quiet. I am but one voice speaking the heartfelt sentiments of many, crying out for truth and justice for our accused and convicted loved ones. The mentality that speaks to 'The good and discipline of the service at all cost' has just slipped beyond the realm and boundaries of the military justice system and into the civilian and private lives of its citizens.

Who can stop it? Who will challenge the power of the train? Many have tried but power is hard to let go of. This most powerful country in the world is still living in the 17th century, dusting the cobwebs of outdated law books from past English tyrannical kings in a determined effort to maintain it's grip on the citizens of this country. I doubt very much that that was in the thoughts and minds of those who drafted our constitution.

The Declaration of Independence reads, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it."

The First Amendment to the Constitution, says that Congress shall make no law abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The first sentence of the Code of Induction begins with "I will uphold the Constitution".

ARTICLE VI reads: In all prosecutions, the accused shall enjoy the right to a speedy and PUBLIC trial, by an IMPARTIAL JURY of the State and district wherein the crime shall have been committed.

Are we to believe that our constitutional rights are to be left in the dust with the stroke of a pen upon induction into the Armed Forces? If that is to be so, then CAMI suggests that **DISCLOSURE**, which has become so powerful a word in our Government, be carefully and honestly explained to any new inductee and or their family members if a signature is to be required for them to join. Let's stop feeding the young and impressionable promises of college educations and glamorous travel adventures. Let's tell them the truth. Sign here and pray that you're one of the FEW GOOD MEN. Oh, by the way, does your

family have enough money to hire the best legal defense team that money can buy cause in our world, your first offense is your last offense and we're most likely going to convict you and we're going to use any and everything we can get our hands on to do it whether it's truthful or not. In other words, screw up kid and you're on your way to Leavenworth.

Here is the question. What if your daughter, son or grandchild were this day enlisted in a branch of the armed forces and unthinkable though it may be, was accused of a crime. What if you really, truthfully believed as countless Americans have in the past that justice would prevail and that rank or influence would not or could not be an option in the possible outcome or dispensation of sentence or acquittal? Would you then offer up a sigh of relief when extended the generous offer of free counsel accompanied by the words "there is no evidence" or rather would fear creep into your soul as you empty your bank accounts, mortgage your home and gather all manner of money to assemble the best legal defense in the world that your money could buy.

There is nothing that can frighten me enough to sidestep my mission for Justice. I have been to the valley of the shadow of death and I fear no evil or the power of the UCMJ.

I thought I was alone. I believed I was the only one and then I learned the truth. My son's case was not special, it wasn't even unique. We were just one more fatality of the UCMJ that claimed not only the life of my son but my marriage, my family, my other children, my home, my business and my freedom. It radiates outward into all areas of my life and countless others like me like the shock waves of an earthquake. Ten years later still impacting my relationships, my children and my career.

Are lives of the innocent and their families worth fighting for? Are the words "and Liberty and Justice for all" worth fighting for? YES, a resounding yes!

If the articles of the UCMJ stand for justice as much as they stand for the "Good and discipline of the service, then let JUSTICE prevail at al cost.

There is a well know quote that states, **"Better 10 men should go free than one who is innocent be unjustly convicted"**
The military version is slightly different. It reads, **"Better that 10 innocent men be convicted than one who is guilty go free."**

That should be the priority of the United States Armed Forces. Right from the start. That would truly be for the good and discipline of the service.

In the movie A FEW GOD MEN, Jack Nickelson said we couldn't handle the truth. I'm here today to tell you that not only can we handle it, we are starved for it. We demand it and we will not be intimidated under pressure or back down until we find it!

"Injustice will not be destroyed until those who are not affected by it are just as outraged as those who are."
....Author unknown

C.A.M.I. (Citizens Against Military Injustice)

Written Comments

Submitted by Glenda Ewing

March 13, 2001

To the:

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

(The "Cox Commission")

Topics for Consideration

To: The Honorable Walter T. Cox, 111, Senior Judge, United States Court of Appeals for the Armed Forces, Chair, and the Honorable Members, of the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice.

In the pages that presentation to follow, I will cite comments from citizens of this country directly affected by the military justice system and list the highlights of their stories of indignation. In doing so, I believe we can affirm with an resounding YES to answer the first of the commissions questions on whether there is a need for a congressional review of the military justice system and in fact, a complete overhaul.

My name is Glenda Ewing and I come before you today with the privilege of giving a voice to countless Americans who have none. The name of my organization is CAMI, Citizens Against Military Injustice. I began this organization not even a year ago with my own meager funds and the with the help of an acquaintance, knowledgeable in web design, with just a burning desire to provide information and help to others who might find themselves where my family did 9 years ago. To date, it has become far more than that as the stories of abuse, destroyed and financially devastated families, heartbreak and loss of family life pour into our site over the internet. I am today, not without the dream that with the help of other organizations committed to truth and justice that change in the UCMJ will be affected. Military justice for the majority is prefabricated according to the wishes of the local Commander and the "trial" is tantamount to a verdict of guilty. How could any trial be considered fair when the Convening Authority by right of title is given the power to select the judge, the attorneys and the jury members. It may go unsaid, but the mentality is that if the Convening Authority sees fit to bring about a court-martial, the accused can be assumed to be guilty.

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saying **"I do believe that on the whole, the system is designed to be fair. It would be a mistake to take an incident or a group of incidents out of thousands and thousands of cases tried and say the system is not fair."**

More to the point, Camp Pendletons Col. Mark Haiman, Marine Corp senior circuit judge and appointed to hear the Holt case, huffs: **"To anyone who says our system is a railroad, I'll spit in their eye because it's just not true."** Critics however, are not deterred by the insistance of military officials.

Says Robert Rivkin, a former Army lawyer who is now in private military practice, **"I find the system to be incorrigibly corrupt."** He goes on with others to say that hundred of convictions have been reversed on appeal because of unlawful command influence and they argue that **they can find no case of a commanding officer who, in turn, has suffered prosecution for the act.**

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It is defined as the unlawful assertion of authority that interferes

with the fair and just administration of military justice under the UCMJ. Article 37, UCMJ, was written into the Uniform Code of Military Justice to ensure that commanders did not unlawfully influence the disposition of charges or otherwise poison the justice process. It acknowledges that commanders do have a wide range of authority in the military justice arena but requires that they act with discretion and independence when enforcing good order and discipline. Most of all in this area

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conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

The foregoing provisions of the subsection shall not apply with respect to:

1. General instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or

2. To statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

We would suggest that in serious crimes, the accused be completely removed from all possibilities of the assumption of command influence by implementing a separate and distinct **criminal** justice system. Point of view being that the convening authority that refers charges for court-martial, also hand picks the judge, panel members, defense and prosecution. *How can anyone even suggest that fairness and impartiality will be imparted to the accused?*

Each year 95-98% of accused defendants are convicted. Military justice is prefabricated according to the 'generally' known wishes of the commander. The trial is now tantamount to a verdict of guilty.

Real life examples of command influence alive, well and flourishing in America today:

(See attached documents to be submitted for the record)

1. **Lee Mirecki** (deceased) Airman Recruit in the United States Navy: Died March 2, 1988 while participating in sea rescue training at the Naval Air Station in Pensacola, Florida.

2. **Air Force Capt. Carla Lancaster:** sentenced to 6 months for taking medication prescribed by her dentist by a military justice system that allows authorities to play accuser, judge and jury. (Article by Jack Anderson and Michael Binstein, appeared in the Washington Post on April 14, 1994)

3. **Brian Adams** US Army: Arrested by civilian authorities off base after an accusation of rape by a female soldier. After sworn testimony and and absence of evidence from a rape kit test, the case was thrown out. The commander at Fort Drum aggressively pursued the matter and Brian was brought to a court-martial where he was found guilty of rape.

4. **Lt. Col; Karen (Dwyer) Tew, US Air Force:** Looking at the loss of a military career and deserved pension over a love affair gone bad, eventually took her own life after the military drug her personal life out for all the world to see and labeled her "dishonorable" even though she told the truth.

5. **Peter Cole, Major, U.S.Army:** While assigned as a battalion logistics officer in Germany, he investigated he loss of combat equipment. Upon finding evidence of massive theft that affected combat readiness, he was forced to go over the head of his superior to report his findings. He was relieved of his duties, reassigned, given a poor evaluation and threatened with court-martial.

6. **Ray Olafson Physician, US Navy:** with a twenty-year stellar record, convicted of rape with no physical, witness or evidentiary testimony. Wife and daughters are labeled "victim witnesses" and unable to have contact with him.

7. **Donald Bramlett; US NAVY:** Accused of rape while stationed in Bahrain and sentenced to 9 years at Fort Leavenworth. Accuser had regular sex with several individuals but when a married Navy man, fearful of charges of adultery with the woman, denied the relationship and together accused Bramlett.

8. **Marine Corporal Lindsey Scott,** began serving a 30-year prison term for the rape and stabbing of a woman near Quantico. A shocking miscarriage of justice that pinned the black marine with the crime. Court-martialed and convicted, Scott maintained his innocence but his pleas went unanswered until a civil rights activist, Lori Jackson (now deceased) together with Scott's attorney, went to war against the US Marine Corp to acquit the man who was railroaded by a racist military system.

9. **Clayton Lonetree, former Marine Sgt;** Convicted of espionage by court-martial while stationed as a guard at the US embassy in Moscow. Served 12 years at the USDB. Many agree that later convicted Aldrich Ames, an American official of the CIA who was entrusted with discovering Soviet spies and who himself became one of the most successful double agents for the Soviet Union and Russia, quietly stood by while Lonetree took the blame.

10. **Kevin Holt, former LCPL US Marines;** falsely accused by an AWOL marine and later convicted on pre-meditated murder and conspiracy and sentenced to life imprisonment at Fort Leavenworth, Ks. Eyewitness testimony of eleven marines were called "Elvis Sightings" by the prosecution.

11. **John Mullahy, US Navy;** A classic example of how the military's judicial system is manipulated by officers with personal vendettas.

12. **Walter Fitzpatrick III, former Lt. Commander of the USS Mars;** falsely accused and convicted of misappropriation of funds after receiving approval to send

staff members to the commanders funeral in Greece who had been assassinated while touring there. With evidence in hand to send TOP military officials to prison, he is still fighting the system to have his name cleared after ten long years.

Kevin Holt

Nine years ago this May, my family and I were living what most would call a normal life. We worked hard, we paid our taxes, and we were living in our new home. We anxiously awaited the homecoming our youngest son Kevin, a proud Marine who was on his way home to be married. In my worst nightmare I could not begin to know the terror that filled my life that warm day in May when Kevin was arrested and falsely accused of the murder of a fellow Marine. Little did I know then that the nightmare, which began with the accusation of an AWOL Marine, would eventually propel me into attempting to find an explanation for the injustice and the horror of witnessing a military court-martial where the life of my son hung in the balance of a capitol conviction? Little did I know that my aggression in these matters would eventually lead me to form an organization on behalf of the victims of military injustice. Little did I know that my passion for justice would bring me before you today as a voice for the people of this country who are fed up with the way military justice is metered out to it's own. Hopelessly divided, angered beyond reason and immune to the lies and deceit of each story that unfolds in our daily newspapers and the media.

Undisputed Facts

- 11 eye witness marines immediately came forward with their statements
- 45 minutes of unaccounted for time
- 44 minutes of driving time alone
- 42 items taken from car and sent to crime lab.
- No blood found on clothes
- No weapon found

- A government theory that defies the imagination
- A commanding officer who stated that EVERYONE on base KNEW he was guilty
- A government witness who gave false credentials and, who was denounced by his superiors, as a liar for hire, yet was paid $25000 for his testimony.
- 5 accusers known to each other chose to say nothing until the body was discovered. Two did not come forward until 4 months later. What changed their mind?
- Levis that were found to be void of blood and unwashed upon examination by the Army crime lab, mysteriously show up in court 8 months after sitting in an evidence locker smelling freshly laundered with visible signs of blood. Blood by the way which could NOT be typed and was not DNA tested.
- A victim who was only slightly known to the accused, well known to the accusers, and stabbed 46 times.
- An autopsy that stated that the victim had been dead POSSIBLY longer than 24 hours.
- A body that was found almost 70 hours after the government alleges he died yet still in a state of rigor mortis, and untouched in an area crawling with coyotes.
- Who just prior to his arrest and upon seeing flashing lights in his rear view mirror asked his fiancée if he had run a stop sign or something?

- An investigating officer who held the article 32 hearing, stepped out of his role of impartiality when he gave the prosecution, the card of a forensics blood specialist and suggested that they bring him in to examine the jeans for blood even though the Governments own army crime lab found none, and the California state police and highway patrol refused to look at the evidence upon hearing of the initial findings. The defense was not notified of this specialist until just before he appeared at trial and only on appeal was it learned by the defense of the role of the investigating officer.

The list goes on and on and on. Kevin missed receiving the death penalty by 2 votes. He is currently serving a life sentence at Fort Leavenworth. His defense council was promoted to Major. Trial counsel was promoted to a full colonel. The judge retired with honors.

On March 18 on the FOX channel, the network premier showing of the made for TV movie, A Glimpse of Hell based on the book by Charles Thompson will air. It's the story and cover-up of the explosion in gun turret #2 aboard the battleship USS IOWA in which 3 explosions ultimately claimed the lives of 47 men.

John Mullahy

RECIPE of a Navy Cover-up

1.Blame it on a dead soldier whose name was Clayton Hartwig.

2. Lie, saying he was Gay to drum up anti-gay sentiment

3.Destroy the life and career of the man who risked his life to save the ship and crew.

4.Allow a US Navel officer to lie to Spanish dignitaries through a translator.

5.Promote the naval offices that caused it all.

The explosion aboard the USS Iowa is not unlike what happens in the lives of countless Americans each year as family members and loved ones of the military's accused are court-martialed in this country at the unbelievable rate

of 10,000+ a year with a conviction rate of 95 to 98%. On a par, gentlemen with communist China.

IN CLOSING

Suspicion, Distrust, iron fisted, secretive, out of control, fearful, not to be trusted, arrogant, single minded, tyrannical. Are these words being used to describe some third world power or government? No. These words are being used throughout this country to describe the current conditions and beliefs held by its citizens about the military justice system.

What Does Websters Have To Say

TYRANNY: Despotic rule- the unjust and cruel exercise of power of any sort. An oppressive or cruel ruler. An arbitrary and absolute ruler who took power by force.

SUSPECT: To believe someone guilty of something to his discredit without conclusive proof-to form a notion of someone not necessarily based on fact.

FEAR: The intuitive emotion aroused by impending or seeming danger. Anxiety, danger, to be afraid of.

SECRETIVE: The state of being secret-kept from the knowledge of-hidden-known only to the initiated. Something kept from the knowledge of others. Something which has not been explained. Hidden or not obvious.

Over the years, serious flaws in the military system of justice have given rise to the attention of congress and the desperate need for reform. Indeed, decrees and judgments handed down by the Supreme Court have seriously attempted to halt the miscarriage of justice running rampant and seemingly beyond control in this country. All but a precious few of these "patches" to the system have been altered and their effectiveness seriously

diminished. Year after year, day after day, story after story, we are witnesses to the callousness, indifference and general attitude of "catch me if you can" by our military. We hear of the minor and major indiscretions of the commands from one part of the world to another. We listen in shock and unbelief as cover-up after cover-up, one lie at a time assaults our senses and ultimately gives rise in the deepest part of our souls to outrage and indignation! Then comes the clincher. The military then hands us up their version of the biblical sacrificial lamb. Usually, the lowest rank on the totem pole of power to be held publicly accountable for all of the sins of the current situation. Should he or she attempt to deny the charges brought against them, the tyrant swings into action, using every power available to them to destroying everything and every explanation in it's path that is accusatory to their version of the facts. The "lamb" has no chance of survival. He is sacrificed for the openly held belief of "for the good and order of the service". The sacrificial lamb I charge is your son, daughter or grandchild or mine. Your life has just come to an end but you don't know it yet. Everything you believed to be true, all that you've sacrificed for thru the years is trashed, but you don't know it yet. All of your attempts to find truth and justice for your sacrificed loved one are useless, but you don't yet know that. For you, the light at the end of the tunnel is the speeding train called court-martial powered by the unlimited resources of fuel and unchallenged power of the military justice system.

I am not a learned scholar. I do not have a background in law, I am not trained as a public speaker but I cannot stay home and be quiet. I am but one voice speaking the heartfelt sentiments of many, crying out for truth and justice for our accused and convicted loved ones. The mentality that speaks to 'The good and discipline of the service at all cost' has just slipped beyond the realm and boundaries of the military justice system and into the civilian and private lives of its citizens.

Who can stop it? Who will challenge the power of the train? Many have tried but power is hard to let go of. This most powerful country in the world is still living in the 17th century, dusting the cobwebs of outdated law books from past English tyrannical kings in a determined effort to maintain it's grip on the citizens of this country. I doubt very much that that was in the thoughts and minds of those who drafted our constitution.

I ask you to carefully consider one question. For you who have served on or for the highest courts in the military system. Is it possible that your eyes and ears have escaped the reality to the ruthlessness of the system? I doubt it or you would not be here today.

Article 1 of our Constitution reads, "No man shall make any law to diminish the individual rights of its citizens".
The first sentence of the Code of Induction begins with "I will uphold the Constitution".

Are we to believe that our constitutional rights are to be left in the dust with the stroke of a pen upon induction into the Armed Forces? If that is to be so, then CAMI suggests that DISCLOSURE, which has become so powerful a word in our Government, be carefully and honestly explained to any new inductee and or their family members if a signature is to be required for them to join. Let's stop feeding the young and impressionable promises of college educations and glamorous travel adventures. Let's tell them the truth. Sign here and pray that you're one of the FEW GOOD MEN. Oh, by the way, does your family have enough money to hire the best legal defense team that money can buy cause we're most likely going to convict you and we're going to use any and everything we can get our hands on to do it whether it's truthful or not. In other words, screw up kid and you're on your way to Leavenworth.

Here is the question. What if your daughter, son or grandchild were this day enlisted in a branch of the armed forces and unthinkable though it may be, was accused of a crime. What if you really, truthfully believed as countless Americans have in the past that justice would prevail and that rank or influence would not or could not be a fraction in the possible outcome or dispensation of sentence or acquittal? Would you then offer up a sigh of relief when extended the generous offer of free counsel accompanied by the words "there is no evidence" or rather would fear creep into your soul as you empty your bank accounts, mortgage your home and gather all manner of money to assemble the best legal defense in the world that your money could buy?

There is nothing that can frighten me enough to sidestep my mission for Justice. I have been to the valley of the shadow of death and I fear no evil or the power of the UCMJ.

I thought I was alone. I believed I was the only one and then I learned the truth. My son's case was not special, it wasn't even unique. We were just one more fatality of the UCMJ that claimed not only the life of my son but my marriage, my family, my other children, my home, my business and my freedom. It radiates outward into all areas of my life and countless others like me, like the shock waves of an earthquake. Ten years later still impacting my relationships, my children and my career.

Are lives of the innocent and their families worth fighting for? Are the words "and Liberty and Justice for all" worth fighting for? YES, a resounding yes!

If the articles of the UCMJ stand for justice as much as they stand for the "Good and discipline of the service, then let JUSTICE prevail at al cost.

"Better all men should go free than one who is innocent should be unjustly convicted"

That should be the priority of the United States Armed Forces. That would truly be for the good and discipline of the service.

In the movie A FEW GOD MEN, Jack Nickleson said we couldn't handle the truth. Not only can we handle it, we are starved for it. We demand it and we will not be intimidated under pressure or back down until we find it!

"Injustice will not be destroyed until those who are not affected by it
are just as outraged as those who are."
....Author unknown

The Kevin Holt Case - Summary

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Forget the Bill of Rights and civilian concepts of a justice system, including the presumption of innocence until proven guilty. The Uniform Code of Military Justice (UCMJ) was designed and is perpetuated primarily to reinforce the command structure.

Lance Corporal Kevin Holt, USMC, was arrested by the San Diego Sheriff's Department on May 17, 1992 while home on leave in Washington State. He was on his way home from church with his fiancée, whom he was due to marry in three days. He was 21 years old.

He was charged with the stabbing murder of fellow marine Brent Arthurs in an alleged cover-up of the theft of a trailer and the deceased's motorcycle. The military took over the case soon after.

Holt acknowledged his participation in the theft and his second-hand knowledge of a related insurance scam. He has, however, steadfastly maintained his innocence of the murder charge, and continues to do so, even though a confession would offer his only hope of a commuted sentence.

The Government's Theory

On a Friday evening, Holt lured Corporal Arthurs to a remote area in San Diego county where he stabbed him 46 times to conceal the theft and scam. He subsequently, according to the government witnesses, offered them a detailed account of the murder. A 45-minute window on that Friday night is specifically cited in the record as the time of the murder.

The Defense Theory

On that Friday evening, Holt assisted the victim and the others involved in the theft scam (the chief prosecution witnesses) to move and hide the motorcycle until Arthurs (the murder victim) could collect the insurance money. Holt departed on leave to Washington on Saturday morning to get married.

No less than **eleven** marines testified that they knew Arthurs and had either seen or spoken to him on Saturday! One had even had breakfast with him. All eleven were dismissed by the government as "Elvis sightings".

The Key Government Witnesses

1). A Marine Corps deserter and confessed liar and thief with an obsession for motorcycles, who was granted immunity by the government for his damning testimony. He was in possession of the stolen motorcycle at the time of Holt's arrest.

During closing argument in Holt's trial, the prosecutors referred to their star witness as "a liar, a thief and slimeball".

2). A fellow marine and cohort of the deserter, Arthurs and the motorcycle group. A man obsessed with knives and killing who had boasted to a female marine about knifing a man in Tennessee, taking pictures of the blood trail, and showing them off to anyone who cared to see them.

3). His 16-year-old girlfriend, who married him two weeks after the murder. She called police a week after the body was found and gave explicit details of the murder saying that Holt had volunteered them to her.

Draw your own conclusions.

Some Anomalies

There are holes in this case big enough to drive an Abrams tank through! For the full appeal petition, detailing the **eight legal errors in the government's case**, see the APPEAL, page. Here are just a few:

- The abovementioned government witnesses testified that Holt told them he was "covered" with blood after the killing. His clothes and torn-apart car were thoroughly analyzed by the US Army forensic laboratory which found NO blood or fiber evidence.
- The government countered this setback in their case by hiring a highly dubious (according to his professional peers) civilian, "forensic expert", for the princely fee of $25,000, to testify that he had found blood spatters that the US Army Crime Lab had missed and San Diego Sheriff's Department.
  NOTE 1: the defense's investigation budget, allocated by the Convening Authority, was only $5,000 for this entire capital case!
  NOTE 2: This expert's "evidence" was the government's key and **only** material evidence against Holt.
- The junior of the two officers assigned to Holt's defense, who did all the interviewing and hands-on work with witnesses, was inexplicably reassigned and reposted to Washington, DC, just days before the trial.
- Privately and at his own expense, this officer flew to California to testify at the Court-Martial in Holt's defense. **He was denied access to the base.**
- There are many more anomalies (see APPEAL).

Kevin Holt is now 29 years old. He will remain in the Detention Barracks at Fort Leavenworth, Kansas until he is at least 40 years old. Unless, of course, he decides to confess to a crime he maintains, and the record strongly indicates, he did not commit.

If you still have doubts, read Kevin's open letter to CAMI, posted October 27, 200, on the Letters to CAMI page.

Final Words

In the US military, a fair trial is only as fair as its overriding military purpose. See the Justice? section of this site for more on this.
Accordin to the Government Accounting Office in 1978: "The military justice system presents obstacles to the impartial delivery of justice... Problems with the defense and trial counsel organizations in the services further contribute to a perception that military justice is uneven, unfair, and of low priority."

Nothing has substantially changed since then.

"Discipline and Good Order" take precedence over truth.

The Convening Authority (CA) in a military justice action is usually the accused's Commanding Officer (CO), who, with the advice of his/her legal advisor, also controls:

- The direction, management and funding of the investigation (which may be changed to suit his/her purpose, as in the prosecution's funding in the Kevin Holt case)
- The charges laid against the accused (the more charges, the greater the chance of conviction-the shotgun approach)
- Selection of the jury (panel) members and alternates, also their future careers in light of their findings
- The career futures of the judges and counsels involved (through his/her networking influence and the lack of tenure for military judges).
- The "message" communicated to his/her unit, and to the military in general, by the outcome of the case. Typically, a CO will direct the case to demonstrate his/her toughness on crime and assertion of disciplinary policy.
- In a supreme irony, the CA is also the first level of appeal!

Military Justice is an internal matter.

The military's justice system is rarely exposed to civilian scrutiny. As a tool of command, the system is kept "in-house" as far as possible.
Only the most egregious cases are likely to be accepted by the civilian Court of Military Appeals and even fewer will ever reach the Federal Appeal Courts.

The majority of appeal cases will go as far as the Courts of Military Review, composed of military judges who are, regardless of judicial training, active duty officers of their respective services, with their careers on the line.

Disparity in Sentencing.

Sentencing in the military is NOT subject to sentencing guidelines, as it is for civilians. The judge in the case can allow no mitigating factors.

Sentences are decided by the panel (jury) which delivered the verdict. As discussed above, the panel is inevitably swayed by the intent and thrust of the Convening Authority.

And so it goes.

Citizens Against Military Injustice (CAMI)

This article by John Harry Watson was published August 3, 2000 in Kevin Holt's hometown newspaper, The Edmonds Paper.

Local Mother Fights Back Against Military Justice System
by John Harry Watson.

On May 17, 1992, 21-year-old U.S. Marine Corps Lance Corporal Kevin Holt was home in Edmonds on leave from Camp Pendleton, California. He was to be married three days later and the future looked bright indeed for the young Gulf War veteran.

In the morning, he and his fiancée attended Westgate Chapel, where Kevin had been an active member of the choir and congregation. After services, they went shopping for their wedding rings. His brother stated that he had never seen Kevin so happy and light hearted.

About 5 p.m., the couple set out toward his father's house for a barbecue. Kevin noticed that a police car was following them. He asked his fiancée if he had run a stop sign or something. She said she didn't think so. Obligingly he pulled over to the side of the road.

Kevin had no reason to be alarmed until police surrounded his car and took him to the ground at gunpoint &endash; beginning a living nightmare which continues more than 8 years later.

Holt was arrested and charged by the San Diego Sheriff's department for the brutal slaying of a fellow Marine at Camp Pendleton. The victim had been stabbed 46 times.

His principal accuser was another Marine, an erstwhile "friend", who, although absent without leave and in possession of the victim's stolen motorcycle at the time of the arrest, was granted full immunity by the government to testify against Kevin. Even the prosecutor called him a "slimeball who was not used to telling the truth".

In a still controversial move, the San Diego Sheriff's department, after its initial crime scene investigation (which was in an unincorporated area outside the Camp Pendleton perimeters), turned the case over to the military &endash; the beginning of the end for Kevin, who was subsequently convicted on all charges and, narrowly escaping the death penalty, was sentenced to life in prison without the possibility of parole. He is now 29 years old.

Court-Martial

The investigations, hearings and court-martial offer a horrifying picture of a "justice" system carefully insulated from public scrutiny which produces a 95% conviction rate in more than 10,000 cases per year &endash; numbers equaled only by the People's Republic of China!

The full details of the Holt case require a book (which is in the works). Following are just a few of the salient points:

• The government contended that the murder took place in a 44 minute window on a Friday evening before Kevin was to return home on leave. No less than eleven Marines, who knew the victim but did not know Kevin personally, testified that they had seen the victim (one even had breakfast with him) on the following Saturday and Sunday, when Kevin's whereabouts were fully accounted for.

The government dismissed all eleven out of hand as "Elvis sightings."

• Immediately after Holt's arrest, police seized 42 items from his mother's home, including his car and the pair of jeans he allegedly wore at the murder scene. After careful forensic analysis, the jeans were found to be devoid of any blood or fiber evidence by both the San Diego Sheriff's department and the U.S. Army's own high-tech crime lab.

Faced with this setback, the government paid $25,000 to a civilian "blood spatter expert" who, sure

enough, "found" blood stains. When the jeans appeared at court-martial they exhibited an obvious large brown spot in the crotch area and their condition differed in several important ways from that testified to by the original crime lab technicians, even including the contents of the pockets.

Dr. Herbert McDonnell, a world-wide authority on blood spatter analysis who provided initial training to the government's "blood spatter expert", later described him as a "Frankenstein monster, liar for hire, whore and charlatan," and noted that he "has no scientific background."

At the time of the post-trial investigation, this same "expert" was under investigation by a Grand Jury for allegedly tampering with evidence and accepting bribes in an unrelated civilian case.

• The two key government witnesses, self-confessed liars and thieves, testified that Holt had voluntarily confessed to them a full account of the murder including the detail that he was "covered with blood" afterwards. Other than the jeans as noted above, no blood was found on any of Holt's clothing, possessions or in his car, which was literally torn apart for forensic examination and had not been cleaned in several weeks.

In interviews conducted as part of a post-trial investigation by an independent attorney, these two witnesses were less sure about Kevin's confession and each pointed the finger at the other as the possible perpetrator!

• The victim was required to be at formation on the Saturday morning following his alleged murder. Formation attendance is routinely recorded in the unit diary. Interestingly, said diary was "missing" at the court-martial. Had it been presented in evidence, of course, it would have blown the government's entire case.

The anomalies go on and on. In the words of that same attorney: "To point out every conceivable error committed in this trial and all matters properly to be raised before appellate courts would turn this submission into a book."

Even a book would not have made any difference in the subsequent appeals through the military system: each court dismissed the appeals and upheld the sentence. Holt's attorney, William Cassara of Augusta, Georgia, has requested an appeal to the United States Supreme Court.

Reality Check

Readers, especially those who have served or are serving in the military, may find this story incredible. Indeed, one of the most alarming aspects of the military justice system is how little is known about it, even by service members. A recent message from another victim of military injustice begins, "I had been in the Air Force for 19 years with an outstanding service record and quite frankly, had no knowledge of the military injustice system." That's how it is!

A Mother Speaks Out

In "An Open Letter to the Parents of Graduates and the Community of Edmonds", Kevin's mother, Glenda Ewing, writes:

"After nine years of intimidation by the Military, I have decided to bring to the attention of the public a story so outrageous that it defies the imagination. Remembering that someone had once said to me, "don't get mad, get even", I have taken the heartbreak and the knowledge that I have learned and have formed an organization called CAMI (Citizens Against Military Injustice), dedicated to providing help, resources and information to anyone who may find themselves where I did on May 17th, 1992. Our web address is www.militaryinjustice.org.

This story will affect thousands of Americans as it will bring insight to the fact that if their son or daughter should at some point decide to go into the military, they will need to know, as I did not, that civil rights as we know them, go out the window with the stroke of the pen!

On the third day of the court-martial, the president of the jury and the presiding judge (both officers) had lunch together and were in close conversation all the way back to the courtroom. I have never seen that in our American court system. But then again the military court system is different.

Right now we are preparing for an appeal, so I can't say too much. But there are MANY key factors in my son's case that should never have even gone to an Article 32, much less a court-martial. I have always thought that the military was a branch of the United States Government and should have the same justice system. Boy, was I wrong! **It's a whole different ball game, with a set of rules all its own.**

Before I let another family member, loved one or friend join the military, I will tell them about my son and about CAMI. I strongly urge all of you to do the same, or at least have them visit the web site.

We need to slow down the enlistment rate or bring it to a stop until we can get at least a congressional investigation into military injustice.

Do not wait until this happens to you! It is a living nightmare!

My son was willing to lay down his life for OUR country, OUR freedom, OUR way of life, and OUR justice system. If my child was willing to die for OUR country, then shouldn't he be entitled to the SAME justice system that he would lay down his life for?

Code 011

From: MMFR Donald D. Bramlett, USN

To: Admiral Charles W. Moore, Commander, U.S. Naval Forces, Central Command

SUBJ: CLEMENCY PETITION - U.S. v. DONALD D. BRAMLETT

1. Sir, I respectfully petition you to exercise discretion as the convening authority to grant clemency in my case. I respectfully petition you to set aside my conviction, order a mistrial or a new trial based on the facts as follows.

2. Sir, I did not rape Huniada Abdulqader nor did I unlawfully enter her dwelling at any point while stationed at Naval Support Activity, Bahrain. These allegations came about out of her fear of being sent back to her home country of Lebanon and for her financial gain. Sir, in late May of 1999 I retained the services of a female Bahraini lawyer named Jamila Ali Sulman who put me in contact with her own private investigator named Hussan. I spent an evening speaking with Mr. Hussan. He told me he was going to investigate these allegations. Mr. Hussan called me the next morning and informed me that he spoke with Huniada Abdulqader. Mr. Hussan informed me that Miss Abdulqader stated to him that, "if I pay her 5,000 Bahraini Dinars she would drop the charges against me." I told Mr. Hussan to tell Miss Abdulqader that, "I would see her in court because I am not paying her any money." Sir, I told both of my military lawyers about this very serious information. During the trial her attempt at extortion was not mentioned nor did my lawyers even question Miss Abdulqader about it.

3. The morning of these allegations I was turned over to a foreign government by members of NSA Bahrain. Special Agent Jim Kenworthy NCIS, MA1 Hussain COMMAND INVESTIGATIONS, MA2 Durkee COMMAND INVESTIGATIONS, Patrolman Murchinsen and Patrolman Martin of base security along with two Bahraini police officers made me walk of the Al Zehara building (a.k.a. Yum Yum Tree) across the street to the Bahraini Public Safety police station in the Hoora section of Manama, Bahrain. I was then left there without any representation from the American Government and placed in the custody of the Bahraini's. While in the Bahraini's custody, I was subjected to mental and physical abuse and coercion. I was forced to give the Bahraini's a handwritten statement, under extreme duress, in order to be turned over to the American Authorities. I was also interrogated by Colonel Walmsey of the Bahraini Public Safety police, Criminal Investigation Department. I was then stripped of all my clothes and left naked until NCIS showed up with a pair of clothes about an hour later. Sir, I reference (U.S. v. MM3 Bramlett Record of Trial page ###). This statement from BPS was used against me in trial. After many hours talking to my lawyers I was talked out of testifying because of the statement.

4. Sir, I again reference (U.S. v. MM3 Bramlett Record of Trial page ###) where Chief Lott asked, "Did you at any point say no?" Miss Abdulqader admits that she never said no to having sex with me. Furthermore, upon review of the pictures presented in trial, they do not denote the injuries sustained by a victim during a violent act of rape, for which I was wrongfully convicted.

5. Sir, finally, in reference to (U.S. v. MM3 Bramlett Record of Trial page ###) CAPT Hacth (Presiding Judge) stated that he and CAPT Carlson (Senior

EXHIBIT 2

Jury Member) shared lunch together and then walked and talked from the Oasis restaurant to the courtroom during trail. If nothing else, this violates the strict professional etiquette required for participating in a General Court Martial.

6. Sir, as part of the Sec Det I was aware that if the opportunity ever arose I would have to put my life on the line to come to your assistance if we ever received your alarm. I was and am willing to lay my life down for you and any other member of our command. Sir, I strive to be like your friend that you told me about on MIA/POW day who was "Killed in Action" in Vietnam. I still strive to have the same honor, courage and commitment, as he, to lay my life down for life, liberty and the pursuit of happiness. Sir, I don't just say these things as I know a good soldier would. I say them because I come from a long line of military service members. Sir, my heart is one of a God faring man. I have never hurt any woman nor have I ever forced myself upon a woman. Sir, this injustice that has taken place is going to ruin my life. Please, I implore you sir to take action in my case. I am sorry sir, I do not like to say anyone is responsible for my life, "For I am a man." But, in this case sir, my life is in the mercy of your hands.

7. Admiral Moore, I am respectfully requesting that you will set aside the conviction, order a mistrial or a new trial based on these facts that I have mentioned. Please sir, allow me to prove my innocence. I thank you humbly for your attention in this matter, sir.

Respectfully,

Donald D. Bramlett USN

MMFR Donald D. Bramlett

Long ENS, Security Department
From: /O=ASU SWA BAHRAIN/OU=ASU_SWA/CN=RECIPIENTS/CN=LONGD
To: Sheek LCDR, Security Department
Subject: PERSONAL CONDUCT

From the Security Officer

It saddens me to inform you that on the morning of 20 march 1999, GM3 Bramlett was taken into custody by Bahraini Public Security and accused of committing a violent rape of a Lebanese woman. Although this case is under investigation and the crime is only an allegation, Petty Officer Bramlett has been relieved of all Security duties until further notice. This action was taken because of the seriousness of the alleged offense. He has been re-assigned to the base Master-at-Arms.

Anyone with information regarding his whereabouts on the evening of 19 March and early morning hours of 20 March 1999, is requested to come forward and notify the Command Investigations Office. It is alleged that he was extremely intoxicated and had been with other members of the Security Force prior to the alleged offense. Irregardless of the outcome, this type of behavior and extreme level of intoxication are unacceptable. There is no greater shame than one of our own gone bad. This incident has tainted the reputation of the entire Security Force and affects each and everyone of us. As keepers of the peace and enforcers of the law our actions, both on and off duty, are scrutinized by all.

Any information you may have concerning Petty Officer Bramlett, regardless how insignificant you may feel it is, should be reported to Command Investigations for determinations.

[redacted]

We have been recognized as the #1 Security Department in the Navy. Let's live up to this reputation, on and off duty. Shipmates take care of shipmates.

Keep up the good work.

SECO Sends

S P Sheek
LCDR USN

EXHIBIT 3

STATE OF BAHRAIN
MINISTRY OF THE INTERIOR
PUBLIC SECURITY
GENERAL DIRECTORATE OF CRIMINAL INVESTIGATION
P.O.BOX - 26698

TEL 718888
TELEX : 8333 ALAMN BN
FAX - 0973 - 714760
CABLE : DAKHELIAH

دولة البحرين
وزارة الداخلية
الامن العام
الادارة العامة للتحقيقات والمباحث الجنائية
ص . ب : ٢٦٦٩٨
تليفون ٧١٨٨٨٨
تلكس : ٨٣٣٣ الامن بي . ان
فاكس رقم : ٠٩٧٣ - ٧١٤٧٦٠
برقيا : — داخلية

NO. MOI/PS/CID/FM/165/03/99, الرقم :
DATE : 21.03.1999. التاريخ :
TO : الى :

Medico Legal Report
Concerning the Examination of
MISS. HENIDA ABDEL KADER ABDEL KADER.
P.P. NO. 1498848

At the request of C.I.D., I, Doctor Ebrahim Mohammed Saleem, Chief Medico-legal Doctor, examined ***MISS HENIDA ABDEL KADER ABDEL KADER*** *at 10 o' clock a.m. on 20/03/1999 in my office at the Head Quarter of C.I.D. to ascertain whether she was the subject of recent rape and I state the following.*

1 - Circumstances :

[redacted]

2 - Medico Legal Examination:

The examinee was a young lady of about 32 years old rather short and slim in good general health, fully concious and oriented. On her examination the following injuries were noticed.

[redacted]

a) Tenderness on both sides ...

EXHIBIT 4
ENCLOSURE (1)

افـــادة
STATEMENT

القسم ..... Division

الاســـم Hunaida Abdulqader Abdulqader ..... Name

السن 31 Age Beutique Retail Trade الحرفة Salesman Occupation

الجنسية Lebanese ..... Nationality

العنوان Flat 24 Bldg. 141 Road 2004 Manama Town 320 ..... Address

[redacted]

H.A.A.

Continued Page 2
ENCLOSURE (1)

12

STATE OF BAHRAIN
MINISTRY OF THE INTERIOR
PUBLIC SECURITY

دولـــــة البحرين
وزارة الـــداخـــلية
الأمن العـــام

Telephone: 0973 098
582400 ext

افـــادة
STATEMENT

Statement taken by Colonel V.S. Ivanovsky at 11.05 on 00.03.99 at C.I.D. HQ.

القسم Division: CID HQ.

الاسم Name: Hunaida Abdulqader Abdulquader

الجنسية Nationality: Lebanese.

السن Age: 16.4.67 الحرفة Occupation: Sourcing Manager

العنوان Address: Flat 03 Building 141 Road 2004 Manama 520

[redacted]

PS 14

Continued Page 2

STATE OF BAHRAIN
MINISTRY OF THE INTERIOR
PUBLIC SECURITY

وزارة الداخلية
الأمن العام

افادة
STATEMENT

القسم
Division

الاسم
Name: Hunaida Abdulqader Abdulqader

الجنسية
Nationality: Lebanese

الحرفة
Occupation: Boutique Manager

السن
Age: 31 Yrs

العنوان
Address: Flat No:24, Bldg No:141, Road No:2004 Manama-320

[redacted]

NB : THIS FIRST STATEMENT BY VICTIM NOT COMPLETED AT HOORA POLICE STATION BY : Tasha E.PICKENS/MA3

This statement was taken in my presence and read to the victim. She agreed to the contents of the statement and signed it. Tasha E. Pickens

Tasha E. Pickens/MA3/USN/Command Investigations T24-46C

J. G. Lawsley
Lt Colonel,

التاريخ
Date

Record

STATE OF BAHRAIN
MINISTRY OF THE INTERIOR
PUBLIC SECURITY

دولـــــة البحرين
وزارة الـــداخـــــلية
الامـن العـــام

افـــادة
STATEMENT

القسم
Division

الاســـم
Name: Hunaida Abdulqader Abdulqader

الجنسية
Nationality

السن
Age

الحرفة
Occupation

العنوان
Address

I now remember that I had infact seen my attacker previously. He was a resident of our apartment building and I had seen him in the lift and two months ago whilst I was with my friend SCOTT had seen the man very briefly in his flat.

This statement is correct [redacted]

(This statement was taken in my presence and read to the victim. She agreed to the contents of the statement and signed it. Tasha E.PICKENS.)
Tasha E.PICKENS/MA3/USN/Command Investigations - Tel:724460

Signed:
Hunaida Abdulqader A.Qader

Signed:
Colonel-V.B.Walmsley

STATEMENT PLACE: NCISFO MIDDLE EAST

DATE: 21 MARCH 1999

I, Hunaida Abdul Qader ABDUL QADER, make the following free and voluntary statement to Robert MCFADDEN and Debra WINSLOW, whom I know to be Special Agents of the U.S. Naval Criminal Investigative Service. I make this statement of my own free will and without any threats made to me or promises extended. I fully understand that this statement is given concerning my knowledge [redacted]

For the purpose of identification, I am a white female, 156cm tall (5' 1") and weighing approximately 52-53 kilograms (114-115 pounds). I have brown hair and brown eyes. My date of birth is 16 April 1967. I was born in Tripoli, Lebanon. I have a Lebanese passport and a Bahrain Citizen Population Registry (CPR) card number 67042826. I have lived in Bahrain for approximately 11 months. Prior to that I lived in Kuwait for almost five years. I am employed by Yusef Abdul Ghani Trading Company as a shop manager. I work in the Seef Mall in Bahrain. I am single and I have never been married. My permanent home is in Lebanon where my parents Abdul Qader (father) and Afaf Abdul Qader (mother) live. My home telephone number in Bahrain is 973-293-298. I reside in flat number 25 in the Al-Zahra building off of Exhibitions Avenue in Al-Hoora, Bahrain. I lived there since I arrived in Bahrain.

On 20 March 1999, during the early morning hours, sometime after 4:00 to 4:30 am, I was alone and watching the "Super Movie Channel" in my apartment (as mentioned above). I ~~was~~ watched "Circle of Friends" and then "While you Were Sleeping," turning my television off approximately 20-30 minutes before the end of the second movie (because I have already seen the last segment of the film). I heard the first call to prayer just as I shut my window and turned the air conditioner (ac) on, as I went to bed. The lights in my flat were turned off. I closed my eyes and I started to fall asleep-- [redacted]

EXHIBIT (1)

CONTINUATION OF VOLUNTARY STATEMENT BY HUNAIDA ABDUL QADER

only talked about casual things such as work, "how are ?" and other light topics.

[redacted]

This statement consisting of six (6) pages was typed for me by Special Agent MCFADDEN as he, Special Agent WINSLOW, and I discussed its contents. I have read and understand the above statement. I have been given the opportunity to make any changes or corrections I desire and to make and place my initials over the changes or correction. This statement is true and correct.

Hunaida ABDUL - KADER.

Date 21 Mar 99 Time 1600

Sworn to and subscribed before me at NCIS Field Office, Middle East, Bahrain, on this 21st day of March 1999.

WITNESSES: 21 Mar 99/1600

, SA, NCIS 21 MAR 99 1600

AUTH: SECNAVINST 5520.3b of 04JAN93

DNG

NAVY AND MARINE CORPS TRIAL JUDICIARY
TRANSATLANTIC JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURT MARTIAL

UNITED STATES	)	
	)	
V.	)	GOVERNMENT
	)	WITNESS LIST
DONALD D. BRAMLETT	)	
MM3/E-4	)	
U.S. NAVY	)	

1. The government intends to call the following witnesses in its case-in-chief:

DAY-
PEWS
DORMAN
ALESCA

Special Agent James Kenworthy, NCIS
Special Agent Doug Einsel, NCIS
Special Agent Mike Adams, NCIS DEF
PH2 Rebecca Kearns, USN, COMNAVCENT DEF
GM3 William Scott Alger, USN, ASU Bahrain, Security
HM2 Donald Murray, USN, ASU Bahrain, Medical Clinic DET
SMStg Kimberly Trost, USAF, Joint Task Force South, Ramstein, Germany
FC1 Hector Nalzaro, Naval Support Activity Naples, Security
CDR Deborah Fitzgerald, MC, USN, Naval Medical Center San Diego
LCDR Ilene Scanlan, MC, USN, NSA Bahrain, Medical Clinic
LCDR John Taylor, MC, USN, NSA Bahrain, Medical Clinic
Ms. Hunaida Abdul Qadar, Civilian
Col. V.B. Walmsley, Bahrain Public Security
Ahmed Khan Mohammed Sharif, Bahrain Public Security
Areef Ebrahim Seyadi, Bahrain Public Security
Areef Mahmood Ansari, Bahrain Public Security
MMT Essa Al-Khayyat, Bahrain Public Security
N/Areef Balachandran P.K., Bahrain Public Security
Mr. Muhammad Aziz, Bahrain Public Security
Dr. Ebrahim Mohammed Salim, Bahrain Public Security
LTJG David Long, USN, NSA Bahrain, Security
Dr. Coleman, NSA Bahrain, Family Service Center
PRICE, DNA

MONDAY

2. The Government reserves the right to call rebuttal witnesses as well.

M. C. HOLLEY
LT, JAGC, USNR
Trial Counsel

[redacted]

HUNAIDA ABDUL-KADER ABDUL-KADER, Civilian, was called as a witness for the government, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the government counsel:

Q. Hunaida, if you could first say your name, first and last.
A. My name is Hunaida Abdul-kader Abdul-kader.

Q. Okay; and could you spell the last name?
A. Okay; it's A-B-D-U-L, dash, K-A-D-E-R.

Q. Okay; and you actually say it twice?
A. Yeah.

Q. Okay; all right; I have here a statement that you made earlier; I'm going to give it to you right now [handing document to witness]. Are you familiar with that statement?
A. [Examines document and nods head.]

Q. Okay; now, did you have an opportunity to review that statement at the time you signed the statement?
A. Yes.

REPORTER: I can't hear what she's answering at all.

GC: Okay, Hunaida, if you could just speak up a little bit louder.

WITNESS: Okay.

GC: Here, let me move this microphone just a little bit closer to you [moving microphone]. It doesn't amplify; it just records what you're saying.

Q. Okay; did you have an opportunity to read this at the time you originally signed it?
A. Yes; I read it; yes.

Q. And again today, did you have a chance to look over it today?
A. Yes; I looked over it.

C.A.M.I. (Citizens Against Military Injustice)

Written Comments by Sherry Swiney

Submitted By C.A.M.I

March 13, 2001

To the:

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

(The Cox Commission)

To: The Honorable Walter T. Cox, III, Senior Judge, United States Court of Appeals for the Armed Forces, Chair, and the Honorable Members, of the Commission on the fiftieth Anniversary of the Uniform Code of Military Justice.

Prisoner Rights, the Constitution and the American Judicial System
by Sherry Swiney, December 30, 2000

All citizens of the United States have certain rights which are imposed by the Constitution of the United States. When a person is convicted of a crime and sentenced to prison, that person remains a citizen and the only right removed is the right to roam freely in society. His/her right to free speech and due process are not removed. His right to fair treatment and the basics for living are not removed. His right to individuality is not removed.

In an Opinion of the United States Supreme Court Procunier v. Marinez 416 U.S. 396, 428; 94 S. Ct. 1800, 1818 n. 14, 40 L.Ed 2d 224 (1974) we see the following: "When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end nor is quest for self-realization concluded. If anything, the need for identity and self-respect are more compelling in the dehumanizing prison environment..."

The role of the penal system is to hold an offender away from society for the duration dictated by the courts. The role of the penal system is not to torture and punish. The punishment is the removal from society and loss of freedom. Imprisonment alone is the punishment. Additional punishment is forbidden by Law.

Prison Administrators are bound by law that there shall be no discrimination on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, religious beliefs, moral percepts, birth or other status [meaning also the legal reason for the conviction]. According to the United Nations Standard Minimum Rules for the Treatment of Prisoners http://www.hrw.org/advocacy/prisons/un-smrs.htm Prisoners can expect clean living conditions, healthy food and proper medical care.

Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants. http://www1.umn.edu/humanrts/instree/g2bpt.htm

Medical abuses and neglect are forbidden. The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.
http://www1.umn.edu/humanrts/instree/g3bpppdi.htm

Moreover, the role of the penal system is to "correct" the behavior of the offender in preparation for the day when his/her duration of imprisonment has ended. This means that every effort is to be taken by the prisons to help every offender improve their lives.

Okay, those are the Rules that are already in place. If anyone in this Nation knows of any prison that is following any of these rules, please come forward because all reports coming in from across the Nation indicate that none of these rules are being followed. This means that all prisons in the United States are in violation of these basic rules for the treatment of prisoners. People are dying from medical neglect, lack of proper food, physical, mental and psychological abuse.

Most prisons in the United States do not presently work to improve the lives of prisoners and when they are released, they have nowhere to go but back to prison unless they have a support system on the outside to help them get back on their feet with jobs, training, education, a place to live, clothes, and other basics needed to re-establish themselves as law-abiding tax-paying citizens. In addition, our own Society is unforgiving and does not allow a newly released prisoner half a chance to start over again. The pressures on released prisoners and their families to reduce recidivism are enormous. What society doesn't realize [yet] is that when a prisoner is released and does not return to prison, crime for that community, that person, that family, has been reduced. When society turns its back, making it impossible for a soul to begin again, recidivism necessarily increases which means crime is increased.

Is it by design that society refuses to welcome formerly errant citizens who have paid their price, done their time? And is it by design that the penal system promotes recidivism by dehumanizing, abusing, torturing, or neglecting? It appears that way. We must all realize that Prison is big business, and therefore it does not "pay" to empty the prisons. Empty prisons are bad for the bottom-line revenue of the Prison Business. To combat this, to change this, to reduce crime, the Prison Business could very well thrive as a Rehabilitation Business. But in the end, with our errant citizens being rehabilitated, crime would become a thing of the past and that business would become defunct. Were we an enlightened society that placed good over evil, love over wealth, law over corruption, such a promise of corporate demise would be cheered, toasted, promoted and funded by the American People.

Instead, those who stand up for measures such as Equal Justice according to Law, Equal Opportunity according to Humanity, Love and Compassion, are frequently scorned by the very society who cries out for crime reduction measures that dehumanize their own kind, thus defeating their own wishes in the end. When you are treated with disrespect, when you are

abused, when you are neglected, will you then respect in return? When you make a mistake, when you are forgiven, when you are treated with respect and taught to survive, will you then not be thankful and respectful? Anyone who separates themselves from safety for a noble cause, is always awarded, and this is Patrick Swiney [Sweeney] and others from the core of their hearts www.patrickcrusade.org. They care so much about the injustice in this country, that they are willing to put themselves in jeopardy to expose what's happening to them and so many others. The injustice is revealing to anyone who has the strength of character to look. Our forefathers had the same heart and this drove them to write the sacred documents, the United States Constitution and the Bill of Rights, to ensure that this country would never fall into tyranny. Today, Patriots sing at the top of their lungs to tell We The People that we have fallen into a government that condones Constitutional Violations with impunity. When The People are afraid of their government, as they are today, we have tyranny; when the Government is afraid of The People, as it should be, we have freedom and justice for all.

Though it may be Corporations such as the Punishment Industry driving the corruption in America, it is People -- blinded by money and/or promises of power -- who are responsible for "how" such corporations treat human beings. We have met the enemy and it is us. The men, women and children of this era who have learned this Truth, shall not go away, but shall grow. We shall continue educating the Public who have become blinded, by design, over the years.

There will come a day when Politicians who vote for "tough on crime" rhetoric, including death penalty and severe punishment rather than treatment and rehabilitation programs, will be voted out of office or prevented from gaining office in government. Politicians who do not follow their hearts on what's right and just, but who follow their pocketbooks and dreams of power, shall not be able to rule over The People, but the people shall rule over them as it should be.

When this happens, constitutional violations in our courts that wrongly imprison people and abusive prison environments shall cease to exist. Errant citizens who are convicted by unbiased Due Process according to Law, will be removed from society and they will be treated, educated, and prepared for re-entry into society after their duration in prison has ended -- and they shall not return to prison because they will have learned to respect themselves and other human beings; they will have learned to survive without taking from others that which is not theirs to take; and an enlightened society will give them a second chance in Life.

The "cost" to our society is too high right now, and this must change.

This is the new millennium. Mankind should be evolving as rapidly as its technology is evolving. But Mankind, as a whole, is still barbaric and cruel. May our heavenly Father have mercy on us all. May we learn now what we will all eventually learn tomorrow -- that Human Beings deserve to be treated with respect from birth to grave, that mistakes happen, that judging is wrong when we are not a society who is willing to take responsibility for the faults of others, for we have created a Monster in society by the mere approval of the injustices, cruelty, and blatant constitutional violations that are bestowed upon millions of Americans today. Each member of American Society has a responsibility to their own freedom and the freedom of their neighbors and grandchildren. Until Freedom becomes more important than money, power, and safety, we shall remain an enslaved society. The rest of the world is watching us to see what we do. America's Society is no longer respected. Will the American People continue drowning themselves and their children in their own fantasy propaganda, preferring slavery over independence and freedom? History shall be the judge of that.

Senator Robert F. Kennedy, in the Day of Affirmation Address at the University of Capetown, South Africa, 1966 stated: "It is from numberless diverse acts of courage and belief that human history is shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring those ripples [to] build a current which can sweep down the mightiest walls of oppression and injustice." Was Kennedy a hopeless dreamer or are we strong enough to meet the challenge of offering hope as enlightened Human Beings rather than continuing down the path of barbarians as de-evolved homo-sapiens? The choice may not be an easy one, but it is definitely ours -- and ours alone -- to make.

COMMISSION ON THE 50TH ANNIVERSAY OF THE UNIFORM CODE OF MILITARY JUSTICE

Statement Before

The Commission

By

Walter Francis Fitzpatrick, III

Tuesday, 13 March 2001

Judge Cox and Distinguished Commissioners, I should like to give high profile to the only relevant question before you here today. As a first concern I inquire of you as to how and when we reform the military justice system? Is there nothing we can do to stop the abuse?

There can be no question about the need.

I come to this Commission to factually report on aspects of my Special Court-Martial – a textbook case in the unlawful exercise of command influence – represented as the best evidence available and most appropriate to your work. I'm confident you all know, by way of a historical note, the primary evil that the 1951 UCMJ was enacted to correct was unlawful command influence.

Sufficient background to this case is found in sections 1 and 2 of my supporting documents. Time is not a friend now.

I've placed a copy of my last fitness report in section two instead of the charge sheets that were advanced to the Article 32 and Trial. Both contain similar information.

I crossed swords with Navy Rear Admiral John W. Bitoff in 1989 complaining against his policies and staff. The sword Bitoff used in exacting his vengeance was the Navy's criminal justice system...and it was a much bigger sword.

On June 28, 1988 the terrorist group November 17 murdered Captain William Nordeen, Military Attaché in Athens, Greece, in a horrific car bomb attack.

Captain Michael B. Nordeen was commanding officer in USS MARS at the time.

The two men were brothers.

I was Mike Nordeen' Executive Officer.

Captain Mike Edwards flew to San Diego from our Combat Logistics Group One staff headquarters in Oakland temporarily relieving Mike Nordeen. Captain Nordeen then traveled to Greece to attend to his brother's remains and escort him home. William Nordeen was buried as a hero with full military honors at the Arlington National Cemetery on 6 July 1988. A contingent of USS MARS' sailors and wives were in attendance as escorts to the Nordeen family and representatives of our command.

I could not go as our ship was actively engaged in Refresher Training in San Diego at the time. My wife attended instead.

14 months later I was Court-Martialed for singularly stealing the money used to send crewmen and wives to that funeral. Other charges leveled were as specious.

Article 98 of the UCMJ reads that any member of the Armed Forces who "knowingly and intentionally" fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused: shall be punished as a Court-Martial may direct."

However, Article 98 is only a theory in that not a single prosecution, much less conviction, for an Article 98 violation exists on record despite the hard fact that hundreds of cases have been thrown out on appeal due to its exercise. Within that context, please consider the following. References can be provided on request.

Evidencing unlawful command influence in its purest form, the Convening Authority and his Staff Judge Advocate to my trial were at once and simultaneously, by proof of their own words, the only two men who ever accused me of wrongdoing. They were, respectively, Rear Admiral John W. Bitoff – then Commander, Combat Logistics Group ONE, and Lieutenant Timothy W. Zeller, Judge Advocate General Corps, United States Navy. Neither Bitoff nor Zeller were aboard MARS to observe first hand events that later lead to charges and trial.

But Captain Mike Edwards was there, in command and fully aware of the events surrounding him.

When the September 1989 investigation into the funeral trip began, Mike Edwards was Bitoff's Chief-of-Staff (or XO). Tim Zeller was the Staff Judge Advocate to Group ONE, working for both Edwards and Bitoff. It was Edwards who assigned Zeller as the preliminary investigating officer.

Zeller would accuse me of stealing over 10 thousand dollars. He was under orders to notify the Naval Investigative Service that moment of his suspicion. He did not.

Regulations of the day also required Zeller to divest himself of investigative duties once finding his own Chief-of-Staff involved in the allegations under inquiry.

Zeller did not contact the NIS nor did he alert higher authority about the need for his replacement.

Zeller prepared two investigation reports before trial, both fraudulent. In the first Zeller declared his continuation as investigating officer even though he was aware that conduct impermissible.

Zeller then went wrote a memo to Bitoff via Edwards recommending charges. Captain Edwards called a meeting of the three, tasking Attorney Zeller to brief the charges for Admiral Bitoff's approval. Captain Edwards, as witness and participant to the events in question, had no business being in attendance at this gathering.

Admiral Bitoff then directed Zeller to swear and sign for those charges Bitoff approved. Bitoff and Zeller, by proof of their own words, then and there became my accusers. After 10 years of silence John Bitoff finally came forward to write in April 1999 "I brought the charges and I convened the Court-Martial."

Zeller's second investigation report followed days later. This writing is significant for tens of reasons. But the two most important are that 1) Zeller listed our 1988 Morale, Welfare, and Recreation report as evidence he examined. 2) He declared my guilt.

Zeller wrote a third investigation report after trial.

All three reports were secreted until well after the trial was over. Beyond failure to respond to trial discovery requests, there are six known efforts to conceal Zeller's investigative work product. His investigation reports were not available at the Article 32 or at trial. Other documents are being withheld to this day.

The MARS 1988 MWR report has gone missing. No version of it exists anywhere and there is no record of it since Zeller's sworn statement to the NIS in February 1990 certifying its existence. The 1988 MARS MWR report heads a very long list of documents still missing or destroyed.

Zeller and Bitoff, my accusers, handpicked the defense attorney, a Marine Corps Captain named Kevin "Andy" Anderson. Anderson conspired with Zeller and Bitoff to perpetrate a fraud on a military court of which more in a moment.

Zeller and Bitoff also selected the military judge who presided over the Article 32 Investigation, and later the jury pool from which my jury was selected. The list of potential and eventual jurors read like the Group ONE social roster and included men Zeller worked with in adjoining offices during the trial, men I

knew personally and had complained against, and all men who had their fitness reports signed by John Bitoff.

The only person not specifically called out by Zeller and Bitoff was the prosecutor, Lieutenant Matthew Bogoshian.

The Article 32 lasted only a few days around the 1989 Thanksgiving Day holiday. Captain Edwards was called to testify but not without protest from Zeller. And testimony from Edwards wasn't Zeller's only concern.

On Thanksgiving Day 1989, Tim Zeller came to work to write a memorandum attempting 1) to preclude the Article 32 appearance of Captain Edwards, and 2) replace the prosecutor, Lieutenant Bogoshian, for failure to take orders and lack of motivation and experience. Zeller wrote this to Bitoff, "Due to the command influence factor, we specifically did not ask for a certain Government Counsel. Unfortunately, it seems as though the one we were assigned lacks not only experience, but also desire...Although there is no requirement in the Manual for Courts-Martial that a Government Counsel be assigned at all, the complexity of this case requires the dedication of someone who desires to win."

Zeller's Thanksgiving Day memo was protected from public view with the words "Attorney Work Product" typed on top.

Bogoshian stayed on the job leaving Zeller and Bitoff to rely upon Anderson and a stacked jury to achieve a certain conviction.

Block 18 of the Article 32 Report, asking if reasonable grounds existed to believe that I had committed the offenses alleged, was checked "NO." Judge Quigley, a Zeller and Bitoff puppet, recommended Article 15 nevertheless.

I am going to talk more about Article 15 abuses later. For now I only want to highlight that, despite claims to the contrary, Article 15 was not offered before trial as documented in section 10. I would have refused had it been, correctly, recognizing my guilt predetermined.

Before trial I submitted a request to the Navy Inspector General to oversee events unfolding which I knew to be unlawful. For that Tim Zeller accused me of a security violation and reported it to the NIS with Bitoff's full concurrence. My clearance was later revoked, although no there was no finding of such a violation, the NIS dropping their inquiry for lack of evidence.

Zeller typed 7 single-spaced pages with specifications and charges. All at Bitoff's behest. All pure invention and Zeller constructs. All false.

I was convicted of Article 92, willful dereliction of duty in the performance of my duties by failing to follow proper procedures for the accounting and expenditure of Morale, Welfare, and Recreation funds. To this day no one has been able to articulate the act, or failure to act, that

constitutes the delict. I invite your attention, again, to my contemporaneous fitness report.

There are these important points to make about the trial worth mentioning now. There was a complete absence of jurisdiction. Accusers are statutorily disqualified from convening courts and refereeing charges. The error is jurisdictional and any subsequent proceedings are a nullity in the eyes of the law.

I was found guilty only of Charge I, Specification 1 earlier declared by the Military Judge, Captain George Wells, to be deficient. Captain Wells explains why the Charge fails to state an offense on pages 98 and 99 of the Record of Trial. The deficiency was not remedied.

Zeller dispatched other attorneys to trial to report back to him on the day's happenings. Zeller of course was reporting to Bitoff. One of the counselors was verbally reprimanded when she failed to carry out Zeller's bidding. Lastly this: I was denied the right to confront my accusers in court. Neither Bitoff nor Zeller testified.

The post-trial phase is where many skeletons are still buried, the more damaging secrets aggressively guarded.

Zeller conspired with Captain Anderson, my defense counsel, to introduce a forged confession into the record. Kevin Anderson wrote it, typed it, and gave it to Zeller. Zeller then put it into the record as shown in

section 7. Official inquiry into the forgery has been lukewarm and halfhearted. We do know this much. The fake confession was printed on the same machine used by Andy Anderson to print other court documents Anderson signed using his own name. The font type, style, and size are identical according to a Naval Criminal Investigative Service report. Information known only to Anderson at the time appears in the body of the document, and Anderson had my copy of the Record of Trail and Letter of Reprimand needed to create the criminal instrument. I possessed neither witting in that day.

My signature appears at the bottom of this statement.

Post-trial advice has become the crime du-jour as it's been discovered only within the past six months that the recording of post-trial advice, the document itself, signed by the attorney providing it, has been illegally extracted from the Record of Trial.

Section 8 begins with a summary of statements made by officials claiming post-trail advice was made part of the record or was reviewed, but in all instances, witnesses post-trial advice say supplied by someone other than Zeller. Rear Admiral Rick Grant went so far as to name an attorney, Lieutenant T.J. Algiers, but, regrettably, Grant was lying.

Tim Zeller unlawfully provided post-trial advice. A document, kept secret for 10 years, emerged only last October. It's another memo from Zeller to Bitoff, one accuser to the other.

Before moving into a discussion of my appeals I make this observation. Tim Zeller was to my trial what Eddie Murphy has been in many movies, all characters played by one, always in disguise. Records identify Zeller as a preliminary investigating officer, accuser, advisor to the Convening Authority, assistant trial-counsel, and post-trial attorney all on the same case. I call your attention to the summary of statements leading section 6.

Important to remember, Bitoff and Zeller, Group One for that matter, were required by clear regulation to divest themselves of all responsibility in this matter due to the involvement, right or wrong, of their own Chief-of-Staff, Captain Edwards.

John Bitoff's personal interests here also qualified him as my accuser.

No one observed Zeller's freelance investigation. Most of his work product is missing, destroyed, or under lock.

I waited until Bitoff and Zeller had left Group ONE before submitting my first appeal. Lieutenant Karen Hill eventually filled Zeller's job. Merrill Ruck took over for Bitoff who retired in October 1991.

My first appeal submission contained as much as I knew at the time. A copy of the forgery was enclosed and complained against. I attacked the trial on ten issues that were

1) Failure to state an offense.
2) Error by the military judge in his instructions to the jury.
3) Whether the charge was sufficiently spelled out so I could build a defense.
4) Whether or not the government knowingly withheld evidence, the MARS 1988 MWR report specifically.
5) The exercise of unlawful command influence.
6) Admiral Bitoff as my accuser.
7) Whether the evidence was insufficient and failed to prove the offense charged.
8) Whether the government acted in bad faith by alleging baseless charges, such as stealing money from my shipmates, to make me look bad and worthy of punishment.
9) Whether the numerous violations reported, in cumulative effect, constituted prejudicial error.
10) Whether of not Zeller and Bitoff had perpetrated a fraud on the court.

I focus your attention to these topics because they were all directly on point and meritorious. I completely expected to prevail. But I did not.

The Navy Judge Advocate General, then Rear Admiral Harold E. "Rick" Grant, changed the charge from willful to negligent dereliction of duty while leaving the conviction undisturbed.

There was no reason given. None of the ten issues I'd raised were discussed. It comes as no surprise, from what I've told you already, that I resubmitted the appeal on 23 February 1993 demanding answers. I was especially upset about the forged confession.

In my first appeal submission I identified the need for and requested a criminal investigation. Request denied.

Karen Hill, Zeller's replacement and the attorney present at the Group during my appeal stated that if she had only known about the wrongdoing, she would have caused a proper inquiry. Again, a copy of the forgery was in the appeal, along with evidence of extensive criminal misconduct by Zeller and Bitoff.

Hill took my appeal to the retired Bitoff repeatedly for his review and comment.

Bitoff, a civilian, denied the application.

After sitting on my second appeal for ten months, Admiral Grant denied it without fanfare or comment. The delay in response was caused by, as so many at Navy JAG declared, non-receipt. Congressman Dicks, Senator Murray, and former Senator Gorton were all told there was no February or March 1993 record of receipt in Admiral Grant's office despite a certified mail card returned bearing

the signature of Grant's secretary, Donna McClung Underwood. A memo in section 9 has more details.

In the meanwhile I continued to collect evidence of serious criminal misconduct by Navy seniors. Realizing the cover-up had commenced resulting from allegations against Bitoff and Zeller in my appeal, I became more persistent and aggressive.

Today my appeal rights rests in the hands of Navy JAG Don Guter, former executive assistant to Rear Admiral Grant and Deputy to Rear Admiral Hutson.

I filed my first criminal complaint with the Naval Criminal Investigative Service in September 1993. 13 people were named as participants in extensive criminal racketeering. Over the course of the past ten years the list of those accused has grown in more than 100 criminal complaints lodged with the NCIS, the Federal Bureau of Investigation, the Navy Inspector General's office, the Defense Criminal Investigative Service, and the Department of Defense Inspector General's office. But this case is radioactive. It goes too high and touches too many senior people. No one wants to go near it.

Secretary of the Navy John Dalton shut down the 1993 complaint to the NCIS by classifying the accusations as "SENSITIVE – HOLD CLOSE."

A 1998 NCIS internal memorandum offered the statute of limitation as reasoning for not investigating forgery further and because the NCIS can defer

investigations when, in NCIS judgment, the inquiry would be fruitless and unproductive.

The original of the fake confession was unearthed in Navy-Marine Corps Appellate Review offices aboard the Washington Navy Yard in 1997.

The list of those accused today includes former Navy Judge Advocate Generals, Rick Grant and John Hutson, and present Navy JAG, Rear Admiral Don Guter.

What are the scope, significance, and weight of the statute of limitations in the context of an intended waiting game wherein the NCIS stands as Praetorian Guard to senior navy officials? Who and how do you bring criminal charges against NCIS officials or Navy JAG's? How do you beat the cover-up? All tough questions that go unanswered.

In another internal NCIS dispatch, this one penned exactly 3 months before the original forgery was unearthed, an agent wrote: "...the forgery is only one allegation of many [Fitzpatrick] has made against the Navy. However, if you can prove the forgery, it totally supports [Fitzpatrick's] 10 years worth of contentions and makes the NAV look really bad." I'm going to repeat that so it sinks. "If you can prove the forgery, it totally supports [Fitzpatrick's] 10 years worth of contentions and makes the [Navy] look really bad."

I suppose it would.

By the way, I have with me here a certified true copy of the fake confession, prepared by the man who holds the original criminal instrument under lock in his office at the Washington Navy Yard.

So...with the wrongful conviction of an innocent man standing in the balance, why is no Navy organization or agency actively investigating forgery? The answer is plainly this: seeing justice done in this situation is not worth the inevitable scandal. If the Navy's Judge Advocate General can turn his head away from these hard facts, what else is he capable of dismissing? Now how about the Defense or Navy Secretariats who've given their official sanctions. What is the quality of justice for any who serve under their imprimatur?

I'll make this clear. Serving justice has never been the concern. Avoiding scandal has always been the core issue.

Obstructing my appeal is aiding and abetting forgery. Forgery introduced with specific intent to prejudice an accused is an offense punishable under Article 98.

THE TOOLS OF THE COMMANDER

A trend has become evident over the decades once a junior accuses a senior. Those foolish enough to believe in the system are deemed crazy and ordered to psychological examinations. Security clearances are revoked and Article 15's are ordered on invented accusations. Findings of guilt at Captain or Admiral's Mast

open the door to Administrative Separation hearings with nearly always certain administrative separation.

All these tactics were used to discredit me.

Article 15 wasn't offered after the Article 32 Hearing, as was recommended. Zeller and others claim otherwise but the mast package, section 10, is dispositive. Had it been offered I would have declined. I knew my fate was sealed as documented in Zeller's 23 October investigation report declaring my guilt.

After trial, having finally been assigned to a ship, I was declared to be in an unauthorized absence status and charged 35 days UA. My commanding officer, Captain Doyle Borchers, II wrote a message, in the past tense, to his seniors and others including Admiral Bitoff announcing his finding of guilt on the UA charge, stating the punishment awarded as of verbal reprimand, alerting higher command of possible press interest in the Mast results, and declaring me unfit for duty aboard an operational command due to the loss of my security clearance.

The problem with the message was that it was written the day before the Mast was held. The date time group gives it away.

Predetermining guilt in the Navy is habit forming. It's happened to me twice!

The following exchange at Mast, when it did transpire, is of note. Borchers, obviously taken back by my protests against the Navy's justice system told me,

as a former XO, I knew how the system worked. Those words burn in my ears today just as they did 10 years ago, and are just as offensive.

Still, the UA conviction served its real purpose to set the stage for my ultimate administrative separation hearing occurring later that year in Seattle. All charges from the trial were added. It was, in effect, a second trial. The Administrative Board of three Navy Captains cleared me of all accusations relating to my performance as XO in MARS. Borchers, years later, confronted with his message obtained through the Freedom of Information Act, reversed himself on the UA conviction.

Borchers and the Navy docked me for 35 days pay. There was no problem in taking the money; however, great difficulties in getting it back. This sort of thievery goes on every day in our modern Navy.

Make no mistake. I want the money back, paid with interest.

CONTROL OF INFORMATION

Another most effective tool used with ease and sophistication is complete control of information in all forms.

I plead with you to revere the documentation provide you today. Do not take it for granted. It has come at an unimaginable cost.

My anger peeks many times when I stop to consider what was held from me as I tried to defend myself at the Article 32, the trial, and then my administrative hearing. It may be easy to dismiss now, but at the time I was facing

dishonorable discharge from the Navy with commensurate loss of benefits four years short of retirement. Men wearing the uniform of our Navy knowingly withheld information I desperately needed to build my defense against false charges...men who'd sworn an oath to support and defend the Constitution against all enemies, foreign and domestic.

Tim Zeller's Thanksgiving Day memo did not surface as part of my 1991 appeal, even though it was directly on point, but rather came to my attention when one Legalman, troubled by conscience, leaked news of its existence giving enough details to support a subsequent FOIA request. It took a full year to capture that document after its disclosure. More alarming this: the informant didn't want his named be given out for fear of reprisal at the hands of the same command that Court-Martialed me.

Admiral Grant dismissed my attack of Zeller's memo out of hand. There has been no end to the lying!

I have come to know from personal experience that one of the greatest threats to the Constitution and our form of governance is found within the priesthood of the Judge Advocate General's Corps for all services. That is what we must set about to remedy.

It has taken me 10 years to obtain some of the papers you hold today while others are still being withheld, if not destroyed outright. Boxes of documents are being used as foot rests under the desk of Lieutenant Commander James Roth,

Room 7000, Presidential Towers NC-1 in Crystal City. Who knows if the post-trial advice and MARS 1988 MWR report are there, but I'd sure like to see them.

The practice of holding documents until determined harmless with intent to conceal crimes is an Article 98 violation.

A conspiracy continues to this day. Navy JAG Guter and others are holding a wrongful conviction in place. Again...obstructing my appeal is aiding and abetting forgery.

CONGRESSIONAL OVERSIGHT

I offer Congressman Norman D. Dicks as a poster child for Congressional indifference. He, an attorney by education and training, has had full and complete access to events I report today as they unfolded. Many times I was able to predict events later ignored by the Representative. Norm Dicks has demurred his Washington DC connections that know him on a first name basis to the detriment of his constituents who do not. Congressman Dicks has subsequently brought harm to the wider military population just as well. With a wink and a nod Congressman Dicks has encouraged and made worse the contumacious behavior of Navy Secretaries and Admirals.

Former Senator Slade Gorton, once an Air Force JAG, and senior Senator from Washington State, Patty Murray, has allowed Navy officialdom to lie to their face and conduct themselves with unmitigated arrogance.

This trembling trio has been raking leaves in a strong wind for almost ten years. Confusing progress with motion they believe they've done all they can while doing nothing.

The oversight duty of Congress is clear but the Congress itself is missing in action.

Samuel Johnson once said "to do nothing is in every man's power" while Edmund Burke said "the only thing necessary for the triumph of evil is for good men to do nothing." Over the past decade, in the context of this case, I've encountered some of the most powerful and good people on God's green earth...and they're all in Congress.

REVIEWS AND INVESTIGATIONS

Navy JAG Don Guter is sitting on a report he and his predecessor, John Hutson initiated in 1997. It has been refused me under FOIA.

Navy Secretaries Dalton and Danzig have declared all matters I've brought to their attention sufficiently resolved.

Navy JAG and the NCIS have declared all clear. God is in his Heaven...all is well.

Pabulum!

I can quickly and effectively dismiss this legerdemain by pointing out only a few questions that remain unanswered:

- Who has the 1988 MARS MWR report today and where has it been?

- Where is the written, signed post-trial advice once part of the Record of Trial? Where is that writing now and who removed it from the Record?
- Who gave Tim Zeller the original of the forgery?

The last inquiry is the most telling because, to this day, no one has put the question to Zeller officially if at all. It suggests itself as an obvious one to ask.

THE NCIS AS PRAETORIAN GUARD

The Naval Criminal Investigative Service deserves all the bad press it's received in past years. Their misconduct and abuse will be given high profile, again, next Sunday night with the premiering of the television movie "A Glimpse of Hell" which tells the story of the USS IOWA gun turret explosion. I've contacted over thirty NCIS agents over time and nearly all have walked away from serious scrutiny of evidence I've collected.

This Gestapo, absent effective internal oversight and no oversight from outside, must be dismantled and begun over or turned over.

FEDERAL FELONY OFFENSES

Forgery, obstruction of justice, concealing evidence, maltreatment and cruelty, false swearing, false official statements, suppression of investigation reports from a military tribunal, intentional infliction of financial and emotional distress, aiding and abetting, holding an illegal conviction in place to conceal these acts, denial of due process, egregious abuses of other fundamental

Constitutional rights, and conspiracy towards these crimes are all federal felony offenses.

Evidence I hold supports making the above allegations against, at a minimum, the sitting Navy JAG, Don Guter and his two predecessors, John Hutson, and Harold Grant. That's just a start. Bitoff and Zeller come next on the list.

Oh...let's not forget unlawful command influence, punishable under Article 98 of the Uniform Code of Military Justice.

The arrogant confidence displayed by Navy seniors in flagrant violation of law, practiced with ease and sophistication knowing they enjoy complete immunity, must be of extraordinary moment to this Commission.

Attempts to bring senior officers to justice have been as frustrating as the carnival whack-a-mole game. Nothing you do gets the job done. Every bit an exercise in frustration.

So...who's going to arrest Admiral Guter? The NCIS...I think not!

HUNDRES IF NOT THOUSANDS NOW AFFECTED

The papers in section 15 characterize undeniable evidence of criminal racketeering. The current and past two Navy JAG's are accused felons. What does that say about all other cases they've touched during their combined tenures? Or before?

Consider for the moment the extent to which men identified in this statement have gone to keep the lid on their dirty little secrets. In the grand scheme of things my case is of small issue and remedies could have been easily applied in the early go. Instead this monster has just kept growing and growing as one government echelon after the next digs in their heels thinking, if past is prologue, all will fade away with the passage of time.

If Navy JAG's are willing to commit felony crimes to protect a corrupt and broken system, what do you think they'll do when they've got the wrong man in...let's say a murder case, but no other suspects.

News of Navy JAG's misconduct must be made widely public in order that other Sailors and Marines abused as I have been abused may enjoy the right to have their cases examined as is appropriate.

CALL FOR INDEPENDENT INVESTIGATION

Beginning that process here and now I call for an independent criminal investigation into every aspect of my case. More to the point, I offer this investigation as the beginning the reform process being contemplated here today.

I am prepared to return to active duty, in proper grade, to assist in the conduct of any such investigation. Beyond that, I must demand the Navy return me to uniform if only to restore my good name, career, and security clearance,

repair my service record, and allow for proper retirement in grade with all back pay and benefits fully compensated.

ON THE OUTSIDE LOOKIN' IN

What I've told you today is not news.

While a Midshipman at the United States Naval Academy in the early 70's I read Robert Sherrill's book, Military Justice is to Justice as Military Music is to Music. Excerpts from that monograph, written over thirty years ago, are provided in section 14. Since Sherrill's report the law against unlawful command influence atrophies while the practice flourishes.

In 1994 U.S. News and World Report ran two cover stories about the corrupt and out of control Naval Justice System.

Gregory L. Vistica wrote Fall From Glory, The Men Who Sank the U.S. Navy in 1997 wherein the NCIS and other Navy Justice institutions took a beating.

More recently Davidson reports that Art. 98 remains a law not enforced through the year 1999. We can all rest assured it's not been enforced to this very moment because of cases such as mine.

What more is needed to bring severe scrutiny to bear? Where's the oversight?

CONCLUSION

In any given endeavor there's a talkin' part and a doin' part.

I sit before you here today under the burden of a federal conviction, held up on appeal by felons, for an innocent act, on a charge that fails to state an offense,

handed down by a court without jurisdiction – a nullity in law – the victim of forgery and other equally serious federal felony offenses within a court planned, created, and completely administered by the only two men who were my accusers.

How can that be?

What kind of justice system do you have when those entrusted to uphold and enforce the law are lawbreakers themselves?

I've not told you everything or presented all my evidence. But you have enough for now.

To answer the question I posed at the top, the way to begin reform of the UCMJ and fully engage the Congress in the process is to investigate this case taking it where it leads. Find and prosecute the criminals, members of JAG's priesthood. Obstructing my appeal is at once aiding and abetting forgery.

Next, review of all cases touched by Navy JAG's Grant, Hutson, and Guter. That's where we start.

So with that Judge Cox and Distinguished Commissioners,

WHAT ARE WE GOING TO DO?

I'm done talkin'

Thank you for your time.

May God Bless America

Walter Francis Fitzpatrick Jr.

COMMISSION ON THE 50TH ANNIVERSAY OF THE UNIFORM CODE OF MILITARY JUSTICE

Supporting Documents

Walter Francis Fitzpatrick, III

Tuesday, 13 March 2001

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The Elusive Assassins of Athens

November 17 strikes again

FOTIS FLOROS SYGMA

Nothing left to chance: *Nordeen, the hulk of the bomb car*

ARGYROPOULOS PHOTO PRESS

Navy Capt. William Nordeen had the punctual habits of a military man. Last Tuesday, precisely at 8 a.m., the U.S. Embassy defense attaché left his house in an Athens suburb and got into his armor-plated Ford Granada. He nodded as usual to the Greek policeman standing guard in front of the house, then began driving up the narrow, tree-shaded street. About 100 yards away, Nordeen passed a parked Toyota—and suddenly a massive explosion rocked the neighborhood. The blast from nearly 50 pounds of TNT and plastic explosives, hidden in the trunk of the Toyota, killed the officer instantly. His decapitated body was hurled more than 30 feet; flames from the demolished car shot 15 feet high. The Greek terrorist group November 17 had taken another American life.

November 17 is Western Europe's most elusive group of urban guerrillas. Despite help from the FBI and Italian antiterror experts, Greek police have been unable to crack the group. While Italy's Red Brigades, West Germany's Baader-Meinhof and France's Direct Action have been largely neutralized, November 17 is thriving. The group's main credo is a fierce anti-Americanism. Their communiqués demand that Greece expel the 3,500 U.S. troops stationed in the country and close down four leased military bases. (The group's name commemorates a failed student uprising on Nov. 17, 1973, against the junta then in power.) Nordeen was the third U.S. diplomat assassinated by the group, which has also killed nine other people since 1975 and wounded more than 100 others, including scores of American servicemen stationed in Greece. The latest round of Greek-American talks on renewing the base leases may have provoked the attack on Nordeen.

The officer's killing showed a new November 17 sophistication. In the past, the group executed its victims with a .45-caliber handgun. This time the members set a Beirut-style, remote-controlled car bomb. Nothing was left to chance. To focus the force of the blast on their victim, the terrorists packed sacks of cement on the side of the rigged Toyota that faced the sidewalk. The car itself had been stolen, the license plates were lifted from a different vehicle and after detonating the bomb from an empty villa across the street, the killers escaped on a stolen motorbike. The police admit they have no leads.

The terrorists' tightly closed cell structure has stymied the police. Experts theorize that there may be only a dozen people in the group's central core, although the 15-year-old organization must have recruited a second generation by now. Loyalty—or fear—keeps the operatives in line. Last week the U.S. State Department posted a $500,000 reward for information about last week's killing. No members of November 17 have defected. And unlike most urban guerrilla groups, November 17 has not had to rob banks for funds. Some Greek and other experts believe Muammar Kaddafi is bankrolling the group as well as supplying explosives; the Palestinian terrorist Abu Nidal, these observers say, has given November 17 members training in Iraq.

Cultivated image: While keeping their identities hidden, the guerrillas have cultivated their image. "The group has been careful to pick victims who will not be objects of public affection—victims such as industrialists and Americans," says Vassilis Kavafas, a writer who has studied November 17. The group often refers to "big capitalist sharks and swindlers" as its true enemies, and once bombed three tax offices to protest unfair taxation. November 17 also fuels widespread Greek anti-Americanism by calling the U.S. troops "a military occupation force" and blaming Washington for Turkish encroachments in Cyprus.

Prime Minister Andreas Papandreou says his government is doing its best to hunt the November 17 terrorists, but some critics charge that the leftist administration is not fully committed to pursuing the group. Opposition members say there may be guerrilla sympathizers in the far left of the ruling Pan-Hellenic Socialist Movement (PASOK) and among the left-wing, pro-Papandreou press. Ethnos, for example, Athens's major daily, reprints November 17 communiqués verbatim, and the paper referred to Nordeen's murder as an "execution."

Political pressure: The U.S. bases in Greece confront Papandreou with a dilemma. His government badly needs the U.S. military support it gets in return for the bases; last year the aid totaled $343 million. But political pressure to close the bases is growing. PASOK needs votes from the far left if the party is to win re-election in the vote that must be held by next June. The U.S. lease on the installations expires at the end of this year, and the Greeks are expected to deliver an eviction notice at the end of July, a formality that will give Washington another 17 months while talks continue.

For Americans, Athens is no longer a relaxed place to live. Soldiers now shun their special license tags in favor of regular Greek plates. They don't wear their uniforms in town; they confine their jogging to their bases. "Using Athens as a base is something like living among the enemy," said one serviceman who did not want to be named. "You begin looking at every Greek as a potential bomber. Believe me, it's no fun." The situation of American troops in Greece is likely to remain uncomfortable and even dangerous—but for the moment, at least, the soldiers will remain.

THEODORE STANGER *in Athens*

784

Navy officer fights exile from sea

Reprimand that killed career was vendetta, he says

By Ed Offley
P-I Military Reporter

BREMERTON — Navy Lt. Cmdr. Walter Fitzpatrick surveys the ruin of a once-promising career with dogged optimism and even a touch of defiance.

"I'm not a quitter," says Fitzpatrick, a beefy man with prematurely gray hair and two steel pins in his right shoulder from a helicopter crash in the Persian Gulf in 1987.

An officer identified by his superiors as an excellent performer destined for senior rank throughout most of his 20-year career, Fitzpatrick today is a sailor exiled from the sea, working in a small Bremerton Navy office to resurrect his professional life in a case that fellow officers and a congressman say may represent justice wrongly done.

Fitzpatrick is struggling to clear his name of a court-martial conviction that left a career-destroying letter of reprimand in his personnel record.

Navy records state that Fitzpatrick failed to properly supervise the spending of his ship's "morale, welfare and recreation" money — nongovernmental money raised for the crew's use through proceeds from the ship's retail store — and while he did not personally gain from the money, his decisions violated Navy policies.

The money is usually used by the crew to pay for items such as TV and audio equipment, recreational supplies and other nonmilitary gear.

Fitzpatrick's five-year legal nightmare began with a shipmate's tragedy, the 1988 murder of a Navy officer in Greece who was the brother of Fitzpatrick's commanding officer. At the time, Fitzpatrick was the executive officer of the supply ship USS Mars, second in command to Capt. Mike Nordeen.

On June 28, 1988, Fitzpatrick woke Nordeen to tell him that his brother, Capt. William Nordeen, had been murdered by terrorists in Athens.

The next day, the ship's crew voted to use the recreation money to send a delegation of crewmen and their wives to the slain officer's funeral at Arlington National Cemetery. The $10,400 expenditure became the centerpiece of a naval investigation that resulted in a 1990 court-martial conviction against Fitzpatrick on one count of financial negligence.

Fitzpatrick's ship's headquarters says spending the money to send the sailors and their wives to the funeral was improper.

Fitzpatrick and Mike Nordeen, in separate interviews, said they believed — and continue to believe — that spending the money on the funeral trip was proper.

Fitzpatrick has accused officers of his ship's administrative command of a "vendetta" against him after he criticized the Oakland headquarters for inadequate support on a number of issues. Fitzpatrick said the staff officers retaliated by trumping up charges against him to drive him from the service.

Navy officers involved in prosecuting Fitzpatrick on financial negligence charges deny any hidden motives.

"I can't fault the individual's heart but I can fault his judgment," said retired Rear Adm. John Bitoff, who presided over the investigation and appointed the court-martial against Fitzpatrick. "This was not some kind of a witch hunt."

But evidence compiled by Fitzpatrick has prompted some Navy officers familiar with the case to question the investigation and subsequent conviction.

Rep. Norm Dicks, D-Wash., requested independent investigations of the case by Secretary of the Navy John Dalton and the Department of Defense.

"This is not something we do typically," said a Dicks aide familiar with the matter. "But by the evidence . . . it's quite possible that the system did not work this time, so we are asking them to reevaluate it with an independent jury."

In addition to a new trial, Fitzpatrick says he wants a criminal investigation into officials who prosecuted him.

The Navy last month disagreed with Dicks' request for a new trial. "There is nothing presented which warrants a reconsideration" of the conviction, responded Rear Adm. E.E. Grant, acting Navy judge advocate general.

Nordeen said that he was ultimately responsible for every act of his subordinates, but was never charged with any offense.

Fitzpatrick said he believes that staff officers then serving under Bitoff used the fund investigation as a pretext to drum up false charges against him.

Upon return from the Persian Gulf in 1989, Fitzpatrick said he had delivered a 2½-hour briefing to Bitoff's chief of staff in which he criticized inadequate headquarters support to the ship on a number of issues.

Several months later, Fitzpatrick said, the same staffers instigated a series of audits and investigations that led to formal court-martial charges in 1990.

Fitzpatrick accuses the Oakland command of these wrongful steps:

■ Obstruction of justice and unlawful command influence by Bitoff and his headquarters staff, including selection of jurors who came under the admiral's supervision.

■ Intentional falsification of investigative reports and official statements.

■ Intentional withholding of evidence that backed Fitzpatrick's innocence.

■ Attempted cover-up of criminal misconduct by the staff.

■ Perjury during the court-martial.

A special court-martial of three Navy officers in April 1990 found Fitzpatrick not guilty on 39 of 40 charges filed against him, including several other charges unrelated to the funeral trip. He was convicted on one count of being "derelict in the performance of those duties (as executive officer) in that he willfully failed to follow proper procedures for the accounting and expenditure of Morale, Welfare and Recreational Funds. . . . " A career-ending letter of reprimand was placed in his personnel file.

In a review of the trial, the office of the judge advocate general of the Navy on Jan. 14, 1993, downgraded the solitary conviction to that of simple negligence.

Today, the former Navy officer who prosecuted the court-martial says the case brought against Fitzpatrick had little to support it. In an affidavit he provided to Fitzpatrick, former Lt. Matthew Bogoshian said that "the majority of charges . . . brought against Lt. Cmdr. Fitzpatrick seemed to have little or no basis in reality, i.e. there was an absence of much if any evidence to support them."

But the damage had been done. Exiled to shore staff jobs, Fitzpatrick has twice been passed over for promotion to commander, and is due for mandatory retirement in July.

Fitzpatrick has won one victory to use in his quest for a rehearing. A panel of three senior Navy captains last summer evaluated Fitzpatrick for involuntary separation from the Navy. They concluded, "The board did not feel there was sufficient evidence (in the court-martial) to support a finding of guilty of dereliction of duty."

"His record of past performance . . . indicates that Lt. Cmdr. Fitzpatrick would be a continued valuable member of the U.S. Navy," the panel added.

BRUCE MOYER/P-I

After a reprimand based on charges that he says was a vendetta by other officers, Lt. Cmdr. Walter Fitzpatrick's career in the Navy was ruined.

Seattle Post-Intelligencer

A Hearst Newspaper

J.D. Alexander *Editor and Publisher*
John Currie *Business Manager*

Kenneth F. Bunting *Managing Editor*
Charles J. Dunsire *Editorial Page Editor*
Thomas A. Read *Associate Editor*

The voice of the Northwest since 1863

Naval probe needed in officer's discipline

The Navy should reverse course and grant a new trial to Lt. Cmdr. Walter Fitzpatrick, who appears to have been the subject of a vendetta by his superiors.

The case has an odious smell about it and needs an impartial airing.

Fitzpatrick received a court-martial conviction on one count of financial negligence in 1990. As a result, a career-destroying letter of reprimand was placed in his file.

Fitzpatrick's defenders include Rep. Norm Dicks, D-Wash. and Lt. Matthew Bogoshian, the former Navy officer who prosecuted the 40-charge case against him but now says there was little to support any of it.

Nevertheless, Fitzpatrick, a 20-year Navy officer who has two steel pins in his shoulder from a helicopter crash in the Persian Gulf in 1987, has been exiled to shore staff jobs and twice passed over for promotion. He is due for mandatory retirement in July.

Fitzpatrick's troubles surfaced after the brother of his commanding officer aboard the USS Mars, Lt. Mike Nordeen, was murdered by terrorists in Greece. Fitzpatrick was executive officer aboard the ship at the time and his subordinates voted to use $10,400 in non-governmental money to send a delegation of sailors and their wives to attend the funeral. Nordeen also defends the expenditure as proper.

But Fitzpatrick's troubles may have been triggered by a critical debriefing he gave his superiors in Oakland on his return from the Persian Gulf regarding inadequate support to his ship. The same staffers who heard his complaints initiated the investigation against him shortly thereafter.

Fitpatrick has charged the Navy with obstruction of justice, intentional falsification of investigative reports, intentional withholding of evidence supporting his innocence, and attempted cover-up of criminal misconduct and perjury by Navy staff.

Dicks has asked for a new trial, but the Navy has refused. We think Fitzpatrick, rated as an excellent officer throughout his career, deserves another hearing.

1972163

P1611-1

SEP 13 1989

03

REPORT ON THE FITNESS OF OFFICERS

1 NAME (LAST, FIRST, MIDDLE)	2 GRADE	3 DESIG	4 SSN
FITZPATRICK, WALTER FRANCIS III	LCDR	1310	551-90-4692

5 ACDUTRA/TEMAC	6 UIC	7 SHIP/STATION	8 DATE REPORTED
	05831	AFS 1, USS MARS	87NOV16

OCCASION FOR REPORT: [ ] 9 PERIODIC [X] 10 DETACHMENT OF REPORTING SENIOR [ ] 11 DETACHMENT OF OFFICER

PERIOD OF REPORT: 12 FROM 88NOV01 13 TO 89AUG31

TYPE OF REPORT: [X] 14 REGULAR [ ] 15 CONCURRENT [ ] 16 SPECIAL [ ] 17 OPS CDR

BASIS FOR OBSERVATION: [X] 18 CLOSE [ ] 19 FREQUENT [ ] 20 INFREQUENT

21 EMPLOYMENT OF COMMAND (CONTINUED ON REVERSE SIDE OF RECORD COPY): WESTERN PACIFIC/INDIAN OCEAN/PERSIAN GULF DEPLOYMENT

22 DAYS OF COMBAT: N

23 REPORTING SENIOR (LAST NAME, FI, MI)	24 TITLE	25 GRADE	26 DESIG	27 SSN
NORDEEN, M B	CO	CAPT	1310	390-42-2297

28 DUTIES ASSIGNED (CONTINUED ON REVERSE SIDE OF RECORD COPY): XO-EXECUTIVE OFF-{10}, SECURITY MANAGER-{10}, 3M MANAGER-{10}

SPECIFIC ASPECTS OF PERFORMANCE (TYPE IN OCR CODE LETTER FROM WORK SHEET)

29 GOAL SETTING & ACHIEVEMENT A; 30 SUBORDINATE MANAGEMENT & DEVELOPMENT A; 31 WORKING RELATIONS A; 32 EQUIP & MATERIAL MANAGE A; 33 NAVY ORGAN SUPPORT A

A: 34 RESPONSE IN STRESSFUL SITUATIONS A; 35 EQUAL OPPORTUNITY A; 36 SPEAKING ABILITY A; 37 WRITING ABILITY A

WARFARE SPECIALTY SKILLS (FROM OCR WORK SHEET)

38 SEAMANSHIP A; 39 AIRMANSHIP N; 40 WATCH STANDING A; 41 TACTICAL PROFICIENCY A; 42 LEADERSHIP A; 43

44 SUBSPECIALTY CODE

REQUIRED BY BILLET: [ ] 45 YES [ ] 46 NO

UTILIZATION: [ ] 47 FREQUENT [ ] 48 INFREQUENT [ ] 49 NONE

(WORK SHEET CODE) 50 PERFORMANCE N

MISSION CONTRIBUTION	NOT OBS	HIGH			MID			LOW		MARG	UNSAT*
51 EVALUATION			X			/					
52 SUMMARY	0		1	0	0	0	0	0	0	0	0

TREND OF PERFORMANCE: [ ] 53 FIRST REPORT [ ] 54 CONSISTENT [X] 55 IMPROVING [ ] 56 DECLINING*

C: DESIRABILITY (TYPE IN OCR CODE FROM WORK SHEET)

57 COMMAND A; 58 OPERATIONAL A; 59 STAFF A; 60 JOINT/OSD A; 61 FOREIGN SHORE A

RECOMMENDATION FOR PROMOTION: [X] 62 EARLY [ ] 63 REGULAR [ ] 64 NO*

RANKING FOR EARLY PROMOTION: 65 NUMBER RECOMMENDED 1; 66 RANKING 1

PERSONAL TRAITS (TYPE IN OCR CODE FROM WORK SHEET)

67 JUDGMENT A; 68 IMAGINATION A; 69 ANALYTIC ABILITY A; 70 PERSONAL BEHAVIOR A; 71 FORCEFULNESS A; 72 MILITARY BEARING A

[ ] 73 [ ] 74 [ ] 75 [ ] 76

WEAKNESSES DISCUSSED: [X] 77 NONE NOTED [ ] 78 YES [ ] 79 NO*

STATEMENT: 80 NOT DESIRED N; 81 ATTACHED N

D: 82 SIGNATURE OF OFFICER EVALUATED (IAW BUPERS INST. 1611-12-SERIES). "I ACKNOWLEDGE THAT I HAVE SEEN THIS REPORT, HAVE BEEN APPRISED OF MY PERFORMANCE AND RIGHT TO MAKE A STATEMENT."

COPY PROVIDED

E: 83 DATE FORWARDED: 89SEP06; 84 RED PART [ ]

85 SIGNATURE OF REPORTING SENIOR: M B Nordeen

F: 86 DATE FORWARDED

87 SIGNATURE OF REGULAR REPORTING SENIOR ON CONCURRENT AND CONCURRENT/SPECIAL REPORT

NAVPERS 1611/1 (REV. 7-64) S/N 0106-LF-016-7101

RECORD COPY

★U.S. GOVERNMENT PRINTING OFFICE: 1987—176-630

27. EMPLOYMENT OF COMMAND (Continued)

FITZPA[redacted]TRICK, W F III, 551-90-4692, 88NOV01-89AUG31

CART, IERA, TRAV, SMA, SOCAL OPS,
3M INSP, SOSMRC INSP, TORPEDO TEST OPS.

28. DUTIES ASSIGNED (Continued)

29. COMMENTS (Continued)

A BRILLIANT NAVAL OFFICER, LCDR FITZPATRICK HAS PERFORMED MAGNIFICENTLY AS EXECUTIVE OFFICER IN MARS. THE SHIP'S SUCCESS IS A TRIBUTE TO HIS SKILL, TENACITY AND LEADERSHIP. AS SENIOR SWO, HE DEMONSTRATED MASTERY OF ALL FACETS OF NAVAL SCIENCE. RAZOR SHARP DECISION MAKER. HE SPEAKS WITH POWER AND PRECISION. POWERFUL LEADER WITH THE ABILITY TO ASK AND ATTAIN THE NEAR IMPOSSIBLE FROM THE CREW. ACCOMPLISHMENTS:

- COORDINATED FLAWLESS PERSIAN GULF DEPLOYMENT CONDUCTING OVER 200 UNREPS IN SUPPORT OF TWO DISTINCT OPERATING FORCES: BATTLE GROUP BRAVO AND CTJFME.

- INITIATED DAMAGE CONTROL QA SPOT CHECK PROGRAM USING ALL OFFICER'S AND CPO'S. IMPROVEMENT OF OVER 30% TO 94% EFFECTIVENESS SINCE HE BECAME XO.

- PLANNED AN IMPLEMENTED ENERGY CONSERVATION PROGRAM NAMED NUMBER ONE IN PACFLT, RESULTED IN CINCPACFLT NOMINATING MARS FOR SECNAV ENERGY CONSERVATION AWARD.

- AS 3-M MANAGER CREATED MOST AGGRESSIVE 3-M SELF ASSESSMENT PROGRAM SEEN BY ISIC. RESULT: SURPISE INSPECTION GRADES OF SHIPWIDE RAR 96%, DC RAR 99%, FINAL SHIPBOARD GRADE 94%.

- AS SECURITY MANAGER CLOSED OUT SURPRISE CMS INSPECTION DISCREPANCY FREE. INSTALLED INNOVATIVE SECURITY PROCEDURES WHICH DEFEATED A DEDICATED SURPRISE ATTEMPT BY ISIC TO BREECH SHIP'S SECURITY.

- LCDR FITZPATRICK'S CALIBER WAS DEMONSTRATED PRIOR TO DEPLOYMENT WHEN I LEARNED OF MY BROTHER'S ASSASSINATION (CAPT WM. NORDEEN, THEN NAVAL ATTACHE TO GREECE) AND WAS ORDERED TO ATHENS THAT DAY TO SERVE AS ESCORT. LCDR FITZPATRICK STEPPED IN AND RAN THE SHIP WITH MAGNIFICENCE. HIS ABILITY TO INSPIRE AND LEAD TROOPS ENSURED UNPRECEDENTED PERFORMANCE IN BECOMING THE FIRST CLF SHIP IN SURFPAC TO PASS "POST STARK" REFTRA.

LCDR FITZPATRICK IS A SURFACE WARRIOR WITHOUT EQUAL. HIS MASTERY OF THE PROFESSION WAS DEMONSTRATED TIME AND AGAIN IN THE HOSTILE WATERS OF THE PERSIAN GULF. HE EXHIBITED GENIUS IN THE MOST DEMANDING OPERATIONAL ENVIRONMENTS. IN ALL POSSIBLE RESPECTS MARS IS A MORE CAPABLE WARSHIP DUE TO HIS EFFORTS. LCDR FITZPATRICK'S COMPREHENSIVE KNOWLEDGE OF SURFACE WARFARE IS DIRECTLY RESPONSIBLE FOR MARS SWEEPING ALL DEPARTMENTAL AWARDS AND BEING ODDS ON FAVORITE TO WIN HER SECOND CONSECUTIVE BATTLE "E" (CYCLE COMPLETED RESULTS PENDING.)

PROMOTE THIS SPECTACULAR OFFICER INSTANTLY. GROOM HIM WITH A DEMANDING JOINT SPECIALTY ASSIGNMENT THAT WILL PREPARE HIM FOR INTERSERVICE CONTRIBUTIONS. MOST STRONGLY RECOMMEND COMMAND SCREEN. RETURN HIM TO SEA IN COMMAND OF A DESTROYER. COMMAND AT SEA IS THIS MAN'S DESTINY.

DEFENSE DIVISION
NAVAL LEGAL SERVICE OFFICE
SAN FRANCISCO, CA 94130

1 February 1990

From: Captain K. Anderson, USMC, Defense Counsel
To: LT M. Begoshian, JAGC, USNR, Trial Counsel

Subj: **REQUEST FOR DISCOVERY ICO UNITED STATES V. LCDR WALTER FITZPATRICK, USN**

Ref: (a) RCM 701 and 703
(b) 18 USC 3500
(c) Brady v. Maryland, 373 US 83 (1963)
(d) US v. Webster, 1 MJ 216 (CMA 1975)

1. To expedite defense preparation of the above case it is requested, in accordance with references (a) through (b) that all discoverable matters including, but not limited to the following be provided to defense counsel as soon as practicable:

a. A list of all witnesses pertinent to the case in the prosecution case-in-chief.

b. A list of all witnesses pertinent to the case in the prosecution case on sentencing.

c. All documentary evidence to be presented in the prosecution case-in-chief and on sentencing.

d. All statements made by the accused whether oral or written, sworn or unsworn.

e. All report chits, incident complaint reports, and other investigation reports done by or for the Convening Authority, including but not limited to Naval Investigative Reports and preliminary investigation reports and notes taken on interview of any witness incident to such investigation or report.

f. All attachments to the reports referenced in paragraph e.

g. Any other evidence to be used against the accused.

h. All correspondence pertaining to the case.

i. Any evidence which could reasonably require motions to be made.

j. Any evidence tending to exculpate the accused or reduce the seriousness of the offense.

k. Any material evidence favorable to the accused, both as going to the case in chief and to matters in extenuation and mitigation.

l. Any documentary evidence relating to the fuel oil leak emergency on board the USS Mars in July of 1988 to include engineering reports and damage reports.

m. Any reports, memos or chronologies prepared by Captain Edwards, USN, incident to his period of command on board the USS Mars in July of 1988.

n. The names and locations of all individuals serving as fund administrators and recreational services officers of MWR funds on all ships assigned to COMLOGRU I in July of 1988.

o. The names and locations of all individuals serving as fund administrators and recreational services officers of MWR funds on all ships assigned to COMLOGRU I at the present date.

p. The inventories of MWR equipment, as of July of 1988, specifically relating to stereo and television equipment, for all ships assigned to COMLOGRU I as of July of 1988.

q. The inventories of MWR equipment, as it currently stands, specifically relating to stereo and television equipment, for all ships assigned to COMLOGRUI as currently.

r. All notes relating to interviews and investigation noted in paragraph 5

of the 23 October 1989 interim report of LT Zeller, JAGC, USN.

3. This is a continuing request and requires that any item falling with the ambit of this request which is received by or becomes known to the government after the making of or initial compliance with this request shall be made available to the defense when so received or learned of, whichever is first.

K. Anderson

K. ANDERSON
Captain USMC
Defense Counsel

100202

DEPARTMENT OF THE NAVY
COMMANDER COMBAT LOGISTICS GROUP ONE
FPO SAN FRANCISCO 96601-5300

IN REPLY REFER TO

5041
N14/1322
4 Oct 89

received
TUES 31 DEC 91

FOR OFFICIAL USE ONLY

From: Commander, Combat Logistics Group 1
To: Commander, Naval Surface Force, Pacific Fleet

Subj: HOTLINE PROGRESS REPORT

Encl: (1) HOTLINE PROGRESS REPORT ON 890825
(2) HOTLINE PROGRESS REPORT ON 890863
(3) HOTLINE PROGRESS REPORT ON [redacted]

1. Enclosures (1) through (3) are forwarded for your information.

P. A. ROMANSKI
By direction

FOR OFFICIAL USE ONLY

ENCLOSURE (

NAVY HOTLINE PROGRESS REPORT
AS OF 4 OCTOBER 1989

1. Applicable DON Organization: Commander, Combat Logistics Group 1, NSC Oakland, Ca.

2. Hotline Control No.: CNSP I&E 05-89

3. Date Referral Initially Received: 15 September 1989

4. Status: The investigation has revealed that approximately twenty percent of the 100,000 dollars expended from the MWR fund in Fiscal Year 1988 was misspent. Due to the wide dispesion of the personnel involved, the accountability issues are still being addressed. Although the current regulations require the inclusion of the Naval Investigative Service in an investigation when possible wrongdoing has been discovered, the deployment of the USS MARS has made such action impractical. The investigating officer embarked on the ship to conduct the investigation.

5. Date of Expected Completion: 15 October 1989.

6. Action Agency Point of Contact:

Enclosure (3)

DEPARTMENT OF THE NAVY
COMMANDER COMBAT LOGISTICS GROUP ONE
FPO SAN FRANCISCO 96601-5309

IN REPLY REFER TO:

5800
Ser N14/1471
26 OCT 1989

FOR OFFICIAL USE ONLY

From: Commander, Combat Logistics Group 1
To: Commander, Naval Surface Force, U.S. Pacific Fleet

Subj: INTERIM HOTLINE COMPLAINT REPORT, CNSP I & E 05-89

Ref: (a) COMNAVSURFPAC ltr Ser 006/9002 of 15 September 1989

Encl: (1) Hotline Interim Completion Report as of 23 October 1989

1. Enclosure (1) is provided in response to reference (a). Enclosure (1) should be considered "raw data," reflecting specifically the findings, opinions and recommendations of the investigating official alone, without editing by higher authority.

2. In view of the apparent lack of proper management associated with the USS MARS (AFS 1) Morale Welfare Recreation (MWR) Fund and apparent serious irregularities identified by the investigating official, the following actions are being taken:

a. The new USS MARS (AFS 1) Commanding Officer, Captain W. W. Pickavance, has been directed by message to secure in his possession all MWR records for the time period of investigation interest, and to ensure the availability of witnesses upon USS MARS (AFS 1) return from PACEX operations.

b. Charges are being prepared in the case of Lieutenant Commander Walter F. Fitzpartick, former USS MARS (AFS 1) Executive Officer, and will be referred to an Article 32 hearing appointed by this command.

c. Lieutenant Commander Walter F. Fitzpatrick is currently in execution of PCS orders between USS MARS (AFS 1) and Naval War College. In order to ensure proper jurisdiction is maintained in this case, this command requested NAVMILPERSCOM modify the PCS orders to reflect assignment of Lieutenant Commander Walter F. Fitzpatrick to COMLOGGRU ONE on a TEMDU FURASPERS basis, to remain in effect until resolution of this matter. Lieutenant Commander Walter F. Fitzpatrick was verbally notified of this action on 13 October 1989 to preclude his moving out of his permanent residence in the San Francisco Bay area.

NOV 1989
JUDGE ADVOCATE GENERAL'S CORPS

ENCLOSURE (1)

Subj: INTERIM HOTLINE COMPLAINT REPORT, CNSP I & E 05-89

3. Appropriate decisions with regard to disposition of charges and conclusions of accountability will be made upon completion of the Article 32 hearing.

M. B. EDWARDS
Chief of Staff

HOTLINE INTERIM COMPLETION
REPORT AS OF 23 OCT 1989

1. Name of Investigating Official: Lieutenant Timothy W. Zeller, JAGC, USNR.

2. Billet and Address of Investigating Official: Staff Judge Advocate, Commander, Combat Logistics Group 1, NSC Oakland, Ca. (415) 466-6125/AVN 836-6125.

3. Hotline/Integrity and Efficiency Control Number: CNSP 05-89.

4. Allegations Investigated: Abuse of monies from the Morale, Recreation and Welfare Fund, particularly the expenditure of funds to send certain members of the USS MARS (AFS 1) and spouses to a funeral and the expenditure of funds by sending two members to Hawaii for an alleged MWR brief. The investigation was broadened in accordance with regulations to include all other wrongdoing(s) discovered in the expenditure of MWR funds.

5. Evidence Examined:

a. CNSP Audit report of 1 Sep 1989
b. NAVMILPERSCOMINST 1710.3A
c. BUPERSINST 1710.11A
d. Interview of CAPT Michael B. Nordeen, previous Commanding Officer, USS MARS (AFS 1)
e. Interview of CDR T. A. Rorex, Senior Supply Officer USS MARS (AFS 1)
f. Interview of LCDR W. F. Fitzpatrick, Executive Officer
g. Interview of LT B. Ableson, CHC
h. Interview of LT J. Samples, current MWR Fund Custodian
i. Interview of LTJG L. D. Vaughn, with receipts for trip to funeral
j. Interview of HMC M. W. Collins, Rec Committee Member
k. Interview of SKC G. F. Esposto
l. Fiscal year 1988 MWR Report
m. Custody Cards for Electronic equipment purchased by MWR
n. USS MARS Instruction 1710 dated 1985
o. USS MARS Instruction 1710 (Proposed)
p. Copies of all available checks and bank statements
q. Proposed Fiscal year 1989 MWR Report
r. Fiscal Year 1989 Recreation Committee minutes
s. Interview of SKC L. N. Strong, Current MWR Director
t. Interview of SK3 E. D. Brown, Rec Committee Member

6. Circumstances and Facts:

Out of the $100,000.00 expended from the MWR Fund during Fiscal Year 88, it is apparent that approximately twenty percent

ENCLOSURE (9) ~~ENCLOSURE (~~

was misspent. This figure does not include the cost of the hail and farewell, since this expenditure actually was paid for in FY 89.

SPECIFIC INSTANCES OF IMPROPER EXPENDITURES

1. Funeral Party.

a. On or about 1 July 1988, Commanding Officer, USS MARS (AFS-1) received a telegram stating that his brother had been murdered by terrorists. CAPT M. B. Edwards, Assistant Chief of Staff at CLG-1, was immediately dispatched to SOCAL. At the time of CAPT Edwards' arrival to temporarily relieve CAPT Nordeen, USS MARS (AFS-1) was engaged in REFTRA in the SOCAL OP area. Turnover lasted approximately one hour, after which CAPT Nordeen departed the area by helo.

b. That day, the Chaplain, LT Ableson, was put ashore to observe CACO assistance for CAPT Nordeen's sister-in-law. Upon returning, he was told by the Executive Officer that some of ships' personnel would be attending the funeral. The Chaplain indicated that the appropriate leader would be line officer. The Executive Officer subsequently sent the Chaplain as the senior member.

c. Prior to departure of the team (which consisted of two Officers, the Command Master Chief, five Enlisted Personnel and the spouses of the Executive Officer, Chaplain, Doctor and a Master Chief), the Master Chief called a meeting of the Recreation Committee, whose actions are advisory in nature, voted affirmatively for sending military personnel and flowers, but voted unanimously against paying for spouses. According to one witness, the implication from the Master Chief was that the committee would either go along or would be on the "shit list". The personnel in the funeral party were unaware of the vote not to send spouses.

d. The decision to send the party, including the spouses, lies with the Executive Officer. The Executive Officer stated that after the MWR meeting, he held a meeting on the fantail of all crewmembers. The content of the talk given by the Executive Officer differs between the story of the Executive Officer and the other members involved. The Executive Officer gives the impression that he stated that sending the military members and the spouses had been approved by MWR, but that he wanted anyone that had an objection to the expenses being paid by MWR to get word to him. The other version of the story relates that there was no mention of the spouses at all, and that the implication was that objections would have to be voiced at that moment on the fantail. One of the crewmembers relates that it was even

presented that the Executive Officer would pay for the trip himself if the crew did not approve, but that either way the crewmembers were going.

f. At the time of the decision, the Executive Officer was not the acting Commanding Officer. Evidence indicates that the temporary Commanding Officer, CAPT Edwards, was only aware that a party of crewmembers were attending the funeral, without being advised how it was being paid for or that spouses were included.

g. CAPT Nordeen was unaware the MWR funds had been used to pay any expenses of the trip until 2 or 3 months later. Even then he was not aware that the spouses' tickets had been paid for with MWR Funds.

2. Hawaii Trip.

a. OSC Wagoner received a check for $1400.00 to fund a trip for himself and LT Dorris to Hawaii for an MWR/Operations brief. It is interesting to note that LT Dorris, the Operations Officer, had no connection with MWR other than Athletic Director.

b. The Executive Officer disclaims any knowledge of the fact that an OPS Brief was taking place at the same time as the trip. The check in this case was signed personally by the Executive Officer. The Commanding Officer, CAPT Nordeen, stated that even though he knew the trip was to be dual purpose, MWR and OPS Briefs, he did not know until later that MWR funds had been used to pay for the trip.

c. There is no evidence at the present time that any MWR brief was ever scheduled or took place in Hawaii.

3. Electronic Equipment Expenditures

a. This abuse of funds by the Executive Officer relates to purchases of equipment (stereo's, televisions and video recorders) for exclusive use by the Commanding Officer, Executive Officer and the Command Master Chief.

b. Prohibitions against MWR funds being used for such purposes are contained in NAVMILPERSCOMINST 1710.3A and BUPERSINST 1710.11A, as well as in the USS MARS Instruction governing such funds. The impropriety of the acquisition was pointed out to the Executive Officer at the time of the purchase and afterward by LCDR Dolan, the Assistant Supply Officer.

c. All purchases were authorized the Commanding Officer by a general statement that he wanted to upgrade the gear onboard. The equipment was picked out and purchased by the Executive

Officer with MWR Funds. It is the contention of the Executive Officer that these funds were properly spent due to his belief that they were part of the crew also.

d. The instructions clearly prohibit the expenditures of funds if the benefit will only be for a few, in this case, only one.

e. The electronics' bill from this mass purchase amounted to approximately $6500.00.

4. Hail and Farewell

a. Although the majority of the problems addressed occurred in 1988, the problem continues. A recent Hail and Farewell for the departing and oncoming Commanding Officers was paid for to a large extent out of MWR funds.

b. The matter was brought up before the MWR committee, which agreed to fund the event up to $2,000.00, provided the entire crew was invited. The fact of the situation was simply that the additional cost of the outing ($60.00 per person) was such that few enlisted personnel could have afforded it. It was also apparent that even though the sign up list was readily available to the officers and chiefs, the same was not true for the enlisted personnel in paygrades E-6 and below.

5. Promotional Items.

a. The MWR funds are spent to fund minor items of promotion for the ship as well. USS MARS (AFS 1) in the practice of distributing Mars candy bars to visiting VIPs, visiting CO's and others, nicely packaged on a miniature pallet. These items are paid for out of MWR.

b. There is some indication that this cost is being reimbursed.

OVERSIGHT PROBLEMS

1. No direct access of the Fund Custodian to the Commanding Officer.

a. LT Samples has been required to go through the Supply Officer and the Executive Officer to obtain direction. No personal access was provided to the Commanding Officer.

2. Failure to control preprinted MWR Checks.

a. Current regulations dictate that a tight control be kept on all preprinted checks and a strict accounting be maintained.

b. The Executive Officer was in the habit of taking several checks at a time to use for various items without explanation or receipts.

c. Several checks which were taken have shown up on the bank statements but were never actually returned to the custodian.

d. All bank statements go through the ship's office prior to being sent to the Supply Department for the fund custodian. It has been known that sometimes the statements have been open prior to being received by the fund custodian.

e. The Executive Officer states that he never saw the Bank Statements.

3. Failure to maintain Records and submit reports..

a. All records and receipts for FY 88 and prior are missing with the exception of some cancelled checks and a rough copy of the FY 88 report. The later was recovered from the Executive Officer during the time I was on board. It had never been forwarded to CNSP or NMPC-65.

b. The missing records were discovered upon the departure of OSC Wagoner.

c. During the interview with the Executive Officer, LCDR Fitzpatrick claimed that he was unaware of the requirement to send the reports to NMPC and CNSP. However, when the investigating officer obtained a copy of the FY 88 report from the Executive Officer, attached to the report were two messages from CNSP, both of which outlined the proper procedures and addressees for the report. The messages had a date time group of 16 and 20 September 1988, respectively.

7. CONCLUSIONS OF THE INVESTIGATING OFFICER

CAPT Nordeen is guilty of dereliction of duty by failing to account for the proper expenditure of MWR Funds.

LCDR Fitzpatrick is guilty of dereliction of duty by failing to adhere to proper procedures for the expenditure of MWR funds, violation of the Standards of Conduct by using his authority with MWR funds for his own acgrandisement and several counts of larceny due to the diversion of monies to personnel not attached to the crew, including his spouse.

8. LOCATION OF ALL WORKING PAPERS: Office of the Staff Judge Advocate, Commander, Combat Logistics Group 1.

Very respectfully,

T. W. ZELLER

ATTORNEY WORK PRODUCT

23 Nov 89

MEMORANDUM

From: N14
To: 00
Via: 01_____02_____

Subj: Government Counsel Performance ICO LCDR Fitzpatrick

Sir, in the past week it has become apparent that we are not receiving the appropriate service from the Government Counsel in the Fitzpatrick case. LT Bedoshian has repeatedly refused to repeat our position on witnesses, and seems to be willing to give the defense counsel anything and everything that he desires.

I instructed the GC that we would be willing to produce three witnesses that are necessarily involved to the extent that a phone call would never suffice. He was further instructed that any additional witnesses would have to be ordered by the investigating officer with the appropriate consideration given to the time required to present such witnesses. It was understood that he would do everything possible to provide the substitutes for live testimony that are allowed for in RCM 405. None of these efforts have been made by the government, with the case of Capt Edwards being a perfect example. Capt Edwards will undoubtedly be required to attend a hearing on this Saturday while he is in town. He has never been contacted by either counsel, and the testimony he will be asked for is of such minor duration that he will spend more time driving than on the witness stand.

A second example is the appearance of Ms. Ruth Christopherson, the MUR coordinator that conducted the audit. The GC assumed that she would be able to come down without any effort to contact her or this office in regard to a formal witness request. The naivete of the GC is apparent when he states that the witness can be compelled to come even though the GC and the DC have not done anything to discover what she will testify to. The GC cannot get it through his head why my one star should not go to a three star and tell him to produce a witness because the time of the lawyers is more valuable than that of the witnesses.

Notwithstanding the obvious inexperience of the Government counsel, I am sincerely convinced that the GC does not have the desire to put the effort into this case which will be required. An example of this is the fact that he will not be present when Capt Edwards is called and does not see any reason for there to be a substitute GC. Evidently the GC has alternate plans for this weekend and assumes the Investigating officer will do his job for him. Although there is no requirement in the MCM that a GC be appointed at all, the complexity of this case requires the dedication of someone who desires to win. We asked for an above average counsel for the Defense in order to ensure that the trial be fair, and for a military Judge to ensure that the complexity of the case will be appreciated. Due to the command influence factor, we specifically did not ask for a certain GC.

Unfortunately it seems as though the one we were assigned lacks not only experience, but also desire. One can be overcome by the other, but the absence of both leads to an untenable position.

With regret, it is recommended that corrective action be taken immediately to assign a special prosecutor to this case that will give it the attention it merits. This action is required if we are to use this hearing to find out all the facts of the improprities alleged, with the alternative being that the case may well be seriously jeopardized for lack competant representation.

Very Respectfully,

T. W. Zeller

SWORN STATEMENT OF
MR. MATTHEW K. BOGOSHIAN

My name is Matthew K. Bogoshian. I am currently a civilian attorney practicing law in Anaheim, California. I desire to make the following statement concerning my assignment as prosecuting attorney in United States v. LCDR Walter F. Fitzpatrick, III, USN, 551-90-4692. At that time I was a U.S. Navy Judge Advocate Corps Lieutenant, on active duty, and assigned to the Naval Legal Service Office in Treasure Island, California.

In addition to being the prosecutor at LCDR Fitzpatrick's Special Court-Martial, I was also the attorney representing the government at the Article 32 Investigation that preceded the trial.

As the prosecuting attorney in the case mentioned above and the attorney for the government at the Article 32 Investigation, I had an opportunity to work with and observe LT Timothy W. Zeller. LT Zeller was the Staff Judge Advocate (SJA) to RADM John W. Bitoff, Commander, Combat Logistics Group ONE (COMLOGGRU-1). COMLOGGRU-1 was the Convening Authority for LCDR Fitzpatrick's case.

LT Zeller was difficult to work with on this case and I did not enjoy the experience. LT Zeller seemed obsessed with the prosecution of LCDR Fitzpatrick. It was my impression that LT Zeller had a gut feeling, correct or not, that LCDR Fitzpatrick was a bad egg, and LT Zeller was intent on doing everything he could to show that. LT Zeller was a real pit bull on LCDR Fitzpatrick's case.

I remember that LT Zeller was LCDR Fitzpatrick's accuser and that a tremendous number of charges were preferred to the Article 32 Investigation. From my own research as prosecuting attorney, as borne out by the Article 32 Investigation and Special Court-Martial, the majority of charges LT Zeller brought against LCDR Fitzpatrick seemed to have little or no basis in reality, i.e., there was an absence of much if any evidence to support them. After completing my research I remember thinking that LT Zeller was quite unusual for bringing all the charges he did against LCDR Fitzpatrick.

LT Zeller ensured that I got all the witnesses I needed on LCDR Fitzpatrick's case. It is my impression that a great deal of money was spent for LCDR Fitzpatrick's prosecution.

I remember being told that there had been a Integrity and Efficiency Investigation regarding LCDR Fitzpatrick and the USS MARS (AFS-1), but I cannot remember when I learned of it.

I do remember being told that someone had contacted LCDR Fitzpatrick's promotion board (for Commander) to notify that board of the results of LCDR Fitzpatrick's trial.

The way in which LT Zeller handled this case was unusual. Also, the significant attention he gave the case was noteworthy and struck me as exceptional.

I have read and fully understand this statement, and I swear/affirm that it is true and correct.

Matthew K. Bogoshian

STATE OF CALIFORNIA)
) ss.
COUNTY OF Orange)

On this 8th day of April, A.D. 1992, before me, the undersigned a Notary Public in and for the State of California duly commissioned and sworn, personally appeared Matthew K. Bogoshian, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he signed and sealed the said instrument as his free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and offical seal hereto affixes the day and year in this certificate above wiitten.

OFFICIAL SEAL
STEVE WHITE
NOTARY PUBLIC-CALIFORNIA
ORANGE COUNTY
My Comm. Exp. May 12, 1995

Notary Public in and for the
State of California
Residing at Anaheim, CA

AL3005B
//22/29/12//
U.S. NAVAL INVESTIGATIVE SERVICE

EPORT OF INVESTIGATION (CLOSED) 21MAR90

COMPROMISE (III) CONTROL: 22FEB90-12AL-0061-5FNA/E

S/FITZPATRICK, WALTER FRANCIS III/LCDR USN
M/W/NO04/S/551-90-4692/27JAN52/VALLEJO, CA

COMMAND/COMLOGGRU 1, NAVAL SUPPLY CENTER, OAKLAND, CA/55271

MADE AT/12AL/ALAMEDA, CA/D.R. WEST, SPECIAL AGENT

SYNOPSIS

1. INVESTIGATION WAS CONDUCTED FOLLOWING RECEIPT OF INFORMATION FROM LT TIMOTHY ZELLER, JAGC, USN, COMBAT LOGISTICS GROUP ONE (COMLOGGRU 1), NAVAL SUPPLY CENTER, OAKLAND, CA, REPORTING THE POSSIBLE COMPROMISE OF CLASSIFIED MATERIAL BY SUBJECT. LT ZELLER REPORTED SUBJECT HAD SENT A PACKAGE TO RADM JOHN W. BITOFF, CDR, COMLOGGRU 1, ALLEGING MISCONDUCT BY COMLOGGRU 1. THIS PACKAGE INCLUDED AMONG OTHER THINGS, NAVAL MESSAGE 010855Z NOV 88, CLASSIFIED "CONFIDENTIAL." FURTHER INQUIRIES LATER DETERMINED THE MESSAGE HAD BEEN DECLASSIFIED BY THE ORIGINATOR. LT ZELLER STATED SUBJECT HAD BEEN RELIEVED AS EXECUTIVE OFFICER ABOARD THE USS MARS (AFS-1), AND SHOULD NOT HAVE HAD ACCESS TO THE NAVAL MESSAGE AT THIS TIME. ZELLER REVEALED SUBJECT IS CURRENTLY UNDER INVESTIGATION, AND IS SCHEDULED TO APPEAR AT A SPECIAL COURT MARTIAL FOR A SEPARATE MATTER. ZELLER ALSO STATED SUBJECT MAINTAINED WHAT SUBJECT CALLED HIS "PERSONAL FILE," WHICH CONSISTED OF A COUPLE OF BINDERS AND A BOX FULL OF PAPERS. ZELLER STATED SOME OF THESE "FILE" PAPERS WERE MARKED "CONFIDENTIAL," BUT WERE DECLASSIFIED ACCORDING TO SUBJECT. ZELLER BELIEVES THE NAVAL MESSAGE IN QUESTION WAS PRODUCED FROM THIS "FILE." INQUIRIES REVEALED SUBJECT DOES NOT MAINTAIN ANY CLASSIFIED DOCUMENTS NOR HAVE A PLACE TO DO SO AT HIS PRESENT DUTY STATION. SUBJECT WAS INTERROGATED IN THE PRESENCE OF HIS ATTORNEY, CAPT ANDERSON, USMC. SUBJECT, AFTER WAIVING HIS RIGHTS, STATED HE WAS AWARE OF THE NAVAL MESSAGE IN QUESTION AND ADMITTED HE HAD MAILED THE PACKAGE TO RADM BITOFF. SUBJ ALSO STATED HE WAS AWARE THE NAVAL MESSAGE HAD BEEN DECLASSIFIED. SUBJ'S ATTORNEY WOULD NOT ALLOW HIM TO EXPLAIN HOW HE KNEW THE MESSAGE HAD BEEN DECLASSIFIED. SUBJ DENIED HAVING ANY CLASSIFIED DOCUMENTS. CAPT ANDERSON STATED HIS CLIENT WOULD NOT GIVE A SIGNED STATEMENT, GRANT A SEARCH OF HIS PERSONAL BELONGINGS, SIGN A CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT, OR UNDERGO ANY EXAMINATION USING ADDITIONAL INVESTIGATIVE TECHNICAL AIDS. REVIEW OF SUBJ'S MILITARY RECORD REVEALED SUBJ, WHEN BEING RELIEVED ABOARD THE USS MARS, WAS REPORTED NOT TO BE IN POSSESSION OF ANY CLASSIFIED DOCUMENTS. DUE TO THE LACK OF SUBSTANTIVE LEADS, THIS INVESTIGATION IS CLOSED.

STATUE

2. THIS INVESTIGATION WAS WORKED PURSUANT TO ARTICLE 92 OF THE UCMJ.

NARRATIVE

3. ON 21FEB90, LT ZELLER REPORTED (EXHIBIT (1)), THAT ON 16FEB90, RADM BITOFF RECEIVED A PACKAGE FROM SUBJECT VIA EXPRESS MAIL. THE

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PACKAGE CONTAINED ITEMS ALLEGING MISCONDUCT BY COMLOGGRU 1. ENCLOSED WITH THE PACKAGE WAS NAVAL MESSAGE 010855Z NOV 88, CLASSIFIED "CONFIDENTIAL" (EXHIBIT (2)). RADM BITOFF TURNED THIS PACKAGE OVER TO LT ZELLER. ZELLER STATED SUBJ HAD BEEN RELIEVED AS EXECUTIVE OFFICER ABOARD THE USS MARS ON 26SEP89, AND IS SCHEDULED TO APPEAR AT A SPECIAL COURT MARTIAL IN EARLY APR90, FOR ALLEGED VIOLATIONS OF ARTICLE 92 OF THE UCMJ (DERELICTION OF DUTY), AND ARTICLE 106 (WRONGFUL DISPOSITION OF GOVERNMENT PROPERTY). ZELLER STATED SUBJ SHOULD NOT HAVE HAD ACCESS TO NAVAL MESSAGE 010855Z NOV 88, WHICH WAS ORIGINATED ABOARD THE USS MARS, FROM THE COMMANDING OFFICER, CAPT MICHAEL NORDEEN, TO CAPT EDWAREDS, THE CHIEF OF STAFF, COMLOGGRU 1, AT THAT TIME. LT ZELLER STATED SUBJ SHOULD NOT HAVE BEEN IN POSSESSION OF ANY CLASSIFIED DOCUMENTS FROM THE USS MARS WHEN HE WAS RELIEVED. LT ZELLER ALSO STATED WHILE HE WAS ON BOARD THE USS MARS IN SEP89, SUBJ HAD TWO BINDERS AND A BOX FULL OF PAPERS, WHICH SUBJ REFERRED TO AS HIS "PERSONAL FILE." ZELLER STATED THE BINDERS WERE FILLED WITH NOTES AND SHIP DAILY SCHEDULES, MANY OF WHICH WERE MARKED "CONFIDENTIAL." SUBJECT, WHEN QUESTIONED BY ZELLER ABOUT THESE "FILES," STATED THAT ALL THE DOCUMENTS HAD BEEN DECLASSIFIED. LT ZELLER STATED, TO HIS KNOWLEDGE, SUBJ HAS HAD NO ACCESS TO CLASSIFIED MATERIAL ABOARD THE USS MARS SINCE SEP89.

4. ON 22FEB90, CAPT A. E. MILLIS, CHIEF OF STAFF, COMLOGGRU 1, WAS APPRISED OF THE ALLEGATIONS AGAINST SUBJ, AT WHICH TIME, MILLIS FELT AN INVESTIGATION SHOULD BE INITIATED.

5. ON 02MAR90, CAPT BRUCKNER, CHIEF OF STAFF, MSCPAC, NAVAL SUPPLY CENTER, SUBJ'S TEMPORARY DUTY STATION, WAS APPRISED OF THE INVESTIGATION. BRUCKNER STATED HE HAD NOT SEEN SUBJ FOR SEVERAL MONTHS, AND COULD NOT PROVIDE ANY PERTINENT INFORMATION CONCERNING SUBJ.

6. ON 02MAR90, CDR JANORA AND LCDR STINSON WERE CONTACTED AT MSCPAC. JANORA IS IN CHARGE OF THE CLASSIFIED SAFES IN THE AREA SUBJ WAS WORKING IN. JANORA STATED SUBJ IS NOT KEEPING ANY CLASSIFIED DOCUMENTS IN ANY OF THE SAFES. JANORA STATED HE HAS NOT SEEN SUBJ SINCE DEC89. STINSON WORKED WITH SUBJ AT MSCPAC, AND STATED HE HAS NOT SEEN SUBJ SINCE JAN90. STINSON STATED SUBJ DOES NOT MAINTAIN ANY CLASSIFIED DOCUMENTS IN HIS WORK AREA.

7. ON 06MAR90, CAPT MICHAEL NORDEEN WAS CONTACTED AT OPNAV 55, LOCATED AT THE PENTAGON, WASHINGTON D.C. NORDEEN IS THE ORIGINATOR OF NAVAL MESSAGE 010855Z NOV 88. NORDEEN STATED THE NAVAL MESSAGE IS NO LONGER CLASSIFIED, AND WAS ONLY CLASSIFIED AT THE TIME BECAUSE IT MENTIONED MATTERS PERTAINING TO THE PERSIAN GULF. NORDEEN STATED HE HAS NO DOCUMENTATION RELATING TO THE DECLASSIFICATION OF THE MESSAGE. (SA JANIGA)

8. ON 08MAR90, SUBJ WAS CONTACTED AND STATED HE WOULD BE WILLING TO TALK TO THE CASE AGENT ABOUT THE INVESTIGATION THE FOLLOWING DAY.

9. ON 09MAR90, SUBJ STATED HE WAS STILL WILLING TO TALK ABOUT THE ALLEGATIONS MADE AGAINST HIM, BUT WOULD LIKE TO HAVE HIS ATTORNEY FOR

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E SPECIAL COURT MARTIAL, CAPT ANDERSON, TO BE PRESENT WHEN HE DID J.

10. ON 14MAR90, SUBJ WAS INTERROGATED IN THE PRESENCE OF HIS ATTORNEY, CAPT ANDERSON (EXHIBIT (3)). FITZPATRICK WAS ADVISED OF HIS MILITARY SUSPECT'S WAIVER OF RIGHTS, WHICH HE SIGNED AFTER CONSULTATION WITH CAPT ANDERSON. SUBJECT STATED HE WAS AWARE OF NAVAL MESSAGE 010855Z NOV 88, AND THAT HE HAD SENT IT TO RADM BITOFF VIA EXPRESS MAIL. SUBJ STATED HE WAS AWARE THE NAVAL MESSAGE WAS NO LONGER CLASSIFIED, BUT WAS NOT ALLOWED TO EXPLAIN HOW HE KNEW THIS BY HIS ATTORNEY. SUBJECT DENIED HAVING ANY CLASSIFIED DOCUMENTS, BUT WAS NOT ALLOWED TO PROVIDE ANY ADDITIONAL INFORMATION BY HIS ATTORNEY. CAPT ANDERSON STATED HIS CLIENT WOULD NOT GIVE A WRITTEN STATEMENT, GRANT A SEARCH OF HIS PERSONAL BELONGINGS, SIGN A CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT, OR UNDERGO ANY ADDITIONAL INVESTIGATIVE TECHNICAL AIDS.

11. ON 15MAR90, LCDR C. B. DIVIS, EXECUTIVE OFFICER, USS MARS, WAS CONTACTED. DIVIS STATED THE USS MARS HAS NO RECORD OF SUBJ SIGNING A CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT WHEN SUBJ LEFT THE SHIP.

12. ON 19MAR90, LCDR BANNOW, COMMAND SERVICES, NAVAL LEGAL SERVICE OFFICE, NAVAL STATION TREASURE ISLAND, CA, WAS CONTACTED, AND PROVIDED SUBJECT'S SERVICE RECORD BOOK FOR REVIEW. THE REVIEW EVEALED THAT SUBJ WAS RELIEVED AS EXECUTIVE OFFICER ABOARD THE USS ARS ON 26SEP89. AT THIS TIME, SUBJ TURNED OVER HIS DUTIES, ONE OF WHICH STATED THE CMS AND TOP SECRET ACCOUNTS WERE IN PROPER ORDER AND ALL ACCOUNTED FOR (EXHIBIT (4)). THIS WAS TURNED OVER TO ENS ERIN WILSON, COMMUNICATIONS OFFICER, USS MARS, WHO CERTIFIED ON 26SEP89, THAT SUBJECT NO LONGER HAD ANY CLASSIFIED MATERIAL IN HIS POSSESSION, AND THAT ALL CLASSIFIED MATERIAL PREVIOUSLY SIGNED FOR BY SUBJ HAD ALL BEEN RETURNED. THIS REPORT WAS ENDORSED BY LCDR DIVIS AND CAPT PICKAVANCE, COMMANDING OFFICER, USS MARS.

INVESTIGATIVE STATUS
13. DUE TO THE LACK OF SUBSTANTIVE INVESTIGATIVE LEADS, THIS INVESTIGATION IS CLOSED.

EXHIBITS
(1) STATEMENT BY LT ZELLER/21FEB90...(ORIG 0022/COPY ALL)
(2) NAVAL MESSAGE 010855Z NOV 88...(COPY ALL)
(3) IA: RESULTS OF INTERVIEW/14MAR90...(COPY ALL)
(4) RELIEF OF EXECUTIVE OFFICER/26SEP89...(COPY ALL)

PARTICIPATING AGENT
M. J. JANIGA, NISRA WASHINGTON, D.C.

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Voluntary Statement

I, Lieutenant Timothy W. Zeller, JAGC, USN, make the following free and voluntary statement to Dayne R. West whom I know to be a Special Agent of the Naval Investigative Service.

On Friday, 16 Feb 1990, RADM Bitoff received a package from LCDR Walter F. Fitzpatrick via express mail. The package was a copy of certain materials that were being sent to NMPC alleging that the group had mishandled a Surface Warfare Revocation by denying it at our level. Enclosed in the package, among other things was a classified message, a confidential Personal For from Capt Nordeen to Capt Edwards, the then CLG-1 COS.

LCDR Fitzpatrick is currently TEMDU to CLG-1 with a TAD assignment to MSCPAC. He is scheduled to appear at a Special Court Martial on 19 March 1990 on unrelated matters. The message in question was sent from the USS MARS, and is declass on OADR. While conducting an investigation aboard USS MARS in Sept of 1989, I had occasion to visit the stateroom of the LCDR (then XO) to among other things see if he had a report for Fiscal Year 1988 that no one else on the ship seemed to have. The XO produced the report out of what he called his personal files which he was gathering. The personal files consisted of a couple binders and a box about the size of a Xerox paper box which was full. That report was not classified. Later that same day, the XO brought me a copy of a Confidential SPECAT message from COMNAVSURFPAC which he stated was for my personal use. I gave the message to Capt Pickavance that evening at dinner and then disposed of it in a burn bag. I had no intention of taking the message off the ship. A few days later the Xo met me at my office to provide additional information, (this was after he detached the ship which was still deployed) and brought with him a black three inch binder which was filled with notes and daily schedules of the shipboard activities. Many of the schedules were marked confidential, and upon inquiry of this to the XO he stated that they had been declassified.

To my knowledge, the LCDR has no access to classified material from the USS MARS at the present time, nor since he detached from the ship in Sept/Oct 89.

The above statement is true to the best of my knowledge and belief.

Timothy W. Zeller

This statement was sworn to this 21st day of Feb 90, before Mr. Dayne R. West, Special agent for the Naval Investigative Service.

Dayne West

By Authority of SECNAVINST 5520.1B

EXHIBIT (1)

REAR ADMIRAL JOHN W. BITOFF, USN (RET.)
1911 Pierce Street
San Francisco, California 94115

April 30, 1999

The Honorable Norm Dicks
United States Congressman
6th District Washington
500 Pacific Avenue
Bremerton, WA 98337

RECEIVED
VIA FAX @ 10:46 a.m.
FRIDAY, 30 APRIL 1999
SENT TO ME BY RADM BITOFF

Dear Congressman Dicks:

This is in response to your letter of March 5, 1999 in which you asked me to provide you with a written account of my role in the case of LCDR Walter Fitzpatrick, USN (Retired). I regret the length of time it took for me to respond to your request, but the incident that eventually led to LCDR Fitzpatrick being tried by a court-martial occurred in 1988 and it required an enormous effort on my part to recall the details associated with the case. In addition, I retired from active service at the end of 1991 and I am no longer privy to the official files and other documents pertaining to this case.

As a matter of background, I was Commander Combat Logistics Group ONE (CLG-1) and Commander Naval Base San Francisco from January 1989 through October 1991. In addition, I was Commander Task Force 33, the operational commander for all logistics ships, including Military Sealift Command ships, in the U.S. THIRD Fleet. In my CLG-1 hat I had 15 major ships, including the USS MARS (AFS-1), and approximately 6000 officers and men.

I had close personal knowledge and frequent association with the 15 commanding officers in my Group. I met with them frequently and wrote their fitness reports. Conversely, I had little or no contact with the ship's executive officers and with the exception of one or two, I did not know them by name. I did not know LCDR Walter Fitzpatrick, Executive Officer, USS MARS, personally or by reputation. The USS MARS was a top performing ship with two exceptional commanding officers during my tenure. Both of these fine officers went on to command aircraft carriers and one of them became a flag officer. USS MARS was nominated by me for the coveted Battle Efficiency "E" award in both competitive cycles during my tour. She was considered to be the best AFS in the Pacific Fleet. It stands to reason that LCDR Fitzpatrick; the ship's executive officer (the number two officer in the ship's chain of command) played a significant role in USS MARS's achievement.

The incident that led eventually to LCDR Fitzpatrick's trial before a court-martial occurred in 1988, long before I assumed command of Combat Logistics Group ONE. The incident I am referring to concerned a group of USS MARS officers and enlistedmen and their spouses who represented the ship at the funeral for the brother

of Captain Michael B. Nordeen, USN, the MARS commanding officer. The funeral took place at Arlington National Cemetery. Captain Nordeen's brother, also a Navy captain, was murdered by terrorists while serving in Greece. Funding to send the ship's representatives to the funeral came from the USS MARS Morale, Welfare and Recreation (MWR) fund. The decision to send a delegation from the ship apparently occurred after Captain Nordeen departed on emergency leave. Incidentally, this thoughtful gesture by MARS personnel was lauded at the highest echelons of the Navy, including the Chief of Naval Personnel

My predecessor, RADM Robert Tony, USN, did not brief me on the incident during the change of command process, and when later queried by me, indicated that he did not inform me because he believed it to be a minor matter. I first became aware of a possible problem with MARS MWR account when the ship became the subject of an MWR audit or "assist visit" by the Commander Surface Warfare Force, U.S. Pacific Fleet (COMSURFPAC) civilian Welfare and Recreation Management Specialist. Somewhere in the sequence of events, I also remember being informed of a telephone message on our Waste, Fraud and Abuse "hotline" that questioned the expenditures for the funeral trip. The distinction I am making here is that I did not ask for the audit, it was initiated by my immediate senior in the chain of command. The audit questioned the use MWR funds for sending a delegation from the MARS to the funeral. In addition, other expenditures were in question, including the purchase of a tent for official ceremonies and the purchase of several televisions and stereo sets for the ship. As a result of the audit, COMNAVSURFPAC directed me to conduct an inquiry to the allegations contained in the inspection report.

The next thing that happened in sequence was an Article 32 Investigation to determine if there was any real wrongdoing in this case. My recall is not complete as to the specific details that led up to the Article 32, but I believe my Chief of Staff came to see me in the company of LT Timothy W. Zeller, my Staff Judge Advocate, regarding the matter. LT Zeller was adamant that we conduct an Article 32 investigation, if for no other reason than to "cover our six o'clock" with higher authority. I concurred, hoping that it would the clear the air on this issue. I assumed the Article 32 investigation would follow normal practice and be conducted by a civilian special agent of what was then called the Naval Investigative Service or NIS.

I was extremely busy at this time dividing myself between my duties at my two primary commands and the increasing demands placed on me by my CTF 33 operational hat. In fact, I was deployed much of this time in Alaska and the Aleutian Islands for PACEX 89, the largest peacetime exercise in Pacific Fleet history. My CLG-1 staff remained behind in Oakland in the normal conduct of business while I was deployed aboard ship. Shortly after my return from deployment, the Loma Prieta earthquake struck the Bay Area and I found myself leading the Navy's massive rescue and recovery effort.

I clearly remember being surprised by how aggressive LT Zeller seemed to be about this case and specifically, LCDR Fitzpatrick's role in it. I liked Tim Zeller personally and i had complete faith and trust in him. However, it was obvious that LT Zeller saw

most things in terms of black and white. On one occasion, during an informal conversation in my office, I told him that real life situations were often too complicated for purely black and white solutions and that sometimes the answer lies in shades of gray. He smiled, and said, "I guess it's my Marine Corps training." I mentioned this encounter to my Chief of Staff and he agreed with my assessment of LT Zeller and added that he was nevertheless, extremely persevering and serious in all endeavors.

When the Article 32 investigation was completed, I was surprised to find LT Zeller had conducted the investigation, rather than the NIS. I questioned my Chief of Staff on this point and I recall him telling me that LT Zeller had asked NIS for assistance, but they were unable to provide an agent to go to sea aboard USS MARS. I am not sure whether LT Zeller and/or my Chief of Staff briefed me when they provided me with the results of the Article 32, but I do remember not being terribly concerned with the seriousness of what I was being told. I specifically remember asking the following questions: Did anyone line their pockets with the MWR expenditures? Was there anything irregular regarding the purchase of the TVs and stereo equipment for the ship or did any of this equipment find its way to a crewmembers home or car? The answer to each of my questions was no.

LT Zeller remained hard over on the use of MWR funds for the crewmembers to attend the funeral. I did not agree that these were criminal acts, but rather "creative", albeit improper use of MWR funds and a modicum of poor judgement as well. Based on this information, I told LT Zeller that I would convene an Article 15 NJP (Admiral's Mast) in the case of LCDR Fitzpatrick. I would have taken the same action with CAPT Nordeen, the former commanding officer, but he had departed the area and I no longer had Article 15 jurisdiction over him. I did however, award CAPT Nordeen a Non-Punitive Letter of Instruction, citing the discrepancies noted in the COMSURFPAC MWR audit. I also directed that crewmembers that received funds for the trip to the funeral in Arlington National Cemetery are asked to return all, or as much as, they could afford, to the MARS MWR fund. I believe there was a reasonable attempt to do this, because I received a telephone call from one of the officers (a Navy Chaplain) who attended the funeral with his wife, telling me that he returned the funds and asked for my understanding on this matter.

I was not making light of the charges regarding the misappropriation of MWR funds. My training and upbringing in the Destroyer Force, where I spent most of my seagoing career, made me a "strict constructionist" regarding the proper administration of all funds that were entrusted in my care. However, my long experience revealed that the Naval Aviation community had a reputation for taking a different or more liberal view of MWR funds as apposed to appropriated funds. Many Naval Aviators took a more imaginative or creative approach to the administration of MWR funds. I do not mean to infer that funds were used in an illegal fashion from a criminal perspective, but rather giving short shrift to the MWR Regulations "fine print" as long as it enhanced crew morale. I have had personal experience with similar matters when I was a junior officer. Based on the aforementioned and the fact the commanding officer was a naval aviator, I concluded that this atmosphere existed on USS MARS and it should not be a surprise that the executive officer would reflect the

captain's attitude. Therefore, I had no desire to single out LCDR Fitzpatrick for punishment.

I next received an office call from CAPT Kevin Anderson, USMC, certified as a Judge Advocate, who I believe was accompanied by LT Zeller, my Staff Judge Advocate. CAPT Anderson identified himself as LCDR Fitzpatrick's Defense Counsel and then informed me that LCDR Fitzpatrick would not accept Admiral's Mast / Article 15 NJP unless I guaranteed that if any punishment was awarded, it would be non-punitive (i.e. not go in his record). I was startled and incensed by this demand, particularly coming from an officer of the court. I made it clear to CAPT Anderson that he was not acting in the best interests of his client. I gave him a stern lecture and told him that I have had NJP authority, on and off, for almost 30 years, beginning as a Lieutenant commanding officer and that I never prejudged a case that came before me. On the contrary, I dismissed many cases at Captain's Mast because new information surfaced during the proceedings. As a matter of principle, I could not accede to CAPT Anderson's demands. I closed the meeting by telling CAPT Anderson, in the strongest possible terms, that he and LCDR Fitzpatrick were making a serious mistake that could have terrible consequences. I instructed him to advise LCDR Fitzpatrick that Article 15/ NJP was in his best interest. LCDR Fitzpatrick, through his Defense Counsel, chose trial by court-martial vice Article 15 /NJP. LCDR Fitzpatrick's refusal to accept Article 15/NJP left me with no legal recourse but to convene a Special Court-Martial. The court-martial convicted LCDR Fitzpatrick of violating Article 92 of the Uniform Code of Military Justice, being derelict in the performance of his duties regarding the administration and expenditure of MWR funds. Therefore, I awarded him a Letter of Reprimand.

Congressman Dicks, I tried to avoid a court-martial in this case at every turn in the road. Based on my assessment of the charges, I believed that a court-martial would be a waste of the Navy's time and money and it would unfairly single out LCDR Fitzpatrick for punishment. There was no doubt in my mind that MWR funds were used improperly and there was sufficient blame to go around. I was convinced that there was no personal gain from the misuse of these funds and in the final analysis, the ship and the Navy were the ultimate beneficiaries. However, rules and regulations are there for good reason and I, in good conscience, could not sweep the matter under the rug. While I indicated earlier that I never prejudged an Article 15 case, I necessarily went into the proceedings with a general idea or window of possible punishment if no additional information or extenuating circumstances were presented. In this case, if LCDR Fitzpatrick had accepted Article 15/NJP and nothing more untoward came out, I was prepared to award him a Non-Punitive Letter of Instruction, the same punishment that was meted out to his commanding officer. This would have allowed him to go on with his career without impediment.

I have never understood why LCDR Fitzpatrick and/or his defense counsel refused my offer of Article 15. At the time, I surmised that it was a combination of LCDR Fitzpatrick acting in a fit of peak and incompetence on the part of CAPT Anderson, his defense counsel. I distinctly remember being unimpressed with CAPT Anderson, beginning with the encounter in my office the day he refused to accept the Article 15

for his client. I fervently hoped that LCDR Fitzpatrick and CAPT Anderson would come to their senses before risking it all at a court-martial. Had they done so up to the very minute before the court-martial opened, I would have gladly reverted to Article 15/NJP. In addition, I was a very accessible flag officer with a career-long reputation for championing the underdog and for my friendly demeanor. Why was it that LCDR Fitzpatrick, or anyone else in his camp, did not attempt to meet with me and have reason prevail in this case?

You should be aware, that in the wake of the court-martial conviction, LCDR Fitzpatrick did exercise the right of appeal and I denied it. Frankly, by my very nature, I was inclined to grant the appeal, but after much soul searching and seeking independent opinion from other senior officers not associated with the case, I found myself with a moral dilemma. I believed the punishment awarded by the court-martial to be too harsh and that LCDR Fitzpatrick was bearing full responsibility for the events on USS MARS, but I brought the charges and I convened the court-martial in the proper conduct of my duties. How could I now throw it all to the wind just because I was not happy with the results of the proceedings that I instituted. That court was made up of a jury of his peers, who unfortunately did not see the situation in the same light, which I did. They came close however and cleared him of all charges and specifications but one. It was a tough call and I made my decision after much thought and deliberation. I have always been extremely unhappy with the outcome of this case and I wish I could have prevented the irrational behavior that brought it about.

I had to make a statement on this case in 1994 when the Chief of Naval Operations directed the Judge Advocate General of the Navy to look into the matter following a series of newspaper articles that appeared in your home state of Washington. I had hoped that upon review, the case would have been thrown out on some technicality. However, my position has not changed in the ensuing years: (1) the charges stemming from the events aboard USS MARS should not have been consummated in a court-martial; (2) LCDR Fitzpatrick was not properly served by his defense counsel; (3) LCDR Fitzpatrick, by virtue of his rank and experience, should have known that it was in his best interest to accept Article 15/NJP; and (4) LCDR Fitzpatrick should have done everything in his power to meet with me before the die was cast.

LCDR Fitzpatrick has petitioned me over the years and most recently and most ardently, during the last two months, to change all that has happened and "restore him to his rightful place on active duty." I have neither the power nor the authority to grant his wish. However, he has made a series of new and disturbing allegations, which if true, bear looking into. The most serious of these allegations from my perspective, are:

- That CAPT Anderson did not apprise him of my comments during the meeting in which he, on behalf of LCDR Fitzpatrick, refused Article 15/NJP.

- That there are serious doubts as to the validity of LCDR Fitzpatrick's signature on the Response to Letter of Reprimand dated July 17, 1990, or the so called "confession".

I am not sure what action you are inclined to take on behalf of LCDR Fitzpatrick, if any, after reading my statement. I have tried to paint a picture of the events of this case and how they unfolded to the best of my recollection. I can assure you that I carried out my important responsibilities in this case to the best of my ability. I am not a lawyer and I do not presume to have in-depth knowledge of the arcane language associated with the legal documents, procedures and other minute details associated cases of this type. I followed the advice of my Staff Judge Advocate, as well as the advice of other legal authorities throughout these proceedings. If there were procedural errors made by me, they were not intentional and the Office of the Judge Advocate General of the Navy or other competent authority has heretofore not brought them to my attention.

I believe the only option open to you to bring some humane closure to this tragedy, is to convince the Navy to review this case again in light of the troubling allegations mentioned above. Possibly, in a gesture of magnanimity, the Secretary of the Navy might grant clemency and remove the Federal conviction from his record. As an aside, but of great immediate importance, LCDR Fitzpatrick informed me that there is a move afoot to remove his security clearances as a delayed result of his long ago conviction. If this is allowed to happen it will, in all likelihood, deprive him of his ability to earn a living. Based on the circumstances of this case, removing his security clearances is not appropriate and is draconian by any civilized rule of measure.

Sincerely,

John W. Biloff
Rear Admiral, U.S. Navy (Retired)

REAR ADMIRAL JOHN W. BITOFF, USN (RET.)

(66)

RECEIVED

MONDAY, 17 JULY 2000 THROUGH FOIA

June 4, 1999

Honorable Richard E. Danzig
Secretary of the Navy
1000 Navy Pentagon
Washington, D.C. 20350 - 1000

Dear Mr. Secretary:

As a matter of courtesy, I am enclosing a copy of my response to an official query from Congressman Norm Dicks regarding the sequence of events that led to the 1989 court-martial of LCDR Walter Fitzpatrick.

This is a very sad case because it should not have been consummated in trial by court-martial with the resultant career ending punishment. In my letter to Congressman Dicks, I made it very clear that I tried to avoid going down this precarious road, but to no avail. Frankly, I found my hands tied from both legal and ethical perspectives.

I am bothered by LCDR Fitzpatrick's recent allegations of misconduct by his defense counsel and the doubts as to the validity of Fitzpatrick's signature on the Response to Letter of Reprimand. I would ask that the appropriate authorities look into these allegations and determine their veracity.

Very respectfully,

John W. Bitoff
Rear Admiral, U.S. Navy (Retired)

Cc: The Judge Advocate General of the Navy

Enclosure: (1)

Tim Zeller Fingerprints

(Updated Sunday, March 11, 2001 for the Cox Commission)

Selected Quotes

"[Lieutenant Zeller's] status as accuser disqualified him from any involvement in the case as staff judge advocate to the convening authority either before or after the case or direct involvement in the prosecution of the case."

Rear Admiral Harold Grant
Navy Judge Advocate General
in a letter to U.S. Senator Patty Murray
5 May 1994

"As the accuser in LCDR Fitzpatrick's case, however, LT Zeller was disqualified from providing the convening authority [Rear Admiral Bitoff] with formal advice on the case. There is no evidence in the record that LT Zeller violated this prohibition."

Rear Admiral C.M. LeGrand
Navy JAG (Acting)
in a letter to U.S. Senator Patty Murray
9 June 1994

"In the fall of 1989 I was tasked with conducting an investigation into the MWR expenditures onboard USS MARS, said tasking being a result of a directive from Commander, Naval Surface Force, Pacific Fleet. **My client** in this matter, **as both an investigator and Legal Officer was** the Department of the Navy as personified by **Rear Admiral John Bitoff**, then Commander, Combat Logistics Group 1." (Emphasis added)

Commander Timothy W. Zeller
JAGC, USN
in a statement to the Oklahoma Bar
8 July 1998

"LT Timothy W. Zeller, [was] my Staff Judge Advocate, regarding the [Fitzpatrick] matter."

"I followed the advice of my Staff Judge Advocate [LT Zeller], as well as the advice of other legal authorities throughout these proceedings."

"I brought the charges and I convened the court-martial in the proper conduct of my duties. How could I now throw it all to the wind just because I was not happy with the results of the proceedings that I instituted.

Rear Admiral John W. Bitoff, USN
Retired
In a statement to U.S. Congressman Dicks
30 April 1999

"Thus, there is no evidence to support the characterization of RADM Bitoff as an accuser. In fact, there was no evidence of any action on the part of the convening authority, Rear Admiral Bitoff, his chief of staff, Captain Edwards, or his staff judge advocate, LCDR Zeller, which prevented LCDR Fitzpatrick from receiving a fair trial."

Rear Admiral Harold Grant
Navy JAG, Retired
in a letter to U.S. Senator Patty Murray
5 May 1994

"It appears that LT Zeller continued to serve in his assigned billet as staff judge advocate to [RADM Bitoff] Commander, Logistics Group 1 throughout the preliminary investigation and trial and the charges against LCDR Fitzpatrick."

Rear Admiral C. M. LeGrand
Navy JAG (Acting), Retired
In a letter to U.S. Senator Patty Murray
9 June 1994

Timothy W. Zeller's participation in this case

has been documented as follows

Date	Activity
1989	
Friday, 9/15	• Assigned as Integrity and Efficiency (I & E) Investigating Officer by Captain Edwards.
Monday, 9/18 (USS MARS underway from NSC Oakland)	• Embarks in USS MARS (AFS-1) to commence the I & E. USS MARS gets underway for Dutch Harbor, Alaska.
Monday 9/18 to Monday 9/25 (USS MARS at sea)	• Conducts interviews of shipboard personnel. Takes notes of interviews. Places interviewed personnel under gag orders not to discuss the interview. Collects documents.
Wednesday, 9/20 (USS MARS at sea)	• Administers Article 31(b) warnings to LCDR Fitzpatrick. • Interviews LCDR Fitzpatrick • Comes into possession of a copy of the USS MARS MWR report for 1988. • Comes into possession of two COMNAVSURFPAC messages outlining proper procedures for submission of MWR reports. • Comes into possession of a CONFIDENTIAL SPECAT message from COMNAVSURFPAC to USS MARS. Turns the message over to Captain Pickavance.
Sunday, 9/24 (USS MARS at sea)	• Continues interview of LCDR Fitzpatrick
Monday , 9/25 (USS MARS moors Dutch Harbor, Alaska)	• Disembarks USS MARS (AFS-1). LT Olson (CLG-1)picks him up, takes him to the airport. Zeller flies back to Oakland, Ca.
Wednesday, 10/4	• Interviews LCDR Fitzpatrick in CLG-1 offices in Oakland, Ca. • Files first I & E 05-89 investigation report.

Tuesday, 9/26 to Tuesday, 10/17 (Exact days unknown)	• Prepares briefing memo for Captain Edwards and Admiral Bitoff). Gives the memo to Captain Edwards. • Briefs Captain Edwards and Admiral Bitoff on status of I & E. Recommends charges to both men that should be brought against LCDR Fitzpatrick. At this brief Captain Edwards recommends, and Rear Admiral Bitoff concurs, that an Article 32 Investigation should be convened
Tuesday, 10/17	• At Captain Edwards direction, leave for USS MARS personnel comes under Tim Zeller's control.
Date unknown	• MWR fund records are forwarded to LT Zeller. No pertinent MARS MWR records left onboard ship (see CO, USS MARS letter of 21 Feb 90).
Date unknown	• ***Interviews Mr. Brian Feeley***
Monday, 10/23	• Files second I & E 05-89 investigation report. Forwards the report to Captain Edwards ***(see note below).*** • Pronounces guilt of LCDR Fitzpatrick,
Date unknown	• ***Prepares charge sheet for Article 32***
Wednesday, 11/1	• Prefers formal charges. Becomes my formal accuser. • Requests Article 32 Investigation by direction of RADM Bitoff
Thursday, 11/2	• Amends and adds to first charge sheet • Presents both charge sheets to LCDR Fitzpatrick in the presence of CDR John Januzzi (N-3, CLG-1)
Friday, 11/3	• Files expected witness list with the Article 32 Investigating Officer. Signs as SJA, CLG-1

Pre-Article 32 (early November))	• Assigns Ensign Kimberly Boyer to organize evidence collected. • Assigns Ensign Boyer to locate witnesses. • Grants immunity to Mr. Brian Feeley. • Assists prosecution in witness production. • Repeatedly directs LT Bogoshian (prosecutor) on CLG-1 position on witnesses.
Wednesday, 11/22	• Takes sworn statement of SK3 Eugene Brown at CLG-1 HQ in Oakland, Ca.
Thursday, 11/23 (Thanksgiving Day)	• As "N14" authors his memorandum to RADM Bitoff as "00" requesting the removal of LT Bogoshian as prosecutor.
Thursday, 11/23	• Submits the Thanksgiving Day memo to CLG-1 Assistant Chief-of-Staff (Paul Romanski)
Monday, 11/27 (my speculation)	• Submits SK3 Brown's sworn statement into the Article 32 record via LT Bogoshian. Last day of the Article 32.
Date unknown	• ***Prepares Article 34 recusal letter for RADM Bitoff's signature.***
Friday, 12/22	• RADM Bitoff recuses LT Zeller from furnishing Article 34 Advice.
Friday, 12/29	• Phone conversation between LT Zeller and LCDR Steve Bannow (NAVLEGSVCOFF); Subject: Pretrial Advice.

1990

January (day unknown)	• Attends meeting with RADM Bitoff, Captain Anderson. Recommends against dropping charges. Aggressively argues for trial (as was related to me).
Date unknown	• ***Prepares NJP package***
Tuesday, 1/16	• Unsigned memorandum for the record from LT Zeller (as CLG-1 SJA); Subject: LCDR Fitzpatrick - NJP.

Wednesday, 1/17	• Signed memo from LT Zeller as CLG-1 SJA to Captain Anderson; Subject: NJP package ICO LCDR Fitzpatrick. Gives LCDR Fitzpatrick until 1200 1/19 to accept or decline NJP.
Date unknown	• ***Prepares charge sheet for trial***
Wednesday, 1/24	• Prefers formal charges to trial • Prepares Special Court-martial (SPCM) convening order (signed this date by RADM Bitoff).
Pre-Trial (actual date unknown)	• Assigns ENS Boyer to collect potential jury questionnaires and to act as his assistant regarding this case. • Selects potential jurors.
Monday, 2/5	• Sends letter to LT Bogoshian; Subject: Discovery Act Request ICO LCDR Fitzpatrick.
Thursday, 2/8	• Sends letter to LT Bogoshian; Subject: Discovery Act Request ICO LCDR Fitzpatrick. • Prepares SPCM Order (signed by RADM Bitoff this date).
Tuesday, 2/13	• Assigned by LT Zeller, Ensign Boyer takes jury questionnaire information by phone in a conversation with CDR David Armstrong.
Thursday, 2/15	• Initials Discovery Act Request from Captain Anderson to CO, USS MARS.
Friday, 2/16	• RADM Bitoff receives complaint filed by LCDR Fitzpatrick to the Naval Inspector General. Turns the package over to LT Zeller.
Tuesday, 2/20	• Phone conversation between LT Zeller (SJA-CLG-1) and LCDR Conrad Divis (XO, USS MARS); Subject:: USS MARS MWR record availability.

Wednesday, 2/21	• Is copy to (as CLG-1 SJA) on response to Captain Anderson's Discover Act Request of 2/15. • Provides sworn statement to NIS accusing LCDR Fitzpatrick of the possible compromise of classified material.
Wednesday, 3/28	• Prepares SPCM convening order (signed by RADM Bitoff this date).
Monday, 4/2 through Thursday, 4/5	• Assigns LT Gruber to observe and report back on the trial. • Assigns LT Pelligrino to observe and report back on the trial.
Monday, 5/21	• Grants Captain Anderson request for extension of time to submit 1106 matters acting for CLG-1.
25 May – 7 June	• ***Prepares and delivers Post-Trial advice to Rear Admiral Bitoff.*** • ***Prepares LCDR Fitzpatrick's letter of reprimand for RADM Bitoff's signature.*** • ***Prepares post-trial documentation as SJA to RADM Bitoff.***
Thursday, 6/7	• Prepares and issues SPCM CLG-1 convening order #11-90 and signs as CLG-1 by direction (gives title as CLG-1 SJA).
Monday, 6/11	• Signs by direction the forwarding letter for the Convening Authority's Action and Letter of Reprimand for LCDR Fitzpatrick. Certifies these documents as true copies.
Date unknown	• NMPC 82 contacted. Separation processing not anticipated.
Tuesday, 6/12	Files final report closing I & E investigation 05-89. Named as the investigating official.

Thursday, 9/20	• By direction of CLG-1, inserts into the record a certified copy of Special Court-martial Promulgating Order 11-90 of 7 June 1990 and Copy of Statement of LCDR Fitzpatrick dated 17 July 90 (reported forgery).

1991

Tuesday, 12/31	• Zeller's I & E 05-89 investigation reports first disclosed. Suppressed to this date.

1994

Tuesday, 7/26	• Zeller's Thanksgiving Day memo first disclosed. Suppressed to this date.
Monday, 10/4	• Zeller's NJP package first disclosed. Suppressed to this date

2000

Wednesday, 10/11	• Zeller's 31 August 1990 post-trial advice memo to RADM Bitoff first disclosed. Suppressed to this date

Notes:

1. All references to LT Zeller by title are attributable to documented depiction by personnel working with or near LT Zeller or to documented self-depiction.
2. Prepared at the request of Captain Pixa (phone conversation of Monday, 27 October 1997.
3. ***Problems, discrepancies, inaccuracy, and credibility of LT Zeller's 23 October 89 I & E 05-89 investigation report have been separately briefed to Captain Pixa.***
4. (Prepared by Walter F. Fitzpatrick, III on Wednesday, 29 October 1997)
   (Revision 1: Thursday, 30 October 1997; Changes are in bold italic)
   (Revision 2: Tuesday 20 June 20, 2000 - added 1 Nov 90 entry on 32 request)
   (Revision 3: Sunday, March 11, 2001 – added Zeller's 31 August 1990 memo to RADM Bitoff. This addition made in support of prepared Statement for the Cox Commission)

MEMORANDUM 31 MAY 1990

From: 006
To: 00
Via: 01 _____ 02 _____

Subj: Convening Authority Action ICO LCDR Fitzpatrick

Sir, enclosed are the action and the Letter of Reprimand ordered awarded by the court members in the subject case. Also enclosed is a clemency request from the defense counsel in which he recommends that you disapprove the findings of the court, essentially overturning the court-martial, based on his opinion that a court was not the proper forum. This contention is somewhat ironic in view of the fact that the accused was offered a fair hearing at mast and refused that opportunity. I strongly recommend that clemency not be granted, and that the sentence of the court-martial be carried out as adjudged. Your execution of the action and the letter will execute the sentence.

Very Respectfully,

T. W. Zeller

RECEIVED
0936 WEDNESDAY, 11 OCT 2000

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400

IN REPLY REFER TO

5860
Ser 40/0313
5 May 1994

The Honorable Patty Murray
United States Senator
2988 Jackson Federal Building
915 2nd Avenue
Seattle, WA 98174-1003

Dear Senator Murray:

The Secretary of Defense has forwarded your letter of March 18, 1994, to this office for response. For your information, we have received similar correspondence from Senator Feinstein and Congressman Dicks.

Lieutenant Commander (LCDR) Walter F. Fitzpatrick, U.S. Navy, was the subject of an Article 32, Uniform Code of Military Justice (UCMJ) Investigation appointed on November 21, 1989, by Rear Admiral Bitoff, Commander, Logistics Group ONE. He named LCDR J.J. Quigley, JAGC, USN, to investigate 40 specifications alleging misconduct by LCDR Fitzpatrick. In his report dated January 9, 1990, LCDR Quigley recommended that LCDR Fitzpatrick receive nonjudicial punishment under Article 15, UCMJ. It is not clear from the record of trial whether Article 15 proceedings were contemplated and LCDR Fitzpatrick exercised his right to refuse disposition of charges nonjudicially, or whether the convening authority rejected LCDR Quigley's recommendation and referred the charges to a court-martial for disposition.

On February 5, March 27, April 2, 3, 4 and 5, 1990, LCDR Fitzpatrick was tried by a special court-martial consisting of members convened by Commander, Logistics Group ONE at Naval Station Treasure Island, San Francisco, California. He was charged with one specification of dereliction of his duties as the Executive Officer of the USS MARS (AFS 1), in that he willfully failed to follow proper procedures for the accounting and expenditure of Morale, Welfare and Recreation (MWR) funds on board his ship, one specification of disobeying a general regulation by using a Government owned vehicle for his personal use, one specification of suffering the wrongful disposal of military property, and one specification of larceny of $2800 in MWR funds.

The members (jury) found him guilty of the dereliction of duty offense and not guilty of the remaining offenses. He was sentenced to receive a reprimand. On June 7, 1990, the convening authority approved the findings of the court and ordered the sentence executed. Pursuant to Article 64, UCMJ, his case was reviewed by the Assistant Force Judge Advocate, Naval Surface Force, U.S. Pacific Fleet. It was determined, on August 17,

1990, that the findings of the court were correct in law and fact and that the sentence was within the limits set by law.

In March 1992, LCDR Fitzpatrick first submitted a two volume application for relief under Article 69(b), UCMJ, which he later supplemented with an additional volume in June 1992. His application, with endorsements, arrived in the Office of the Judge Advocate General in September 1992. We have no explanation concerning why LCDR Fitzpatrick waited 15 months to file his application for relief. LCDR Fitzpatrick raised ten issues, seven of which touched directly or indirectly on the issue of unlawful command influence. The defense had made no motions at the trial to dismiss the charges based upon unlawful command influence. The case was analyzed by one Naval Reserve judge advocate and one active duty Marine judge advocate and on January 14, 1993, action was taken by the Assistant Judge Advocate General (Military Justice). This action affirmed the sentence to reprimand and only so much of the findings of the case as provided for a negligent, as opposed to willful, dereliction of LCDR Fitzpatrick's duties as Executive Officer.

On February 23, 1993, LCDR Fitzpatrick forwarded a request for reconsideration of the action on the application, asking in the alternative for a more favorable ruling by this office, certification of the case to the Navy-Marine Corps Court of Military Review, or a new trial. This request was never received in this office, and it was resubmitted in November, 1993. On November 29, 1993, his request was denied after thorough review. Prior to denial of the request, the case was again reviewed by a judge advocate.

On January 10, 1994, the Honorable Norm Dicks, U.S. House of Representatives, requested another review of the case. His letter included, as an enclosure, another volume of alleged unlawful command influence errors from LCDR Fitzpatrick. After having the case reviewed once again in this office, this time by another Naval Reserve judge advocate and two active duty judge advocates, I responded to Congressman Dicks on March 9, 1994 in my capacity then as the Acting Judge Advocate General. I advised the Congressman that the issues now raised by LCDR Fitzpatrick were the same as those already reviewed in the case and that nothing he presented warranted a reconsideration of the decision that Lieutenant Commander Fitzpatrick's special court-martial conviction was correct in law and fact. Accordingly, I decided that a new trial was not warranted.

The issue of unlawful command influence was first raised by LCDR Fitzpatrick in his application for relief under Article 69(b), UCMJ. Rule for Court-Martial 905(b) requires objections based on defects in the investigation, preferral, or referral of charges to be raised before entry of pleas, or, pursuant to section (e) of the same rule, that issue is waived. Nevertheless, the issues

- Did LT Zeller conduct an investigation, collect evidence as part of the investigation, and knowingly preclude the Naval Investigative Service from taking over the investigative responsibility? In the course of the I&E Investigation, LT Zeller, the investigating officer, collected evidence. This office is not in possession of that investigation, other than those pages included in LCDR Fitzpatrick's petition. We do not have access to the November 23, 1989, memorandum from LCDR Zeller to RADM Bitoff. Nothing contained in the record indicates that the Naval Investigative Service was involved in the investigation of the USS MARS MWR, nor is there any indication within the record that LT Zeller or anyone else attempted to preclude such an investigation.

- Did Captain Edwards assign LT Zeller as investigating officer? Captain Edwards testified at the Article 32 Investigation that he directed LT Zeller to go on board the MARS and conduct the I&E Investigation. It is unclear from his testimony whether he was relaying a decision of the Commander, or acting under his own authority. LT Zeller was not staff judge advocate to Captain Edwards, who was the Logistics Group ONE Chief of Staff. LT Zeller was staff judge advocate to the Commander, Logistics Group ONE, RADM Bitoff. Such an assignment to conduct an I&E investigation is a administrative act outside the pretrial investigative procedures established by the UCMJ.

- Did LT Zeller report the results of his investigation to Captain Edwards? LT Zeller reported the results of his I&E investigation to the Commander, Logistics Group ONE. According to his testimony, Captain Edwards was present when this occurred.

- Did Captain Edwards send a SPECAT EXCLUSIVE message to Captain Pickavance directing collection of evidence? Captain Edwards sent a SPECAT EXCLUSIVE message 171402Z OCT 89 to USS MARS informing Captain Pickavance that allegations against LCDR Fitzpatrick were being forwarded to an Article 32 Investigation and requesting that he take personal steps to secure all MWR records and temporary active duty orders from 1988. Such a message informing a subordinate commander of a pending case against a member of the command and requesting security of potential evidence is not indicative of any unlawful command influence.

- Did LT Zeller act simultaneously as investigating officer and staff judge advocate to the convening authority? The record is silent regarding whether another officer acted temporarily as staff judge advocate while LT Zeller conducted the I&E Investigation. It does not appear from the record that he acted as staff judge advocate during the

Article 32 investigation or the special court-martial. The record of trial reflects that other officers fulfilled the duties of staff judge advocate in offering pretrial and post trial advice to the convening authority. His post trial involvement in the case appears limited to a purely administrative duty of authenticating the special court-martial promulgating order dated 7 June 1990.

♦ Did LT Zeller recommend charges which were approved by RADM Bitoff? In his interim report dated October 26, 1989, LT Zeller recommended charges be considered against Captain Nordeen and LCDR Fitzpatrick. He served as accuser on the charge sheet referred to the Article 32 Investigation and the charge sheet ultimately referred to special court-martial by RADM Bitoff. His status as accuser disqualified him from any involvement in the case as staff judge advocate to the convening authority either before or after the case or direct involvement in the prosecution of the case.

♦ Did Captain Edwards recommend disposition of the charges? I am unable to find specific evidence in the record that Captain Edwards recommended disposition of the charges after the Article 32 Investigation, however, it would be entirely within the scope of his duties as chief of staff to advise the commander regarding disciplinary matters in the command. The ultimate decision on disposition of charges is a matter solely within the discretion of the convening authority, who is required by law to personally decide how he will dispose of charges, including whether to refer them to court-martial (RCM 601, Manual for Courts-Martial). No motion was made at trial attacking his referral of the charges, and there is no evidence in the record that RADM Bitoff, the convening authority, acted under any outside influence.

♦ Did RADM Bitoff, an accuser, convene a special court-martial? RADM Bitoff convened a special court-martial and referred the charges against LCDR Fitzpatrick to that court on January 24, 1990. He was not, however, an accuser. In military law, the term "accuser" refers to the person who swears to the charges, the person who directs that charges nominally be signed and sworn by another, and any other person who has an interest other than an official interest in the prosecution of the accused (Article 1, UCMJ). While an accuser is disqualified from referring charges to court, no motion to dismiss the charges alleging that RADM Bitoff was an accuser was made at trial. As indicated above, failure to make such motion prior to pleas waives the issue. As a result of his application, and post-application letters from the accused and members of Congress, LCDR Fitzpatrick's allegations of unlawful command influence have been reviewed by not less than 8 judge advocates, including myself, none of whom were involved in the case at the trial level or have

any personal interest in the case. In addition to the fact that the issue is legally moot as having been waived by failing to object at trial, none of these judge advocates have found any legal merit whatsoever in LCDR Fitzpatrick's allegations. Thus, there is no evidence to support the characterization of RADM Bitoff as an accuser. In fact, there was no evidence of any action on the part of the convening authority, Rear Admiral Bitoff, his chief of staff, Captain Edwards, or his staff judge advocate, LCDR Zeller, which prevented LCDR Fitzpatrick from receiving a fair trial. It is my opinion that had any motion been made attacking RADM Bitoff's referral of this case to trial, it would properly have been denied.

LCDR Fitzpatrick has fully exercised his rights at trial and has exhausted his rights of appeal. His case is final.

The military justice system, as established by the U.S. Congress and the President, has been designed to fairly and impartially serve both the needs of good order and discipline in the armed services as well as the rights of individual accused. For over 40 years, the Uniform Code of Military Justice has provided service members procedural protections that their civilian counterparts do not have. For example, in this case, LCDR Fitzpatrick was provided with military counsel at no expense to himself, without being required to show indigence on his part.

Prior to the case's referral to special court-martial, his case was investigated at an Article 32, UCMJ, investigation, similar to a civilian grand jury. Unlike a grand jury, however, LCDR Fitzpatrick was present, represented by counsel, and had the right to present evidence. Once at the special court-martial, he exercised the right to have his case heard by a panel of officer members, rather than a military judge alone. He and his counsel had the right to question and challenge those members. The trial was conducted pursuant to the Presidentially-mandated Military Rules of Evidence and Rules for Courts-Martial.

LCDR Fitzpatrick's right to appeal the conviction under Article 69(b), UCMJ, was explained to him in writing and attached to the record of trial. Article 69(b) provides that cases like LCDR Fitzpatrick's may be reviewed by the Office of the Judge Advocate General upon application by the accused and that findings, sentence, or both, may be modified or set aside by the Judge Advocate General on grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, error prejudicial to the substantial rights of the accused, or appropriateness of the sentence. As noted above, LCDR Fitzpatrick exercised this right with a three volume application. Each of his allegations was carefully considered on appeal and were rejected as being without merit.

The military justice system has a long-standing, well-deserved reputation for protecting the rights of the accused. In my opinion, the system has worked properly, efficiently, and fairly to protect the rights of LCDR Fitzpatrick.

Your interest in the welfare of naval personnel is appreciated. I trust the foregoing information will be of assistance to you.

Sincerely,

H.E. GRANT
Rear Admiral, JAGC, U.S. Navy
Judge Advocate General

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332 2400

IN REPLY REFER TO

9 June 1994

The Honorable Patty Murray
United States Senator
2988 Jackson Federal Building
915 2nd Avenue
Seattle, WA 98174-1003

Dear Senator Murray:

We received your letter of May 10, 1994, regarding Lieutenant Commander (LCDR) Walter F. Fitzpatrick, USN. Regrettably, there may be a misunderstanding as to the limited role of the Judge Advocate General in these circumstances. The Uniform Code of Military Justice (UCMJ), Article 69, specifically defines the responsibilities of the Judge Advocate General in LCDR Fitzpatrick's case and those like it:

> The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

Our comprehensive review of the record of trial in LCDR Fitzpatrick's case and the information presented in his Article 69(b), UCMJ, appeal leads us to the conclusion that his conviction of negligent dereliction in the performance of his duties in violation of Article 92, UCMJ, was supported in law and fact. LCDR Fitzpatrick has not demonstrated that the court-martial lacked jurisdiction over him or the offense he was found guilty of committing. He has not presented any newly discovered evidence that demonstrates that the prosecution's case at trial, which was based upon the testimony of 22 witnesses and numerous documents, was defective. He has not shown that prejudicial error occurred, that the sentence imposed on him was inappropriate, or that fraud on the court was committed.

It is also important to note that LCDR Fitzpatrick's court-martial came about after an independent pretrial investigation by a judge advocate performed pursuant to Article 32, UCMJ, in January 1990. The investigating officer, LCDR J. Quigley, JAGC, USN, made a determination that probable cause existed to believe that LCDR Fitzpatrick committed a dereliction of duty. Another independent reviewing officer, LT T. Algiers, JAGC, USN, a member of Naval Legal Service Office, San Francisco, provided formal advice to Commander, Logistics Group 1, under Article 34, UCMJ. He concluded that the Article 32 investigation revealed suffi-

cient evidence to support the dereliction of duty charge against LCDR Fitzpatrick.

These independent determinations, both finding sufficient evidence of dereliction of duty, led to referral of charges to a special court-martial by the convening authority, Rear Admiral Bitoff. The charges were tried from 2 through 5 April 1990 in a forum presided over by an experienced, highly respected military judge, Captain G. Wells, JAGC, USN. The court-martial members were thoroughly questioned by both the government and defense counsel during the voir dire process. LCDR Fitzpatrick has presented absolutely no evidence that the members of this independent jury failed to live up to their oath to "faithfully and impartially try, according to the evidence, [their] conscience, and the laws applicable to trial by court-martial the case of the accused now before th[e] court."

The prosecution case consisted of 22 witnesses who testified in court about the circumstances surrounding LCDR Fitzpatrick's involvement with USS MARS's MWR program and the manner in which MWR funds had been spent and the program managed. LCDR Fitzpatrick was represented by qualified defense counsel, a Marine judge advocate, who zealously and effectively defended LCDR Fitzpatrick's interests. LCDR Fitzpatrick himself testified at length during the trial about his actions aboard USS MARS, his intentions, and his understanding of what had occurred. Based on this evidence, the members of the court-martial determined as a matter of fact that LCDR Fitzpatrick was derelict in his duties. Their conclusion that LCDR Fitzpatrick was guilty of one of the four charges is fully supported by the evidence. There is simply no support for LCDR Fitzpatrick's claim that he was the victim of baseless, unsubstantiated charges which were the product of a Logistics Group 1 vendetta against him. The record of trial shows otherwise.

Recognizing that yours was a letter requesting information and was not a petition for further appellate review, the following information taken from the record of trial and the papers accompanying LCDR Fitzpatrick's application for review under Article 69, UCMJ, is provided:

- <u>Does the Executive Officer typically have sole authority regarding the accounting and expenditure of MWR funds? What role did the crew, officers, and acting commanding officer have in that particular decision?</u> LCDR Fitzpatrick, as Executive Officer of USS MARS, would carry out those duties assigned him by the commanding officer. Captain Nordeen testified at trial that LCDR Fitzpatrick was responsible for a number of programs on board USS MARS, including MWR. As such, directives governing MWR required that the funds be spent on authorized activities and that an accounting be made for their expenditure. The evidence supports findings

that LCDR Fitzpatrick, as the Executive Officer, and MWR Coordinator, was derelict in his responsibilities because he failed to ensure that proper documentation was maintained. During September 1988, LT J. Samples informed LCDR Fitzpatrick that the MWR fund was "probably in a deficit situation." He informed LCDR Fitzpatrick that he could not certify that the fund was properly administered because all expenditures were not reported or accounted for. He also advised LCDR Fitzpatrick that the inventory of MWR property was not properly maintained. He then made specific recommendations on methods to improve the MWR account. Despite the fact that LCDR Fitzpatrick was placed on notice of significant discrepancies in the MWR fund, he did nothing to resolve the problem between September 1988 and September 1989. An audit conducted of the MWR fund in September 1989 identified more than 25 discrepancies that were not remedied by LCDR Fitzpatrick despite the previous notice. The Manual for Courts-Martial (MCM) indicates that a person is derelict in the performance of his/her duties when that person willfully or negligently fails those duties or when the person performs them in a culpably inefficient manner. LCDR Fitzpatrick's failure to supervise the expenditure of MWR funds exhibited a lack of that degree of care which a reasonably prudent person should have exercised given the notice he received from LT Samples.

- Who gave final approval for the expenditure of MWR funds while Captain Edwards was acting commanding officer? Why was Captain Edwards disinterested in a decision involving everybody else aboard USS MARS? The record of trial contains evidence that LCDR Fitzpatrick made the decision to send four USS MARS spouses, including Mrs. Fitzpatrick, as part of the funeral party. He informed Captain Edwards that a party was being sent to the funeral but did not detail who would be in the party or how it would be funded.

- Did Captain Edwards assign LT Zeller as investigating officer, or was he relaying a decision of RADM Bitoff? Captain Edwards testified at the Article 32 Investigation that he directed LT Zeller to ride USS MARS during an underway period in order to conduct the Integrity and Efficiency (I&E) Investigation. It is not clear from his testimony, however, whether he was relaying a decision of the Group Commander, Rear Admiral Bitoff, or acting under his own authority.

- Who acted as staff judge advocate while LT Zeller was I&E investigating officer? Was he staff judge advocate to the convening authority during the Article 32 investigation or the special court-martial? It appears that LT Zeller continued to serve in his assigned billet as staff judge advocate to Commander, Logistics Group 1 throughout the prelimi-

nary investigation and trial of the charges against LCDR Fitzpatrick. As the accuser in LCDR Fitzpatrick's case, however, LT Zeller was disqualified from providing the convening authority with formal advice on the case. There is no evidence in the record that LT Zeller violated this prohibition. LT Zeller was not disqualified from continuing his duties as staff judge advocate in other unrelated cases and issues. In fact, the formal pretrial advice to the convening authority in LCDR Fitzpatrick's case was provided to RADM Bitoff by LT T. J. Algiers, JAGC, USNR, a judge advocate assigned as Command Legal Services Officer, Naval Legal Service Office, San Francisco. LT Algiers--who had no connection to Logistics Group 1--effectively acted as staff judge advocate for purposes of LCDR Fitzpatrick's case, and he found that the evidence supported the charges against LCDR Fitzpatrick.

Thank you for your letter. I hope that the foregoing information will assist you.

Sincerely,

C. M. LEGRAND
Rear Admiral, JAGC, U.S. Navy
Judge Advocate General
Acting

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400

IN REPLY REFER TO

JUL 14 1994

The Honorable Patty Murray
United States Senator
2988 Jackson Federal Building
915 2nd Avenue
Seattle, Washington 98174-1003

Dear Senator Murray:

In my letter to you concerning Lieutenant Commander (LCDR) Walter F. Fitzpatrick, U.S. Navy, dated May 5, 1994, and the letter signed by Rear Admiral LeGrand dated June 9, 1994, reference was made to the actions of Lieutenant (LT) Timothy W. Zeller, JAGC, USN, Staff Judge Advocate, Logistics Group One. In those letters we noted that LT Zeller conducted an Integrity and Efficiency investigation during October 1989. As a result of that investigation LT Zeller recommended that charges be considered against Captain Nordeen and LCDR Fitzpatrick. On November 1, 1989, he signed the charges under oath, thereby becoming the accuser on the charge sheet that referred the matter for the Article 32, Uniform Code of Military Justice (10 U.S.C. 832) pretrial investigation. When, following the pretrial investigation, charges were referred to a special court-martial, LT Zeller was again the accuser, signing and swearing to those charges on January 24, 1990.

Because LT Zeller was the accuser, following the pretrial investigation, the statutory Article 34, Uniform Code of Justice (10 U.S.C. § 834) pretrial advice was prepared for Rear Admiral Bitoff by another lawyer, LT Algiers.

In prior correspondence, you requested that I obtain a copy of a memorandum signed by LT Zeller to Rear Admiral Bitoff dated November 23, 1989. This memorandum was considered potentially relevant on the issue of unlawful command influence. Although the memorandum was previously unavailable to me, the Department of Defense, Inspector General's Office was able to obtain it and forwarded it to me on July 11, 1994. In this memorandum, LT Zeller voiced his disenchantment with the performance of the government counsel in preparing for the Article 32 investigation. He therefore requested that the government counsel be replaced by a more experienced attorney.

You may recall that the context in which I had reviewed this case was in execution of my responsibilities under Article 69, Uniform Code of Military Justice (10 U.S.C. § 869), acting on matters submitted by LCDR Fitzpatrick. Although this November 23, 1989 memo was not part of LCDR Fitzpatrick's submission, I have again reviewed the case in light of the memorandum and do not find illegal command influence. Clearly LT Zeller was providing advice to his commander, but he was not making recommendations concerning the guilt or innocence of LCDR Fitzpatrick, the

appropriate sentence for LCDR Fitzpatrick, or, even, whether the case ultimately should be referred to a general court-martial. Those recommendations were all made in due course by the Article 32 pretrial investigating officer and by LT Algiers, the substituted staff judge advocate. In short the memorandum does not purport to influence the independent judgment of the convening authority or participants in the court-martial on any of these matters. The memorandum expresses criticism of the government counsel's failure to proceed efficiently and seeks a more experienced advocate for the government side. In any event, LT Zeller's recommendation was not followed, since the complained of government counsel continued to serve as prosecutor in the special court-martial. LT Zeller did not fulfill the statutory duties of a staff judge advocate after the Article 32 investigation, recusing himself from the Article 34 advice and the post-trial review. The convening authority thus acted on the Article 32 investigation and the record of trial with the advice of LT Algiers, not LT Zeller.

In my review, I also found it worth noting that, while advocating an aggressive government approach, the November 23, 1989 memorandum actually expresses the goal of a full and fair hearing. In the memorandum LT Zeller notes that the Command had requested "an above average defense counsel to ensure that the trial would be fair and for a military judge [to act as investigating officer] to ensure that the complexity of the case will be appreciated." This memorandum does not advocate conviction, it makes no attempt to influence any decision on the merits on the part of the convening authority. Rather, it indicates an effort to ensure an efficient, high quality and balanced pretrial investigation.

There has been a lot of interest in LCDR Fitzpatrick's special court-martial, and upon receipt of the November 23, 1989 memo from the Inspector General's office I decided to use the opportunity to take a fresh look at the case. I am satisfied that my prior disposition was the right one, and that LCDR Fitzpatrick's rights have been fully protected.

I hope that the foregoing is responsive to your concerns. Please let me know if you want additional information.

Sincerely,

H. E. GRANT
Rear Admiral, JAGC, U.S. Navy
Judge Advocate General

Copy to:
DOD IG

ATTORNEY WORK PRODUCT

23 Nov 89

MEMORANDUM

From: N14
To: 00
Via: 01_____02 [illegible]

Subj: Government Counsel Performance ICO LCDR Fitzpatrick

Sir, in the past week it has become apparent that we are not receiving the appropriate service from the Government Counsel in the Fitzpatrick case. LT Begoshian has repeatedly refused to repeat our position on witnesses, and seems to be willing to give the defense counsel anything and everything that he desires.

I instructed the GC that we would be willing to produce three witnesses that are necessarily involved to the extent that a phone call would never suffice. He was further instructed that any additional witnesses would have to be ordered by the investigating officer with the appropiate consideration given to the time required to present such witnesses. It was understood that he would do everything possible to provide the substitutes for live testimony that are allowed for in RCM 405. None of these efforts have been made by the government, with the case of Capt Edwards being a perfect example. Capt Edwards will undoubtedly be required to attend a hearing on this Saturday while he is in town. He has never been contacted by either counsel, and the testimony he will be asked for is of such minor duration that he will spend more time driving than on the witness stand.

A second example is the appearance of Ms. Ruth Christopherson, the MWR coordinator that conducted the audit. The GC assumed that she would be able to come down without any effort to contact her or this office in regard to a formal witness request. The naivete of the GC is apparent when he states that the witness can be compelled to come even though the GC and the DC have not done anything to discover what she will testify to. The GC cannot get it through his head why my one star should not go to a three star and tell him to produce a witness because the time of the lawyers is more valuable than that of the witnesses.

Notwithstanding the obvious inexperience of the Government counsel, I am sincerely convinced that the GC does not have the desire to put the effort into this case which will be required. An example of this is the fact that he will not be present when Capt Edwards is called and does not see any reason for there to be a substitute GC. Evidently the GC has alternate plans for this weekend and assumes the Investigating officer will do his job for him. Although there is no requirement in the MCM that a GC be appointed at all, the complexity of this case requires the dedication of someone who desires to win. We asked for an above average counsel for the Defense in order to ensure that the trial be fair, and for a military Judge to ensure that the complexity of the case will be appreciated. Due to the command influence factor, we specifically did not ask for a certain GC.

Unfortunately it seems as though the one we were assigned lacks not only experience, but also desire. One can be overcome by the other, but the absence of both leads to an untenable position.

With regret, it is recommended that corrective action be taken immediately to assign a special prosecutor to this case that will give it the attention it merits. This action is required if we are to use this hearing to find out all the facts of the improprities alleged, with the alternative being that the case may well be seriously jeopardized for lack competant representation.

Very Respectfully,

T. W. Zeller

DEPARTMENT OF THE NAVY
COMMANDER COMBAT LOGISTICS GROUP ONE
FPO SAN FRANCISCO 96601-5309

IN REPLY REFER TO:
5800
Ser 006/1602
20 September 1990

FOR OFFICIAL USE ONLY

From: Commander, Combat Logistics Group 1
To: Commander, Naval Military Personnel Command (NMPC-82)

Subj: SPECIAL COURT-MARTIAL ICO LCDR WALTER FRANCIS FITZPATRICK, USN, 551-90-4692

Encl: (1) Certified True Copy of Special Court-Martial Promulgating Order 11-90 dtd 7 June 90
(2) Copy of Statement of Lieutenant Commander Walter F. Fitzpatrick, USN, ltr dtd 17 July 90

1. Enclosures (1) and (2) are forwarded for inclusion in the subject named officer's official record.

T. W. ZELLER
By direction

FOR OFFICIAL USE ONLY

DEPARTMENT OF THE NAVY
COMMANDER COMBAT LOGISTICS GROUP ONE
FPO SAN FRANCISCO 96601-5309

IN REPLY REFER TO:
7 June 1990

SPECIAL COURT-MARTIAL COMBAT LOGISTICS GROUP ONE ORDER NUMBER 11-90:

Before a Special Court-Martial which convened at Naval Legal Service Office San Francisco pursuant to Commander, Combat Logistics Group ONE Special Court-Martial Convening Order Numbers 1-90 dated 24 January 1990 and 1A-90 dated 8 February 1990, was arraigned and tried:

The accused was arraigned on the following offense and the following findings or other dispositions were reached:

LCDR Walter F. Fitzpatrick, U. S. Navy, 551-90-4692, Combat Logistics Group ONE.

Charge I: Violation of the UCMJ, Article 92. (Guilty)

Specification 1: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, who should have known of his duties as Executive Officer on board USS MARS (AFS 1), from about July 1988 to about January 1989, was derelict in the performance of those duties in that he willfully failed to follow proper procedures for the accounting and expenditure of Morale, Welfare and Recreation funds on board USS MARS (AFS 1), as it was his duty to do. (Guilty)

Specification 2: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, did, in the State of California while assigned on board USS MARS (AFS 1), on diverse occasions from on or about December 1987 to on or about July 1988, violate a lawful general regulation, to wit: Secretary of the Navy Instruction 5370.2H dated 24 October 1984, by wrongfully using a Government owned vehicle for his personal use. (Not Guilty)

Charge II: Violation of the UCMJ, Article 108. (Not Guilty)

Specification: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check numbers 689 through 698, inclusive, and check numbers 700 through 703, inclusive, of an aggregate value of about $10,400.00, military property of the U. S. Government, to be wrongfully disposed of by USS MARS (AFS 1) funeral party, said party including both military members and dependent spouses. (Not Guilty)

CERTIFIED TO BE A TRUE COPY

A. Sharrod
LN1, USN, Staff Paralegal
COMLOGGRU ONE

ENCLOSURE (1)

SPECIAL COURT-MARTIAL COMBAT LOGISTICS GROUP ONE ORDER NUMBER 11-90: (Continued)

Charge III: Violation of the UCMJ, Article 121. (Not Guilty)

Specification 1: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, did, on board USS MARS (AFS 1), on or about July 1988, steal funds of a value of about $2800.00, the property of the Morale, Welfare and Recreation Fund on board USS MARS (AFS 1), by directing such funds be used for travel expenses for the spouses of the said Lieutenant Commander Fitzpatrick, Lieutenant Bradford Ableson, USN, Lieutenant Timothy Archer, USN, and Personnelman Master Poasa Fa'Aita, USN. (Not Guilty)

SENTENCE

The Members awarded the following sentence on 5 April 1990:

To be reprimanded.

ACTION

DEPARTMENT OF THE NAVY
COMMANDER, COMBAT LOGISTICS GROUP ONE
FPO SAN FRANCISCO, CALIFORNIA 96601-5309

7 June 1990

ACTION

In the foregoing special court-martial case of Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, 551-90-4692, the sentence is approved and will be duly executed.

Pursuant to the sentence of the court, as herein approved, a letter of reprimand is this date being served upon the accused and a copy thereof is hereby incorporated as an integral part of this action.

The clemency request submitted by the accused's defense counsel on 30 May 1990, was considered prior to taking action.

SPECIAL COURT-MARTIAL COMBAT LOGISTICS GROUP ONE ORDER NUMBER 11-90 : (Continued)

The record of trial is forwarded to the Staff Judge Advocate, Commander Naval Surface Force, U. S. Pacific Fleet, for review pursuant to Article 64(a), UCMJ and R.C.M. 1112, MCM, 1984.

/s/J. W. Bitoff
J. W. BITOFF
Rear Admiral, U. S. Navy
Commander, Combat Logistics
Group ONE

DISTRIBUTION:
Original
Original Record of Trial
Duplicate Original
Service Record of the Accused
Certified Copies
COMNAVMILPERSCOM (NMPC-82)
COMNAVSURFPAC (Code 006)
Original Record of Trial (3)
Each Copy of Record of Trial (1)
Plain Copies
COMLOGGRU 1 (N14)
CO, NAVLEGSVCOFF, San Francisco
Military Judge (CAPT George L. Wells, JAGC, USN)
Trial Counsel (LT Matthew K. Bogoshian, JAGC, USNR)
Defense Counsel (Captain Kevin M. Anderson, USMC)
Accused
File

Issued by:

TIMOTHY W. ZELLER
LT, JAGC, USN
Staff Judge Advocate
Commander, Combat Logistics Group 1
By direction

17 July 1990

From: Lieutenant Commander Walter Francis Fitzpatrick, USN
To: Commander, Combat Logistics Group One

Subj: **RESPONSE TO LETTER OF REPRIMAND**

Ref: (a) Ltr of Reprimand, 7 June 1990
(b) Record of Trial ICO US v. LCDR Fitzpatrick

1. In response to the letter of reprimand, reference (a), I would like to point out the following facts. It was the testimony of a government witness, Chief Wagner, the detailed MWR officer on board the USS Mars, that it was his suggestion to use MWR funds for the trip to Hawaii and that he advised me that this was an authorized expenditure. See page 53 of reference (b). The Master Chief of the command, PNMC Poasa Fa 'Aita, also testified that he saw a message about an MWR seminar to be held in Pearl Harbor and that he discussed this seminar with Chief Wagner, page 21 and 25 of reference (b).

2. When I used MWR as an excuse to fund a trip of ship's personnel to Hawaii it was because I was informed by my MWR officer that such a trip was authorized. If the convening authority believes this not to be the case then the convening authority chooses not to believe the testimony of the very witnesses called by the prosecution to testify against me.

3. In paragraph three of reference (a) I am reprimanded for the purchase of electronic equipment that was placed in my stateroom and the stateroom of the commending officer. I would note that the record of trial, page 30 of reference (b), indicates that the commanding officer, Captain Nordeen, authorized the purchase and placement of this equipment. I would also note that Defense Exhibit "D" of reference (b) also establishes that the majority of ships in LOGGRU One currently place MWR entertainment equipment in officer's staterooms. It seems incongruous that I be reprimanded for an action taken by the commending officer and which is conformance of the tolerated policy of the entire group. Furthermore, contrary to your statement in paragraph (3) of reference (a), I am not aware of any mention

in reference (b) to my having been "warned" against the distribution of entertainment equipment as was directed by the commending officer. I would also note that reference (b) demonstrates that a small portion of the total funds was used for equipment placed in my stateroom and that of the commanding officer. Reference (b) also shows that this equipment replaced MWR equipment that was in place even before I arrived on board the ship.

4. I am also informed by my defense counsel that in his discussions with members of the court-martial panel it was disclosed that they did not consider to me guilty of dereliction in reference to the entertainment equipment. I believe this information is also known to your staff judge advocate.

5. I believe that I served the interests of the United States Navy and of the USS Mars well and to the best of my ability. I rely upon testimony of my commanding officer and the command master chief in evaluating my performance on board the USS Mars. Finally I rely upon the performance of the USS Mars while I served as her executive officer. I believe that my judgment, performance and dedication to duty did contribute to the service of the finest ship afloat in LOGGRU I.

Walter Fitzpatrick
LCDR, USN

Friday, October 06, 2000
Revised Wednesday, October 11, 2000
Revised Thursday, October 12, 2000
Printed: Sunday, March 11, 2001 in preparation for the Cox Commission

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Memo to Distribution

Subject: Post-trial advice to Rear Admiral (RADM) Bitoff

This memo is to be used by way of comparison to the letter received today from LCDR Roth (supplied separately). The emphasis added in all cases below is mine.

The following excerpts are taken from a letter dated 30 March 1995. The General Counsel of the Department of Defense, Judith A. Miller, wrote in a response to an inquiry from Senator Patty Murray:

Dear Senator Murray:

> **"This is in response to your letter to the Secretary of Defense of August 17, 1994, which was forwarded to me because it refers to matters within my areas of responsibility.**
>
> **Even though this office ordinarily has no role in the court-martial review process, we have conducted a thorough review of the record of trial and the extensive correspondence generated during the post-trial review. For the reasons set forth below, we believe that LCDR Fitzpatrick was treated fairly, that there was no retaliation against him by Navy officials or unlawful command influence exerted in his case, and that the investigation, prosecution, and appeal of his case were undertaken in compliance with applicable laws and regulations.**
>
> **We have considered the allegations of retaliation and command influence, and find no evidence to support these claims or impropriety against Lieutenant Zeller, Captain Edwards, and Rear Admiral Bitoff. The record provides the following information with regard to the following individuals:**
>
> **a. LIEUTENANT ZELLER. Lieutenant Zeller preferred the charges against LCDR Fitzpatrick, and was therefore an "accuser". As an accuser, he was prohibited from providing legal advice to Rear Admiral Bitoff after the charges were referred to trial by court-martial. Lieutenant Zeller did not handle the prosecution of the case, but was critical of the judge advocate assigned to prosecute. Rear Admiral Bitoff took no action regarding this criticism. A Navy judge advocate from the San Francisco Naval Legal Service Office provided advice to the Admiral during the post trial review process.**

b. REAR ADMIRAL BITOFF. Rear Admiral Bitoff had no personal interest in the outcome of the proceedings, nor did he at any time improperly direct the outcome of the case.

In conclusion, our review confirms the decisions made by the Chief of Naval Operations and the Judge Advocate General of the Navy. LCDR Fitzpatrick was treated fairly and not subjected to retaliation or unfair treatment by Navy officials, before or after the trial. LCDR Fitzpatrick's court-martial and all subsequent reviews of the record of trial were accomplished in compliance with the Uniform Code of Military Justice.

Sincerely,

Judith A. Miller"

"In order to ensure that my part in this case was apparent, I signed as the accuser on the charge sheet. This made me ineligible to fulfill the statutory duties of rendering advice in accordance Article 34, UCMJ as well as reviewing the case for legal sufficiency and errors after a conviction. Both of these statutory actions were performed by other attorneys who were not disqualified."

Statement of Commander Timothy W. Zeller, JAGC, USN
To the Oklahoma Bar Association in a letter dated 8 Aug 1998

'...it is not alleged, nor was I the SJA who prepared the Judge Advocate review before the Commander signed the promulgating order, approving the court-martial panel members' findings and sentence."

Statement of former Lieutenant Karen D. Hill, JAGC, USN
To the Oklahoma Bar Association in a letter dated 10 July 1998

"The record is silent regarding whether another officer acted temporarily as staff judge advocate while LT Zeller conducted the I&E Investigation. It does not appear from the record that he acted as staff judge advocate during the Article 32 investigation or the special court-martial. The record of trial reflects that other officers fulfilled the duties of staff

judge advocate in offering pretrial and post trial advice to the convening authority. His post trial involvement in the case appears limited to a purely administrative duty of authenticating the special court-martial promulgating order dated 7 June 1990."

Statement of Rear Admiral Harold E. "Rick" Grant, JAGC, USN
Then Navy Judge Advocate General
In a letter to U.S. Senator Patty Murray dated 5 May 1994

"You may recall that the context in which I had reviewed this case was in execution of my responsibilities under Article 69, Uniform Code of Military Justice (10 U.S.C. § 869), acting on matters submitted by LCDR Fitzpatrick. Although this November 23, 1989 memo was not part of LCDR Fitzpatrick's submission, I have again reviewed the case in light of the memorandum and do not find illegal command influence. Clearly LT Zeller was providing advice to his commander, but he was not making recommendations concerning the guilt or innocence of LCDR Fitzpatrick, the appropriate sentence for LCDR Fitzpatrick, or, even whether the case ultimately should be referred to a general court-martial...In short the memorandum does not purport to influence the independent judgment of the convening authority...

LT Zeller did not fulfill the statutory duties of a staff judge advocate after the Article 32 investigation, recusing himself from the Article 34 advice and the post-trial review. The convening authority thus acted on the Article 32 investigation and the record of trial with the advice of LT Algiers, not LT Zeller...

This memorandum does not advocate conviction, it makes no attempt to influence any decision on the merits on the part of the convening authority. Rather, it indicates an effort to ensure an efficient, high quality and balance pretrial investigation.

Statement of Rear Admiral Harold E. "Rick" Grant, JAGC, USN
Then Navy Judge Advocate General
In a letter to U.S. Senator Patty Murray dated 14 July 1994
Specifically addressing Zeller's 23 November 1989
"Thanksgiving Day" memo to Rear Admiral Bitoff before trial

"As the accuser in LCDR Fitzpatrick's case, however, LT Zeller was disqualified from providing the convening authority with formal advice on the case. There is no evidence in the record that LT Zeller violated this prohibition."

Statement of Rear Admiral C.M. LeGrand, JAGC, USN
Then Navy Judge Advocate General (Acting)
In a letter to U.S. Senator Patty Murray dated 9 June 1994

"LT Timothy W. Zeller, [was] my Staff Judge Advocate, regarding [the Fitzpatrick case]...I followed the advice of my Staff Judge Advocate, as well as the advice of other legal authorities throughout these proceedings."

Statement of Rear Admiral John W. Bitoff, USN (Retired)
Convening Authority
In a letter to U.S. Congressman Norman D. Dicks dated 30 April 1999
"The Bitoff Letter"

"Regarding your request for records of "post-trial advice provided to RADM Bitoff on or before June 7, 1990", a search of records under the cognizance of OJAG, COMNAVSURFPAC, and CNSGPNW did not identify any records made part of the Record of Trial that are responsive to your request.

Our search of records related to your special court-martial disclosed a memorandum to the convening authority [RADM Bitoff], dated May 31, 1990, signed by the COMLOGGRU staff judge advocate [LT Zeller]. The subject line of that memorandum is "Convening Authority Action ICO LCDR Fitzpatrick." Our coordination with COMNAVSURFPAC indicated this memorandum was previously released to you in its entirety in June of this year.

Statement of Lieutenant Commander J.L. Roth, JAGC, U.S. Navy
Head, FOIA/PA Branch
Administrative Law Division (Code 13)
Office of the Judge Advocate General
In a letter to Mr. Fitzpatrick dated 29 September 2000

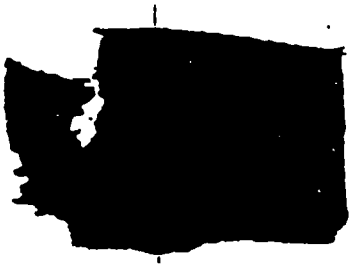
"Discussion: Allegations which brought into question LCDR Zeller's suitability for promotion to Commander have been resolved. An investigation into this matter by the Navy Criminal Investigative Service (NCIS) and a complete review of the case by the Navy Judge Advocate General have both determined there was no misconduct by LCDR Zeller and the alleged misconduct is determined to be unsubstantiated.

Recommendation: Recommend LCDR Zeller be confirmed by the Senate for promotion to the grade of Commander."

Former Secretary of the Navy, John H. Dalton
In a memorandum for the Assistant Secretary of Defense
Dated 11 June 1998

PATTY MURRAY
WASHINGTON

COMMITTEES:
APPROPRIATIONS
BANKING, HOUSING, AND URBAN AFFAIRS
BUDGET



Date: 7.26.94

To: Cathy

From: Michael

Number of Pages (including cover sheet): 5

Message: PLS re-fax to Cheri in Bremerton
Thanks

MY NOTES

PAGE 1 : FAX TRANSMITTAL LETTER
PAGES 2-3 : RADM GRANT'S 14 JULY 1994 LETTER TO SENATOR PATTY MURRAY
WITH
PAGES 4-5 : LT ZELLER'S 23 NOVEMBER 1989 MEMO TO RADM BITOFF.

received
WEDNESDAY,
27 JULY 1994
BETWEEN 1000-1100 VIA FAX TO CONGRESSMAN DICK'S BREMERTON OFFICE

2988 Jackson Federal Building
915 2nd Avenue
Seattle, WA 98174-1003
(206) 553-5545
(206) 553-0736 TDD
(206) 553-0891 FAX

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332-2400

IN REPLY REFER TO

JUL 14 1994

The Honorable Patty Murray
United States Senator
2988 Jackson Federal Building
915 2nd Avenue
Seattle, Washington 98174-1003

Dear Senator Murray:

In my letter to you concerning Lieutenant Commander (LCDR) Walter F. Fitzpatrick, U.S. Navy, dated May 5, 1994, and the letter signed by Rear Admiral LeGrand dated June 9, 1994, reference was made to the actions of Lieutenant (LT) Timothy W. Zeller, JAGC, USN, Staff Judge Advocate, Logistics Group One. In those letters we noted that LT Zeller conducted an Integrity and Efficiency investigation during October 1989. As a result of that investigation LT Zeller recommended that charges be considered against Captain Nordeen and LCDR Fitzpatrick. On November 1, 1989, he signed the charges under oath, thereby becoming the accuser on the charge sheet that referred the matter for the Article 32, Uniform Code of Military Justice (10 U.S.C. 832) pretrial investigation. When, following the pretrial investigation, charges were referred to a special court-martial, LT Zeller was again the accuser, signing and swearing to those charges on January 24, 1990.

Because LT Zeller was the accuser, following the pretrial investigation, the statutory Article 34, Uniform Code of Justice (10 U.S.C. § 834) pretrial advice was prepared for Rear Admiral Bitoff by another lawyer, LT Algiers.

In prior correspondence, you requested that I obtain a copy of a memorandum signed by LT Zeller to Rear Admiral Bitoff dated November 23, 1989. This memorandum was considered potentially relevant on the issue of unlawful command influence. Although the memorandum was previously unavailable to me, the Department of Defense, Inspector General's Office was able to obtain it and forwarded it to me on July 11, 1994. In this memorandum, LT Zeller voiced his disenchantment with the performance of the government counsel in preparing for the Article 32 investigation. He therefore requested that the government counsel be replaced by a more experienced attorney.

You may recall that the context in which I had reviewed this case was in execution of my responsibilities under Article 69, Uniform Code of Military Justice (10 U.S.C. § 869), acting on matters submitted by LCDR Fitzpatrick. Although this November 23, 1989 memo was not part of LCDR Fitzpatrick's submission, I have again reviewed the case in light of the memorandum and do not find illegal command influence. Clearly LT Zeller was providing advice to his commander, but he was not making recommendations concerning the guilt or innocence of LCDR Fitzpatrick, the

appropriate sentence for LCDR Fitzpatrick, or, even, whether the case ultimately should be referred to a general court-martial. Those recommendations were all made in due course by the Article 32 pretrial investigating officer and by LT Algiers, the substituted staff judge advocate. In short the memorandum does not purport to influence the independent judgment of the convening authority or participants in the court-martial on any of these matters. The memorandum expresses criticism of the government counsel's failure to proceed efficiently and seeks a more experienced advocate for the government side. In any event, LT Zeller's recommendation was not followed, since the complained of government counsel continued to serve as prosecutor in the special court-martial. LT Zeller did not fulfill the statutory duties of a staff judge advocate after the Article 32 investigation, recusing himself from the Article 34 advice and the post-trial review. The convening authority thus acted on the Article 32 investigation and the record of trial with the advice of LT Algiers, not LT Zeller.

In my review, I also found it worth noting that, while advocating an aggressive government approach, the November 23, 1989 memorandum actually expresses the goal of a full and fair hearing. In the memorandum LT Zeller notes that the Command had requested "an above average defense counsel to ensure that the trial would be fair and for a military judge [to act as investigating officer] to ensure that the complexity of the case will be appreciated." This memorandum does not advocate conviction, it makes no attempt to influence any decision on the merits on the part of the convening authority. Rather, it indicates an effort to ensure an efficient, high quality and balanced pretrial investigation.

There has been a lot of interest in LCDR Fitzpatrick's special court-martial, and upon receipt of the November 23, 1989 memo from the Inspector General's office I decided to use the opportunity to take a fresh look at the case. I am satisfied that my prior disposition was the right one, and that LCDR Fitzpatrick's rights have been fully protected.

I hope that the foregoing is responsive to your concerns. Please let me know if you want additional information.

Sincerely,

H. E. GRANT
Rear Admiral, JAGC, U.S. Navy
Judge Advocate General

Copy to:
DOD IG

ATTORNEY WORK PRODUCT

23 Nov 89

MEMORANDUM

From: N14
To: 00
Via: 01_____02 [signature]

Subj: Government Counsel Performance ICO LCDR Fitzpatrick

Sir, in the past week it has become apparent that we are not receiving the appropriate service from the Government Counsel in the Fitzpatrick case. LT Begoshian has repeatedly refused to repeat our position on witnesses, and seems to be willing to give the defense counsel anything and everything that he desires.

I instructed the GC that we would be willing to produce three witnesses that are necessarily involved to the extent that a phone call would never suffice. He was further instructed that any additional witnesses would have to be ordered by the investigating officer with the appropriate consideration given to the time required to present such witnesses. It was understood that he would do everything possible to provide the substitutes for live testimony that are allowed for in RCM 405. None of these efforts have been made by the government, with the case of Capt Edwards being a perfect example. Capt Edwards will undoubtedly be required to attend a hearing on this Saturday while he is in town. He has never been contacted by either counsel, and the testimony he will be asked for is of such minor duration that he will spend more time driving than on the witness stand.

A second example is the appearance of Ms. Ruth Christopherson, the MWR coordinator that conducted the audit. The GC assumed that she would be able to come down without any effort to contact her or this office in regard to a formal witness request. The naivete of the GC is apparent when he states that the witness can be compelled to come even though the GC and the DC have not done anything to discover what she will testify to. The GC cannot get it through his head why my one star should not go to a three star and tell him to produce a witness because the time of the lawyers is more valuable than that of the witnesses.

Notwithstanding the obvious inexperience of the Government counsel, I am sincerely convinced that the GC does not have the desire to put the effort into this case which will be required. An example of this is the fact that he will not be present when Capt Edwards is called and does not see any reason for there to be a substitute GC. Evidently the GC has alternate plans for this weekend and assumes the Investigating officer will do his job for him. Although there is no requirement in the MCM that a GC be appointed at all, the complexity of this case requires the dedication of someone who desires to win. We asked for an above average counsel for the Defense in order to ensure that the trial be fair, and for a Military Judge to ensure that the complexity of the case will be appreciated. Due to the command influence factor, we specifically did not ask for a certain GC.

ATTORNEY: ROBA FRUGGI

Unfortunately it seems as though the one we were assigned lacks not only experience, but also desire. One can be overcome by the other, but the absence of both leads to an untenable position.

With regret, it is recommended that corrective action be taken immediately to assign a special prosecutor to this case that will give it the attention it merits. This action is required if we are to use this hearing to find out all the facts of the improprities alleged, with the alternative being that the case may well be seriously jeopardized for lack competent representation.

Very Respectfully,

T. W. Zeller

OKLAHOMA BAR ASSOCIATION
1901 North Lincoln Boulevard • P. O. Box 53036 • Oklahoma City, OK 73152 • 405 / 416-7007
FAX 405 / 416-7003

DAN MURDOCK
General Counsel
MIKE SPEEGLE
Asst. General Counsel
JANIS HUBBARD
Asst. General Counsel
ALLEN J. WELCH
Asst. General Counsel
ROBERT D. HANKS
Investigator
TONY R. BLASIER
Investigator
RAY PAGE
Investigator

July 10, 1998

Mr. Walter Francis Fitzpatrick
825 NE Rimrock Dr.
Bremerton, WA 98311

RE: Grievance against Timothy W. Zeller, DC 98-203

Dear Mr. Fitzpatrick:

Enclosed please find a response we have recently received to the grievance you filed against the above-referenced attorney.

Please examine this response and notify us in writing of any areas of agreement or disagreement you may find. Your comments are very important and we would appreciate your answer within twenty (20) days from the date of this letter.

If you have any questions you may contact this office at (405) 416-7007 or use our in-state WATS number 1-800-522-8065.

Sincerely,

Tony R. Blasier

Tony Blasier

TB/aw
Enclosure

RECEIVED
TUESDAY, 14 JULY 1998

RECEIVED
TUESDAY, 14 JULY 1998
WJJ

8 July 1998

RECEIVED
JUL 10 1998
Office of the
General Counsel
Oklahoma Bar Association

Mr. Dan Murdock
General Counsel, Oklahoma Bar Association
1901 North Lincoln Blvd
P.O. Box 53036
Oklahoma City, OK, 53036

Re: Complaint by Mr. Walter Fitzpatrick, DC 98-203/IC 92-721

Dear Mr. Murdock,

The complaint dated 23 June 1998 was received on 1 July 1998. This complaint was originally made in 1992 as IC 92-21. Mr. Fitzpatrick is a former Navy Lieutenant Commander who was convicted at a Special Court-Martial. Since that conviction, he has continuously slandered and harassed me at every turn, attempting to discredit me in order to launch a collateral attack on his conviction. This latest accusation is just another effort after his last allegation of forgery was found to be false. The following is an outline of the pertinent events dating back to 1989. I am informed that I am writing to a non-military audience.

In 1989, I was the Staff Judge Advocate for Commander, Combat Logistics Group 1. The Staff Judge Advocate is responsible for supervision of all legal matters within the Group and may be equated to the equivalent of a civilian in-house counsel and assistant district attorney combined. Military case law has recognized the role as being both prosecutorial and as an objective reviewer at different times in the same trial. In the fall of 1989 I was tasked with conducting an investigation into the MWR expenditures onboard USS MARS, said tasking being a result of a directive from Commander, Naval Surface Force, Pacific Fleet. My client in this matter, as both an investigator and Legal Officer was the Department of the Navy as personified by Rear Admiral John Bitoff, then Commander, Combat Logistics Group 1.

Subsequent to the investigation, the case was referred to a Hearing in accordance with Article 32 of the Uniform Code of Military Justice. The Article 32 Officer recommended modifications to the charges and disposition at Non-Judicial Punishment, (this is from memory only, I have no records of the report, but believe that was the recommendation). Non-Judicial punishment, while not carrying the label of a criminal conviction, does have serious ramifications on the career of any Sailor. As a result, all personnel not attached to or embarked on vessels have the right to refuse non-judicial punishment and demand a court-martial, where they have counsel and the right to be tried by members (a jury). LCDR Fitzpatrick exercised the right to refuse NJP and was referred to a Special Court-Martial. Upon the original forwarding of the case before the Article 32 hearing to the Naval Legal Service Office, San Francisco, a request was made that an experienced counsel be assigned due to the complexity of the case. The detailing authority for the assignment of experienced Defense Counsel. The detailing authority for defense counsel was

the Commanding Officer, Naval Legal Service Office, at that time a Captain in the Navy Judge Advocate General's Corps. It was also requested that the Article 32 Hearing Officer be a military judge rather than a normal attorney, again, due to the complexity of the case. The detailing authority for the military judge was the Chief Judge of the circuit. Being represented by Counsel, then Captain Kevin Anderson, U.S. Marine Corps, LCDR Walter Fitzpatrick was found guilty by a panel of members, and awarded a letter of reprimand which is normally placed in his official record. The sentence in this case, a letter of reprimand, entitles the convicted person to forward a letter of rebuttal for inclusion in the record. This letter is not required to be submitted by the recipient of the letter.

In order to ensure that my part in this case was apparent, I signed as the accuser on the charge sheet. This made me ineligible to fulfill the statutory duties of rendering advice in accordance with Article 34, UCMJ as well as reviewing the case for legal sufficiency and errors after a conviction. Both of these statutory actions were performed by other attorneys who were not disqualified. I and my office did handle most other actions in the case, including the processing of the letter of reprimand and the forwarding for inclusion in the officer's record in accordance with existing Navy Regulations and Policies.

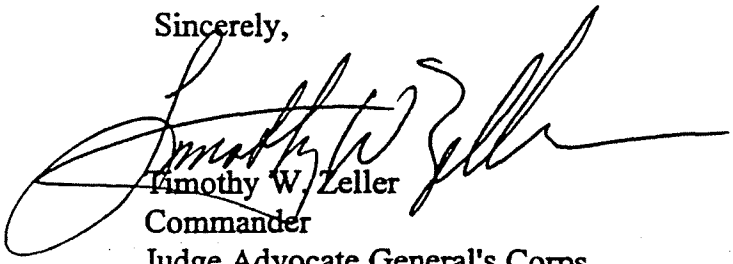
Over the past 9 years Mr. Fitzpatrick has accused me of virtually everything imaginable, and constantly changes the accusations. Last year he accused me of forging his signature to the rebuttal of the letter of reprimand. As evidenced by the attached handwriting analysis, it is most likely that he signed the letter himself. When that allegation failed, he has now turned to accusing me of conspiring with his defense counsel to introduce that letter into his file. This false allegation is but yet another form of harassment. Any practitioner of military law would know that a letter of rebuttal is not required to be submitted in conjunction with a letter of reprimand. The choice to submit one belongs to the accused alone. The SJA (my role) had nothing to gain or lose by the submission of the rebuttal. Military practitioners also know that the Staff Judge Advocate does not assign the Defense Counsel, as alleged by Mr. Fitzpatrick. Captain Anderson had no conversations with me that were improper, he suggested no inappropriate actions, and to the best of my recollection defended his client in an admirable and zealous manner. At no time did I ever conspire with Capt Anderson or any party to introduce a forgery into the record as alleged by LCDR Fitzpatrick.

In the past several years, I have been investigated by COMNAVSURFPAC, the Judge Advocate General of the Navy, the Professional Responsibility Rules Counsel of the Judge Advocate General Corps (twice), the Naval Criminal Investigative Service and a myriad of other persons in response to congressional inquiries, etc. The latest allegations were used to delay my promotion to Comander, and the outcome is noted in the attached letter signed by the Secretary of the Navy. In all cases the results have been the same. LCDR Fitzpatrick's allegations have been found without merit. One of the aggravating situations in this case has been Mr. Fitzpatrick's tendency to wait until personnel transfer from one job to another in the Navy and

then make a new complaint on the same old facts with the new personnel. This is now apparently happening with the OBA, as I had spoken at length with Mike Speegle on this matter. Now on his departure, Mr. Fitzpatrick will once again rehash all his grievances. I respectfully request this matter be closed once and for all.

In the event you have any questions in this matter, my work phone is (847) 688-3805.

Sincerely,



Timothy W. Zeller
Commander
Judge Advocate General's Corps
US Navy

Attachments:
1. Handwriting Analysis
2. Letter from Captain Gonzalez, Judge Advocate General Corps, USN
3. Letter from the Judge Advocate General to Senator Patty Murray
4. Letter from the Rules Counsel to the General Counsel of the Oklahoma Bar Association
5. Letter from the Secretary of the Navy

C O N S U L T A N T S E R V I C E S

LEGAL OPINIONS - PSYCHOLOGICAL ASSESSMENT

Frederick G. Dudink, M.A.
4011 - 9th Street
Winthrop Harbor, Illinois 60096-1020
Business: (847) 746-5031 Residence: (847) 746-2004

October 22, 1997

CASE: Zeller vs. Fitzpatrick

LABORATORY REPORT

IN QUESTION: Authenticity of a signature of Walter·F. Fitzpatrick.

KNOWN, STANDARD WRITINGS of Walter F. Fitzpatrick and of Timothy W. Zeller.

PROCEDURES AND COMPARISONS

1) The known standard written signatures of Walter F. Fitzgerald were examined and compared with Question signature. Exhibit A.
2) The known standard signatures as well as various request, witnessed, writings of Timothy W. Zeller spanding a time frame from 1972 to the present were compared with the question signature (Exhibit B).

Considering that the Question signature is maintained to be a forgery and is maintained to have been written by Timothy W. Zeller comparisons were made to face these issues (Exhibits A & B).

When a writer attempts to simulate another person's signature invariably some of his own writing characteristics enter into the writing. It is impossible to know and keep track of all of one's own writing habits and at the same time to simulate accurately the writing habits of another writer.

The misspelling of the name in the Question signature rules out the possibility of attempted retracing, use of carbon paper or transferred light in the production of the Question signature. All that remains is an attempted simulation.

FINDINGS

In Exhibit A the Standard signatures of Walter F. Fitzpatrick were compared to the Question signature in the following areas:

- pen movements
- letter forms
- arrangement
- baseline alignment
- slant and spacing
- line quality
- proportional ratios
- curvature and angularity
- circles and loops
- diacritics
- entry and exit strokes
- individual characteristics
- writing pressure

Numerous identities (writing habits of Walter F. Fitzpatrick) were observed in the Question signature. See Exhibit A.

Inaddtion, at least four indications of attempts to disguise the writing by the writer were observed.

Exhibit B demonstrates the comparison of Standard writings of Timothy W. Zeller. There were no identities of his writing found in the Question signature. At least eight fundamental differences were observed.

OPINION

It is my opinion that Timothy W. Zeller did not write the signature in Question.

This opinion is qualified upon viewing the Question signature in its original form.

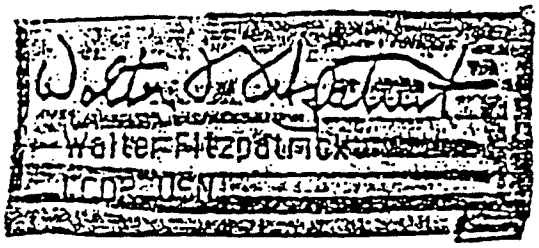
Frederick G. Dudink
Board certified Document Examiner
WORLD ASSOC.OF DOCUMENT EXAMINERS

State of Illinois
County of Lake
Signed before me this
23rd Day of October, 1997
Brenda J. Henry

"OFFICIAL SEAL"
BRENDA J. HENRY
Notary Public, State of Illinois
My Commission Expires 02/22/98

9958 COPIER

CASE: Zeller vs. Fitzpatrick

QUESTION	KNOWN
	Walter F. Fitzpatrick, III LCDR, USN Defendant's Statement Walter F. Fitzpatrick, III Defendant's Statement Walter F. Fitzpatrick, III Walter F. Fitzpatrick, III 4/30/97 Date 1331 Time Statement to Richard R. Allen Walter F. Fitzpatrick, III Walter F. Fitzaptrick, III Addendum Statement

FINDINGS

1) Misspelled Surname in the Question.

2) Identities of Known to the Question:
   - Writing slant
   - Writing pressure
   - Even baselines
   - Letter proportions
   - In capital letters (F & W)
   - In lower case letters(t,a,i,z & p)
   - Placement of hiatuses
   - Punctuation
   - Ligature spacings between letters
   - Spacings between first name, initial & surname
   - Initial & terminal strokes

3) At least four indications of attempts to disguise the writing.

State of Illinois
County of Lake

Signed before me this 23rd day of October, 1997, by Frederick G. Dudnik.

Brenda J. Henry

"OFFICIAL SEAL"
BRENDA J. HENRY
Notary Public, State of Illinois
My Commission Expires 02/22/98

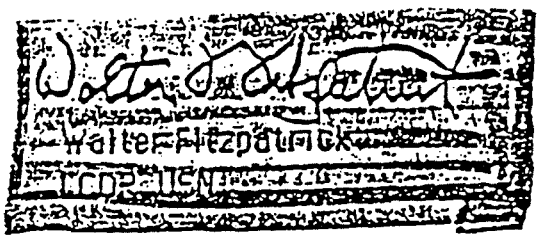
Frederick G. Dudnik

EXHIBIT
A

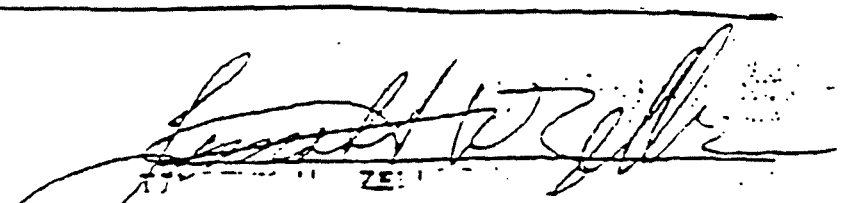
9958 COPIER

CASE: Zeller vs. Fitzpatrick

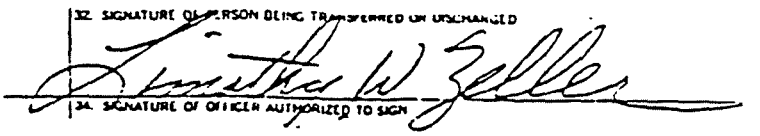
QUESTION



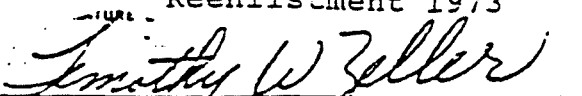
KNOWN WRITING OF Timothy W. Zeller



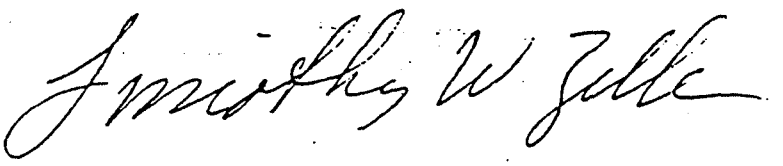
Naval Medical Center
Statement of patient 05/72

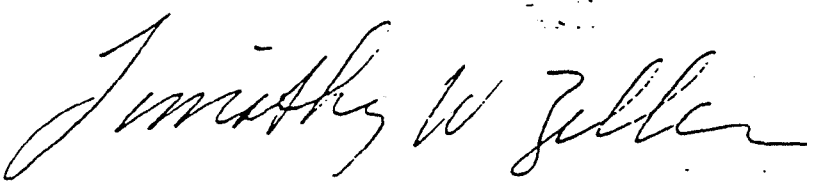


Reenlistment 1973

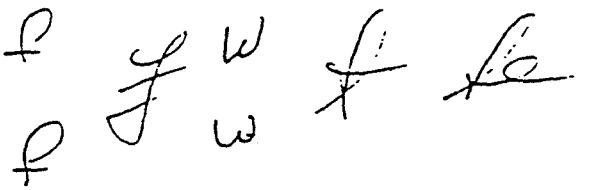


Transfer of Duty 1977





Witnessed Request writing 10/97



Letter forms of T.W. Zeller compared withsame letter forms in Question. Witnessed 10/97

INDINGS

ı comparing the letter forms of .W. Zeller with the same letter forms ı the Question there are fundamental ıfferences in the following:

- writing slant
- writing pressure
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State of Illinois
County of Lake
Signed before me this 23rd day of October, 1997 by Frederick G. Sudnik

Brenda J. Henry

"OFFICIAL SEAL"
BRENDA J. HENRY
Notary Public, State of Illinois
My Commission Expires 02/22/98

Frederick G. Sudnik

EXHIBIT
B

DEPARTMENT OF THE 9958 COPIER

16 Oct 97

From: Captain Glenn N. Gonzalez
To: Lieutenant Commander Timothy W. Zeller

Subj: YOUR DEALING WITH FORMER XO OF MARS

1. LCDR Zeller, per our discussion of 16 October 1997, I am providing this statement for your appropriate use. I am quite familiar with the allegations that LCDR W.F. Fitzpatrick made against you during my previous tour at COMNAVSURFPAC (August 1990 to June 1992). With the exception of a death JAGMAN investigation and subsequent actions related to that investigation, I personally spent more time working the LCDR Fitzpatrick case than any other action item while assigned to SURFPAC as the Deputy Force Judge Advocate from 1990 to 1992.

2. LCDR Fitzpatrick made several allegations against you personally and the COMLOGGRU ONE staff in general. In essence, the allegations were that you conducted an improper hotline investigation against him and that charges against him were fabricated and personally motivated. Not only did I see these allegations on numerous documents he generated, I also spoke to him by telephone on many occasions. Because of his numerous complaints following his special court-martial, the CINCPACFLT IG directed the COMNAVSURFPAC staff to conduct an investigation into the objectivity of your investigation. I conducted a thorough investigation, with guidance and support from my then immediate supervisor, Captain Richard Stewart. The results of the COMNAVSURFPAC investigation (dated 21 May 1992 and signed by VADM D.M. Bennett) disclosed that neither you nor the COMLOGGRU ONE staff did anything improper while handling LCDR Fitzpatrick's case.

3. I also discussed this case, including your involvement and actions, with Captain Richard Stewart (now retired). He also concurred that you did not act improperly. I know there have been many allegations against you throughout the years. I can state with reasonable certainty that the allegations of your forging any documents were never made to me personally - despite my many discussions with LCDR Fitzpatrick. Further, I absolutely do not recall reading any such allegations in any of the many documents he submitted to COMNAVSURFPAC. I also had extensive discussions with your relief at COMLOGGRU ONE, LCDR Karen Hill. I do not recall any allegations about forgery. Had I known about any such allegation, I would have addressed it in the investigation I conducted.

4. Please feel free to direct any inquiries directly to me. This is not a new case. Considering the many congressional complaints, FOIA requests, Article 138 complaints, and court-martial review, the file is extensive. Those at headquarters as well as at COMNAVSURFPAC should have considerable information.

R, G.N. Gonzalez

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400

IN REPLY REFER TO

JUL 14 1994

The Honorable Patty Murray
United States Senator
2988 Jackson Federal Building
915 2nd Avenue
Seattle, Washington 98174-1003

Dear Senator Murray:

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DEPARTMENT OF THE NAVY 9958 COPIER

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I hope that the foregoing is responsive to your concerns. Please let me know if you want additional information.

Sincerely,

H. E. GRANT
Rear Admiral, JAGC, U.S. Navy
Judge Advocate General

Copy to:
DOD IG

DEPARTMENT OF THE NAVY 9958 COPIER

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400

IN REPLY REFER TO
5803
Ser 22R11929.93
8 OCT 1993

Mr. Dan Murdoch
Office of General Counsel
Oklahoma Bar Association
P.O. Box 53036
Oklahoma City, OK 73152

Dear Mr. Murdoch:

This follows up the telephone conversation that you had with Lieutenant Greg O'Brien, JAGC, U.S. Navy, of my staff on July 20, 1993, regarding certain allegations of ethical misconduct lodged against Lieutenant Commander Timothy W. Zeller, JAGC, U.S. Navy, by Lieutenant Commander Walter Fitzpatrick, U.S. Navy, in a letter to you dated November 20, 1992. As you may recall, Lieutenant Commander Fitzpatrick provided a copy of his November 20th letter to the Office of the Navy Judge Advocate General.

The Judge Advocate General has promulgated rules of professional conduct, structured on the American Bar Association's Model Rules, governing attorneys practicing under his supervision. Under those rules, I am the designated Rules Counsel and am charged with reviewing all allegations of professional misconduct against naval judge advocates.

Upon receiving Lieutenant Commander Fitzpatrick's letter, I began a review of the allegations against Lieutenant Commander Zeller. That review is now complete. I have concluded that no probable cause exists to believe that Lieutenant Commander Zeller violated our rules and have, consequently, closed the file in this case. This information is provided so that your file in this matter may be complete. Please call Lieutenant O'Brien at (703) 614-1781 if you have any questions.

Sincerely,

D. A. ALBRECHT
Captain, JAGC, U.S. Navy
Rules Counsel

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL # of pages ▶ 1

To CRAIG PLAIN	From LCDR DON KOENIG
Dept./Agency IG/GREAT LAKES	Phone # DSN 664 8280
Fax # 792-4165	Fax #

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

(2)

THE SECRETARY OF THE NAVY
WASHINGTON, D.C. 20350-1000

11 June 1998

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE (FORCE MANAGEMENT POLICY)

FROM: John H. Dalton
Secretary of the Navy
Prepared by: CDR A. C. Stewart, USN, PERS-85, 614-2725

SUBJECT: Navy Officer Nomination - INFORMATION MEMORANDUM

PURPOSE: To provide information regarding the nomination of Lieutenant Commander Timothy W. Zeller, JAGC, USN

DISCUSSION: Allegations which brought into question LCDR Zeller's suitability for promotion to Commander have been resolved. An investigation into this matter by the Navy Criminal Investigative Service (NCIS) and a complete review of the case by the Navy Judge Advocate General have both determined there was no misconduct by LCDR Zeller and the alleged misconduct is determined to be unsubstantiated.

RECOMMENDATION: Recommend LCDR Zeller be confirmed by the Senate for promotion to the grade of Commander.

RECEIVED
SATURDAY, 18 JULY 1998

OKLAHOMA BAR ASSOCIATION
1901 North Lincoln Boulevard • P. O. Box 53036 • Oklahoma City, OK 73152 • 405 / 416-7007
FAX 405 / 416-7003

DAN MURDOCK
General Counsel
MIKE SPEEGLE
Asst. General Counsel
JANIS HUBBARD
Asst. General Counsel
ALLEN J. WELCH
Asst. General Counsel
ROBERT D. HANKS
Investigator
TONY R. BLASIER
Investigator
RAY PAGE
Investigator

July 13, 1998

Mr. Walter Francis Fitzpatrick
825 NE Rimrock Dr.
Bremerton, WA 98311

RE: Grievance against Karen D. Hill, DC 98-204

Dear Mr. Fitzpatrick:

Enclosed please find a response we have recently received to the grievance you filed against the above-referenced attorney.

Please examine this response and notify us in writing of any areas of agreement or disagreement you may find. Your comments are very important and we would appreciate your answer within twenty (20) days from the date of this letter.

If you have any questions you may contact this office at (405) 416-7007.

Sincerely,

Tony R Blasier

Tony Blasier

TB/aw
Enclosure

Karen D. Hill

Attorney at Law

861 Bryant Street
San Francisco, CA 94103

Phone (415) 626-5134
Fax (415) 626-5257

July 10, 1998

RECEIVED

JUL 13 1998

Office of the
General Counsel
Oklahoma Bar Association

Oklahoma Bar Association
1901 North Lincoln Boulevard
P. O. Box 53036
Oklahoma City, Oklahoma 73152
ATTN: Mr. Dan Murdock

RE: Grievance by LCDR Walter Francis Fitzpatrick, U. S. Navy (Ret.),
DC 98-204

Dear Mr. Murdock:

Please accept this letter as my response to the above referenced grievance.

The grievance alleges that I was an accessory after the fact to a conspiracy by U. S. Navy personnel to wrongfully prosecute LCDR Fitzpatrick in a special court-martial convened on or about 1989. The grievance also alleges that I had knowledge of a forgery by LCDR Fitzpatrick's trial defense counsel.

However, I have never been involved in a conspiracy to maliciously prosecute LCDR Fitzpatrick. In addition, I have never had any knowledge of a forgery committed by CAPT Anderson, the trial defense counsel.

The grievance does not allege, nor was I ever assigned as LCDR Fitzpatrick's defense counsel. Also, it is not alleged, nor was I ever involved in the pre-trial investigation of LCDR Fitzpatrick's case. Further, it is not alleged, nor was I the Staff Judge Advocate (hereinafter referred to as SJA) who prepared the SJA recommendation to the court-martial convening authority, Commander, Combat Logistics Group One (hereinafter referred to as Commander) to refer charges against LCDR Fitzpatrick. Moreover, it is not alleged, nor was I the SJA who prepared the Judge Advocate review before the Commander signed the promulgating order, approving the court-martial panel members' findings and sentence.

The grievance does not state any specific facts regarding my involvement in having knowledge of a forgery by CAPT Anderson, nor does the grievance address any specific acts tying me into a conspiracy to maliciously prosecute LCDR Fitzpatrick.

RECEIVED
SATURDAY, 18 JULY 1998

My role in the case began after the court-martial conviction and sentencing took place. In August of 1991, I was assigned as the SJA for the Commander. I took this position over from a Judge Advocate who had been temporarily assigned to this position to fill the gapped position after LCDR Zeller had transferred from the command. I held this position from August 1991 to July 1992. One of my duties was to serve as a reviewing officer in post-conviction review matters, which included the review of LCDR Fitzpatrick's case.

I did absolutely nothing improper in the discharge of my official duties in reviewing LCDR Fitzpatrick's case. This was a matter that I took very seriously since it involved a court-martial conviction of a naval officer. Also, there were U. S. Congressional inquiries and a formal Uniform Code of Military Justice (UCMJ), Article 138 Complaint to the Secretary of the Navy that I was responsible for reviewing and preparing responses to for the Commander . I spent an estimated 300 hours over an approximate 10 month period of time reviewing and drafting responses to: LCDR Fitzpatrick's petition for post-conviction relief, the related Congressional inquiries, and the formal UCMJ Article 138 complaint, along with researching the applicable laws and regulations.

Specifically, my review of the case included reviewing LCDR Fitzpatrick's written and oral petitions for relief from his court-martial conviction, reviewing the Morale Welfare and Recreation Audit/Inspection report which formed the underlying basis of the charges, reviewing the pre-trial documents, listening to a tape recording of a telephone conversation between LCDR Fitzpatrick and LCDR Zeller, reviewing the record of trial, conducting legal research under the Uniform Code of Military Justice, reviewing case law, and studying applicable naval instructions and regulations pertaining to the case.

At no time during my review of the case, did I have any knowledge of a forgery by the trial defense counsel nor of a conspiracy by naval officials to wrongfully prosecute LCDR Fitzpatrick. If such serious misconduct had been reported or came to my attention during my review process, I would have taken immediate action to have any such misconduct investigated, and would have recommended appropriate disciplinary action if warranted.

Based on my review of the case, as noted above, I concluded, that there was sufficient evidence to substantiate each and every element of the charge, beyond a reasonable doubt, for which LCDR Fitzpatrick was convicted by the court-martial panel. In addition, the sentence was one of the lowest forms of punishment available at this level of court-martial, . I reviewed the evidence submitted in extenuation and mitigation, which included LCDR Fitzpatrick's outstanding Officer Fitness Reports, and concluded that the sentence was appropriate.

The Commander I advised was the first to review the case in a multi-tier review process. At this low level of review, the Commander's input only resulted in a recommendation. The next level of review in the chain of command was to the Admiral at Naval Surface Force Pacific, in San Diego, California (hereinafter referred to as SURFPAC). SURFPAC had a legal staff headed by a Captain in the Judge Advocate General's Corps, CAPT Gonzalez, JAGC, USN, who reviewed

LCDR Fitzpatrick's petition for relief from the court-martial conviction and recommended that the case be affirmed. SURFPAC also reviewed the case and recommended that the conviction and sentence be upheld. SURFPAC then forwarded the case to the Office of the Judge Advocate General (OJAG) for review. OJAG's review of the case took place after I was honorably discharged from active duty.

However, it is my understanding that OJAG reduced the conviction to a lesser included offense from an intentional criminal act to a negligent criminal act on the part of LCDR Fitzpatrick.

Also, it is my understanding that OJAG approved the sentence, which was a punitive letter of reprimand.

If I can provide any further information that would assist the disciplinary review committee, I can be reached directly at (415) 626-7131. Please apprise me in writing of your findings.

Very truly yours,

Karen D. Hill

Karen D. Hill

Walt Fitzpatrick

From: "Roth, James L" <Roth.James@HQ.NAVY.MIL>
To: <manoverboard@silverlink.net>
Cc: "Lama, Doris M" <Lama.Doris@HQ.NAVY.MIL>; <NeesenDA@jag.navy.mil>
Sent: Tuesday, August 01, 2000 11:47 AM
Attach: INDEX OF POSTTRIAL ROT DOCUMENTS ICO FITZPATRICK.doc
Subject: Your FOIA and PA requests

5720

Ser 13/3PA11676.00A

August 1, 2000

Mr. Walter F. Fitzpatrick, III
825 NE Rimrock Drive
Bremerton, WA 98311-3142

Dear Mr. Fitzpatrick:

This responds to your emails of August 1, 2000, addressed to Ms. Lama, Head, DON FOIA/PA Policy Branch, in the Office of the Chief of Naval Operations . Your emails have been forwarded to this office for response.

The official Record of Trial in your special court-martial case is under the custody of the Deputy Assistant Judge Advocate General (Military Justice). You may contact that office by writing to OJAG (Code 40), 716 Sicard Street SE, Suite 1000, Washington Navy Yard, DC 20374-5047. The point of contact in that office is the Deputy Assistant Judge Advocate General, LtCol David A. Neesen, USMC. LtCol Neesen may be contacted by telephone at (202) 433-5895 x4001 or by email at NeesenDA@jag.navy.mil. The fax number is (202) 433-6489.

Review of the Record of Trial indicates that the original document entitled "Response to Letter of Reprimand" was returned to the record custodian by NCIS. I have requested a certified true copy of the original document be made and forwarded to this office for release to you, as this office is currently coordinating the response to your requests concerning all documents under the cognizance of the Office of the Judge Advocate General. I am currently awaiting receipt of the certified copy you have requested, and will forward it under separate cover.

Enclosed please find an index of the post trial documents attached to or part of the Official Record of Trial. There are 14 documents. Review of the Record of Trial indicates these documents were previously provided to you as part of the appellate process.
Please review the enclosure, and if there are any documents listed which you

require copies of, please advise me in writing so that copies can be released to you.

Information concerning the certification of Navy attorneys practicing law under the cognizance of the Judge Advocate General is under the cognizance of Commander, Navy Personnel Command, in Millington, TN. I have been advised by Ms. Lama's office that your request for information concerning Captains Gonzalez and Pixa has been referred to that organization for reply to you.

With regard to your request for "a copy of the Post-trial Advice (along with any companion) documents to this advice)" and "the name of the officer or officers who gave RADM Bitoff Post-trial advice as evidenced by the statutory writing in the Record of Trial," please be advised that I am currently conducting a search and review of the records concerning your case for any responsive documents. The records consist of four boxes of documents, or approximately two large file drawers of records.

In addition, as you discussed previously with Ms. Lama, I am currently reviewing our response letter 5720 Ser 13/3PA11676.00 dated July 11, 2000, to review the documents attached to the report of investigation prepared by CAPT Pixa for any segregable documents. As soon as a release determination is made concerning those documents, any releasable portions will be provided to you. I anticipate that the review and release determination will be completed by August 15, 2000.

I am the point of contact for this matter for all of the documents under the cognizance of the Office of the Judge Advocate General. I may be reached by telephone at (703) 604-8218.

Sincerely,
/s/
J. L. ROTH
Lieutenant Commander,
JAGC, U.S. Navy
Head, FOIA/PA Branch,
Administrative Law

Division

Encl: 1. Index of Post-trial documents in the ROT ICO United States v. LCDR Walter F. Fitzpatrick, III, USN

<<INDEX OF POSTTRIAL ROT DOCUMENTS ICO FITZPATRICK.doc>>

INDEX OF POST-TRIAL DOCUMENTS IN THE RECORD OF TRIAL
ICO UNITED STATES V. LCDR WALTER F. FITZPATRICK, III, USN

1. Appellate Exhibit XXXII, POST-TRIAL RIGHTS STATEMENT dtd 5 Mar 1989 (sic) and signed 5 Apr 90

2. Memo from LCDR Fitzpatrick to Trial Counsel, Subj: Service of Record of Trial, dtd 5 Apr 90

3. Memo from Trial Counsel to Commander, Combat Logistics Group ONE, Subj: Report of Results of Trial

4. Certificate in Lieu of Receipt dtd 14 May 90

5. Clemency Petition dtd 30 May 90 w/ encl

6. Special Court-Martial Order Number 11-90 dtd 7 Jun 90

7. Commander, Combat Logistics Group ONE ltr 5800 Ser 006/1226 of 11 Jun 90, Subj: Letter of Reprimand w/ FIRST ENDORSEMENT dtd 1 Jul 90

8. LCDR W. F. Fitzpatrick ltr of 17 Jul 90, Subj: Response to Letter of Reprimand

9. Commander, Combat Logistics Group ONE ltr 5800 Ser 006/1456 of 7 Aug 90, subj: Summarized Record of Trial ICO LCDR Walter F. Fitzpatrick, USN

10. Commander, Naval Surface Force, U.S. Pacific Fleet SPCM 27-90 5814 Ser 0062:cqs of 17 Aug 90, Subj: Review of Special Court-Martial in accordance with UCMJ, art. 64; MCM (1984), and R.C.M. 1112 (Art 64 review)

11. JAG 5814 Ser 40.2/64333 of 14 Jan 93, Examination pursuant to Article 69b, UCMJ, of the special court-martial convened by Commander, Combat Logistics Group ONE

12. Supplementary Court-Martial Order No. 1-93

13. JAG ltr 5814 Ser 40.2/64334 of 14 Jan 93, Subj: Application for relief pursuant to Article 69(b), UCMJ, ICO Lieutenant Commander Walter F. Fitzpatrick, III, U.S. Navy

Department of the Navy
Office of the Judge Advocate General
Administrative Law Division

MAIL: OJAG (CODE 13)
WASHINGTON NAVY YARD
1322 PATTERSON AVE SE SUITE 3000
WASHINGTON DC 20374-5066

OFFICE LOCATION:
PRESIDENTIAL TOWER SUITE 7000
2511 S. JEFFERSON DAVIS HIGHWAY
ARLINGTON, VA 22209

PHONE: (703) 604-8228 DSN: 664 FAX: (703) 604-6955/6996

FAX

To: WALTER FITZPATRICK c/o Mr Shane FORAKER / MR Eric Foraker

From: LCDR ROTH

Fax: 360-373-4599 **Pages:** 3 + Cover

Phone: **Date:** 10 OCT 00

Subject:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply

Comments:

Per Mr Fitzpatrick's email, Pls contact him upon receipt at 360-377-5108

MEMORANDUM 31 MAY 1990

Concur 6/1

From: 006
To: 00
Via: 01 _____ 02 _____

Subj: Convening Authority Action ICO LCDR Fitzpatrick

Sir, enclosed are the action and the Letter of Reprimand ordered awarded by the court members in the subject case. Also enclosed is a clemency request from the defense counsel in which he recommends that you disapprove the findings of the court, essentially overturning the court-martial, based on his opinion that a court was not the proper forum. This contention is somewhat ironic in view of the fact that the accused was offered a fair hearing at mast and refused that opportunity. I strongly recommend that clemency not be granted, and that the sentence of the court-martial be carried out as adjudged. Your execution of the action and the letter will execute the sentence.

Very Respectfully,

T. W. Zeller

RECEIVED
0938 WEDNESDAY, 11 OCT 2000

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON DC 20374-5066

IN REPLY REFER TO
5720
Ser 13/3PA11676.00C
September 29, 2000

Mr. Walter F. Fitzpatrick, III
825 NE Rimrock Drive
Bremerton, WA 98311-3142

FRIDAY, 6 OCT 2000 @ 1600

Dear Mr. Fitzpatrick:

This follows up my previous letter to you, 5720 Ser 13/3PA11676.00B, of August 3, 2000.

Our response to your Freedom of Information Act (FOIA)/Privacy Act (PA) requests has been delayed while we coordinated the processing of your requests with Commander, Naval Surface Force, U.S. Pacific Fleet (COMNAVSURFPAC).

COMNAVSURFPAC advised this office that numerous records had been released to you at the end of June, 2000. COMNAVSURFPAC is in the process of providing this office an index of the records they released to you. When we receive that index, I will review it against the records maintained in this office, which we have also been indexing. Any documents not previously released to you, and which are releasable, will then be provided to you. We will also provide you with an index of the records, and will identify the documents previously released to you. I anticipate receipt of the index from COMNAVSURFPAC near the beginning of October 2000, and I anticipate responding to your requests by the middle of October 2000.

In response to your questions concerning records maintained in the Office of the Judge Advocate General (OJAG), the following information is provided. The records are currently physically located in my office in the Administrative Law Division, OJAG. These records are from the Judge Advocate General Inspector General (JAG IG), and are part of the IG system of records, system N05040-1. I have enclosed a copy of the system notice. These records appear to be duplicates of records maintained by COMNAVSURFPAC, which is why we are coordinating your request with that office, particularly in light of their earlier release of documents to you. Our coordination with Commander, Naval Surface Group, Pacific Northwest (CNSGPNW), the successor command to Commander, Combat Logistics Group One (COMLOGGRU One), indicates that all records maintained at that command were previously forwarded to the JAG IG.

Regarding your request for records of "post-trial advice provided to RADM Bitoff on or before June 7, 1990", a search of records under the cognizance of OJAG, COMNAVSURFPAC, and CNSGPNW did not identify any records made part of the Record of Trial that are responsive to your request. You were previously advised that Commander in Chief, U.S. Pacific Fleet, also did not have responsive records. You should be aware that, because your were tried by a special court-martial and your

Privacy Act Online

privacy.navy.mil

DEPARTMENT OF THE NAVY PRIVACY ACT NOTICES

RECEIVED
FRIDAY, 6 OCT 2000
@ 1600

N05041-1

System name:

Inspector General (IG) Records (March 18, 1997, 62 FR 12811).

System location:

Office of the Naval Inspector General, Building 200, 901 M Street, SE, Washington DC 20374-5006; Inspector General offices at major commands and activities throughout the Department of the Navy and other naval activities that perform inspector general (IG) functions. Official mailing addresses are published as an appendix to the Navy's compilation of systems of records notices.

Categories of individuals covered by the system:

Any person who has been the subject of, witness for, or referenced in an Inspector General (IG) investigation, as well as any individual who submits a request for assistance or complaint to an Inspector General.

Categories of records in the system:

Letters/transcriptions of complaints, allegations and queries; tasking orders from the Department of Defense Inspector General, Secretary of the Navy, Chief of Naval Operations, and Commandant of the Marine Corps; requests for assistance from other Navy/Marine Corps commands and activities; appointing letters; reports of investigations, inquiries, and reviews with supporting attachments, exhibits and photographs; records of interviews and synopses of interviews; witness statements; legal review of case files; congressional inquiries and responses; administrative memoranda; letters and reports of action taken; referrals to other commands; letters to complainants and subjects of investigations; court records and results of nonjudicial punishment; letters and reports of adverse personnel actions; financial and technical reports.

Authority for maintenance of the system:

ENCLOSURE 1

10 U.S.C. 5014, Office of the Secretary of the Navy; 10 U.S.C. 5020, Naval Inspector General: details; duties; SECNAVINST 5430.57F, Mission and Functions of the Naval Inspector General, January 15, 1993.

To determine the facts and circumstances surrounding allegations or complaints against Department of the Navy personnel and/or Navy/Marine Corps activities.

To present findings, conclusions and recommendations developed from investigations and other inquiries to the Secretary of the Navy, Chief of Naval Operations, Commandant of the Marine Corps, or other appropriate Commanders.

Routine uses of records maintained in the system, including categories of users and the purposes of such uses:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The `Blanket Routine Uses' that appear at the beginning of the Navy's compilation of systems of records notices apply to this system.

Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:

Storage:

File folders and computerized data base.

Retrievability:

By subject's or complainant's name; case name; case number; and other case fields.

Safeguards:

Access is limited to officials/employees of the command who have a need to know. Files are stored in locked cabinets and rooms. Computer files are protected by software systems which are password protected.

Retention and disposal:

Permanent. Retired to Washington National Records Center when four years old. Transfer to the National Archives and Records Administration when 20 years old.

System manager(s) and address:

Naval Inspector General, 901 M Street SE, Washington Navy Yard, Washington, DC 20374-5006 or the local command's IG office. Official mailing addresses are published as an appendix to the Navy's compilation of systems of records notices.

Notification procedure:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Naval Inspector General, 901 M Street SE, Washington Navy Yard, Washington, DC 20374-5006 or the relevant command's IG office. Official mailing addresses are published as an appendix to the Navy's compilation of systems of records notices.

The request should include the full name of the requester and/or case number.

Record access procedures:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Naval Inspector General, 901 M Street SE, Washington Navy Yard, Washington, DC 20374-5006 or the relevant command's IG office. Official mailing addresses are published as an appendix to the Navy's compilation of systems of records notices.

The request should include the full name of the requester and/or case number.

Contesting record procedures:

The Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

Record source categories:

Complainants; witnesses; Members of Congress; the media; and other commands or government agencies.

Exemptions claimed for the system:

Portions of this system may be exempt under the provisions o 5 U.S.C. 552a(k)(1) and (k)(2), as applicable.

An exemption rule for this system has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 701, subpart G. For additional information contact the system manager.

This website is provided as a public service of the Department of the Navy's Office of the General Counsel in cooperation with the SECNAV/CNO Privacy Act Office.

Saturday, 10 June 2000

Mark and Paul,

My first appeal (submitted in parts) takes up a couple of binders. I've made a copy for the OBA to use as their own that was provided to them in the fall of last year.

That might be too much for your purposes, so in the meanwhile, I thought it would be instructive for you to know the headings of the 10 issues I raised.

I

Whether the Government failed to state an offense by failing to allege actual knowledge as an element of willful dereliction of duty. (Note: The military judge, Captain George Wells, found this problem. There is no record of its remedy. This is a technically I know, but it was recognized early on in the trial as a problem and it would have been foolish for me not to raise up the issue.)

II

Whether the military judge erred in the instructions he gave to the members allowing them to apply an erroneous standard of law in determining the knowledge required for willful dereliction of duty. (Note: Another technically raised for the same reason as the first issue.)

III

Whether a specification for willful dereliction of duty was spelled out so that the accused knew the precise nature of his misconduct. (Note: Hard issue. No one has been able to name the act, or my failure to act, that constituted the alleged delict. To this day no one can.)

IV

Whether the government knowingly withheld evidence which was favorable to the defense and which prevented the defense from adequately preparing for trial. (Note: Hard issue. I have never seen what Zeller collected. I have never seen a chain-of-custody that itemizes what Zeller collected. Binders marked "LCDR Fitzpatrick #1" and "LCDR Fitzpatrick #2" are secreted from my view. Of course, the only document I needed was the USS MARS (AFS-1) fiscal year 1988 MWR Report.)

V

Whether unlawful command influence unfairly prejudiced the accused's trial and deprived a fair trial in derogation of his right to due process under the Fifth Amendment to the Constitution. (Note: Hard issue. And I was directly on point!)

VI

Whether the convening authority was a Type II or Type III accuser and improperly referred charges, convened the SPCM, and took post-trial action. (Note: Hard issue. This is the defendant's appeal equivalent of Babe Ruth's calling his home run. RADM Bitoff had to conceal his identity as my accuser to get by this challenge.)

VII

Whether the evidence presented was insufficient and failed to prove the offense charged as a matter of law. (Hard issue: Remember that the Article 32 found no evidence to support the very same charges).

VIII

Whether the Government acted in bad faith by alleging a baseless charge so as to influence the members by suggesting the accused was a bad character worthy of punishment. (Note: Hard issue. For me this was a very hard issue. Tim Zeller accused me of stealing money from my shipmates.)

IX

Whether numerous violations of fundamental rules, in cumulative effect, constituted prejudicial error. (Note: Hard issue.)

X

Fraud on the Court. (Note: Hard issue. Two called home runs in the same game!)

Best regards,

Walter Francis Fitzpatrick Jr.

Walt Fitzpatrick
360.377.5108
manoverboard@silverlink.net

Tuesday, 23 February 1993

From: LCDR Walter F. Fitzpatrick, III
To: Judge Advocate General

Subj: REQUEST FOR RECONSIDERATION ON THE APPLICATION FOR RELIEF PURSUANT TO ARTICLE 69(B), UCMJ, ICO LIEUTENANT COMMANDER WALTER F. FITZPATRICK, III, 551-90-4692, U.S. NAVY

Ref: (a) Judge Advocate General ltr 5814 Ser 40.2/64334 dtd 14-January 1993 w/enclosure (1)

(b) Application of 4 March 1992

(c) Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity ltr 5814 Ser 40/64023 dtd 14 Jan 1993

1. I respectfully request your reconsideration on the subject case. There is a new body of evidence that sufficiently raises questions of criminal conduct before and during its prosecution, that in the opinion of others who have reviewed it, is substantiated and does have merit.

2. I submit that the finding entered by reference (a) is defective because it fails the tests raised on appeal by reference (b). I hereby respectfully request that my conviction be set aside for the reasons given so far and that all rights and privileges I enjoyed prior to this conviction be returned to me.

3. With regard to my earlier request for a criminal investigation, LCDR TIMOTHY W. ZELLER, JAGC, USN, is no longer assigned to the Convening Authority and although he may not be currently assigned to the Office of the Judge Advocate General, since he is a Judge Advocate, *I am unable to understand why you would decline to look into allegations of professional and ethical misconduct involving a Judge Advocate who wears the Judge Advocate's Mill Rind* (reference (c)).

4. The government's theory in this case was based upon three distinct areas of dereliction under Charge I, Specification 1: a funeral trip, an MWR trip to Hawaii, and purchases of electronics equipments (ROT; Prosecution Exhibit 1). On 22 May 1992, a Board of Inquiry composed of three Navy Captains, found no misconduct with regard to Charge I, Specification 1. They specifically considered each of the government's theories and

found them wanting. All three Navy Captains were post Commanding Officers of Ships-of-the-Line and completely familiar with MWR regulations for forces afloat. As discussed under Issue VII of reference (b), the government did not show what specific action (or failure to act) constituted a failure to follow proper MWR accounting and expenditure procedures. I respectfully request to know what specific act, or failure to act, supported your finding of guilt for negligent dereliction of duty.

5. Through the course of preparing for the Board of Inquiry and submission of my appeal, a chain of custody was documented for the USS MARS (AFS 1) 1988 MWR report. The report was turned over sometime prior to 21 February 1990 to LCDR Timothy W. Zeller, then SJA to the Convening Authority by LCDR Conrad Divis, then Executive Officer in MARS (enclosures (66) and (67) to reference (b)). That report has never been seen since. It was not produced by LCDR Zeller prior to my special court-martial and it was not produced by the Staff of Commander, Combat Logistics Group ONE (COMLOGGRU-1) prior to the May 92 Board of Inquiry in spite of defense discovery requests in both cases. COMLOGGRU-1 has never denied having custody of the report. Before my Board of Inquiry, COMLOGGRU-1 claimed that they were unable to find it. The mere existence of this 1988 MWR report contradicts statements by LCDR Zeller in his 23 October 1989 Integrity and Efficiency Investigation Report (enclosure (18) to reference (b)). Intentional withholding of exculpatory evidence was raised on appeal (Issue IV of reference (b)). I respectfully request you make a specific finding on this question. I am unable to understand how this handling of exculpatory evidence was satisfactorily reconciled by you and why LCDR Zeller's conduct was considered proper (reference (c)).

6. As stated in the application for relief (reference (b)), *negligent dereliction of duty is not a lesser included offense to willful dereliction of duty*. "Paragraph 2b(4), Part IV, Manual for Courts-Martial, United States, 1984, specifically provides: 'Specific lesser included offenses, if any, are listed for each offense in this Part, but the lists are not all inclusive'" (U.S. v. Mckinley, 27 M.J. 78 (CMA 1988); see footnote 1). While it is agreed that the language, "lists are not all inclusive", means what it says, the fact remains that *"negligent" dereliction of duty is not listed as a lesser included offense for "willful" dereliction of duty*. Furthermore, it is not suggested in the discussion of Article 92 that "negligent" dereliction may be a lesser included offense to "willful" dereliction. This strongly suggests that any enumerated charge and specification for "willful"

dereliction of duty under Article 92 preempts a lesser included offense for "negligent" dereliction of duty. Also, it is not common practice in military jurisprudence to include "negligent" dereliction of duty as a lesser included offense of "willful" dereliction. This specific question was raised in U.S. v. Dellarosa, 30 M.J. 255 (CMA 1990) by the U.S. Court of Military Appeals but went unanswered because the decision of the military judge was not disputed. Dellarosa was tried by a judge sitting alone and charged with dereliction of duty by reason of his *willful* failure to *accurately* record and report weather conditions. "The military judge found [Dellarosa] guilty of dereliction of duty by reason of his *negligent* failure to *accurately* record and report weather conditions. [As noted by the Court of Military Appeals] The military judge did not explain his reasoning in reaching this finding to a 'lesser included offense' and he was not asked to do so by defense counsel." In the subject case, the question is under dispute and I respectfully request that you give the reasoning for the finding contained in reference (a)).

7. It is suggested that the question regarding the lesser included offense may be premature if not moot. For a lesser included offense to exist, there must first be in place an enumerated charge and specification from which it may be derived. In the subject case, as articulated by the military judge, Specification 1 of Charge I failed to state an offense. Quoting from page 98 of the Record of Trail "the Military Judge informed both counsel that there was a problem with the pleading as to Specification 1 of Charge I. Further the military judge stated that it was not apparent when the sample specification in the Manual for Courts-Martial is read, but that it becomes apparent when you read the instructions that are given to the members contained in the Military Judge's Bench Book, 'One cannot be convicted of willfully failing to perform his duties unless he had actual knowledge of the duties.' [The military judge] further stated that the government had not alleged that the accused had actual knowledge." This defect is fatal as was discussed at length by reference (b) and a specific finding by you on this issue was absent from reference (a). I respectfully request that you make a specific finding and provide your reasoning.

8. If you reconsider your decision regarding negligent dereliction of duty and still feel your finding is appropriate then I respectfully request that you find on each of the issues raised on appeal vis a vis the negligent dereliction of duty.

9. In the event you choose not to make a finding on any of the issues raised by reference (b), I request each of those issues

be certified for review by the Navy-Marine Corps Court of Military Review.

10. In the event you choose not to make a finding on the issues raised on appeal of newly discovered evidence and fraud on the court, and do not certify these issues for review by the Navy-Marine Corps Court of Military Review, I request a new trial under Article 73. I request that the two year limit for making this request be waived inasmuch as both of these issues were raised on appeal within two years but will not have had a finding entered by either you, as was the expectation, nor by the Navy-Marine Corps Court of Military Review.

11. I respectfully request a copy of enclosure (2) to reference (a).

12. After review of the relevant statute, I was unable to find authority for delegation by you to have someone else sign the appeal "by direction". I therefore, respectfully request that you sign any findings you may make.

Very Respectfully,

Walter J. Fitzpatrick LT(JG), USJ

P 395 427 209

Receipt for Certified Mail

No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

UNITED STATES POSTAL SERVICE

Sent to RADM SCHACHTE OJAG	
Street and No. 200 STOVAL ST	
P.O., State and ZIP Code ALEXANDRIA, VA 22332-2400	
Postage	$2.90
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, and Addressee's Address	
TOTAL Postage & Fees	$6.90
Postmark or Date	FEB 23 1993 U.S. NAVY

PS Form 3800, June 1991

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
RADM W.L. SCHACHTE JR
JUDGE ADVOCATE GENERAL
OJAG
200 STOVAL STREET
ALEXANDRIA, VA
22332-2400

4a. Article Number
P 395 427 209

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)

received SAT, 6 MAR 93

PS Form 3811, November 1990 ★U.S. GPO: 1991—287-066 DOMESTIC RETURN RECEIPT

Saturday, 10 June 2000

Mark and Paul:

I submitted a second appeal on 23 February 1993 after the first had been obstructed. It wasn't answered for 10 months (29 November 1993). Although the original request had been sent via certified mail, return receipt requested, senior Navy officials gave as their reason for delay that it had never been received in O JAG's office and there was no record of its receipt. I'm sending the following to you today:

- A copy of the certified mail return receipt. "D. McClung," who was OJAG's secretary, signed for receipt. Her desk sat feet away from the Admiral in the Pentagon. She has since married and goes by Donna McClung-Underwood last time I checked. I don't know if she still works for OJAG. Also, mailroom logs from OJAG independently confirm receipt of my appeal. Note: the green card was returned back to me on 6 March 1993 (this explains the "RECEIVED" stamp you'll notice).

- **Lie #1:** R.E. Ouellette, Colonel, U.S. Marine Corps, (then) Assistant Judge Advocate General (Military Justice) lied to me when he signed out the response to my appeal on 29 November 1993 ("There is no record of receipt of your original letter"). I'm sending this today.

- **Lie #2:** H.E. "Rick" Grant, Rear Admiral, USN, (then) Navy Judge Advocate General lied to Congressman Dicks in a letter dated 9 March 1994 ("This request was never received in this office"). I'm sending a copy to you both today.

- **Lie #3:** Rear Admiral Grant to United States Senator Gorton in a second March 1994 letter. I do not have a copy to send. I only have a copy of the OJAG proposal. I can get a copy if needed.

- **Lie #4:** Colonel Ouellette to U.S. Senator Diane Feinstein in a 21 March 1994 letter ("This request was never received in this office"). I'm sending a copy to you today.

- **Lie #5:** Rear Admiral Grant to U.S. Senator Patty Murray. You both have this letter already.
  5 MAY 1994

R.E. Ouellette retired as a one star (end of tour/career or 'graveyard' promotion).

I still have the original green card returned to me by OJAG. I sighted it yesterday evening.

I'm sending a copy of the second appeal for your reference.

I did not receive the response to my second appeal until 1330 on Wednesday, 8 December 1993. Six days earlier, Dave Proulx (pronounced PROO the "L" and "X" are silent), then my CO, sent out a

request for a new trial and demanded an answer to my second appeal. The request for new trial was ignored. FYI, Dave was going to initiate a JAGMAN into this trial but was stopped by the PSNS shipyard JAG, a commander named Meadows. I have the memos exchanged between them.

On September 2, 1994 I requested RADM Grant recuse himself because it was clear he was protecting Zeller, Bitoff, the process, and the JAG priesthood in general. I'm sending you the request and Grant's response.

My recusal request to Grant was prompted by information I'd received earlier in the summer that my appeal rights did not transcend the Navy JAG. I'm sending that document as well, dated 21 July1994. Of note, it was in July 1994 when Zeller's infamous 23 November 1989 Thanksgiving Day memo to Bitoff was finally turned over.

That Thanksgiving Day memo had been under a Freedom of Information Act request submitted by Congressman Dicks in August of 1993. I'm sending the draft I have FYI.

Best regards,

Walt Fitzpatrick

Walt Fitzpatrick
360.377.5108
manoverboard@silverlink.net

DEPARTMENT OF THE NAVY
Navy-Marine Corps Appellate Review Activity
Office of the Judge Advocate General
Washington Navy Yard - Bldg. 111
Washington, D.C. 20374-1111

received
SAT 30 JULY 94

In Reply Refer To:

21 July 94

LCDR Walter F. Fitzpatrick, III
825 NE Rimrock Drive
Bremerton, WA 98311-3142

Dear Lieutenant Commander Fitzpatrick:

This is to follow-up on our phone conversation regarding your court-martial in April 1990. Because you did not receive a dismissal or confinement in excess of one year, Article 66, UCMJ does not provide for review by either the Navy-Marine Corps Court of Military Review or by the Court of Military Appeals. Since your case has already been reviewed by the Judge Advocate General's Office, pursuant to Article 69, your appellate rights have been exhausted.

I hope that this information is of help to you.

Sincerely,

Alice B. Lustre
LT, JAGC, USNR
Appellate Defense Counsel

DEPARTMENT OF THE NAVY
USS CARL VINSON (CVN-70)
FLEET POST OFFICE AP
96629-2840

5510
OPS 0356
17 July 1991

MEMORANDUM

From: Commanding Officer, USS CARL VINSON (CVN 70)
To: LCDR Walter F. Fitzpatrick III, USN, 551-90-4692/1110

Subj: NOTIFICATION OF SUSPENDED ACCESS TO CLASSIFIED INFORMATION

Ref: (a) OPNAVINST 5510.1H dtd 24 Aug 90, CH-1
(b) Commanding Officer's NJP Mast of 30 Apr 91, VUCMJ Art 86 dtd 18 Mar 91

1. In accordance with reference (a), your access to classified information was suspended effective 18 Mar 91, pending final resolution of appeal action to reference (b).

2. Upon completion of all appeal actions to reference (b), your status regarding access to classified information will be reevaluated.

Doyle J. Borchers II
DOYLE J. BORCHERS II

Copy to:
Service Record

received
FRI 19 JUL 91

USS CARL VINSON (CVN 70)

CAPTAIN'S OFFICE

FACSIMILE COVER SHEET

ORIGINATOR: the gal Officer

ADDRESSEE: LT GRUBER NLSO

FACSIMILE NO.:

NO. OF PAGES: 3

RELEASING OFFICER: LCDR ABUAN

Signature

DATE/TIME OF TRANSMITTAL: 5/21/92 1445

UUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUU
U UNCLASSIFIED U
UUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUU

B 2 MAY 91

ADMINISTRATIVE MESSAGE

PRIORITY

P 301135Z APR 91 ZYB PSN 399335Z32

PERSONAL FOR

FM USS CARL VINSON

TO COMNAVAIRPAC SAN DIEGO CA//00//

INFO COMCARGRU THREE//00//
NAVSHIPYD PUGET SOUND WA//00//
COMLOGGRU ONE//00//
COMNAVBASE SEATTLE WA//00//
SUPSHIP SEATTLE WA//00//

BT
UNCLAS //N00000//PERSONAL FOR VADM KOHN, RADM WRIGHT, RADM MARSH,

RADM BITUFF, CAPT CLARK AND CAPT DOYLE FROM BORCHERS
SUBJ: NJP ICO LCDR WALTER F. FITZPATRICK, USN, 551-90-4692/1120
MSGID/GENADMIN/USS CARL VINSON//
RMKS/1. THIS MSG PROVIDES BACKGROUND IN THE EVENT OF POSSIBLE CONGRESSIONAL/MEDIA ATTENTION RESULTING FROM NJP AWARDED TO SNO.

2. ON 30 APRIL 1991, I HELD CAPTAIN'S MAST ON SNO FOR A VIOLATION OF UCMJ ART. 86 (ABSENT WITHOUT AUTHORITY) FOR A PERIOD OF 35 DAYS (91JAN30-91MAR05). PUNISHMENT AWARDED WAS A VERBAL REPRIMAND. POSSIBLE CONGRESSIONAL AND MEDIA ATTENTION EXISTS DUE TO SNO EXPRESSED DESIRE TO "GO PUBLIC" WITH HIS DISSATISFACTION WITH THE HANDLING OF PREVIOUS SPECIAL COURTS MARTIAL AT FORMER COMMAND AND CURRENT NON-JUDICIAL PUNISHMENT. AT MAST HE ALSO STATED THAT HE WROTE CONGRESSMAN DICKS (D-WA) ABOUT TWO WEEKS AGO REQUESTING AN INDEPENDANT NAVY IG INVESTIGATION OF HIS APR 90 COURT MARTIAL FINDING. QUESTIONS REGARDING THIS CASE SHOULD BE ADDRESSED TO CARL VINSON PAO LT B. GARCIA (206) 476-1663 (A/V: 439-1663) OR ME DIRECTLY AT (206) 476-2860 (A/V: 439-2860).

3. THE CHRONOLOGY OF EVENTS LEADING UP TO MAST ARE AS FOLLOWS.
2-5 APR 90: SNO RECEIVED SPCM WHILE ATTACHED TO COMBAT LOGISTICS GROUP ONE - FOUND GUILTY OF VIOLATING UCMJ ART. 92.
7 JUN 90: SNO RECEIVED LETTER OF REPRIMAND AS A RESULT OF SPCM FROM COMMANDER, LOGGRUONE.
1-30 SEP 90: SNO ON LV WHILE ATTACHED TO LOGGRUONE.
1 OCT 90: SNO DETACHED LOGGRUONE FOR ULTIMATE DUTY AT CVN 70 WITH

DLVR:USS CARL VINSON(1). ORIG
CO(1)...INFO FOR NAVSHIPYD PUGET SOUN(3)

17604/ 3/0008
CO(1)...INFO
RTD:000-000/COPIES:0002

399335/6694/121 1 OF 2 M1-0146 121/02:54Z 301135Z APR 91
CSN:RXBW0161 USS CARL VINSON

UUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUU

INTERMEDIATE DUTY AT SUPSHIP SEATTLE, WA. ORDERS DIRECTED SNO TO REPORT NLT JAN 91 TO CVN 70.
25 FEB 91: CVN 70 OPS OFFICER INQUIRED WITH NMPC (CARRIER PLACEMENT) AS TO LOCATION OF SNO; NMPC STATED THERE MAY HAVE BEEN AN ORDER MOD.
4 MAR 91: CVN 70 OPS OFF CALLED NMPC (SURFACE DETAILER) ABOUT EXTENDING NUMERICAL REPLACEMENT FOR SNO. NMPC STATED SNO SHOULD HAVE REPORTED IN JAN 91.
5 MAR 91: CVN 70 OPS OFF AGAIN CALLED NMPC (CARRIER PLACEMENT) TO ADVISE SNO DID NOT REPORT AND WAS TOLD THAT SNO WAS LAST AT SUPSHIP SEATTLE, WA. CVN 70 OPS OFF CALLED XO SUPSHIP SEATTLE TO FIND SNO. XO SUPSHIP STATED "SNO CHECKED OUT OF SUPSHIP ON 29 JAN 91 WITH ONE DAY TRAVEL". CVN 70 OPS OFF ALSO INFORMED THAT SNO RESIDED IN BREMERTON AND WAS GIVEN HOME PHONE NUMBER. CVN 70 OPS OFF CALLED SNO TO DETERMINE SNO PLANS AND POSSIBILITY OF UNKNOWN ORDER MOD. AFTER DISCUSSION, CVN 70 OPS OFF ORDERED SNO TO REPORT IMMEDIATELY. SNO REPORTED TO CVN 70 AT 1400, 5 MAR 91.

4. IN THE LAST SEVEN WEEKS I.VE HAD SNO ON BOARD, WE HAVE WORKED WITH THE LOCAL NLSO TO HELP HIM CONSTRUCT HIS APPEAL TO THE APR 90 SPCM WHICH HE CLAIMS WAS FRUSTRATED AT NLSO TREASURE ISLAND. ADDITIONALLY HE WAS GIVEN EVERY OPPORTUNITY TO SHOW CAUSE FOR NOT BEING UA FROM 30 JAN-5 MAR 91. AT EVERY TURN HE APPEARS TO BE FIXATED ON THE EVENTS OF THE APR 90 SPCM. HE DOES NOT HAVE A SECURITY CLEARANCE AND IS OF LITTLE USE TO AN OPERATIONAL COMMAND, THEREFORE I AM WORKING WITH NMPC TO GET HIM DETAILED TO A SHORE BASED COMMAND IN THE AREA. HE ALSO REPORTED ABOARD IN AN OBESE STATUS. I WILL PROVIDE AN UPDATE IF WARRANTED. VERY RESPECTFULLY, DOYLE.//
BT

UUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUU
U U N C L A S S I F I E D U
UUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUUU

received
MONDAY 3 OCT 94

DEPARTMENT OF THE NAVY
COMBAT LOGISTICS GROUP ONE
BLDG 221-2W NSC
OAKLAND, CA 94626-5000

IN REPLY REFER TO:
5800
Ser 006/0692
27 SEP 1994

Lieutenant Commander W. F. Fitzpatrick
325 NE Rimrock Drive
Bremerton, WA 98310-3142

Dear Commander Fitzpatrick:

This letter and its enclosure respond to your Freedom of Information Act request of August 6, 1994. It also confirms your phone conversation with my Staff Judge Advocate on September 22, 1994, during which you acknowledged that the August 6, 1994 date was incorrect and should have read September 6, 1994.

Your request was received by our office on September 14, 1994 and relates to an alleged offering of NJP in January of 1990 to you by Combat Logistics Group ONE. Your request specifically asks for the following:

The paperwork attendant to the formal offering of mast, i.e. "Mast Package".

That we contact RADM Bitoff and LCDR Zeller, if necessary to collect and provide the requested information.

Any and all documents regarding or related to an "alleged" January 1990 meeting between LCDR Zeller, RADM Bitoff, and Captain Anderson related to your Article 15.

In response to request (1), an exhaustive search of our files indicates that no such paperwork exists.

In response to request (2), your request is denied. The Freedom of Information Act does not require an agency to contact individuals outside the agency as part of their search for documentation. Similarly, the Act does not require an agency to create or compile a record not already in existence to satisfy a FOIA request.

In response to request (3), enclosure (1) is provided. Although a substantial legal basis does exist for withholding enclosure (1), it is being released in light of the October 1993 Memorandums by President Bill Clinton and Attorney General Janet Reno. In their Memorandums both the President and the Attorney General stressed the principle of openness in government. Based on these Memorandums, enclosure (1) is being released as a "discretionary disclosure".

5800
Ser 006/0692
27 SEP 1994

Because your request has been partially denied, you are advised of your right to appeal this determination in writing to the Judge Advocate General, Navy Department, 200 Stovall Street, Alexandria, Virginia, 22332-2400.

The appeal must be received in that office within 60 calendar days from the date of this letter to be considered, and the enclosed copy of this letter should be attached along with a statement regarding why your appeal should be granted. I recommend that the letter of appeal and the envelope both bear the notation "Freedom of Information Act Appeal."

The releasable portions of the requested documents are enclosed. The fees associated with processing this information have been waived.

I am the official responsible for the partial denial of your request.

Sincerely,

E. F. Tedeschi, Jr.

E. F. TEDESCHI, JR.
Rear Admiral, U.S. Navy
Commander
Combat Logistics Group ONE

Encl:
(1) LT T.W. Zeller memo dtd 16 Jan 90

received
MONDAY 3 OCT 94

MEMORANDUM FOR FILE 16 JAN 90

From: Staff Judge Advocate, Combat Logistics Group 1

Subj: LCDR Walter F. Fitzpatrick, USN

1. On 12 Jan 90, the subject named officer was requested to appear at my office at 1300 on 16 Jan 90 to receive paperwork and be advised of non-judicial punishment rights, including the right to refuse NJP. This contact was made by phone to his residence, said phone call being returned when he arrived there or had the message passed on. LCDR Fitzpatrick's reply was that he was going to consult with his attorney, Capt Anderson that afternoon and that afterward he would contact me, or more likely would have his defense counsel contact me regarding whether or not he would appear and/or accept non-judicial punishment.

2. On this date, I spoke with Capt Anderson via telephone and ascertained that the SNO had in fact consulted with his defense counsel on 12 Jan 90. I asked the counsel if there had been a decision to accept non-judicial punishment. He related that he believed that the SNO was going to refuse NJP, but that he had been told LCDR Fitzpatrick was in fact going to appear at my office on this date, 16 Jan 90. I asked Capt Anderson if I could take the SNO's not showing up as an affirmative refusal of NJP. He related that such would be appropriate.

Very Respectfully,

Timothy W. Zeller

Encl (1)

received
1400 44 30 OCT 94

MEMORANDUM 17 JAN 90

From: Staff Judge Advocate, Combat Logistics Group 1
To: Senior Defense Counsel, NLSO TI (Capt Anderson)

Subj: NJP Package ICO LCDR Fitzpatrick

1. Please find enclosed the subject package. LCDR Fitzpatrick has indicated that he desires to make his elections in your presence and requested the package be sent to you. This command will honor that request, with a single qualification. The package, with elections made, must be returned to this office not later than 1200 Friday, 19 Jan 90. This requirement has been set forth by the Chief of Staff, Combat Logistics Group 1. Failure to return the package by that time will be deemed a refusal of Non-Judicial Punishment and a demand for trial by court-martial.

T. W. Zeller

REPORT AND DISPOSITION OF OFFENSE(S)
NAVPERS 1626/7 (Rev. 5-72)

To: Commanding Officer, Commander, Combat Logistics ONE Date of Report: 12 January 1990

1. I hereby report the following named man for the offense(s) noted:

NAME OF ACCUSED	SERIAL NO.	SOCIAL SECURITY NO.	RATE/GRADE	BR. & CLASS	DIV/DEPT
FITZPATRICK, Walter F.	-------	551-90-4692	LCDR	USN	

PLACE OF OFFENSE(S)	DATE OF OFFENSE(S)
USS MARS (AFS_1)	Various

DETAILS OF OFFENSE(S) *(Refer by article of UCMJ, if known. If unauthorized absence, give following info: time and date of commencement, whether over leave or liberty, time and date of apprehension or surrender and arrival on board, loss of ID card and/or liberty card, etc.):*

PLEASE SEE ATTACHED SHEET

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT

LT., Staff Judge Advocate
(Rate/Grade/Title of person submitting report)

T. W. Zeller
(Signature of person submitting report)

I have been informed of the nature of the accusation(s) against me. I understand I do not have to answer any questions or make any statement regarding the offense(s) of which I am accused or suspected. However, I understand any statement made or questions answered by me may be used as evidence against me in event of trial by court-martial (Article 31, UCMJ).

Witness: _____ *(Signature)* Acknowledged: WALTER F. FITZPATRICK, LCDR, USN *(Signature of Accused)*

PRE-MAST RESTRAINT

☐ CONFINED FOR SAFEKEEPING

☐ NO RESTRICTIONS

☐ RESTRICTED: You are restricted to the limits of _____ in lieu of arrest by order of the CO. Until your status as a restricted man is terminated by the CO, you may not leave the restricted limits except with the express permission of the CO or XO. You have been informed of the times and places which you are required to muster.

(Signature and title of person imposing restraint) | *(Signature of Accused)*

INFORMATION CONCERNING ACCUSED

CURRENT ENL. DATE	EXPIRATION CURRENT ENL. DATE	TOTAL ACTIVE NAVAL SERVICE	TOTAL SERVICE ON BOARD	EDUCATION	GCT	AGE
30 July 75	INDEFINITE	14 Years 6 Months				

MARITAL STATUS	NO. DEPENDENTS	CONTRIBUTION TO FAMILY OR QTRS ALLOWANCE *(Amount required by law)*	PAY PER MONTH *(Including sea or foreign duty pay if any)*
			$3213.60

RECORD OF PREVIOUS OFFENSE(S) *(Date, type, action taken, etc. Nonjudicial punishment incidents are to be included.)*

None

S/N 0106-LF-079-0671

D-01999

PRELIMINARY INQUIRY REPORT

From: Commanding Officer Date: _____

To: _____

1. Transmitted herewith for preliminary inquiry and report by you, including, if appropriate in the interest of justice and discipline, the preferring of such charges as appear to you to be sustained by expected evidence.

REMARKS OF DIVISION OFFICER *(Performance of duty, etc.)*

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT

RECOMMENDATION AS TO DISPOSITION:

☐ REFER TO COURT MARTIAL FOR TRIAL OF ATTACHED CHARGES (Complete Charge Sheet (DD Form 458) through Page 2)

☐ DISPOSE OF CASE AT MAST ☐ NO PUNITIVE ACTION NECESSARY OR DESIRABLE ☐ OTHER

COMMENT *(Include data regarding availability of witnesses, summary of expected evidence, conflicts in evidence, if expected. Attach statements of witnesses, documentary evidence such as service record entries in UA cases, items of real evidence, etc.)*

(Signature of Investigation Officer)

ACTION OF EXECUTIVE OFFICER

☐ DISMISSED ☐ REFERRED TO CAPTAIN'S MAST

SIGNATURE OF EXECUTIVE OFFICER

RIGHT TO DEMAND TRIAL BY COURT-MARTIAL

(Not applicable to persons attached to or embarked in a vessel)

I understand that nonjudicial punishment may not be imposed on me if, before the imposition of such punishment, I demand in lieu thereof trial by court-martial. I therefore (do) (do not) demand trial by court-martial.

WITNESS SIGNATURE OF ACCUSED

ACTION OF COMMANDING OFFICER

☐ DISMISSED
☐ DISMISSED WITH WARNING (Not considered NJP)
☐ ADMONITION: ORAL/IN WRITING
☐ REPRIMAND: ORAL/IN WRITING
☐ REST. TO _____ FOR ____ DAYS
☐ REST. TO _____ FOR ____ DAYS WITH SUSP. FROM DUTY
☐ FORFEITURE: TO FORFEIT $_____ PAY PER MO. FOR ____ MO(S)

☐ CONF. ON _____ 1, 2, OR 3 DAYS
☐ CORRECTIONAL CUSTODY FOR ____ DAYS
☐ REDUCTION TO NEXT INFERIOR PAY GRADE
☐ REDUCTION TO PAY GRADE OF _____
☐ EXTRA DUTIES FOR ____ DAYS
☐ PUNISHMENT SUSPENDED FOR _____
☐ ART. 32 INVESTIGATION
☐ RECOMMENDED FOR TRIAL BY GCM

☐ DETENTION: TO HAVE $_____ PAY PER MO. FOR (1, 2, 3) MO(S) DETAINED FOR ____ MO(S)

☐ AWARDED SPCM ☐ AWARDED SCM

DATE OF MAST: DATE ACCUSED INFORMED OF ABOVE ACTION: SIGNATURE OF COMMANDING OFFICER

It has been explained to me and I understand that if I feel this imposition of nonjudicial punishment to be unjust or disproportionate to the offenses charged against me, I have the right to immediately appeal my conviction to the next higher authority within 15 days.

SIGNATURE OF ACCUSED DATE

I have explained the above rights of appeal to the accused.

SIGNATURE OF WITNESS _____ DATE _____

FINAL ADMINISTRATIVE ACTION

APPEAL SUBMITTED BY ACCUSED

DATED: _____

FORWARDED FOR DECISION ON _____

FINAL RESULT OF APPEAL:

APPROPRIATE ENTRIES MADE IN SERVICE RECORD AND PAY ACCOUNT ADJUSTED WHERE REQUIRED

DATE: _____ *(Initials)*

FILED IN UNIT PUNISHMENT BOOK:

DATE: _____ *(Initials)*

☆ U.S. GOVERNMENT PRINTING OFFICE: 1976—703-069/5007 2-1

CHARGES AND SPECIFICATIONS ICO LCDR FITZPATRICK

Charge I: Violation of the UCMJ, Article 92

Specification 1: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, who should have known of his duties as Executive Officer on board USS MARS (AFS 1), from about July 1988 to about January 1989, was derelict in the performance of those duties in that he willfully failed to follow proper procedures for the accounting and expenditure of Morale, Welfare and Recreation funds on board USS MARS (AFS 1), as it was his duty to do.

Charge II: Violation of the UCMJ, Article 108

Specification 1: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 689, of a value of about $700.00, military property of the United States, to be wrongfully disposed of by Lieutenant Ableson, Chaplain Corps, U. S. Navy.

Specification 2: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 690, of a value of about $700.00, military property of the United States, to be wrongfully disposed of by Ensign Vaughn, U. S. Navy.

Specification 3: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 691, of a value of about $700.00, military property of the United States, to be wrongfully disposed of by Personnelman Master Chief Fa' Aita, U. S. Navy.

Specification 4: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 692, of a value of about $500.00, military property of the United States, to be wrongfully disposed of by Personnelman Master Chief Fa' Aita, U. S. Navy.

Specification 5: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 693, of a value of about $700.00, military property of the United States, to be wrongfully disposed of by Hospital Corpsman First Class Collins, U. S. Navy.

Specification 6: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 694, of a value of about $700.00, military property of the United States, to be wrongfully disposed of by Boatsmain's Mate First Class Middleton, U. S. Navy.

Specification 7: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 695, of a value of about $700.00, military property of the United States, to be wrongfully disposed of by Electrician Mate Second Class Padojino, U. S. Navy.

Specification 8: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 696, of a value of about $700.00, military property of the United States, to be wrongfully disposed of by Radioman Seaman McGree, U. S. Navy.

Specification 9: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 697, of a value of about $700.00, military property of the United States, to be wrongfully disposed of by Personnelman Master Chief Fa' Aita, U. S. Navy.

Specification 10: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 698, of a value of about $700.00, military property of the United States, to be wrongfully disposed of by Lieutenant Ableson, Chaplain Corps, U. S. Navy.

Specification 11: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 700, of a value of about $700.00, military property of the United States, to be wrongfully disposed of by Lieutenant Archer, U. S. Navy.

Specification 12: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 701, of a value of about $700.00, military property of the United States, to be wrongfully disposed of by the said Lieutenant Commander Fitzpatrick.

Specification 13: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 702, of a value of about $1500.00, military property of the United States, to be wrongfully disposed of by Lieutenant Ableson, Chaplain Corps, U. S. Navy.

Specification 14: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, on board USS MARS (AFS 1) on or about July 1989, without proper authority, willfully suffer check number 703, of a value of about $700.00, military property of the United States, to be wrongfully disposed of by Petty Officer First Class Arnold Centano, U. S. Navy.

Charge III:. Violation of the UCMJ, Article 92

Specification: In that Lieutenant Commander Walter F. Fitzpatrick, U. S. Navy, Combat Logistics Group 1, on active duty, did, in the State of California while assigned on board USS MARS (AFS 1), on diverse occasions from on or about December 1987 to on or about July 1988, violate a lawful general regulation, to wit: Secretary of the Navy Instruction 5370.2H dated 24 October 1984, by wrongfully using a Government owned vehicle for his personal use.

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS
ACCUSED NOT ATTACHED TO OR EMBARKED IN A VESSEL
RECORD MAY BE USED IN AGGRAVATION IN EVENT OF LATER COURT-MARTIAL
(*See* JAGMAN 0104a)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case of LCDR WALTER F. FITZPATRICK, USN, SSN 551-90-4692, assigned or attached to _____.

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM, 1984, you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses: Violation of the UCMJ, Article 92, dereliction of duty, Article 108, wrongfully dispose of military property, Article 92, violate a lawful general regulation.
(Note: Here describe the offenses, including the UCMJ article(s) allegedly violated.)

2. The allegations against you are based on the following information:

(Note: Here provide a brief summary of that information.)

3. You have the right to demand trial by court-martial in lieu of nonjudicial punishment. If trial by court-martial is demanded, charges could be referred for trial by court-martial by summary, special, or general court-martial. If charges are referred to trial by summary court-martial, you may not be tried by summary court-martial over your objection. If charges are referred to a special or general court-martial you will have the right to be represented by counsel. The maximum punishment that could be imposed if you accept nonjudicial punishment is:

30 days arrest in quarters, forfeiture of ½ of one month's pay for 2 months, 60 days restriction, admonition/reprimand (orally or in writing).

4. If you decide to accept nonjudicial punishment, you may request a personal appearance before the commanding officer or you may waive this right.

a. Personal appearance waived. If you waive your right to appear personally before the commanding officer, you will have the right to submit any written matters you desire for the commanding officer's consideration in determining whether or not you committed the offenses alleged, and, if so, in determining an appropriate punishment. You are hereby informed that you have the right to remain silent and that anything you do submit for consideration may be used against you in a trial by court-martial.

b. Personal appearance requested. If you exercise your right to appear personally before the commanding officer, you shall be entitled to the following rights at the proceeding:

(1) To be informed of your rights under article 31(b), UCMJ;

(2) To be informed of the information against you relating to the offenses alleged;

(3) To be accompanied by a spokesperson provided or arranged for by you. A spokesperson is not entitled to travel or similar expenses, and the proceedings will not be delayed to permit the presence of a spokesperson. The spokesperson may speak on your behalf, but may not question witnesses except as the commanding officer may permit as a matter of discretion. The spokesperson need not be a lawyer;

(4) To be permitted to examine documents or physical objects against you that the commanding officer has examined in the case and on which the commanding officer intends to rely in deciding whether and how much nonjudicial punishment to impose;

(5) To present matters in defense, extenuation, and mitigation orally, in writing, or both;

(6) To have witnesses attend the proceeding, including those that may be against you, if their statements will be relevant and they are reasonably available. A witness is not reasonably available if the witness requires reimbursement by the United States for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or, if a military witness, cannot be excused from other important duties; and

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

5. In order to help you decide whether or not to demand trial by court-martial or to exercise any of the rights explained above should you decide to accept nonjudicial punishment, you may obtain the advice of a lawyer prior to any decision. If you wish to talk to a lawyer, a military lawyer will be made available to you, either in person or by telephone, free of charge, or you may obtain advice from a civilian lawyer at your own expense.

ELECTION OF RIGHTS

6. Knowing and understanding all of my rights as set forth in paragraphs 1 through 5 above, my desires are as follows:

a. Lawyer. (Check one or more, as applicable)

_____ I wish to talk to a military lawyer before completing the remainder of this form.

_____ I wish to talk to a civilian lawyer before completing the remainder of this form.

_____ I hereby voluntarily, knowingly, and intelligently give up my right to talk to a lawyer.

_____ (Signature of witness)

_____ (Signature of accused)

_____ (Date)

(Note: If the accused wishes to talk to a lawyer, the remainder of this form shall not be completed until the accused has been given a reasonable opportunity to do so.)

_____ I talked to _____,

a lawyer, on _____.

_____ (Signature of witness)

_____ (Signature of accused)

_____ (Date)

b. Demand for trial by court-martial. (Check one)

_____ I demand trial by court-martial in lieu of nonjudicial punishment.

_____ I accept nonjudicial punishment.

(Note: If the accused demands trial by court-martial the matter should be submitted to the commanding officer for disposition.)

c. Personal appearance. (Check one)

_____ I request a personal appearance before the commanding officer.

_____ I waive a personal appearance. (Check one)

_____ I do not desire to submit any written matters for consideration.

_____ Written matters are attached.

(Note: The accused's waiver of personal appearance does not preclude the commanding officer from notifying the accused, in person, of the punishment imposed.)

b. Elections at personal appearance. (Check one or more)

_____ I request that the following witnesses be present at my nonjudicial punishment proceeding:

_____

_____

_____

_____

_____

_____ I request that my nonjudicial punishment proceeding be open to the public.

_____	_____
(Signature of witness)	(Signature of accused)
_____	_____
(Name of witness)	(Date)

Commander
Combat Logistics Group ONE
(Code 006)
Bldg. 221-2W, FISC
Oakland, CA 94625-5000

OAKLAND
SEP 29 '94
CA

U.S. POSTAGE
0.29
METER
6136222

Lieutenant Commander W. Fitzpatrick
325 NE Rimrock Drive
Bremerton, WA 98310-3142

received
MONDAY 3 OCT 94

received
SAT, 9 APR 1994

April 7, 1994

From: Captain Doyle J. Borchers II, USN(Ret)/454-64-4751

To: Board of Corrections of Naval Records
Bureau of Naval Personnel (Officer Performance)
Commanding Officer, USS CARL VINSON (CVN-70)
Defense Finance Accounting Service, Cleveland Center

Subj: Setting aside the finding of guilt against Lieutenant Commander Walter f. Fitzpatrick III, USN/551-90-4692/1110 for violation of UCMJ Article 86, Unauthorized Absence, determined during Article 15 hearing held on 30 April 1991 in USS CARL VINSON (CVN-70)

1. Upon reviewing information that was not available to me at the time of the original Article 15 hearing, I now find that Lieutenant Commander Fitzpatrick did not commit the offense for which he was charged, violation of UCMJ Article 86, Unauthorized Absence, and I hereby set aside my finding of guilt which I assigned at the 30 April 1991, mast proceedings held on board CARL VINSON when I was the Commanding Officer.

2. All rights, privileges, pay and benefits Lcdr Fitzpatrick would have been entitled to in the event a guilty finding had not been made should be restored in accordance with the MCM. All references to this mast should be removed from his service record.

3. I base my decision on new information recently brought to my attention by Lieutenant Donald J. Roof, USN, who was an officer in the PSD that held Lcdr. Fitzpatrick's records prior to reporting to CARL VINSON.

4. The MCM requirements for the setting aside of my finding of guilt after two years have been met due to the unusual circumstances of this case. If all the facts of this case had been available to me at the Article 15 hearing, I would have dismissed the charge.

5. For the Board for corrections of naval Records, I request that Board action be initiated to correct Lcdr Fitzpatrick's service record.

6. Lieutenant Commander Fitzpatrick is currently assigned to the USS CARL VINSON (CVN-70).

Respectfully,

Doyle J. Borchers II
Captain, USN (Ret)

Doyle J. Borchers II
3775 N. Freeway Blvd, Ste 210
Sacramento, CA 95834
916-646-0197

CC: Lcdr Fitzpatrick

Thursday, 23 September 1993

From: Lieutenant Commander Walter F. Fitzpatrick, III, USN
551-90-4692/1110
To: Special Agent-in-Charge, Naval Criminal Investigative Service (NCIS) Office, Naval Base, Treasure Island, California

Subj: REPORT OF OFFENSES / FORMAL INITIATION OF CHARGES

1. This report of offenses and formal initiation of charges is made pursuant to Article 1137 of Navy Regulations. It is delivered to the Naval Criminal Investigative Service Office as that law enforcement and investigative agency, within the Department of the Navy, exercising jurisdiction over personnel named below (see R.C.M. 301 of the Manual for Courts-Martial).

2. Submission of this report invokes the mandate for a Preliminary Investigation so as to determine proper disposition (see R.C.M. 303 of the Manual for Courts-Martial).

3. I may be contacted at either of the following locations:

USS CARL VINSON (CVN 70)
Administrative Department
FPO AP 96629-2840

Phones: (510) 263-2171/2116/2119/2147

-OR-

825 N.E. Rimrock Drive
Bremerton, Washington
98310-3142

Phones: (206) 373-1701 (leave voice message)
(206) 377-0230

4. This report is borne of a wrongful conviction at a Special Court-Martial (SPCM) conducted at the Naval Legal Service Office (NLSO), Naval Base, Treasure Island, California (NAVBASE, T.I.). The trial portion of the SPCM ran from 2-5 April 1990. The Convening Authority for this travesty of justice was REAR ADMIRAL JOHN W.
BITOFF, USN (Ret.).

5. It is not my purpose here to argue the case but rather bring to light those egregious abuses to fundamental Constitutional Rights perpetrated under the command of RADM BITOFF.

6. I am filing this report with the NAVBASE T.I. NCIS office because of its central location to current venues of the three men most responsible for the criminal activity alleged:

*REAR ADMIRAL JOHN W. BITOFF, USN (Ret.)
Director, Office of Emergency Services, City and County of San Francisco

*CAPTAIN MICHAEL B. EDWARDS, USN
Chief-of-Staff, Commander, Combat Logistics Group ONE (COMLOGGRU-1); Naval Supply Center, Oakland, California

*LIEUTENANT COMMANDER TIMOTHY W. ZELLER, JAGC, USN
Senior Defense Counsel, Naval Legal Service Office, Naval Base, Treasure Island, California

7. Since 1989 I have made tens of requests to numerous organizations for a serious and independent investigation; mostly ignored. RADM BITOFF, CAPTAIN EDWARDS, and LCDR ZELLER have committed many very serious crimes and senior Navy officials have worked furiously to cover-up those crimes. This includes officials in the Office of the Navy's Judge Advocate General (OJAG).

8. One Navy investigation that did go forward was conducted by the Commander-in-Chief, U.S. Pacific Fleet Inspector General (CINCPACFLT I.G.). It was an inquiry into the impartiality and objectivity exhibited by RADM BITOFF, CAPTAIN EDWARDS, and LCDR ZELLER when they first acted against me in 1989/1990.

9. The CINCPACFLT I.G. investigation report, completed on 21 May 1992, is being buried. Three of my requests for a complete and uncensored copy have been denied outright. One of those requests was made under the Federal Discovery Act. A fourth request, made under the Federal Freedom of Information Act (FOIA), produced a version so chopped up, "whited-out," and censored that it was almost impossible to read. The conclusions and findings of the investigating officer were completely omitted. Those few portions of the report that can be read contain false official statements, misleading statements, and innuendo.

10. One document revealed during the course of the CINCPACFLT I.G. investigation is a 23 November 1989 memorandum written and submitted by LCDR ZELLER to RADM BITOFF. This memorandum is incriminating. It is also being knowingly suppressed. A FOIA request submitted on my behalf by Congressman Norman D. Dicks, requesting release of this specific document, was denied by the Navy. Reasons given are specious.

11. There are other incriminating documents that the Navy is knowingly and illegally withholding.

12. LCDR ZELLER is licensed to practice law in the State of Oklahoma. On 17 November 1992 I filed a complaint against LCDR

ZELLER with the General Counsel of the Oklahoma State Bar Association. In that complaint I requested LCDR ZELLER be disbarred for criminal conduct.

This prompted an inquiry from Oklahoma to the Navy Judge Advocate General which, in turn, caused the start of an inquiry into LCDR ZELLER's ethics by Navy JAG. The Navy inquiry was kicked off in January 1993, almost 9 months ago, and to date, no information has been released. Nothing! Not to the Oklahoma State Bar, not to Congressman Dicks, not to me. After 9 months, nothing!

This inquiry is drum-tight; the cover-up effort obvious and disturbing.

13. Evidence that the Navy's Judge Advocate General office is covering-up for RADM BITOFF, CAPTAIN EDWARDS, and LCDR ZELLER is unassailable. On appeal several hundred documents were presented for review many of which provided clear, compelling, and convincing evidence that crimes were committed.

In response to overwhelming documentary evidence that I did nothing wrong, that my trial, a Federal Courts-Martial, had been maliciously tampered with, and that cruel and unusual treatment had been visited upon myself and my family, the Judge Advocate General's office responded with a one paragraph legal statement changing the offense for which I'd been wrongfully found guilty from "willful" dereliction of duty to "negligent" dereliction of duty. This is an aberration!!

By keeping a wrongful conviction in place, the Judge Advocate General's office conveniently avoids answering the myriad of questions put to them regarding the prosecution of this case. They have dealt with very troubling issues by ignoring them!!

Incredibly, and in egregious violation of the Manual for Courts-Martial, the Navy Judge Advocate General, the man himself, did not sign my appeal. One of his assistants, a Marine Corps Colonel, signed it out. In fact, there is no documentary evidence thus far produced that shows the Judge Advocate General has even seen my appeal.

This question was put directly to the Navy's Judge Advocate General in a 23 February 1993 letter. Another question in that letter was how it was possible for another of his assistants, a Marine Corps Major, to decide, maybe unilaterally, in the face of clear and compelling evidence to the contrary, that a criminal investigation was not warranted.

It's been almost seven months now since I sent that letter and I'm still waiting for an answer!

So is my Congressman!

14. On 12 April 1991, I made a request of Congressman Norman D. Dicks for an inquiry into the prosecution of the instant case. After over two years, the Congressional Inquiry continues and the Navy has been as recalcitrant in providing information to

Congressman Dicks as they have been with me. You have my permission to contact his Bremerton, Washington office with any questions you may have. Point of contact: Miss Cheri Fitz, case worker, 500 Pacific Avenue, Bremerton, Washington, 98310. Phone: (206) 479-4011.

15. Personnel accused in this report:

*REAR ADMIRAL JOHN W. BITOFF, USN (Ret)
Director, Office of Emergency Services for the city and county of San Francisco
(former Commander, Combat Logistics Group ONE)

*CAPTAIN MICHAEL B. EDWARDS, USN
Chief-of-Staff, Commander, Combat Logistics Group ONE
Naval Supply Center, Oakland, California

*LCDR TIMOTHY W. ZELLER, JAGC, USN
Senior Defense Counsel, Naval Legal Service Office
Naval Base Treasure Island, California

*VICE ADMIRAL D.M. BENNETT
Naval Inspector General, Washington, D.C.
(former Commander, Naval Surface Forces, U.S. Pacific Fleet; COMNAVSURFPAC)

*REAR ADMIRAL M.W. RUCK
Commander, COMLOGGRU-1; Naval Supply Center, Oakland, Ca.
(RADM RUCK relieved RADM BITOFF)

*Ms. JUNE G. BROWN
CINCPACFLT Inspector General, Pearl Harbor, Hawaii

*Mr. RON TAM
CINCPACFLT Deputy Inspector General

*COLONEL R.L. VOGEL, USMC
Office of the Navy Judge Advocate General (OJAG)

*CAPTAIN GLEN N. GONZALEZ, JAGC, USN
Commanding Officer, Naval Legal Service Office, Yokosuka, Japan

*CAPTAIN PAUL A. ROMANSKI, USN
Current location and position are unknown

*CAPTAIN A. E. MILLIS, USN
Current location and position are unknown

*COMMANDER ANNIS, USN
Current location and position are unknown

*MAJOR R.K. STUTZEL, USMC
Office of the Navy Judge Advocate General (OJAG)
Washington, D.C.

*LIEUTENANT COMMANDER TIMOTHY W. ZELLER, JAGC, USN
Senior Defense Counsel, Naval Legal Service Office,
Treasure Island, California

*(former) LIEUTENANT KAREN D. HILL, USNR
(former) Staff Judge Advocate, COMLOGGRU-1
Current location unknown

16. UNLAWFUL COMMAND INFLUENCE.

A core issue in my wrongful prosecution is the exercise of UNLAWFUL COMMAND INFLUENCE by RADM BITOFF, CAPTAIN EDWARDS, and LCDR ZELLER. Mine is a case study.It is therefore appropriate and important to provide a short discourse on the subject here.

The prohibition against unlawful command influence is rooted in Article 37, Uniform Code of Military Justice (hereafter referred to as the CODE or UCMJ) 10 USC 837.

It is a concept that is applied to a variety of situations from the deliberate unauthorized interference of a command into the court-martial process, to the most inadvertent injections of command policy statements into a trail through evidence or counsel argument, to merely an appearance that one or the other has occurred. Improper influence can undermine the rights of an accused and the fairness of a trial and must be prevented. Hence, the Article 37 statute of the Code.

It was the Congress of the United States, through the Code, that removed the court-martial as an instrument of the commanding officer's desires in any particular case. "Command Influence" was specifically condemned and deemed unlawful (Article 37) and sanctions were imposed for its exercise (Article 98).

Actual command influence impacts on an individual's ability to receive an impartial determination of the issues. The mere appearance that a command has manipulated the court-martial system to prevent an accused from receiving an impartial hearing impacts on the public's confidence that the military can resolve criminal matters in a fair and impartial manner.

But unlawful command influence is blatant and its exercise and abuses are condoned and covered up. The military is entrusted, by the public, with the authority to self-regulate in this regard. But it has failed miserably. "The worst scandal is the failure to enforce prohibitions against unlawful command influence. Although hundreds of cases have been reversed on appeal due to such actions, in the 40 years since the Uniform Code of Military Justice went

into effect there has not been a single prosecution, much less a conviction, for those violations of military law."

So with Article 37 prohibitions against unlawful command influence firmly in place, its exercise has flourished! The law has atrophied, while its practice has multiplied and, more to the point, gained widespread acceptance!

The abuses discussed above are root causes for the rising chorus imploring the Congress to hold hearings with a view toward reforming the entire military-justice system.

17. ABOVE THE LAW?

It has been my long standing contention that there still exists, within today's society, a truly imperious group of men and women, who, if they so choose, can hold themselves above the law!

They are the senior commanders and Flag Officers of the United States Military. A cursory review of Courts-Martial trying any member of the assemblage bears true faith to my belief.

18. CIVILIAN OVERSIGHT.

Whether it be the Federal court system, the Congress, or some other civilian oversight agency, it is high time to expose the military judicial system, and its flagrant abuses, to the cold morning light.

I am submitting this report to the only civilian organization, charted within the Department of the Navy, the NCIS, with law enforcement and criminal investigation responsibilities because I can no longer trust senior officers with honorably discharging their sworn duties.

However, let me be quick to state that the performance of the NCIS (formerly NIS) has been far from confidence building, and, if I am failed in this last resort, I shall be quick to take the fight outside the military, choosing instead a more level field of battle.

19. ACID TEST.

In determining whether or not an investigation should be seriously pursued, there is but one simple acid test.

If, after review of the body of available evidence, a reasonable man would conclude that there exists just the mere appearance of unlawful command influence, then a serious examination of my case is warranted.

20. SMOKE AND MIRRORS.

Twice before I have seen the tactic used of assigning a legal officer, an attorney, as an investigating officer to find later that the all the fruits of such an investigation are suppressed from public view as "attorney work product."

No thank you! I will refuse to participate or cooperate with any investigating officer who is also an attorney.

Neither am I interested in a report being complied behind by back that is an exercise in the clever use of selected evidence, supporting a hidden agenda, not the truth. I will not tolerate any more personal attacks, against myself or my family. I am finished with the lies, and innuendo.

Let's open this up for the public view of the common man, and let's do so professionally.

21. GROUPING.

Personnel named in allegations below can be effectively sorted into two groups: (1) those that tampered with a Federal trial to achieve a wrongful conviction, and; (2) those involved in trying to cover it up.

RADM BITOFF, CAPTAIN EDWARDS, and LCDR ZELLER, among others, belong to both groups.

22. CAPTAIN EDWARDS' ROLE.

To assist the reader, a brief discussion of the role CAPTAIN EDWARDS played is in order.

As I have maintained throughout, no crimes were committed by myself, or any other crew member in MARS, at any time, while I was the Executive Officer.

However, there were allegations, one of which included the expenditure of Morale, Welfare, and Recreation (MWR) funds to send personnel to a funeral in July 1988.

In July 1988, CAPTAIN MICHAEL B. EDWARDS was in command of USS MARS. He had flown down from Oakland to join the ship in San Diego to allow Captain Nordeen to depart to Athens, Greece and attend to his brother's remains.

As commanding officer, CAPTAIN EDWARDS was the officer who approved the use of the MWR funds for the funeral trip.

14 months later, with CAPTAIN EDWARDS returned to his primary job as Chief-of-Staff, COMLOGGRU-1, this same expenditure was one that came under scrutiny. By virtue of his former position alone, CAPTAIN EDWARDS was supposed to stand clear.

But when allegations arose, instead of distancing himself from the investigation as required, CAPTAIN EDWARDS choose to enmesh himself in its most intimate workings, going against not only common sense, but also numbers of strictures prohibiting such participation.

CAPTAIN EDWARDS, by choice, was illegally at dead center to an investigation he knew he had no business being near.

And so far, without explanation!

23. NAME THAT DUTY!

As I write this report I stand Federally convicted of negligent dereliction of duty.

I'm supposed to know what I did.

But I don't.

What appears in my letter of reprimand is fiction.

No surprise there.

The letter was drafted by LCDR ZELLER and signed by RADM BITOFF.

I have repeatedly asked my superior officers to name the duty and then name the act (or failure to act) that constituted a finding of guilt for negligence.

No one can!

24. NO MISCONDUCT!

In late May 1992 I was ordered to show cause to remain on active duty and faced the same charges I'd faced at the SPCM which came under the administrative heading of misconduct.

Three Navy Captains, with the power to involuntarily separate me from the service, sat in judgement, hearing the same charges leveled by LCDR ZELLER at the earlier trial.

These men found no misconduct.

More simply stated; they unanimously agreed I'd done nothing wrong regarding those charges authored by LCDR ZELLER.

Nothing!

I relied upon documents the Navy unsuccessfully attempted to suppress which were discovered months after the trial. These papers, and other statements, incriminated RADM BITOFF, CAPTAIN EDWARDS, and LCDR ZELLER.

I sent these same papers to the Judge Advocate General's office, as part of my appeal, thinking they would act to completely exonerate me and also serve to initiate a criminal investigation against RADM BITOFF, CAPTAIN EDWARDS, and LCDR ZELLER.

I was wrong on both accounts.

As incredible as it may sound, I'm still a convicted man. An assistant for the Judge Advocate General decided I'd committed a lesser offense, although he can't explain his decision. A different assistant figured there was no cause for a criminal investigation; another decision absent evidence of sound reasoning.

So,....I remain on active duty, serving at sea, because I'm not guilty of misconduct.

But the judicial conviction stands!

Reason?

Because there is an ulterior and disquieting motive. Allowing the conviction to stand circumvents the need for anyone in the Judge Advocate General's office from having to deal, substantively, with the real issues of my case.

It serves mere convenience and sets a dangerous precedent.

CHARGES AND ALLEGATIONS

25. Violation of UCMJ Article 81: Conspiracy.

It was an ambush!!

RADM BITOFF, as former Commander, COMLOGGRU-1, headed a cabal of staff officers whose intrigues were successfully aimed at destroying my career.

To that end, RADM BITOFF illegally formed a military court, as convening authority, to try phony charges trumped-up by his staff judge advocate, LCDR TIMOTHY W. ZELLER. CAPTAIN EDWARDS, Chief-of-Staff to RADM BITOFF was also an agent of conspiracy.

These three men conspired to effect a Special Courts-Martial (SPCM) that was a uniquely sinister exercise in fraud and dishonesty. Projected throughout was the sense of personal vendetta and an overzealous desire to prosecute in the absence of a crime.

It was retribution in one of its purest forms.

Predatory!

Unlawful command influence was blatant. RADM BITOFF had his own staff judge advocate collect evidence, illegally precluded any outside agency from investigating, invented charges, guaranteed a trial by failing to offer Article 15 (Admiral's Mast), tampered with witnesses, withheld exculpatory evidence, and then, when all was said and done, tried to cover the whole episode up.

LCDR ZELLER was RADM BITOFF's henchman in this miscarriage of justice. LCDR ZELLER did the heavy lifting. Assigned by CAPTAIN EDWARDS as the investigating officer, LCDR ZELLER, with clear intent, solicited and pursued charges he knew to be groundless and produced an absurd reading of regulations. Throughout LCDR ZELLER knowingly engaged in a pattern of deception unconstrained by the Rule of Law.

26. Violation of UCMJ Article 92:
Dereliction in the performance of duties;
Failure to obey an order or regulation.

*Pursuant to Article 1023 of Navy Regulations, persons in authority are forbidden to injure their subordinates by tyrannical or capricious conduct. Primary players here are RADM BITOFF, CAPTAIN EDWARDS, and LCDR ZELLER. However; this allegation can be made against several senior officers. Violation of Article 1023 of Navy Regulations.

*RADM BITOFF, CAPT EDWARDS, LCDR ZELLER intentionally preclude the Naval Investigative Service from taking over investigative responsibility on the instant case. Violation of SECNAVINST 5520.3 as modified by ALNAV 096/85.

*LCDR ZELLER briefs CAPTAIN EDWARDS and RADM BITOFF. LCDR ZELLER recommends and RADM BITOFF approves charges. CAPTAIN EDWARDS recommends disposition to RADM BITOFF; specifically, an Article 32 investigation. RADM BITOFF becomes an accuser.

Violation of CINCPACFLTINST 5040.1

*CAPTAIN EDWARDS sends a Confidential SPECAT EXCLUSIVE message to Captain Pickavance in USS MARS directing the collection of evidence.
Violation of CINCPACFLTINST 5040.1

*CAPTAIN EDWARDS signs a cover letter and forwards an investigation report in which his name appears.
Violation of CINCPACFLTINST 5040.1

*RADM BITOFF, CAPTAIN EDWARDS, and LCDR ZELLER suppress investigation reports and allied papers from an Article 32 and subsequent SPCM.
Violation of CINCPACFLTINST 5040.1

*RADM BITOFF wrongfully revokes a security clearance, ignoring the due process requirements of the Navy's Security Manual.
Violation of OPNAVINST 5510.1H

*RADM BITOFF intentionally interferes with the Article 138 grievance procedures to cover his own criminal misconduct.
Violation UCMJ Article 138.

*Numerous violations of the Freedom of Information Act by all personnel attempting to cover up criminal misconduct.

27. Violation of UCMJ Article 93: Cruelty and Maltreatment

RADM JOHN W. BITOFF, USN (Ret) tops the list of those officers who took part in a reprehensible enterprise. CAPTAIN EDWARDS and LCDR ZELLER are right underneath.

The pain, suffering, humiliation, anger, disappointment, and fear knowingly inflicted upon myself, my wife, and my four children is beyond human measure!

And to serve what purpose?

The stress generated from having to face a kangaroo court, and then two attempts to involuntarily separate me from the Navy has certainly shortened my life. The pressure was overwhelming and made for a dysfunctional home life. The emotional roller-coaster we've been forced to ride as a family has had a devastating effect.

My professional life was shattered in an instant! Orders to the Naval War College were cancelled and a Meritorious Service Medal stripped away. My security clearance was wrongfully revoked absent all the due process requirements of the Navy's Security Manual. After trial, the detailing process was worthy of screenplay for an episode of the "Twilight Zone."

For almost one year my family and I had no future. We couldn't plan and we couldn't look ahead. After giving birth to our fourth

child, my wife could not return to work as a Nurse because she was unable to tell an employer how long she could stay with the job.

RADM BITOFF and his cronies hunted me down like a dog and then, after destroying me, turned his back to let myself and my family fend for ourselves. This was a monstrous act! I found out in harsh fashion what it meant to be relegated to the Navy's backwater.

I was banned from boarding Navy ships, one of which was my own command. I was "held hostage" waiting assignment delayed due to a pulled security clearance. I received harassing mail, was professionally maligned, ordered to psychiatric evaluations, and assigned to menial and demeaning work.

I faced involuntary separation twice, which if successful, would have put me out on the street, after 16 years of faithful service, in a declining job market and declining economy, without a retirement pension.

I was lied to and lied about.

Grievance procedures were interfered with.

There was trouble with my fitness reports. I have failed to promote to the grade of full commander twice and have been roundly knocked out of any opportunity to command a destroyer at sea, a lifetime goal.

As I write this report, I face involuntary retirement next July.

The period of time between 27 September 1989 and 24 June 1992 was singularly characterized by the total lack of command support. For this, I have RADM BITOFF and his staff to thank.

The injustice visited upon me by RADM BITOFF and his cronies transformed me. I was not myself. Home life was hell! Self-esteem and self-worth went in the toilet. This had the greatest effect on my wife who would have been well-served and well-justified to have divorced me on several counts. My two little girls were beginning and living the early part of their lives in a home upended.

Make no mistake!

This is RADM BITOFF's handiwork!

Personal financial and economic harm has been extreme and continuous. Failure to promote affects both active duty pay and retirement pay. Standing Federally convicted for something I did not do adds a degree of difficulty in future job searches and is potentially detrimental and harmful. It does nothing to improve one's state of mind.

The intentional infliction of emotional and financial distress has taken a serious toll. Actions of RADM BITOFF, CAPTAIN EDWARDS, and LCDR ZELLER, among others, was retaliatory, vindictive, vicious, and cruel.

And to serve what purpose?

28. Violation of UCMJ Article 98:

Noncompliance with procedural rules;
Knowingly and intentionally failing to enforce or comply with provisions of the Uniform Code of Military Justice.

*LCDR ZELLER simultaneously acts as an Investigating Officer and Staff Judge Advocate (advisor) to a convening authority (RADM BITOFF) on the same case.
Violation Article 6(c) UCMJ and R.C.M. 1106(b)

*Unlawful Command Influence in violation of Article 37 UCJM and R.C.M. 104:

-CAPTAIN EDWARDS, an interested party in the allegations under inquiry, assigns his own Staff Judge Advocate, LCDR ZELLER, as Investigating Officer into those allegations;

-RADM BITOFF, CAPTAIN EDWARDS, and LCDR ZELLER knowingly preclude the inclusion of the Naval Investigative Service, as required, and fail to transfer investigative responsibilities up the chain-of-command to maintain integrity in the face of an obvious conflict of interest;

-LCDR ZELLER reports the results of his investigation to CAPTAIN EDWARDS;

-CAPTAIN EDWARDS orders/directs the collection of evidence (his Confidential SPECAT Exclusive message to Captain Pickavance);

-LCDR ZELLER submits a memorandum to RADM BITOFF intercepted by CAPTAIN EDWARDS. A meeting is scheduled and held with these men in attendance. LCDR ZELLER recommends charges RADM BITOFF approves. CAPTAIN EDWARDS recommends disposition, an Article 32 investigation;

-As an accuser, RADM BITOFF illegally convenes a Special Court-Martial;

-LCDR ZELLER invents false charges and then swears to them.....twice;

-LCDR ZELLER prepares and submits knowingly false investigation reports;

-CAPTAIN EDWARDS, CAPTAIN ROMANSKI, and CAPTAIN MILLIS forward these false reports up the chain-of-command;

-RADM BITOFF, CAPTAIN EDWARDS, CAPTAIN MILLIS, and LCDR ZELLER knowingly hide these reports from the view of the Article 32 Investigation and subsequent trial;

-LCDR ZELLER fails to produce a witness to the Article 32 Investigation; takes a false sworn statement, suborns perjury;

-LCDR ZELLER submits a memorandum to RADM BITOFF recommending the assignment of a Special Prosecutor. Recommends the present prosecutor be fired. Expresses concern over the prosecutor's intention not to be present at the hearing during CAPTAIN EDWARDS' Article 32 testimony;

-LCDR ZELLER collects and intentionally withholds exculpatory evidence;

-CAPTAIN EDWARDS gives perjured and evasive testimony at the Article 32 hearing;

-RADM BITOFF fails to offer Article 15 (Admiral's Mast) ensuring the case goes to trial;

-RADM BITOFF, under advisement by LCDR ZELLER stacks the jury. Convening orders detailing members (jurors) reads like the COMLOGGRU-1 social roster;

-COMMANDER ANNIS, who had to have prior knowledge of the case, states under oath at trial, during voir dire, that he did not;

-RADM BITOFF details COMMANDER DANIEL GABE as a member.

COMMANDER GABE had prior knowledge of the case;

-LCDR ZELLER's activity as a Preliminary Investigating Officer are kept under wraps.

-Malicious and selective prosecution. Only one man is accused.....ME!

29. Violation of UCMJ Article 107: False Official Statements.

*In a 27 Aug 1990 letter, RADM BITOFF records in excess of 15 false official statements;

*In a 23 Oct 1989 Investigation Report, LCDR ZELLER records six pages of knowingly false statements, misleading statements, and innuendo;

*CAPTAIN EDWARDS, CAPTAIN MILLIS, and CAPTAIN ROMANSKI sign out what they know to be falsified investigation reports;

*On 7 June 1990, RADM BITOFF signed a letter of reprimand he knew to contain false official statements;

*On 3 December 1991, RADM M.W. RUCK signs out a letter he knows to contain false official statements;

*On 17 July 1990, an unknown person forged my name to a letter containing false official statements;

*On or about 21 May 1992, CAPTAIN GLEN N. GONZALEZ submits an Investigation Report he knows to contain false official statements;

*On 21 May 1992, VADM D.M. BENNETT signed an Investigation Report he knew to contain false official statements;

*COLONEL R.L. VOGEL and MAJOR R.K. STUTZEL signed court documents they knew to contain false official statements.

30. Violation of UCMJ Article 123: Forgery.

*An unknown person forged my name to a 17 July 1990 letter of reprimand response.

31. Violation of UCMJ Article 131: Perjury

*It can be affirmatively shown that the following persons committed perjury:
CAPTAIN MICHAEL B. EDWARDS
LCDR TIMOTHY W. ZELLER
MR. RAYMOND D. LARSON
LT CHARLES A. ANDREWS

32. Violation of Article 133: Conduct unbecoming an officer and gentleman

*Uttering knowingly false statements;
*Unfair dealing;
*Cruelty;
*Maltreatment;
*Obstruction of Justice;
*Abuse of power;
*Abuse of process;
*Intentional infliction of emotional and financial distress;
*Interference with the production of witnesses;
*Intentional falsification of investigation reports;
*Attempted cover-ups of criminal misconduct;
*Harassment;
*Perjury and suborning perjury;
*Stacking a jury against an accused;
*Pursuit of groundless and frivolous allegations;
*Intentional withholding of exculpatory evidence;
*Suppression of investigation reports from a military tribunal;
*Perpetrating a fraud on a military court;
*Tampering with a Federal Court;
*Waste of public funds in pursuit of frivolous allegations;
*Knowing violations of the Freedom of Information and Privacy Acts, and;
*Interference with a Federal Investigation;
*Egregious abuses of fundamental Constitutional Rights.

These all constitute violations of Article 133, and all are alleged, as appropriate, against officers named in the report.

33. Violation of UCMJ Article 134:

*False Swearing

It can be affirmatively shown that LCDR ZELLER subscribed a false statement before Federal Agents of the Naval Investigative Service during the course of an official investigation;

It can be affirmatively shown that LCDR ZELLER swore to false charges.....twice.

*Misprision of a Serious Offense and Obstruction of Justice

It can be affirmatively shown that the people named below committed a positive act of concealment of a serious offense. This, in conjunction with other acts alleged in this report, constitutes obstruction of justice. I am prepared to name other officers who may have committed these offenses. This includes the intentional concealment of documents that evidence illegal activity and the commission of crimes.

-RADM JOHN W. BITOFF, USN (Ret)
-CAPTAIN MICHAEL B. EDWARDS, USN
-Ms. JUNE G. BROWN
-MR. RON TAM
-RADM M.W. RUCK, USN
-VADM D.M. BENNETT
-CAPTAIN GLEN N. GONZALEZ, JAGC, USN
-COLONEL R.L. VOGEL, USMC
-MAJOR R.K. STUTZEL, USMC
-LCDR TIMOTHY W. ZELLER, JAGC, USN
-LT KAREN D. HILL
-CAPTAIN A.E. MILLIS, USN
-CAPTAIN P.A. ROMANSKI, USN

*Subornation of Perjury

RADM BITOFF, CAPTAIN EDWARDS, and LCDR ZELLER, conspiring together, induced each of the others into the commission of unlawful acts. For CAPTAIN EDWARDS, the extent of this unlawful influence reached into the Article 32 Investigation whereupon he gave perjured and evasive testimony.

For LCDR ZELLER, subornation of perjury occurred when he illegally induced SK3 Brown to give a false statement under oath.

Very Respectfully,

Walter J. Fitzpatrick, III
LCDR, USN

Copies to:
Commanding Officer, USS CARL VINSON (CVN 70)
Executive Officer, USS CARL VINSON (CVN 70)
Legal Officer, USS CARL VINSON (CVN 70)
Public Affairs Officer, USS CARL VINSON (CVN 70)
NCIS Special Agent, Resident, USS CARL VINSON (CVN 70)
Congressman Norman D. Dicks
Congressman Dellums
Commander-in-Chief, U.S. Pacific Fleet
Commander, Naval Surface Forces, U.S. Pacific Fleet
Commander, Cruiser Destroyer Group THREE
Commander, Combat Logistics Group ONE
Navy Judge Advocate General
General Counsel, Oklahoma State Bar Association
Commanding Officer, Naval Legal Service Office, Treasure Island, CA
Commanding Officer, Naval Legal Service Office, Puget Sound Naval Shipyard
Commander Thomas A. Devins, JAGC, USN
Department of Defense Inspector General's Office
Attorney Robert Noel
Attorney Majorie Kholer
Attorney Robert S. Rivkin
Secretary of the Navy

From: S/A RICHARD ALLEN
To: [redacted]
Date: Friday, December 5, 1997 6:58 am
Subject: FITZPATRICK UPDATE

b7c

[redacted] informed me yesterday evening the original document in question was located somewhere at NAMALA. The document was recently forwarded to CAPT PIXA at JAG, who is OJAG IG POC on the matter. [redacted] will send the document to the lab in Norfolk for examination. [redacted] has called the lab and informed them of the priority status of the case and the need for a quick turnaround. We are still waiting for a decision from the PG folks for victim's PG.

RECEIVED
TUESDAY, 11 AUGUST 1998
NCIS FOIA RESPONSE

From: [redacted]
To: 25HOST_DOM:27HOST_DOM:23HOST:[redacted]
Date: Tuesday, January 27, 1998 1:27 pm
Subject: WALT FITZPATRICK -Reply

b7C

[redacted]

I'll be happy to meet with you whenever (except Friday or Monday). I believe our reasoning for not investigating the other allegations were that they were beyond the statute of limitations and therefore could not be prosecuted. Mr. Fitzpatrick will argue that he just learned of them on X date, so they really aren't beyond the SOL. However, not discovering a crime doesn't toll the SOL under the UCMJ. I need to be "refreshed" on the timeframes again, but I'm fairly certain that this was our reasoning. By the way our charter (SECNAVINST 5520.3B) specifically says that NCIS can defer investigations "[w]hen in NCIS judgment, the inquiry would be fruitless and unproductive." I'd say this would qualify.

V/R,
[redacted] b7C

SPECIAL AGENT IN CHARGE NCIS PACIFIC NORTHWEST b7C

From: LEON CARROLL, JR.
To: W. \OFF1CE31\GRP\PSFO.GRP
Date: Monday, May 4, 1998 1:23 pm
Subject: **OFF LIMITS**

This is a notice to all Puget Sound personnel:

A Mr. Walter Fitzpatrick has made inquiries regarding an event that happened to him several years ago when he was the XO of the USS Mars homeported in San Francisco. He was administratively discharged from the navy and is know claiming he was framed. While residing in the Washington, DC area, he made a complaint to our DC office that a memo with his signature forged was used in the proceedings. DCWA opened a case and had the handwriting examined and the results were inconclusive. There is nothing more we can do for Mr. Fitzpatrick. He has now levied charges against his former defense attorney, now a deputy prosecutor with Kitsap County alleging that it was the attorney who forged his signature. Again this has been investigated and the case closed by DCWA. b7C

This morning Mr. Fitzpatrick arrived at the Bremerton Office to file the same complaint. Fortuunately RAC MARY CALL was familiar with the situation and explained to Mr. Fitzpatrick that NCIS had looked into his complaint and could do nothing further to help him. He departed NCISRA Bremerton stating he was going to take his case to U.S. Rep. Norm Dicks.

Mr. Fitzpatrick has shopped his story around for years and has reached the point of shere deparation. He is **not** to be allowed access to any of our spaces. If he shows up or calls your office politely tell him that NCIS has looked into to his complaint and any further information regarding his case can be obtained by quering our headquarters through the Freedom of Information Act.

[redacted] b7C

CC: [redacted]

RECEIVED
TUESDAY, 11 AUGUST 1998
NCIS FOIA RESPONSE

MEMORANDUM 02 September 1997

From: SA [redacted] b7c
To: SSA [redacted]

23B: SA GERRY W. NANCE

Subj: FITZPATRICK INVESTIGATION

1. Investigation was opened at the direction of Code 23B as a lo priority case to assist JAGC Headquarters after Fitzpatrick complained that his signature was forged to a 17 July 1990, memorandum titled "RESPONSE TO LETTER OF REPRIMAND".

2. Fitzpatrick has for years been writing letters and soliciting assistance for relief from his 1989 court martial conviction. He blieves he has been the victim of a massave cover up and conspira by individuals in places of authority within the Navy. In suppor of his bleiefs, Fitzpatrick has volumes of documentation which, I was told, have been provided to the Navy OJAG, newspapers and various congressmen and senators.

3. From my discussion with Fitspatrick, I am left with the impression that, if a person does not accept his interpertation o the instructions and events, he then views that person as a part the cover up.

RECEIVED
TUESDAY, 11 AUGUST 1998
NCIS FOIA RESPONSE

From: [redacted]
To: [redacted]
Date: Monday, August 25, 1997 4:30 pm
Subject: FITZPATRICK

b7c

[redacted]
Please call [redacted] at MWGL. Fitzpatrick has made some new allegations that might put the enire case in its proper perspective (so we can close it down).
B

847 688-5655/6/7/8/9
5668/9

DSN 792-5455

[redacted]

b7c

RECEIVED
TUESDAY, 11 AUGUST 1998
NCIS FOIA RESPONSE

b7c

[redacted]

MEMORANDUM

b7c

02 September 1997

From: SA [redacted]
To: SSA [redacted]

Subj: FITZPATRICK INVESTIGATION

23B
S/A GERRY W. WANCE

1. Investigation was opened at the direction of Code 23B as a low priority case to assist JAGC Headquarters after Mr. Fitzpatrick complained that his signature was forged to a 17 July 1990, memorandum titled "RESPONSE TO LETTER OF REPRIMAND".

2. Interviews of Mr. Fitzpatrick have been conducted and a statement and handwriting exemplars were obtained. We are waiting for records from the Federal Records Center to be returned to the Navy-Marine Corps Appellate Review section to determine if the original memorandum can be located. We have been unable to locate the original of the memorandum at Mr. Fitzpatrick's former command, BUPERS or OJAG.

3. Mr. Fitzpatrick has for years been writing letters and soliciting assistance for relief from his 1989 courts martial conviction. He believes he has been the victim of a massive cover up by individuals in places of authority within the Navy. In support of his beliefs, Mr. Fitzpatrick has amassed volumes of documentation which, I was told, have been provided to the Navy OJAG, newspapers, congressmen and senators.

b5

4. [redacted] In addition, Mr. Fitzpatrick is claiming other procedural irregularities with respect to the legal proceedings against him that pertain to the work of the same [redacted] However, I believe most of this information was previously provided to OJAG.

b7c

5. [redacted]

b5

6. [redacted]

b5

RECEIVED
TUESDAY, 11 AUGUST 1998
NCIS FOIA RESPONSE

RECEIVED
TUESDAY, 11 AUGUST 1998
NCIS FOIA RESPONSE

From: S/A BRUCE DELINQUA
To: BOSS OF BRUCE DELINQUA
Date: Friday, February 6, 1998 2:27 pm
Subject: FITZPATRICK

[redacted]

Just in case you hear from HQ, I wanted to fill you in on a telephone conversation I had with Walter Fitzpatrick. The conversation, which lasted for about 20 minutes, ended with me calmly hanging up on him. Right or wrong, I just didn't believe there was any way to reason with this guy.

Fitzpatrick is the guy who had us running around trying to find out who allegedly forged his signature on a document entitled, "response to letter of reprimand". You, [redacted] and I discussed the case a couple of weeks ago, and decided to close it.

Fitzpatrick talked to [redacted] yesterday. [redacted] told him about the results of the investigation, and the guy was incredulous. He demanded to talk to me today. (This is the first time he's ever asked to talk to me or any other supervisor at this field office; up until this point, he always directed his complaints to the director, DAVID BRANT

I called him this afternoon at about 1:00. He started the conversation by telling me I conducted an incompetent investigation and I had no business closing it. As he went on, his voice steadily got louder, until I warned him to be carefull about how he talked to me and to start over. He then calmed down and tried to get me to answer questions about why I shut the investigation down prematurely. I explained to him we did all we could to determine the authenticity of the document in question, although we were not able to determine if it was a forgery. I told him if he was not satisfied with the results of the investigation, he could order a copy of the report through FOIA, review it, put his concerns in writing and send it back to me and I would review it. He didn't like that suggestion, and demanded I re-open the investigation, accusing the prosecuting attorney (MR. KEVIN "ANDY" ANDERSON at the time of the incident) of forging the document, and that there was a bigger case than just the forged document, if only we would just look into it. He wasn't specific about what the bigger case was. He also said the questioned document was actually a confession, and maintained the signature on it wasn't his, and why couldn't I see that. I again advised him to order the report and put his concerns in writing, and asked him if he had the address for our headquarters, so he could go through FOIA. He responded by asking if the report would be redacted, and I said I didn't know. He wanted to know why he couldn't go into the local NCIS office (in Washington state) and have a statement taken there. I told him that would not be possible without the case being re-opened. I again asked him if he had the HQ address, and he responded by saying that he had already contacted 2 senators and a congressman about this issue and that was going to be his course of action now. I told him that was his right. He then asked me how to get in touch with SA RICHARD ALLEN and I told him S/A ALLEN was not the case agent anymore, not was he available. He said he knew S/A ALLEN had retired, but he just wanted to talk to S/A ALLEN I said it would

b7

S/A RICHARD ALLEN

not be possible. He asked if I would forward a letter to and I said I would consider it. At that time, his voice started to rise as he questioned whether or not I was not going to give the letter to S/A ALLEN I told him not to try to corner me on a response, and at that time he accused me of threatening him, and that he didn't like my tone of voice. He kept going, and at that time I hung up on him.

[redacted] I have never hung up on anyone (except telemarketers), and I probably will never do it again. I try to treat everyone with tact and respect. This guy has manipulated people at HQ, and has wasted the time of the agents at our field office. Maybe there's more to it than the questioned document, but neither RICHARD ALLEN should have had to be on the receiving end of this guy's abuse. Also, S/A ALLEN deserves to have his retirement with privacy, away from the people (like this guy) he's had to deal with for 24 years.

b7c

RECEIVED
TUESDAY, 11 AUGUST 1998
NCIS FOIA RESPONSE

U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

From: NCIS DEPUTY DIRECTOR ERNIE SIMON
To: 25HOST_DOM:~~27~~HOST_DOM:23HOST [redacted]
Date: Thursday, September 4, 1997 10:04 am
Subject: FITZPATRICK -Reply

[redacted] please continue to get answers. This issue will now be looked at again by JAG since RADM GRAU is gone. G. NAUKE said it was low priority. Not now. Push it up ~~to~~ Something that needs to get done as pracitically and soon as possible. We will not be the reason for the delay. By 1200 Monday, I would like a status of what is left to do and who is suppose to do it. This is not a priority 1 case but it has been open for too long already. Please have your guys work with the field office supervisors on this. Do not rely on the case agent rather I would like [redacted] response.

Thanks, [redacted]

b7C

RECEIVED
TUESDAY, 11 AUGUST 1998
NCIS FOIA RESPONSE

WARNING

THIS DOCUMENT IS THE PROPERTY OF THE NAVAL CRIMINAL INVESTIGATIVE SERVICE
CONTENTS MAY BE DISCLOSED ONLY TO PERSONS WHOSE OFFICIAL DUTIES REQUIRE ACCESS HERETO. CONTENTS MAY NOT BE DISCLOSED TO THE PARTY(S) CONCERNED WITHOUT SPECIFIC

From: NCIS DEPUTY DIRECTOR ERNIE SIMON
To: 27HOST_DOM:25HOST_DOM:SRVHQ00_DOM:DCWAHOST_DOM: SUPERIOR OF S/A RICHARD ALLEN
Date: Friday, September 5, 1997 12:17 pm
Subject: FITZPATRICK -Reply -Reply -Reply -Reply

As far as I know, RICHARD ALLEN picked up the entire history when he interviewed Fitzpatrick. Qucik and dirty, he was a Naval Officer who was court martialed early 90s. Although retained in the Navy, he ultimately was retired at a grade lower than he expected due to the court martial. He blames a JAG officer for all his woes and claims every flag offiers who reviewed his case and took no action is part of a conspiracy, including RADM H.E. "RICK" GRANT (OJAG)

Over the years, he has corresponded with OJAG, NCIS, Congress and everyone else along the way to no avail. Many people in the front office have had contact with him to incude I believe, DOROTHY (DIRECTOR BRANTS SECRETARY) S/A CHUCK BRIANT (?), S/A GERRY NANCE and myself. S/A NANCE finally agreed to OPEN the forgery case you are working. Again, the forgery is only one allegation of many Fitz has made against the Navy. However, if you can prove the forgery, it totally supports his 10 years worth of contentions and makes the NAV look really bad. The front office resurfaced this case to OJAG and they agreed to take another look at it since RADM GRANT has now departed. Fitzpatrick called the front office last week to seek a meeting with the Director. He was fended off but arrangements were made for CAPT PIXA to talk to him next Monday. CAPT PIXA is trying to get the latest on what you're doing so he's prepared for the discussion.

I have some other e-mails I'll forward to you for background. b7c

[redacted]

RECEIVED
TUESDAY, 11 AUGUST 1998
NCIS FOIA RESPONSE

RECEIVED

TUESDAY, 11 AUGUST 1998

NCIS FOIA RESPONSE

[redacted] Please handle. Let me know what the [illegible] are. [redacted]

From: SPECIAL AGENT GERRY W. VANCE
To: [redacted]
Date: Thursday, April 3, 1997 12:00 n
Subject: CASE, I KNOW YOU NEED ANOTHER ONE

THE FOLLOWING IS A PAID POLITICAL ANNOUNCEMENT. THE STORY IS TOO LONG AND TOO DETAILED TO GET INTO, BUT LET ME CUT TO THE CHASE.

PLEASE, IF AN AGENT CAN GIVE A CALL TO MR WALT FITZPATRICK AT (703) 412-2706 (WORK). HE WORKS IN CRYSTAL CITY AT A CONTRACTOR. HIS BOSS IS MICHAEL NORDEEN, USN, CAPT, RET., BROTHER OF THE CAPT NORDEEN WHO WAS MURDERED IN GREECE BY TERRORISTS.

b7C

WALT WILL WANT TO GO INTO DETAIL (GREAT DETAIL) ABOUT HOW HE WAS HOSED BY THE NAVY, HIS CO, HIS ADM, THE CHIEF OF STAFF, AND OF COURSE, TIM ZELLER AND LAWYERS IN GENERAL. TELL THE AGENT NOT TO LET HIM GET OFF ON HIS SAD TALE OF WOE, BECAUSE HE HAS OVER HERE, 5, LARGE, THREE RING BINDERS SO FULL THEY CAN HARDLY CLOSE THAT DETAIL ALL THE INJUSTICES. EVERYTHING HE ALLEGES MAY HAVE HAPPENED, BUT EVEN SO, IT IS FAR BEYOND THE STATUTE OF LIMITATIONS. WHAT OUR ROLE IN THIS MESS IS THE FOLLOWING:

HE CLAIMS THERE IS A DOCUMENT IN HIS DISCHARGE BOARD, SUPPOSEDLY SIGNED BY HIM ADMITTING GUILT, AND HE CLAIMS THE SIGNATURE IS A FORGERY. WHILE THIS TOO IS BEYOND THE STATUTE OF LIMITATIONS, OJAG, WHO DENIED HIS APPEAL OVER HIS COURTS-MARTIAL <u>WILL RECONSIDER</u> HIS APPEAL IF IT CAN BE ESTABLISHED THE DOCUMENT IS A FORGERY. THE ORIGINAL DOCUMENT MAY NO LONGER EXIST, BUT THE BEST WE CAN DO IS CALL HIM AND TAKE A <u>BRIEF</u> SWORN STATEMENT ABOUT THE DOCUMENT NOT BEING HIS AFTER HE IS WARNED THAT FALSE SWEARING IS A FEDERAL OFFENSE, YADA, YADA. IF EXEMPLARS CAN BE TAKEN, GREAT, BUT CHECK WITH THE LAB AND MAKE CERTAIN WHAT IS IN THE FILE CAN BE EXAMINED. THEN SET HIM UP FOR A PG AND CLOSE IT AFTER THE PG. IF HE ADMITS HE LIED AFTER PG (MY OPINION: HE IS TELLING THE TRUTH, NOTHING LIKE THIS COULD BE A DREAM), TALK TO A USA IF YOU WANT, BUT THAT IS UP TO YOU. REMEMBER, WE ONLY WANT TO FORWARD THE PACKAGE, WHEN DONE, TO CAPTAIN AKA AT NAVY OJAG HE WILL TAKE IT FROM THERE. CALL IT A 7X, VICE A CAT 4. IF FOR SOME REASON, HE BACKS OUT OF DOING A SWORN STATEMENT, PLEASE DO AN ONLY AND DOCUMENT IT. THANKS, ANY QUESTIONS PLS. GIVE ME A CALL.

b7C

CC: [redacted]

Called 4/23/97 Message left 1035

Crystal Gateway North
1111 Jeff Davis
#804
Arlington, Va.

Mele Assoc.

4-24-97

Walter Francis Fitzpatrick, III

Wednesday, February 28, 2001

Special Agent George Roberts
Naval Criminal Investigative Service (NCIS)
Puget Sound Field Office
9657 Levin Road; Suite L20
Silverdale, Washington 98383-9406

Special Agent Roberts:

Please arrange meetings with the NCIS case agent(s) responsible for the monitoring and oversight of my case so that I may lodge additional criminal complaints that include naming current Navy Judge Advocate General, Rear Admiral Don Guter. This is in keeping with direction I've been given by you and Special Agent Jules Seawood repeating directives you've received after calling your Washington D.C. Headquarters. These meetings must be scheduled before my 7 March departure to most efficiently manage my time. I'm not going to attempt to put these meetings together while I'm on the road.

I am traveling to Washington D.C. on Wednesday, 7 March to remain through 16 March 2001. I'm unavailable for meetings on 7,13, and 16 March.

You've been unavailable to take any of the nine phone calls I've made since Tuesday, 20 February 2001. You've not returned any phone messages left with receptionists Michelle, Vangie, or Cindy. Special Agent Steve Matteson took a detailed message saying he'd give it to you first thing Thursday morning 22 February, still no response. I can't make in person reports locally because of orders you've received from Washington D.C.

I've told you and S/A Seawood I do not know the name of the NCIS agent(s) in Washington D.C. who have responsibility for this case. There has been no feedback from your Headquarters office about the status of this case for well over 1 year. Evidence I've submitted to S/A Leon Carroll, Jr. has gone into a black hole.

I have new evidence proving a conspiracy and forgery reported since 1992. The conspiracy continues to present day.

Respectfully,

Walter Francis Fitzpatrick III.

825 NE Rimrock Drive, Bremerton, Washington 98311-3142 Phone: 360.377.5108 E-mail: walt@silverlink.net

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

SPECIAL AGENT GEORGE ROBERTS
DEPUTY SPECIAL AGENT IN CHARGE
NAVAL CRIMINAL INVESTIGATIVE SERVICE (NCIS)
PUGET SOUND FIELD OFFICE
9657 LEVIN ROAD, SUITE L-20
SILVERDALE, WA 98383-9406

COMPLETE THIS SECTION ON DELIVERY

A. Received by (*Please Print Clearly*): C. FOLEY
B. Date of Deliv: 3-1

C. Signature: X C. Foley
☐ Agent
☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

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FRI 2 MAR 2001

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☐ Registered ☐ Return Receipt for Merchandise
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4. Restricted Delivery? (*Extra Fee*) ☐ Yes

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WALTER FRANCIS FITZPATRICK, III
825 NE RIMROCK DRIVE
BREMERTON, WASHINGTON
98311-3142

98 FEB LETTER TO S/A GEORGE ROBERTS

98311+3142 NCIS

****
***** ACTIVITY REPORT *****
****

TRANSMISSION OK

TX/RX NO.	0199
CONNECTION TEL	
CONNECTION ID	
START TIME	03/02 08:23
USAGE TIME	00'33
PAGES	1
RESULT	OK

Post-it® Fax Note 7671		Date 2 MAR 01	# of pages ▶ 1
To S/A GEORGE ROBERTS		From W. FITZPATRICK	
Co./Dept. NCIS		Co.	
Phone #		Phone # 360. 377. 5108	
Fax # 360. 396. 7009		~~Fax #~~ wwfitz@silverlink.net	

03/02/2001 08:30 FAX 360 377 5108 W. FITZPATRICK

****
***** ACTIVITY REPORT *****
****

TRANSMISSION OK

TX/RX NO.	0201
CONNECTION TEL	202 433 4922
CONNECTION ID	
START TIME	03/02 08:29
USAGE TIME	00'29
PAGES	1
RESULT	OK

Post-it® Fax Note 7671	Date 2 MAR 01	# of pages ▶ 1
To NCIS S/A C. BRANT	From W. FITZPATRICK	
Co./Dept.	Co.	
Phone #	Phone # 360-377-5108	
Fax # 202-433-4922	Fax # wwrin@silverlink.net	

THE SECRETARY OF THE NAVY
WASHINGTON, D.C. 20350-1000

11 June 1998

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE (FORCE MANAGEMENT POLICY)

FROM: John H. Dalton
Secretary of the Navy
Prepared by: CDR A. C. Stewart, USN, PERS-85, 614-2725

SUBJECT: Navy Officer Nomination - INFORMATION MEMORANDUM

PURPOSE: To provide information regarding the nomination of Lieutenant Commander Timothy W. Zeller, JAGC, USN

DISCUSSION: Allegations which brought into question LCDR Zeller's suitability for promotion to Commander have been resolved. An investigation into this matter by the Navy Criminal Investigative Service (NCIS) and a complete review of the case by the Navy Judge Advocate General have both determined there was no misconduct by LCDR Zeller and the alleged misconduct is determined to be unsubstantiated.

RECOMMENDATION: Recommend LCDR Zeller be confirmed by the Senate for promotion to the grade of Commander.

520-244-2886

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

RECEIVED
MONDAY, 4 OCTOBER 1999

The Honorable Norm Dicks
House of Representatives
Washington, DC 20515-4706

Dear Mr. Dicks:

Thank you for your letter of July 15, 1999, on behalf of Lieutenant Commander Walter Fitzpatrick, USN (Ret.) and for providing the statement of Rear Admiral John W. Bitoff, USN (Ret.).

As you may be aware, Lieutenant Commander Fitzpatrick's concerns have been examined on multiple occasions during the nine years since his conviction, including extensive reviews by the Judge Advocate General and the Chief of Naval Operations. Each separate review has affirmed the propriety of the findings and sentence as approved by the Judge Advocate General pursuant to Article 69(b), Uniform Code of Military Justice.

In response to your letter, I tasked the Judge Advocate General to review the allegations raised by Rear Admiral Bitoff. The Judge Advocate General's review concluded that Rear Admiral Bitoff's letter does not raise any issues or allegations which have not previously been thoroughly considered. This new review again concludes that there was no prejudicial error in this case, and reaffirms that no further action is appropriate.

I understand that Lieutenant Commander Fitzpatrick is disappointed with the outcome in his case, and I regret that we could not provide a favorable response. Please let me know if I may be of further assistance.

Sincerely,

Richard Danzig
Secretary of the Navy

Norm-
I am very much interested by Mike Doorley's 1994 recommendation to Secretary Danzig's other reviews.
Richard

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D.C. 20301-1600

30 MAR 1995

The Honorable Patty Murray
Attn: Ms. Muriel Gibson
2988 Jackson Federal Building
915 Second Street
Seattle, Washington 98174

Dear Senator Murray:

This is in response to your letter to the Secretary of Defense of August 17, 1994, which was forwarded to me because it refers to matters within my areas of responsibility. You asked that we review the circumstances surrounding the court-martial of your constituent, United States Navy Licutenant Commander (LCDR) Walter F. Fitzpatrick, who you believe may have been subjected to retaliation by senior Navy officials. Even though this office ordinarily has no role in the court-martial review process, we have conducted a thorough review of the record of trial and the extensive correspondence generated during the post-trial review. For the reasons set forth below, we believe that LCDR Fitzpatrick was treated fairly, that there was no retaliation against him by Navy officials or unlawful command influence exerted in his case, and that the investigation, prosecution, and appeal of his case were undertaken in compliance with applicable laws and regulations.

This conclusion is premised upon the fact that there was sufficient evidence to refer charges to a special court-martial. The evidence considered at trial clearly established that LCDR Fitzpatrick was derelict in the performance of his duties because he was ultimately responsible for the Morale, Welfare, and Recreation (MWR) fund, that the records of the fund were poorly maintained, and that, despite the fact that LCDR Fitzpatrick was placed on notice of these deficiencies, he ignored them over a period of one year.

We have considered the allegations of retaliation and command influence, and find no evidence to support these claims of impropriety against Lieutenant Zeller, Captain Edwards, and Rear Admiral Bitoff. The record provides the following information with regard to the following individuals:

a. LIEUTENANT ZELLER. Lieutenant Zeller preferred the charges against LCDR Fitzpatrick, and was therefore an "accuser". As an accuser, he was prohibited from providing legal advice to Rear Admiral Bitoff. There is no evidence in the record of trial that indicates that Lieutenant Zeller provided any legal advice to Rear Admiral Bitoff after the charges were referred to trial by court-martial. Lieutenant Zeller did not handle the prosecution of the case, but was critical of the judge advocate assigned to prosecute. Rear Admiral Bitoff took no action regarding this criticism. A Navy judge advocate from the San Francisco Naval Legal Service Office provided advice to the Admiral during the post trial review process.

b. REAR ADMIRAL BITOFF. Rear Admiral Bitoff had no personal interest in the outcome of the proceedings, nor did he at any time improperly direct the outcome of the case.

c. CAPTAIN EDWARDS. Captain Edwards served as the Commanding Officer of the USS MARS for nine days while Captain Nordeen was attending the funeral of his brother. Subsequently Captain Edwards was assigned as Chief of Staff for Combat Logistics Group One. In that role, Captain Edwards appointed the Integrity and Efficiency (I&E) Investigating Officer, and later suggested that an Article 32 investigation be convened; however, that does not make him an accuser. The evidence does not indicate that anything he did in the processing of this case was improper or illegally operated to the prejudice of LCDR Fitzpatrick.

The Chief of Naval Operations has also reviewed this case. He determined that LCDR Fitzpatrick's initial failure to be selected for Commander occurred as a result of a promotion board which was unaware of his court-martial conviction.

In conclusion, our review confirms the decisions made by the Chief of Naval Operations and the Judge Advocate General of the Navy. LCDR Fitzpatrick was treated fairly and not subjected to retaliation or unfair treatment by Navy officials, before or after the trial. LCDR Fitzpatrick's court-martial and all subsequent reviews of the record of trial were accomplished in compliance with the Uniform Code of Military Justice.

I hope that you will find this information helpful.

Sincerely,

Judith Miller

Judith A. Miller

Enclosure

520.244.2886

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

RECEIVED
MONDAY, 4 OCTOBER 1999

The Honorable Norm Dicks
House of Representatives
Washington, DC 20515-4706

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Sincerely,

Richard Danzig
Secretary of the Navy

Norm-
I am very much interested by Mike Doonesbury's 1994 recommendation of Nuremberg's other reviews.
Richard

Wa

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20350-1000

received
MONDAY, 6 JUN 94

MAY 27 1994

The Honorable Norm Dicks
House of Representatives
Washington, D.C. 20515-4706

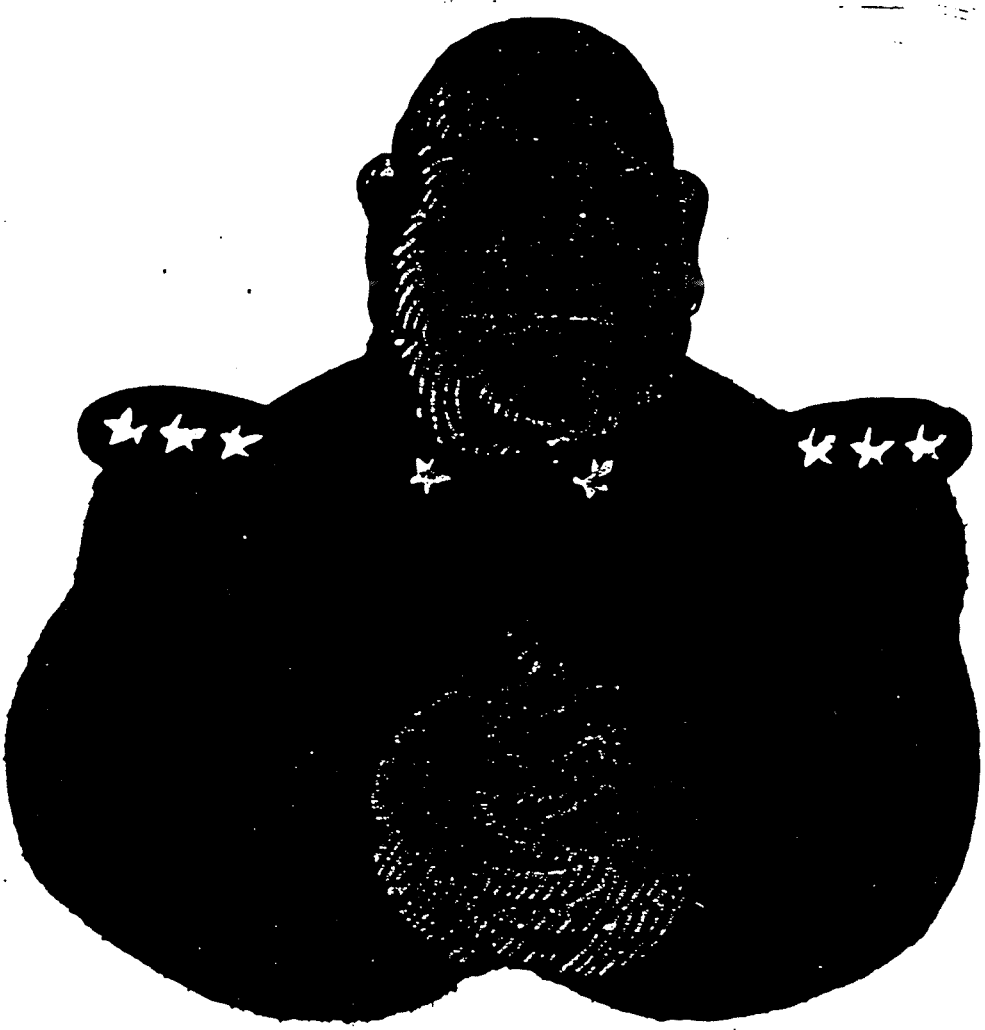
Dear Mr. Dicks:

This is to acknowledge receipt of your letter of April 15, 1994, to the Secretary of the Navy concerning Lieutenant Commander Walter F. Fitzpatrick, U.S. Navy. I am replying for the Secretary.

After carefully reviewing your letter, I have asked Admiral J. M. Boorda, the Chief of Naval Operations, to thoroughly examine the issues you raise in Lieutenant Commander Fitzpatrick's case. I am confident that he will conduct a comprehensive, impartial review and respond to you as soon as possible with his findings.

Sincerely,

FREDERICK F. Y. PANG
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)



MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC

Robert Sherrill

Military Justice Is to Justice as Military Music Is to Music

by Robert Sherrill

HARPER & ROW, PUBLISHERS
NEW YORK, EVANSTON, AND LONDON

Portions of this book have appeared, in different form, in the following publications: the *New York Times, The Nation, Pageant* and *Playboy.*

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FIRST EDITION

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To
Willie Morris
Ronnie Dugger
Robert Hatch
Tom Congdon

3. At All Costs, Discipline

THE MOST DISCOURAGING THING about the "Presidio 27" trials was that they were not unusual. If the certainty of conviction seemed to hang over them from the beginning, this was quite in keeping with the Army's record of getting convictions in 95 percent of all courts-martial. And if the great, melancholy heap of evidence produced by these trials showed injustice by civilian-court standards, it must be mourned not for the blighted lives of the individual defendants so much as for the national threat that all military justice poses.

Chief Justice Warren, usually a defender of the military, warned in 1962:

> Events . . . have required a modification in the traditional theory of the autonomy of military authority. These events can be expressed very simply in numerical terms. A few months after Washington's first inauguration, our army numbered a mere 672 of the 840 authorized by Congress. Today, in dramatic contrast, the situation is this: Our armed forces number two and a half million; every resident male is a potential member of the peacetime armed forces; such service may occupy a minimum of four percent of the adult life of the average American male reaching draft age; reserve obligations extend over ten percent of such a person's life; and veterans are numbered in excess of

> 22,500,000. When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.

In the intervening eight years since Warren gave that warning, the numbers that so frightened him have grown. There are now 26,820,000 veterans and another 3.8 million men are currently in uniform. If they, by their experiences, have developed a tolerance for unconstitutional trial procedures and for unconstitutional and inhumane punishment, it means that the minds of nearly one-half of our male population above the age of eighteen have already to some extent been polluted by militarism, a militarism that is much more dangerous than the economic brainwashing that the military-industrial complex has found so successful.

The Army is quite frank about, and in fact proud of, its mission to condition not only the bodies but the minds of those under its control. In the pamphlet, *The Fort Knox Experiment,* for example, in which the Army praises its methods for "developing the 'whole' man . . . in contrast to just exposing them to information," it says: "The Army today is the only organization in America equipped to conduct this kind of efficient training of our citizenry. The Armed Services have an extraordinary opportunity since they control the time and attention of the trainees 24 hours a day, seven days a week."

One favored military method of conditioning a man into docility is to make trial and punishment not only arbitrary but unpredictable. Refusing to wear a uniform has resulted in sentences ranging from simple discharge to three years in prison. Refusing to obey an order has resulted in sentences ranging from a few weeks to sixteen years. Holding an antiwar bull session while in uniform on base has resulted in everything from an administrative discharge without punishment to ten years in prison and a dishonorable discharge. So long as a serviceman can assure himself, "I have the right to act, within constitutional limits," he is a potential

troublemaker. The less assurance a serviceman has of possessing any practical rights, the more likely will he be to shrink from action beyond that authorized by command.

This is the theory that inspired the Army in the case of Private Joe Miles. A handsome, popular black, Miles had received an award for being an outstanding platoon leader during basic training. But Miles was a political militant, and when he was moved to Fort Jackson, South Carolina, he became a founder of GIs United Against the War in Vietnam. When authorities observed Miles' influence over the other men, they shipped him to Fort Bragg, North Carolina. Hardly breaking stride, he immediately began organizing a new chapter of GIs United at Fort Bragg. There he received, on his written request, permission to distribute copies of the Bill of Rights at a specified time and place. But when he started handing them out, he was arrested for "distribution of unauthorized material." The next day the charges were dropped without explanation; at the same time he was informed that the Army had revoked its permission to distribute leaflets, the revocation being retroactive. A week later he was transferred to a post in northern Alaska.

During 1969 at least half a dozen young men who were members of such organizations as the Progressive Labor Party and the Young Socialist Alliance were drafted into the Army. Before induction they told their draft boards of their membership, but they were taken anyway. Then they were dismissed from the service with less-than-honorable discharges on the grounds that they belonged to subversive organizations.

Are these gross inconsistencies accidental, or are they part of the Army's strategy to keep its personnel off balance, insecure, rattled—and therefore more malleable? The latter. The Army admits it. Lieutenant Colonel Theodore E. Hervey, a high officer in the Pentagon's military personnel office, was asked about the arbitrary variations in the way the Army applies the rules and in the sentences that result from courts-martial. "The varied re-

sponses our commanders make to the dissidents," Hervey replied, "is going to keep them off balance. Whereas if our commanders always attacked at dawn [always applied the same laws the same way] they would know what to expect."

Before he had stopped talking, Colonel Hervey had given a perfect illustration of razzle-dazzle justice. First he said, "We do not control a soldier when he is off duty, off the post and out of uniform—so long as he does not commit a civil offense." When he was reminded that Second Lieutenant Henry Howe, Jr., in the first of the great freedom-of-speech cases arising from the Vietnam conflict, had been sentenced to prison for picketing against the war when he was off duty, off the post and out of uniform, but had committed no civil offense, Colonel Hervey—in the kind of reversal of the field for which the Army is notorious—waved this aside with: "Oh, well, it depends on what activities the soldier is engaged in. Again, we get back to the necessity of taking each individual case on its merits."

Ordinarily, this kind of "conditioning" is applied only to enlisted men and junior officers. But occasionally it happens at the top. After disagreeing wholeheartedly and publicly with the Administration's pursuit of the Vietnam war, and after participating in a peace vigil, Arnold True, a retired admiral who has a high reputation within the Navy as a destroyer tactician, was officially summoned in December, 1966, to the office of Rear Admiral John E. Clark, commandant of the Twelfth Naval District in San Francisco. As he entered the Federal Building, True noticed in the lobby a poster which read: "Let it be clear that this Administration recognizes the value of daring and dissent—that we greet healthy controversy as the hallmark of healthy change." Apparently it was an old poster, for the quote was signed by John F. Kennedy. True remarked upon this poster when he met Admiral Clark and asked if the philosophy had been superseded by another. "No," said Clark, "but it doesn't apply to members of the naval service," and he informed True that, even though he was retired, if

he continued to criticize the Administration's Vietnam policies "the next interview might not be pleasant." True took that to mean that he might be court-martialed. Only the intercession of then Deputy Secretary of Defense Cyrus R. Vance prevented the unpleasantness from occurring, for True refused to shut up.

On the other hand, "taking each individual case on its merits," the military decided there was nothing wrong with Major General Francis S. Greenleaf's public intrusion into Administration policy matters on the Vietnam war. Perhaps that was because Greenleaf, deputy chief of the National Guard Bureau, is *for* the war. In November, 1969, he sent out an official memorandum to all National Guard outfits urging members to "drive their automobiles with the headlights turned on and turn their porch lights on at home" to counteract the November 15 Vietnam Moratorium demonstration, which he called a "betrayal." His memorandum urged Guardsmen not to violently assault the demonstrators even though "to act with restraint in the face of what many of the Guardsmen, I know, believe to be a dishonor to our country requires a patience and understanding that are above and beyond what most Americans are ever asked to perform." The Pentagon decided to ignore that inflammatory note.

The greater the number of men under arms, the narrower the tolerance for policy disagreement and unorthodox behavior and the greater the need for the mental-conditioning effect of courts-martial—or so the military believes. During one year at the peak of World War II, when 12.5 million men and women were in uniform, there were 750,000 courts-martial. (At the end of the war some 45,000 persons who had gone through the military courts were still in prison.) Not long ago one of the judges of the Court of Military Appeals predicted that in the next war possibly 20 million people will be under military law. If the ratio holds, this means that about 1.25 million courts-martial will be held in a boom year of the next international conflict, or quite enough military justice to submerge the Bill of Rights for a time.

It has also been suggested that, in addition to threats and courts-martial, the military uses its stockades and brigs to remold the minds of recalcitrant servicemen. This point was made by Dr. Samuel Nelken, a member of the University of California Medical Center faculty, in his testimony at the Fort Ord portion of the Presidio trials. Referring to the treatment of GI prisoners at the "thought-reform universities" directed by the Chinese Communists during the Korean War, Nelken said: "We believed at that time, and properly, that the brainwashing methods used by the Chinese were cruel and unusual punishment. But we found in the [Presidio] stockade the same methods being used to break prisoners: isolation, confusion, threats of death and taunts about death of fellow prisoners." Of these techniques, he said, none was more important than the element of uncertainy and confusion. "The rules were changed sometimes from week to week, sometimes from day to day; the prisoners were shifted almost daily, so they almost never slept twice in the same place."

One must understand the purpose of military justice. It is not even remotely related to protecting the innocent. The comforting old saw, "Better a hundred guilty escape than one innocent man be punished unjustly," has no place in the military even as a myth. Only in recent years, in fact, has the military establishment even bothered to pretend from time to time that courts-martial result in justice.

Blackstone, England's eminent legal authority of the eighteenth century, charged that the military system of justice was "built upon no settled principles, but is entirely arbitrary in its decisions and is something indulged rather than allowed as law." Colonel W. Winthrop, the most respected nineteenth-century commentator on military affairs in this country, wrote that "Courts-martial are not courts, but are, in fact, simply instrumentalities of the executive power to aid him in properly commanding the army and enforcing discipline therein." This was precisely the opinion also of General

William T. Sherman, who was a lawyer as well as an arsonist. Sherman once put it this way: "The object of the civil law is to create the greatest benefit of all in a peaceful community. The object of military law is to govern armies composed of strong men. An army is an organization of armed men obligated to obey one man." A similarity of spirit is evident in the present-day appraisal given by Senator Sam Ervin, chairman of the Senate's Constitutional Rights Subcommittee. "The primary purpose of the administration of justice in the military services," Ervin said, "is to enforce discipline plus getting rid of people who think they are not capable of contributing to the defense of the country as they should." Subservience or disreputable ouster, no other choice.

From ancient times the mode of military justice has been much the same. Whether one refers to the operation of the Roman *magistri militum,* to Emperor Charles V's penal code of 1532, to the Articles of War of Maximilian II of 1570, to the Articles of War of Free Netherlands twenty years later, to the more sophisticated articles of Gustavus Adolphus of Sweden in 1621, to the British Articles of War and the British Mutiny Articles, or to our own military codes—everything hinges on the whims of military authority. The civilian ideal has always been maximum freedom, restricted by law only so far as is necessary to permit others equal maximum freedom; the military ideal has been just the opposite—maximum restriction by law, with only so much freedom as is necessary to encourage re-enlistment and prevent a harmful slump in morale.

The job of drafting the original military code for this country in 1776 was so distasteful that most members of the Continental Congress committee assigned the task shirked it, and the job was left to John Adams. Adams had such a strange notion of what the new nation stood for that he copied the handiest tyrannical code available—namely, that of the British military, which in turn had been shaped in imitation of some of the sterner European codes. It

was Adams' timorous notion that "nothing short of the Roman and British discipline could possibly save us."

Adams also put together the first Articles for the Government of the Navy, which were essentially the same as Oliver Cromwell's Navy Articles of a hundred years earlier.

Adams himself was surprised that he got by with these harsh and archaic regulations, which were intended, as he says, to produce not justice but discipline. Later he wrote, explaining his goals:

> There was extant, I observed, one system of Articles of War which had carried two empires to the head of mankind, the Roman and the British; for the British Articles of War are only a literal translation of the Roman. It would be vain for us to seek in our own invention or the records of warlike nations of a more complete system of military discipline. I was, therefore, for reporting the British Articles of War *totidem verbis*. . . . So undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause that to this day I scarcely know how it was possible that these articles should have been carried. They were adopted, however, and they have governed our armies with little variation to this day.

He wrote that about a century and a half ago, but it could have been written on the eve of the First World War, for by 1916, when the military code was allegedly revised, not one change had been made in the Roman-English system adopted by the Continental Congress. The 1916 revision simply reshuffled old articles, put them in more modern language and left the fundamentals. Much the same appraisal could be made of the "revisions" of 1806, 1874, 1920 and 1948. In every practical aspect, the American soldier lived under the same code of justice from the beginning of this country until 1950.

Likewise, although the Navy Articles were slightly revised in 1800, no other noteworthy changes in Navy law were made until 1950, and the sailor who fought in World War II was governed in

all judicial matters very much in the same way, and to some extent with the same language, as the British sailor of three centuries earlier.

Adams' Army and Navy Articles were so garishly out of harmony with the Bill of Rights that Secretary of War Henry Knox wrote President Washington in 1789 that governmental propriety "will require that the articles of war be revised and adapted to the Constitution." They never were. The philosophy of discipline at all costs, of the primacy of order and rank, of the need to crush and intimidate men into a narrow mold—this philosophy continued to prevail.

As for physical punishment, the record is just as grim. Adams, disturbed by the extreme barbarity of the flogging in the British military services of that day, deliberately wrote his Continental Articles to be more "humane"—the maximum number of lashes that could be dealt an American serviceman under those articles was a mere one hundred. Yet the articles were barbarous enough. In the 1790s American soldiers were sometimes punished by any one or a combination or all of the following: being whipped, having head and eyebrows shaved, being tarred and feathered, being branded on the forehead. Flogging on board a Navy ship was legal until 1850. Flogging in the Army was permitted off and on until 1861. Branding was not outlawed by statute until 1872, although it had been outlawed by regulation in 1861.

But if legal punishment today is somewhat more civilized, the rules by which military trials in this country are conducted are, despite some refinements, hardly closer to the U.S. Constitution than they were at the beginning. The accused is permitted no bail, no indictment by grand jury, no impartial judge, no due process—all supposedly guaranteed by the Bill of Rights. As for that most elusive but most central theme of constitutional justice, "due process," the U.S. Supreme Court—which has done virtually nothing over the years to extend constitutional protections to the

serviceman—issued one of its most cynical rulings in 1911, to the effect that, "To those in the military or naval service of the United States the military law is due process." What the military wants to do, it does; and that is the law. This is the tradition.

The shaky efforts to construct an indigenously American code of justice, with at least a passing relationship to the Constitution, have all failed. No really serious demand for reform was made by the public or by Congress until after World War I. Four million Americans went into uniform during that war, and many of them resented the stern and sometimes brutal justice of their new life. Nor were they reticent about expressing their anguish and disgust in letters to their Congressmen. One Congressman, Dan V. Stephens, told the House of Representatives on March 3, 1919, "It is conceded on all sides that courts-martial procedure during the present war has been atrociously harsh, brutal, and unjust. There is hardly a Member of Congress who has not directly received convincing evidence of that fact through innumerable justified complaints from his constituency, establishing beyond all doubt that courts-martial are not worthy of the name of courts."

World War I produced such cases as these: A recruit refused to surrender his cigarettes to an officer and was sentenced to twenty years at hard labor. For being "disrespectful" to an officer, a soldier received five years in prison. A young soldier, for being AWOL twenty-seven days, was sentenced to forty years in prison. Another AWOL soldier was sentenced to life in prison. Two young soldiers, having had no sleep for five days, dozed on guard duty and were sentenced to be shot. Petty-larceny cases sometimes ended in sentences of ten years and more. Thirteen Negro soldiers were convicted of murder and executed two days later—four months before their "appeals" were processed in Washington.

These may have been exceptionally harsh sentences, but there were so many thousands of other sentences almost as harsh that the returning doughboys, thoroughly disenchanted, demanded that

Congress reform the military code of justice. However, the 1920 Articles of War that resulted from this demand were in fact no reform at all and actually perpetuated the old system. The best description of military justice during World War I was written in the *Cornell Law Review* of November, 1919, by the courageous and persistent S. A. Ansell. Ansell was Acting Judge Advocate General of the Army during the war, and, because he was outspokenly in favor of reform, he was demoted from brigadier general to lieutenant colonel after it. "The existing system of military justice," wrote Ansell,

> is un-American, having come to us by inheritance and rather witless adoption out of a system of government which we regard as fundamentally intolerable; it is archaic, belonging as it does to an age when armies were but bodies of armed retainers and bands of mercenaries; it is a system arising out of and regulated by the mere power of Military Command rather than Law; it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from the Army that insists upon maintaining it. . . . The system may well be said to be a lawless system. It is not a code of law; it is not buttressed in law, nor are correct legal conclusions its objective. The agencies applying it are not courts, their proceedings are not regulated by law. The system sets up and recognizes no legal standard, and has no place for lawyers and judges. Whatever is done with the final approval of the convening commander is done finally beyond all earthly power of correction.

An even more piquant, but no less accurate, description of military justice in that era was given in the *Minnesota Law Review* in 1918:

> A court-martial is merely an agency "appointed" by the commanding officer for the training of the soldiers in discipline, and though one is sentenced by such a tribunal to death or to a long term of imprisonment, he is not deprived of life or liberty or in fact punished at all, but merely trained and educated and disciplined. A criminal sentence in the Army, in short, serves the same purpose as the manual of arms or the setting up exercises.

This same "lawless" quality was observed through World War II. A 1943 text used by the Judge Advocate General's School at the University of Michigan conceded the point: "Strictly speaking, a court-martial is not a court at all in the full sense of the term but is simply an instrumentality of the executive power of the President for the enforcement of discipline in the armed forces." And in 1946 an article in the *Wisconsin Law Review* summed up the system of justice that had destroyed the lives of thousands of GIs in World War II: "The system is so flexible that it is almost entirely up to the commander to determine not only who shall be tried, for what offense, and by what court but also what the result shall be in each case."

To make sure that the commanding officer could work his will upon justice, it was commonplace in World War II for courts-martial panels to administer stupefyingly heavy sentences and then leave it up to "the Old Man" to cut them down to whatever dimensions and shape he envisioned justice to be. Thus the general courts-martial at Norfolk automatically administered fifteen-year sentences in each of thirty-seven cases, which gave the admiral who was the courts-martial convening authority plenty of margin; and he, in turn, in each case reduced the sentence to three years. These were no acts of mercy; they were, in fact, the first real sentences given to the victims, the fifteen-year sentences being only proxies which the admiral—without hearing testimony or reading the trial record—could treat as he chose.

After World War II, so unhappy were the GIs who had experienced military justice that the American Bar Association, at the reluctant request of the War Department, set up a study committee headed by Arthur T. Vanderbilt, dean of the New York University School of Law. The committee in due time reported what was already quite obvious: that military commanders were rigging

their juries, rigging sentences and disregarding all pretense of formal procedure. Other study groups were similarly critical. And, since Defense Secretary Forrestal wanted to unify the services anyway, this was used as a good excuse to write a reformed uniform code of justice under which all the services would operate.

By previous standards, the 1950 Uniform Code of Military Justice was indeed a major step forward. For the first time in our history a military court of appeals was set up; for the first time in our history a qualified lawyer was required for the defendant in all general courts-martial; for the first time a certified law officer (judge) was required for all general courts-martial. And, most important, the new code included an article (No. 37) which prohibited the commanding officer from exerting his influence on the conduct or outcome of the trial.

Regrettably, the paper reforms of 1950 have not resulted in much reform in practice. Fearful that anarchy would result from the slightest easing of disciplinary justice (just as military authorities once feared anarchy would result from the abolition of the lash), the commanders have quietly transferred the evils of the old Articles of War to the adminstration of the UCMJ. The grossest of the surviving defects are these:

Vagueness of Law. It is here, in the wording of the UCMJ, that the overriding element of arbitrariness begins. One of the honored boasts of our politicians is that "This is a government of laws, not of men"—meaning that there must be a set of rules (the Constitution and the statutes derived from it) by which the governors as well as the governed agree to abide, and that the people in power can't just make up new rules as they go along. It means, too, that the law must be clear enough to the governed that they can be reasonably sure that they are obeying it and reasonably aware of their violations. But the military system of justice undercuts this proud old conception, being in fact set up consciously to give the local commanders the widest possible application of imperiousness. For example, Article 89—"Disrespect Towards a Superior

Officer"—is defined in the *Manual for Courts-Martial* as including "marked disdain, indifference, insolence, impertinence, undue familiarity, and other rudeness"—which could mean any number of things, depending on the depth of spleen of the accusing officer. So could Article 133—"Conduct Unbecoming an Officer and a Gentleman." As for Article 134—"The General Article" (which, it is said, includes *fifty different offenses,* ranging from abusing public animals to wearing unauthorized insignia)—it is a singular twist of justice.*

Edward F. Sherman, a professor at Indiana University Law School and an expert in military law, and Melvin Wulf, legal director of the ACLU, are trying to free two black Marines who were put in prison (with three- and four-year sentences) for making "disloyal" statements—supposedly a violation of Article 134. "Disloyalty" is a typically vague charge characteristic of military justice. The *Manual for Courts-Martial* defines disloyalty as "praising the enemy, attacking the war aims of the United States, or denouncing our form of government."

Sherman and Wulf reasonably ask in their brief:

> Who is the enemy? . . . What constitutes praise? Can one applaud the peace efforts of the Soviet Union in the India-Pakistan dispute? Can he praise the educational programs of Premier Castro? Can he comment favorably on the tenacity of Ho Chi Minh? As for "attacking the war aims of the United States," is it an attack on the war aims of the U.S. to call for escalation of the war? To urge that we pull out of Vietnam? Can a serviceman be sure what the war aims of the United States are? "Denouncing our form of government" is similarly unhelpful. What does it mean? Can a soldier advocate abolition of the electoral college system established in the Constitution? Can a serviceman urge taking away constitutional powers of the Supreme Court or denounce the school desegregation decision? What elements are so basic

* Articles 133 and 134 will be discussed and amply illustrated in the chapters dealing with the case of Howard Levy (page 124) and the case of Henry Howe (page 178).

to our "form of government" that they cannot be denounced—federalism, capitalism, democracy, welfare state programs, the draft?

Command Influence. The corruption of the military system of justice runs through every layer, but it starts at the top, where the whims of the commandants flutter like pigeons over a courtyard. General courts-martial are not convened unless the commanding officer believes the defendant is guilty; and since the officers who make up the trial panel know that the commandant is of this persuasion—and because they must often look to the commandant for promotion—they will most often come through with the verdict he wants. It is, in fact, that simple.

The commanding officer is not supposed to interfere with the process of military justice, but it is virtually impossible for him to refrain from doing so even if he wanted to. Most commanding officers certainly do not want to refrain from controlling the court, for they believe it is their best way to exert control over their troops.

The commander decides when and whom to prosecute. He controls the investigation of the charges and can (as was seen in the Presidio case) overrule the officer who conducted the preliminary investigation. The commander can personally select the jury members from among officers who are beholden to him for favors, promotions and other career opportunities; he also picks the prosecuting officers and the military defense attorneys. Although the staff judge advocate is supposed to be a neutral administrator of portions of the trial procedure, he is in fact the commanding officer's attorney and, as such, represents the commander's wishes in all that he does. The staff judge advocate is supposed to review the pretrial evidence impartially, and he is also supposed to review the trial record and the sentence to see if all was conducted in a legal manner and on the basis of his study make recommendations to the commander. In theory the SJA is a referee who has the

advantage of being at some distance from the court play and therefore better able to observe it objectively. But in practice the SJA—who deliberates daily with the commander upon the needs of discipline—acts with the same subservience as any attorney on the payroll of a powerful, hard-driving executive.

Not until 1969 was the *Manual for Courts-Martial* amended to actually outlaw a military commander's giving the court members "pretrial orientation"—which is a euphemism for letting the court members know which way he wants their verdicts to go. Whether or not the practice will be really outlawed is yet to be seen. A commander who violates this can only be court-martialed, and where is the higher officer who will hold him officially accountable for doing what virtually all officers believe a necessity—ruling their ranks with complete control?

Senator Charles Goodell of New York, who once served as an attorney in the Judge Advocate General's office, knows about these command pressures. He once defended a soldier charged with desertion and won an acquittal for his client. "Well, this created a major controversy," he recalled, because the verdict went against the base commandant's wishes. "Several of the panel were transferred, the judge advocate was called on the carpet—and I was reassigned to prosecution."

Another military lawyer involved in that same case was Irving Peskoe, now an attorney in Homestead, Florida, and a colonel in the Air Force Reserve. Peskoe once again was caught in the squeeze of command pressure in the spring of 1969, when Senior Master Sergeant John H. Smith, who had returned from a tour of duty in Vietnam only a month earlier and was stationed at Homestead Air Force Base, was ordered back to Vietnam to stand trial on charges that he had paid only $17 for $60 worth of goods obtained at a base PX. The charges against him were pressed by a native Vietnamese girl who was later fired by the PX. It was a matter of Sergeant Smith's word against hers. Smith was a veteran

of twenty-one years with the Air Force; he was married and the father of two boys. He had a clean record.

Before Sergeant Smith left Vietnam he had asked his superior officers whether, considering the fact that this charge was hanging over him, perhaps he shouldn't stay on until it was cleared up. No, no, no, go on home, they said. And then, a month later in America, he was being hailed back to a Vietnam court-martial. It was at this point that attorney Peskoe entered the case. He attempted to obtain an injunction delaying the trial, arguing (among other things) that the witnesses Smith needed for his defense had since been transferred back to the States. Peskoe did not get the injunction, but he got plenty of front-page publicity. As one newspaper pointed out, "The civil action Sgt. Smith instituted to stop the order, the court-martial, loss in job performance [Smith was a supervisor of aircraft maintenance with the 4331st Tactical Fighter Wing], attorney's fees, transportation for the 12,000 mile round-trip and other costs may make the total bill as high as $20,000."

Smith was found innocent, came back to Homestead and went to work again, and the only thing that hung on was the bad odor of it all—that and the irritation of Colonel Wiltz P. Segura, top-ranking Air Force officer at Homestead. The day after Peskoe tried to get an injunction on Sergeant Smith's behalf, a letter came from Washington authorizing a reserve position for Peskoe on the judge advocate's staff at Homestead. Segura objected. He wanted no lawyers on his base who bucked his wishes. He wrote the Pentagon demanding that Peskoe be kept away from Homestead. So he was. Peskoe now has to travel two hundred miles to do his reserve officer duty, at Patrick Air Force Base, whereas if he had not offended the base commander by his independence, he could do his reserve duty five miles from home.

In the summer of 1969, Lieutenant Thomas McGuire, twenty-five, of Niles, Michigan, a lawyer, charged that the highest officers

of the 6th Cavalry at Fort Meade, Maryland, were demanding that courts-martial turn in more convictions and stiffer sentences, and that these officers were plaguing defense attorneys with veiled threats and unveiled hindrances. The next quarterly evaluation of Lieutenant McGuire's performance—a routine report made on every officer by his superiors; usually the evaluations are full of praise—noted that McGuire was immature, irresponsible and possibly even disloyal. The next thing McGuire knew, he was in the Panama Canal Zone training for jungle warfare, a stopover on his way to Vietnam. McGuire claimed that his performance evaluation was simply his superiors' way of getting revenge for his criticism of their meddling in the military trial procedures. An Army review board agreed with him and ordered the evaluation removed from his record. McGuire also asked why, if the Army considered him immature, irresponsible and possibly disloyal, it would want to trust him to lead troops at the front. The question was never answered.

As a rule, the commanders try to show at least a touch of reticence when they are communicating their wishes. Not many are as outspoken as Rear Admiral T. Ruddock, Jr., U.S. Navy Retired, who once served as president and permanent member of the Twelfth Naval District's court. He let the other officers of the court understand that he thought it "would be very foolish" of them not to render such verdicts as would enable them to obtain good reports from him, although he "certainly" did not want them to think he was trying to influence their decisions. As the Court of Military Appeals later described the old sea dog's routine: "Every time a new court convened, Admiral Ruddock conducted a short period of indoctrination. He 'usually' informed new members that the Table of Maximum Punishments provides 'tentative guidance.' He stated that he was familiar with the presumption of innocence but did not recognize it as a constitutional right because he believed that persons in the military service had no constitutional rights.

[One officer] who had served intermittently as law officer for the court had heard Admiral Ruddock say at various times that 'anyone sent up here for trial must be guilty of something.' "

In the most notorious recent case of command influence, Major General Thomas Lipscomb, commanding general at Fort Leonard Wood, Missouri, in the mid-1960s, laid such a heavy hand on the courts-martial under his authority that the military board of review in Washington eventually reversed the verdicts or modified the sentences (where there were guilty pleas) in ninety-three cases. So flagrantly did General Lipscomb enjoy his authority that he became the only commander on record even to be investigated for command influence. He was accused of appointing as jurors only senior officers whose careers depended on his favor; of ordering the fort's legal officer to lecture court-martial juries on the need for discipline; of threatening a defense lawyer who challenged one of Lipscomb's hand-picked jurors; and of reprimanding court-martial officers for handing down sentences that were too light for his taste. The Army looked over the evidence and decided General Lipscomb had done nothing out of line. And indeed, according to military tradition, he had not.

One of the civilian defense counsels in the Presidio trials, Joseph Manzella (a former Navy officer), did not endear himself to the military judge when he addressed himself to this truism: "As your honor is well aware, one of the greatest evils of the military tribunals is command influence, which is the most serious threat to justice in the military court-martial. As of this date, only one commanding officer has been investigated for it, and after a lengthy hearing nothing was done about it. Now, your honor is quite aware that there is no direct influence from the command or convening authority directly to the court [Manzella's one distorted effort at either politeness or sarcasm], but in the *sub rosa* method, through his aides who carry this word via the Officers' Club and their other social gatherings, it is quite apparent that the word

permeates down as to this desire, where subconsciously all the members of the court really want to do what they feel the 'Old Man' would like done in this situation."

And then Manzella, having somehow up to that moment escaped a sword thrust, plunged on to the next most obvious feature of that trial and all military trials: "For one thing, I think that this is nothing more than a stacked jury. . . ."

Which brings us to that natural auxiliary to command influence.

The Stacked Jury. In a civilian court the defense attorney seeks to obtain a varied jury—a plumber, a banker, a schoolteacher, a bus driver, etc.—a cross-section of society that will see a question from different viewpoints and thus may very likely disagree. That is how hung juries are made. But in military court, as ACLU attorney Paul Halvonik learned so very well in the Presidio proceedings, "you are not only stuck with a jury that's homogeneous, but one that is homogeneously agreed on the one basic issue in the trial—whether the most important thing in this world is obedience and whether you can shaft somebody completely if you feel they disobeyed or didn't act properly. So you've got the worst possible jury that you could possibly have."

If that is the whimper of a losing attorney, it must be counted a general one, for virtually every defense counsel who goes up against a military court has the same complaint. The same lack of variety, the same overwhelming homogeneous quality, was noted in the first trial of Private Zaino by his attorney, Manzella, the opening of whose blunt summation has already been given, and which continued: "Every member of this court is currently in the infantry or has been in the infantry. Mostly all have the Combat Infantryman's Badge, and with the star indicating that they were in combat in two wars. And how this group, primarily of all infantry officers, was selected—now, I realize that Fort Lewis is an infantry based camp, but I think this is not a proper, random selection, but nothing more than the convening authority's attempt to stack this

jury. I would like to know why the general saw fit to select a group of officers from the Infantry Training Command rather than from a true representation of all the officers within the Sixth Army." (To which the trial judge responded: "We are not going into that any further.")

The U.S. Constitution guarantees unbiased jurors. The Military Code does not. Bearing in mind that a central question of the Presidio trials was to be the propriety of holding protest demonstrations, consider these responses by a member of the panel from which one of the early Presidio jurors was being selected:

DEFENSE ATTORNEY: Colonel, do you believe in the right to demonstrate?
COLONEL: No.
ATTORNEY: Maybe you didn't understand my question. Let's forget about the Army for a moment. Do you believe that civilians have the right to express their views in peaceful demonstrations in support or in opposition to an official policy?
COLONEL: No.
MILITARY JUDGE (*interrupting*): Colonel, you know the Constitution provides that right.
COLONEL: I don't care.
ATTORNEY: OK, we'll challenge him for bias.

In a civilian court a juror will be knocked off the panel by the judge if the defense attorney can show that he is biased against his client. But not until late 1969 did the military judge have anything to say about it; the question of a prospective juror's bias was left up to *a vote of the other members of the jury.** When the above colonel was challenged for bias, the officers on the jury voted to accept their brother as unbiased and fit to serve.

From the selecting process of another Presidio jury there came these other responses: One lieutenant colonel said that parades and demonstrations against the war in Vietnam "annoyed" him,

* Judge Homer Ferguson of the Court of Military Appeals, commenting on this unique practice, admitted, "I think we have had cases where even the man himself [the challenged juror] voted on whether he should be excused."

but he wouldn't let that keep him from giving a fair decision to somebody charged with antiwar demonstrating. Another lieutenant colonel said he felt the reports in the press that called the sit-down a mutiny were accurate—but he hadn't formed any opinion about the case. A colonel on the panel who was in the ROTC Division of the Sixth Army complained that there were "incidents that occur on campuses throughout this Army area almost on a daily basis" which had "an adverse effect" on his ROTC, but he said he wouldn't allow that to prejudice him against sit-downers and protesters. And he said he didn't have anything against the ACLU, although he had found in his experience with them that ACLU attorneys were "misinformed, in a frequency of the cases I got involved in."

Although the mutiny arrests brought about the most explosive publicity in the Presidio's history, a colonel said he had read only the headlines mentioning the affair and that these had not interested him enough to make him read further. Also—or so he claimed—nobody who worked in his office at the Presidio was much interested either.

Q: You say you heard it [discussed] perhaps in office talk. Can you recall what you heard in the office talk, if you recall?
COLONEL: Yes. "Have you seen the morning paper?" "Yes, I seen [*sic*] the morning paper." And some person would mention, "Well, I seen [*sic*] they had trouble up in the stockade"—but not anything in detail.

This colonel also had a low opinion of demonstrations, although he stopped short of calling them criminal.

Q: How do you feel about demonstration and protest?
COLONEL: I'm wondering who's paying these people who can afford this time to go out and do it. . . .
Q: Do you feel that a protest is ever a legal means of expressing a grievance?
COLONEL: I can only presume it is. I would have to say that I feel

that a protest is *not necessarily an illegal* means of expressing a grievance. That would be the best answer I could give you on that one. [Emphasis added.]

Much of the defense's argument would, as has been seen, rest on the fact that the stockade was run in an oppressive, sloppy, perverse way and that therefore the group of protesters had reasonable complaints to make, even if they chose the wrong way to make them. But the defense could hope for little attention from this colonel, who had been an inspector general from 1964 to 1966, visiting prisoners in stockades and listening to thousands of similar complaints.

Q: During this two-year period, did you have the opportunity to check on the complaints or grievances of people who were residing in the stockades as prisoners?
COLONEL: Yes.
Q: Did you find that any of those complaints were justified?
COLONEL: Yes, I'm sure there must have been some. In fact, I know—I recall one.

Why didn't attorney Halvonik challenge these colonels and try to have them tossed off the jury? "I didn't make any challenges for cause," he explained, "because it's insane to do it. I never challenge for cause in a military trial. All it does is set the rest of the panel against you because they think you have insulted a brother officer."

The Defense's Obstacle Course. Of all the Army's petty meannesses in the Presidio trials, none matched its refusal to take verbatim transcripts of the preliminary hearings and to supply the defense in the later trials with transcripts of the earlier trial records. Thus the defense was deprived of a way of determining if prosecution witnesses were lying or were changing their testimony. The denial of verbatim transcripts was done in an especially shabby way, for the defense attorneys had been assured that such transcripts were being taken and then they discovered—too late to set

up tape recorders of their own or to hire court reporters—that the Army had secretly rescinded the order for verbatim reporting and was taking the record only in paraphrase. To defense protests, the Army replied that it could not afford to hire the necessary secretaries and that the base had no tape recorders available.

Records needed by defense attorneys are sometimes destroyed or "lost" by government agents (as will be seen in the Levy trial, Chapter 4). Witnesses for the defense are sometimes threatened with court-martial if they testify (as happened at the preliminary hearing for the "Fort Jackson Eight"). There is hardly anything that military investigators who gather evidence for the prosecution will not do, or have not done—including the planting of fingerprints. In one case, a suspect's family was locked in a room for thirteen hours while Air Force investigators searched for smuggling clues. About 40 percent of the cases reversed by the Court of Military Appeals are for improper, or illegal, investigations; but just as commanders are never prosecuted for jury-tampering, military investigators are never punished for illegal procedures.

Typical of the highhandedness employed quite successfully by the military was the case of Captain Joseph P. Kauffman. He may or may not have been guilty of conspiring to sell information to the East Germans (a court-martial in 1962 said he was guilty), but the method used to convict him hardly spoke well for the democracy he was accused of betraying. He was put on temporary duty at Travis Air Force Base, California, to get him away from his home in Atwater, California, so that the Air Force investigators could ransack his home—without a search warrant—on three occasions. Then his room was wired so that Army officials could record his conversations with his attorney. He was packed off to Wiesbaden, Germany, for trial, too far away for his civilian attorney to help him and where the jury panel that judged his fate would be composed of career officers who lived under daily bombardment of propaganda about the horrors of the Communist East. To top everything else, he was not permitted to face his chief

accuser, a defector from East Germany, who was allowed to wear a disguise while in court.

To obtain confessions that would implicate some of the prisoners in the Fort Dix rioting of June 5, 1969, the Army's Criminal Intelligence Division reportedly used bribe offers and threats. Determined to convict Private Terry Klug of inciting the riot (he was acquitted at his trial), the CID selected several prisoners and put the screws to them. One was Private Miguel Morralles, who had been in the stockade a long time and had expected to be released in three weeks. One of the agents said to Morralles: "So you think you're getting out. We don't think so. We think you were the one who started the riot. Think about it." Three days later Morralles signed a statement implicating Klug. But at Klug's trial Morralles braced up and told how the statement was obtained from him. He said the CID had warned him it was the only way he could get out of jail on time. "Klug, Klug, Klug, they kept asking questions about Klug," Morralles testified. "They put his name in my mouth." Another who was forced to name Klug in a statement was Private James Eastman, nineteen, who has such claustrophobia ("I can't stand small areas, I lose control") that a year earlier he had had to be taken from jail and put in the more spacious confines of Marlboro State Mental Hospital. He was a prime candidate for CID treatment, and with the threat of solitary confinement hanging over him, he too signed.

The military attorneys appointed to help defendants in general courts-martial* sometimes are of great integrity and courage. But

* There are three types of courts: summary, special and general. Theoretically the defendant can be represented by an attorney at any level of court, but actually no serviceman ever gets a counsel for a summary court-martial, where the court consists of one officer who acts simultaneously as judge, jury, prosecuting and defense attorney, and where one month is the longest jail sentence that can be imposed. It sounds mild, but one must remember that a summary court-martial still goes on the serviceman's record as a federal trial, and the idea that a man's record can be smeared permanently at the whim of one officer is something that even most members of the Judge Advocate General's office will admit is a shame and an abomination. Only enlisted men can be tried by summary courts, of which about 25,000 are held each year.

And only enlisted men get to experience a special court-martial, where sentences of up to six months in prison and a bad-conduct discharge can be imposed (about 75,000 a year, lately). Punishment is swift and sure. For example, a soldier who worked in the special processing detachment at Fort Hood, Texas, disclosed that it is commonplace there for trial records to be typed up in advance, complete with guilty verdicts and six-month sentences. Heretofore only about 5 percent of the accused in special courts-martial were appointed military counsel, and as often as not these "defense attorneys" were not competent. A U.S. District Court in Utah threw out the special court-martial conviction of a private in 1965 when it discovered that one of the man's defense attorneys, who ordinarily worked as a veterinarian, had learned everything he knew about military law in a two-day crash course and that his other "counsel" had learned his military law in a college ROTC course. The District Court discovered that "Their advice to the accused on various legal matters was based upon *consultation with the officer who had drawn up the charges.*" (Emphasis added.) The private had requested qualified attorneys to represent him, but the authorities said there was none available; furthermore, the District Court disclosed, the private was warned "not to raise any question with regard to his legal representation with the convening authority or before the court-martial."

Reform, however, may have arrived. A statute that went into effect in 1969 provides that "the accused must be afforded the right to be defended by qualified lawyer counsel at special courts-martial unless the commander certifies one cannot be obtained."

The general court-martial, which is the kind virtually all of the cases discussed in this book were assigned to, handles the most serious breaches of military law. It is the only court-martial that can sentence a man to death, and it is the only court-martial that can hand down a dishonorable discharge. Justice is dispensed by a military judge and a jury of at least five military personnel, usually officers. The defendant is guaranteed trained legal counsel.

whether military or civilian, the defense attorneys in these proceedings are under critical handicaps. They have no subpoena powers of their own, little freedom of cross-examination, no power to call military witnesses. They must make their requests for witnesses *through the prosecution,* and if the prosecution doesn't think the witnesses should be called, they aren't.

In one set of the Presidio trials, the defense attorneys wanted to call General Larsen, commanding general of the Sixth Army, to wring from him testimony that would show that the jury panel set up by him guaranteed that no officer below a certain rank, and no noncommissioned officer with less than eighteen years' service (it

is said the old noncoms are the harshest jurors), would sit on the jury. When the request for Larsen was made, the military judge threw the press out of the courtroom and upbraided the defense lawyers for trying to "embarrass, harass and intimidate the Army."

In that same trial (it was the trial in which Yost was a defendant) the defense wanted to call Dr. Joseph Katz of Stanford University, one of the foremost behavioral psychologists in the country, who was prepared to testify that the men were not mutineers but were in fact supplicants, like children who do something nasty to attract the attention of their parents and thereby tacitly beg their parents for protection from themselves as well as from others. Defense attorney David Lowe explained, "We had Dr. Katz examine the transcripts of other trial proceedings, documents, statements by the Army about physical conditions, the psychological records and tests of all the twenty-seven who were tested. These are voluminous documents. We told the Army that Dr. Katz would testify. And they refused to let us call him. The Army said he hadn't actually interviewed the accused and therefore the Army wouldn't pay his way. So I volunteered to pay the transportation and fees of all such experts (I would have had to raise the money). The Army denied our request. The Army's prosecutor and the military judge have the power to say who we bring and who we don't bring."

Civilian and military defense attorneys who are aggressive on behalf of their clients are often threatened. Lowe was warned that if he didn't stop his unorthodox tactics—such as asking to question General Larsen—military authorities were prepared to have him reprimanded by his state bar. ("I encouraged them to go right ahead," Lowe recalled. "I said, swell, because then we'd have some hearings the Army would *really* be interested in.") Attorney Terence Hallinan says he was told that the Army was gathering evidence in an effort to have him charged with fomenting the mutiny. But the military defense attorneys have had to withstand the most intense pressure. Captain Emmitt Yeary was twice

threatened with court-martial, once because he spoke to the press (his remarks were taped by an Army investigator) and once because he stayed up so late one night preparing his defense case that he was a few minutes late the next morning reporting to his Presidio office. Captain Brendan Sullivan, another outstanding defense attorney, told Lowe that before the trials began he was warned by a superior officer that he would be under surveillance constantly. The officer reportedly warned Sullivan, "I've got men who can look through a keyhole with both eyes." On another occasion the Army let Sullivan know its suspicions of him by requiring the defendants to strip and be searched after Sullivan and another lawyer had left them.

Such dealings inhibit justice in the services more than civilians might think. It is a rare military lawyer who has the courage to question the system, knowing that transfers to bleak outposts, loss of promotion and mysterious difficulties can come his way if he does. Not many will continue to speak out as Captain Sullivan did. Almost immediately after his part in the trials had ended, he was ordered to Vietnam without the ninety-day notice or thirty-day leave that officers usually get before going. He received his orders one day short of the deadline after which he would have been ineligible for Vietnam service. (The order was later rescinded because of public and Congressional protests; the Army tried to pretend it was an ordinary transfer, but they could not explain how it was that of Sullivan's graduating class of one hundred officers he was the only one to receive orders to Vietnam.)

Far from intimidated by it all, Sullivan went right on talking frankly to the press, scoffing at the military-court system as little more than a travesty of the civilian system of justice. "We have in the courts in this country the principle that we have the adversary system, with one lawyer fighting against another, using every tool within his possession, bounded only by ethical considerations to help his client," Sullivan said at one of his press conferences. "Do we have that in the military? I say we do not because the defense

attorneys do not have the power, or the will, or the freedom, to go ahead and use every legitimate tool on behalf of their client. You're a captain, you're not a lawyer in there [in the military courtroom]. Sometimes you get the impression you are fighting the whole Army."

To discuss military justice only in terms of courts-martial, however, is to ignore perhaps the most questionable procedure of them all—the administrative board. It is the smoothest way to achieve the ouster of unwanted men from the service. In fact, it is such a handy maneuver (making absolutely no demands on the military's marginal sense of fair play) that administrative discharges have become very popular with commanders in the past twenty years. In 1968* alone nearly eleven thousand men were removed from the services with "undesirable" administrative discharges based on what military authorities conceived to be misconduct or unfitness.

The categories of misconduct range from AWOL to "other good and sufficient reasons," but by far the most common reason for giving a man an undesirable discharge for misconduct is that he has been convicted in a civil court. This means that he is punished twice for the same offense: once, perhaps lightly, by the civil court and a second time, with extreme weight, by the military, since the undesirable discharge will stick with him for life and will often come between him and the job he wants. Judges of the Court of Military Appeals, including even the most conservative member, Judge Robert Quinn, have often stated their suspicions that the administrative discharge is used to get around the difficulties of proving a serviceman's guilt in a fair trial. But they have been expressing their suspicions for more than a decade, with no resulting reform that can be measured.

* Although this material was prepared in the final days of 1969, no later figures could be obtained from the Pentagon, which guards its information closely, especially if it believes the information will be used in a critical way.

The criterion in the military services for judging the fairness of dismissing a man from the service without a trial and with a less-than-honorable discharge can be summed in one word: convenience. The reputation of the individual is held to be secondary to the convenience of the services. If this means convicting a man on hearsay evidence or on unsworn testimony or on a fabric of rumor, nevertheless it is done. The late Judge Paul J. Kilday of the Court of Military Appeals expressed this point of view quite candidly:

> Here you have men who are convicted administratively by being given discharges. . . . But then you have the practical situation. If you have a fellow aboard ship who pretty nearly everybody on the ship figures is a homosexual and you have everybody upset, or you have a barracks thief who is such a good barracks thief that you have not been able to catch him with the goods, but you have got it reasoned down that he is the only one who could be doing it, what are you going to do, keep the homo aboard ship or send him to another one? Are you going to keep the barracks thief there?

The military's answer to those questions has been: No, even though we haven't enough evidence to support a court-martial, we will get rid of the man for the good of the service. It may ruin him, but it will help us.

The administrative-discharge process includes no rules of evidence, no due-process guarantees, no statute of limitations on the evidence that can be used. The defendant has no subpoena powers, no right to confront his accusers. A defendant can find himself facing rumors and indiscretions that are fifteen or twenty years old and that he can scarcely remember the origins of, much less construct a defense against.

A Navy man of fourteen years' service was discharged on the basis of a homosexual charge that was ten years old and which the Navy had known about all along and despite which it had twice reenlisted him. A major was dismissed from the Army with an administrative discharge (he asked for a court-martial but was

refused) because some unidentified foreign nationals accused him of homosexual conduct; when he asked the field board to present him with the evidence, he was shown only an unsigned, unsworn, Thermo-Faxed copy of the charges. A Navy veteran one year short of twenty-year retirement was dismissed administratively because he wasn't able to pay for his wife's fur coats as fast as she bought them. A Marine was given an undesirable discharge, under less-than-honorable conditions, for no reason except that he had been involved in a serious automobile accident in Haiti.

The defects of the administrative board are much the same as those that afflict general courts-martial. As a representative of the Fleet Reserve Association once told a Senate subcommittee: "The proceedings looking toward the issuance of the discharge are initiated in the first instance by the commanding officer; the commanding officer appoints all of the personnel connected with the field board hearings, and ordinarily such personnel will be junior to him. Under the circumstances, the average board member probably is more inclined to follow or accept the recommendation of his commanding officer than to take steps to see that the individual appearing before the board is accorded any great degree of protection insofar as basic rights are concerned."

Going back a few years to find a superb example of the uses to which the military puts administrative discharges, we come upon the ruined life of Marine Technical Sergeant Boniface (which is not his name, though everything else is factual), a veteran of seventeen years of unimpeachable service, including twenty-two months overseas in World War II, participation in the Iwo Jima campaign, and three months as a combat cameraman in Korea, where he took part in the Inchon landing and the Naktong River operations. He was no hero, but he had served well and honorably and had received four good-conduct medals.

In 1958 he was stationed at the Pentagon. As frequently happens around large conglomerate institutions of that type, homosexuals made use of the toilets as hunting grounds. They

appeared to be especially thick around Pentagon Toilet No. 2D617, so policemen hired by the General Services Administration teamed up with Army Criminal Investigation Division agents to rout them out. Half a dozen agents stationed themselves conveniently to peek through the cracks around the stall doors and to peer under the doors and over the top of the stalls; other government detectives hid out in the ceiling crawl area, taking photographs of what went on in the stalls; still other agents hung around outside the toilet room to follow suspects and find out their identity.

On July 11, 1958, Walter Bruce, a special agent for the Office of Naval Intelligence, was handed a dossier on Sergeant Boniface. Bruce looked through the material and saw that it was (in his own words) "very shoddy investigative work," saw also that the material made no mention of witnesses and that the material had been collected by an anonymous investigator; Bruce wanted no part of it, and when his superior insisted that he take over, Bruce asked hotly: "What the hell do you want me to do with this piece of junk? I don't have an official contributor, and I don't know who did this, and I would prefer to do some investigative work to find out more."

No, no, said his superior, no more investigations were necessary, for Boniface had been identified and observed taking part in perverse acts, and Bruce's only job was to interview the suspect and, hopefully, make him confess.

As it turned out, that wasn't difficult. But exactly what Boniface confessed to isn't clear. Threatened with a court-martial and public notoriety and shame if he didn't confess, Boniface panicked and did as he was told. His panic was caused by being shown an indistinct photo of a Marine and being assured that the Marine was none other than himself, being perverse. Under the direction of military agents, he wrote out and signed a six-page confession to the effect that on two occasions while he was sitting in a toilet stall "an unknown man in an adjoining stall had reached under the

partition separating the stalls and felt my leg and, proceeding further, had performed an indecent act" on him with Boniface's passive cooperation. That's what the written confession said, but Boniface later insisted that what he had told Bruce was that an unidentified man in the next stall had borrowed a book of matches from him and, on returning them, had suggested that they go for a ride and that he, Boniface, had told the man to "get lost."

Because he had confessed, Boniface was advised to escape trial by asking for an undesirable discharge. The advice was given by a Navy officer, supplied as his counsel, who was not an attorney.

Sergeant Boniface was the victim of bluff. He had been told that there were corroborating witnesses, but there were none; he had been told that the evidence against him was sufficient to merit a court-martial, but it was not—for one reason because Section 25, Chapter VI, of the *Manual for Courts-Martial* states: "Ordinarily, charges for an offense should not be preferred against an individual if, after investigation, the only available evidence that the offense was committed is his statement that he committed it."

On September 5, 1958, Boniface was expelled from the Marine Corps with an undesirable discharge. Four years later, in 1962, Boniface's civilian attorney finally forced the Navy to name the two witnesses who allegedly had seen Boniface commit the homosexual act. But at a subsequent trial in the U.S. District Court, neither of the witnesses could identify Boniface and one of the witnesses admitted that "I never personally saw any homosexual acts because I was stationed outside the toilet." After four years, the Navy had finally made clear that it had no case against a seventeen-year veteran except the confession it had frightened out of him.

The Pentagon files are full of cases not only of mature servicemen like Boniface but of seventeen- and eighteen-year-olds who were strong-armed into accepting an undesirable discharge after committing indiscretions that, at worst, can be condemned as

human. A. F. Zerbee, counsel to the Catholic War Veterans, wrote the Senate Constitutional Rights Subcommittee in 1966:

> Very frequently these young men—with no juvenile or adult police records—will commit a minor civilian offense such as joy riding, public drinking, fighting or other minor disturbances. If the soldier is arrested by the civilian police and convicted for the misdemeanor, he is returned to his post and ordered before an Administrative Discharge Board and awarded an undesirable discharge. His offense did not deserve a trial by court-martial, yet the mandatory issuing of the undesirable discharge for the light civilian conviction sends the young man back to civil life as an outcast, and the condemning castigation on the face of his discharge certificate renders him undesirable for employment.

Along with his letter Zerbee sent excerpts from letters which had been received from "undesirables." Samples:

> I have written you before about trying to get my discharge reviewed but, however, it did me no good. I was 17 years of age when I entered the service and 19 when I received my bad conduct discharge. I have been going to night school for 3 years but it does me no good for I cannot get a decent job because of my discharge.

> I understand there are exceptions in some cases and it may sound selfish, but I am asking that my case be made one of those exceptions, because since my discharge, which has been over 3 years, I have gotten married and have a family and another one due, and I have been unable to find employment of any kind due to my discharge. If my discharge can't be reinstated, and I can't re-enlist, could you please give me a letter of recommendation so that I might get a job to support my family?*

Against the thousands of individual hardships of this type, the military weighs its own convenience, and invariably chooses the latter. The administrative-discharge routine, for example, helped

* These, and the Boniface case, are from the Senate subcommittee's hearings on military justice.

get the Army out of an embarrassing situation in 1969 involving the famous case of the "Fort Jackson Eight"—the dissident soldiers who were arrested for holding a boisterous bull session outside their barracks to denounce the Vietnam war and white racists. Fort Jackson officials claimed the men were arrested for refusing to obey an order (though it was admitted that no direct order had been given) and for creating a riotous situation (though the MPs were not called, and one noncom at the scene had been so unimpressed by the danger that he left to get a sandwich).

Some of the dissenters were held incommunicado in the stockade for two months; others were held under barracks arrest. All were threatened with court-martial. If the Army had gone ahead with its threat, the result would have been such a classic freedom-of-speech trial that the Uniform Code of Military Justice might have been seriously shaken. As public support of the imprisoned men increased, the Army dropped all charges against two of them and neatly got rid of the other six either by mutual-consent undesirable discharges or by undesirable administrative discharges.

As a result of military courts-martial, which is poor enough justice, or their poorer substitute, the administrative discharge, more than half a million veterans are now on the labor market bearing the burden of a less-than-honorable discharge which, for the rest of their lives, will make them unwelcome to most employers.

Nor should it be supposed that the military would like to extricate itself from its own harsh discharge system and modify the penalties that it now feels compelled to administer. Several times in the recent past, proposals have been made that would have given the military just such an opportunity, and in each case the proposals were rejected (except by the Air Force, which has by far the fairest record in dealing with its problem servicemen). The late Clyde Doyle, Congressman from California, introduced legislation in the early 1960s that would have enabled men receiving

less-than-honorable discharges to remove themselves from that perpetual blacklist by living exemplary lives for, say, three years thereafter. The bill passed the House but, as a result of intense opposition by the Army and Navy, died in the Senate.

■ LETTERS

Naval injustice: As an Army veteran of the Vietnam era and a lawyer who has defended personnel at courts-martial for more than 20 years, I appreciated your exposé of "Navy Justice" [November 9]. The problem is servicewide and involves the structure of a system that has built into it command influence over courts-martial. You pointed out that commanders decide which investigations lead to trials and which get buried. Those decisions should be taken away from them. Commanders also have the power to select who serves on courts-martial. There should, instead, be a system of random jury selection, modified for military purposes. The worst scandal is the failure to enforce prohibitions against unlawful command influence. Although hundreds of cases have been reversed on appeal due to such actions, in the 40 years since the Uniform Code of Military Justice went into effect there has not been a prosecution, much less a conviction, for those violations of military law. The new Congress should hold hearings with a view toward reforming the entire military-justice system.

Robert S. Rivkin
San Francisco

DAVID BUTOW – BLACK STAR FOR USN&WR

Navy target. *Probe of Ralph Bernard is under attack.*

■ As a former technical director of the Naval Air Weapons Station at China Lake, I carefully read your story and the related article on Ralph Bernard ["The China Lake Affair"]. I am impressed with the thoroughness of the research and horrified and outraged at the story of a Navy and its police force out of control. The Ralph Bernard story illustrates the Navy's willingness to disregard heroic and dedicated past service in its zeal to accomplish its own self-determined program goals, in this case to kill the FOG-S missile in defiance of Congress. Your suggestion that it may be time to do more than give lip service to the reform of the Naval Investigative Service must be emphatically restated as a demand and a requirement if the democracy so cherished by this country is to survive.

Tom Amlie
Bethesda, Md.

■ Your report is an excellent scratch at the tip of a very large iceberg, one that extends, unfortunately, well into the underpinnings of each of the major armed services. There is an ever growing list of patriotic service members and their families who have been irrevocably injured through military injustices that persist because of command interference in the military-justice and investigative systems and the Supreme Court's long-standing ruling that prevents suits by active-duty personnel. Both of these are widely defended in the military as necessary to preserve discipline. The military system investigates itself, tries

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On February 23, 1993, LCDR Fitzpatrick forwarded a request for reconsideration of the action on the application [on his appeal], asking in the alternative for a more favorable ruling by [the Office of Judge Advocate General], certification of the case to the Navy – Marine Corps Court of Military Review, or a new trial. This request was never received in [my – Judge Advocate General's] office...

Harold E. "Rick" Grant
Navy Judge Advocate General

In a 5 May 1994 letter to
To United States Senator Patty Murray
(Preceded by a 9 March 1994 letter to United States Congressman Norman D. Dicks wherein the same statement was made)

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To: The Panel Looking at Revisions to the UCMJ

From: Patricia Hervey Schneider
20484 Langley Drive
Sterling, Virginia 20165

Dear Sirs: Tuesday 13 March 2001

I am pleased to be speaking before you today in this setting of investigation and I thank you for this opportunity.

Some years ago, as a Board Member of MOMS (Members Opposed to Maltreatment of Servicemembers) I was working with then Florida representative Charles Bennett in an attempt to revise the UCMJ. Rep. Bennett died and the project was discontinued.

Now, I would like to see you consider a policy that would avoid the appearance of unjust double jeopardy in proceedings against military members. I understand that now the military (the United States) has the legal right to prosecute a member after a prosecution in another (state) jurisdiction. I think that there should be an active policy against second prosecutions arising out of civilian prosecutions --- especially when the civilian prosecution results in a NOT GUILTY verdict or is otherwise disposed of without the entry of a finding of guilty. See, e.g., United States v. Hutchinson, 49 M.J. 6 (1998), in which a legal and proper disposition of a civilian offense was completely destroyed by the action of the military in subsequently prosecuting. The result was that the member ended the day with two convictions, when his diversion program in the state would have left him with none. Though legal, such cases give the appearance of an abuse of process in the second prosecution.

Where an approved sovereign has adjudicated a case, it seems to me that there should be a requirement for an equivalent process prior to a military prosecution. This is now in place for federal civilian prosecutions, where approval by the Department of Justice is required before a U.S. Attorney can re-prosecute. I recommend that a similar provision requiring DOJ approval be implemented by the President as a firm policy in the Manual for Courts-martial.

In a Missouri Court, my son, David Schneider (Major, USA), was charged with Aggravated Assault of his wife. The record shows that she never said that he tried to kill her. He was found NOT GUILTY in state court. The Army brought him to General Court-martial on the same charge. The record shows that the Command Judge Advocate thought it would "look funny" to continue the charge of aggravated assault and therefore changed the charge to perjury from the state prosecution. All appeals have been made and none has been successful. This has been a miscarriage of justice that should not happen to any one.

In the same case, my son was tried by a panel which included an officer junior to him. When this was discovered, the record shows that the Army said that blame for non-discovery of the error fell to my son and his lawyers. BUT the record shows that the panelist was EXCUSED from the sentencing phase of the court-martial. A requested mis-trial was denied to my son. When this set of facts appeared on appeals, they were all denied at the same time that two or three other cases based on junior members on the panels resulted in overturning the convictions. I think this shows undue Command Influence, prejudice, and unfairness. My son is in his 13th year of a 23 year prison term he does not deserve.

You are here to consider making changes to the UCMJ. Please consider taking action on these two issues.

Patti Schneider

To: The Panel Looking at Revisions to the UCMJ

From: Colonel William P. Schneider, USA (Ret)
20484 Langley Drive
Sterling, Virginia 20165

Dear Sirs: Tuesday, 13 March 2001

I am pleased to be afforded the opportunity to provide my views on this important topic.

The fundamental question concerning the restructuring of the UCMJ has to do with the purpose of the UCMJ. We must assume that, in general, the court system of the United States of America is accepted as being adequate by its citizens for most purposes. In military situations, however, in the past it was necessary to establish Military Justice because civilian justice was simply not available. Our troops out on the frontier were far from civilian judges and all the trappings of justice that go with them. The Military Justice system was set up to provide rough and ready justice for troops in the field.

Today, troops in the field, in situations like Desert storm, even in combat, are only minutes away from Washington D.C. and the sources of the central Justice available to every one in this country. Should a commander need to solve any problem dealing with Military Justice he can even get on his tank radio (while he's in the very middle of military activity) he can still put in a query to the JAG in Washington. He can solve the most complex of legal problems in a matter of minutes.

Even when we are dealing with civilians attached to the military - the old sutler out on the frontier was required to obey the military commander and justice for him was not any special situation - it was the same as that for the soldiers under the military commander. The contractor today maintaining a patriot missile battery is just as much or more subject to "Indian attack" than any of the military personnel.

The purpose today for military justice should be to provide military commanders with the capability of dealing with strictly military crimes which either do not exist in civil life or are greatly magnified in the military situation. In civil life any person who refuses to obey his supervisor can be fired- but even that is subject to restriction such as a union intervention, etc. In particular, a military person who refuses to obey an order could jeopardize the lives of all those in his unit or perhaps an even greater sphere.

Simply limiting the UCMJ to the handling of special military crimes will eliminate a vast range of problems currently dealt with by the UCMJ. In occupation situations, or near occupation situations, the problem arises when dealing with military personnel who commit civilian crimes in foreign countries when we do not believe that the justice system of the host country is adequate. Those people working in our country dealing with these occupation situations have for the most part yielded our sovereignty to the foreign country. Again, if we would simply allow all foreign countries to deal with our soldiers according to their law for civilian crimes and maintain our control over strictly military crimes, most problems go away.

Assuming that we still have to deal with problems such as civilian and military Justice conflicts, the most pertinent to my situation and the one about which I have personal experience, is that of

double jeopardy resulting from civilian trial for a crime followed by military trial of a military person for the same crime. Less likely, but has occurred, is a civilian trial following a military trial. This same type of problem arises no matter which court finds the accused guilty or innocent.

My personal experience has to do with the trial of my son for aggravated assault by a Missouri court which found him not guilty. The commander of the military unit to which my son belonged, was quite unhappy with the not 'guilty verdict' in the civil court. .According to the many memoranda, copies of which we have, which circulated internal to the Command Headquarters, he let it be known that my son should be found guilty by a military court. All the necessary preparations were made to do so. This commander, himself, had been found guilty of command influence in Germany prior to this incident.

Since we are unlikely to change the attitudes of any commanders what can we do to improve the response of the military justice system to such injustice?

For one thing, the current system calls for reviewing the facts only at the first level of review. Thereafter, the only determinations which can be made are as to whether or not the law was correctly applied. There is no further review of the facts. The first level of review is done by military personnel, most typically, junior in rank to the convening authority. The result is that those officers making the review are looking forward to the possibility of being subordinate to the convening authority in the not too distant future. They are therefore unlikely to reject any military verdict based on the finding of fact. The assumption made by the military justice system is that the first finder of fact, the court martial, is the best judge of what the facts were. Even though, as in this case, in the civil trial, the jury found in favor of the defendant (based on the same evidence) the facts were for all practical purposes not reviewed.

The civil court with a 12 person jury, nine men and three women, found for my son in a matter of a few hours. As is clear from the many memoranda written by various personnel in the legal office of the convening authority, the convening authority had already decided to try my son no matter what the verdict was in the civilian court. The military court panel consisted of only seven personnel one of whom was junior to my son; the military judge recognized this. He dismissed the young lady from the panel - after the verdict but before the sentencing - thus he recognized that the court was not valid but proceeded anyway.

When the case came before the Army Court of Review the "the judges" had evidently already written their opinion before the hearing. They issued their final report on the Monday following the Friday of the hearing which allowed no time whatsoever for processing or reviewing the case. They had even a basic misstatement of the fact in their review. Errors, unfair treatment and especially the appearance of command influence do not maintain military morale.

Commission on the 50th Anniversay of the UCMJ

Remarks Concerning the Prisoners at the U.S. Disciplinary Barracks Fort Leavenworth Kansas

March 13, 2001

Presiding Judge:

Walter Cox
USCAAF
450 E Street, N.W.
Washington, D.C. 20442

Submitted by:

Arthur D. Sills, PhD, P.E.
8710 Granite Lane
Laurel, Maryland 20708
(703)415-0091x223 (W)
(703)415-0279 (Fax)
(301)776-2805 (H)
E-Mail: artsills@aol.com

Judge Cox, Ladies and Gentlemen. Thank you for allowing me to speak before you today.

I am the uncle and advocate for highly decorated Colonel Jim Sills of Hurlburt AFB who currently resides in the prison in Fort Leavenworth, Kansas stripped of his liberty, privileges and retirement on one count of allegedly sexually touching his stepdaughter outside the five year statue of limitations and a corollary charge of stating that he was not subject to blackmail on his security form. What an incredible injustice!

I shall speak primarily to his case as this is where my knowledge lies. I believe his case represents much of what is wrong with the way the UCMJ is administered. I shall also speak to a list of concerns provided by other prisoners currently confined at the US Disciplinary Barracks. Colonel Sills was falsely accused and then convicted by a Military Justice System that is biased and prejudiced to the point of being unable to render justice.

Since his trial, his military attorneys have repeatedly pointed out legal problems with his case and have presented the Staff Judge Advocate and the convening authority with legal authority and caselaw which shows that Colonel Sills' conviction is illegal, biased and prejudiced. The Convening Authority at Hurlburt AFB has refused to comply with the case law and recently approved findings which are illegal and a sentence which is inappropriate. Because of the structure of the UCMJ, Colonel Sills now has to wait for an military appellate court to review the clear injustices present in his case. That is unfair and something that this Commission should change.

Unfortunately, Colonel Sills' case is not unique. Based on input I have received from the inmates at the USDB, the following are some comments on the specific "Topics for Consideration" at the Commission on the 50th Anniversary of the Uniform Code of Military Justice. Paragraph numbers are coded to the topics.

I. Is there a need for a complete Congressional Review of the UCMJ? Absolutely! We are an all volunteer force, made up of a cross section of all Americana. We reflect all that is good in our people and also all that is bad. Our troops come from American Society and should be held to the standards of conduct of that society, not to some Draconian "higher" standard set forth in the UCMJ. There are soldiers in the U.S. Disciplinary Barracks today who are serving multi-year sentences for oral sex between unmarried adults. There are a greater number of women in uniform and an equally large female civilian workforce supporting military operations today. In Colonel Sills' case, he was accused of having an affair with a female civilian employee working in his assigned organization. When the Air Force failed to find sufficient evidence that a sexual relationship existed, they chose to charge him with an unprofessional relationship as "Conduct Unbecoming an Officer and Gentlemen". Never mind that this woman was his wife's best friend, that the two women ran the bars together when Colonel Sills was deployed overseas and that she eventually witnessed Mrs. Sills spend the night with a married Lt. Colonel from the same command in which she and Colonel Sills worked.

Colonel Sills "unprofessional relationship" was fostered because of the congenial social environment of today's military, where organizational activities and friendships are plentiful. It was also fostered out of concern; the concern of a woman who was watching her best friend destroy her marriage and harm the man she knew as being caring and concerned for the well-being of every member of her very own squadron. We have evolving standards in our society today. Society doesn't prosecute adultery. It is not even grounds for a divorce in most states of our union. Yet, it is a criminal act under the UCMJ, punishable by 5 years imprisonment. The USDB has inmates in its population right now whose only crime was adultery. Sodomy has been taken off the roles of criminal activity of the vast majority jurisdictions of our country, yet in the military, it is a criminal act, earning a 5 year sentence to Fort Leavenworth, Kansas. And yes, the USDB has many current residents who have convictions for consensual sexual activities that are legal in the society from which they came..

Have the demographics of today's military changed? Yes!! Has society changed? Absolutely! Does the UCMJ need to change to keep pace? Is there any doubt?

II. Jurisdiction

C. Should the jurisdiction over military members in peacetime be restricted to service connected offenses?

Absolutely! Under current law, service connection means the service member can be prosecuted for any criminal act as long as he wears a uniform. The crime doesn't have to be against another military member. It doesn't have to occur on military property. The member doesn't even have to be in uniform. A young man can go to a bar, drink a little too much, make an awkward advance toward a civilian female and if she says he groped her breast, he can go to prison for years. Yes, there are people at the USDB for this crime. Where is the service connection? How has this act impacted military operations?

The military justice system is a bureaucracy and all bureaucracies must grow to survive. Today's military justice system is a complete, stand alone, legal process that can prosecute, convict, incarcerate and execute military members for every crime in American society. Furthermore, the military justice system will prosecute cases which the civilian authorities have investigated through a grand jury and decided not to press charges. Why do they do this? Because military lawyers need business; for without trials and convictions, there wouldn't be a need for a billion dollar military justice system. Colonel Sills was charged, prosecuted and sentenced to years in prison for crimes that would never have seen the light of a civilian court room. And yes, the chief prosecutor's Performance Report was filled with accolades stemming from his great victory against Colonel Sills, even though he violated every tenant of "legal fairness" to include outright misconduct

III Organization of the Military Justice System

A. Convening Authority - Should the Court Members be randomly selected by a jury commission or by a random computer selection process?

Absolutely! The process of jury selection must be taken out of the hands of the Convening Authority and the input of the Staff Judge Advocate into this process must also be eliminated. The entire process of charging, investigating, prosecuting and sentencing is under the control of one man; the Convening Authority. He picks the prosecutors, he picks the names of those who sit on the court-martial panel, he reviews the Article 32 investigation (which amazingly is often conducted by a prosecutor from the base legal office!); he can even ignore a dismissal recommendation and forward charges for trial. Is it any wonder the UCMJ conviction rate is 98%, higher than the most oppressive totalitarian state in the world? General Maxwell Bailey, Colonel Sills' Convening Authority, was given a list of available officers for jury duty. He struck several names and hand wrote in the names of several more. The names he added were friends, acquaintances and former employees. Every single panel member worked for the convening authority! He didn't use a local prosecutor; he brought in top "hired guns" from Washington, D.C. He hired a PhD in Psychology to advise the prosecution. When it was all over, after the Government got their conviction, when General Bailey was told there was witness tampering, prosecutorial misconduct, legal insufficiency and gross misconduct on the part of Colonel Sills' prime accuser, what did he do? He said the legal issues were too complicated for him to pass judgment on and that an Appeals Court would have to settle the legal issues. He didn't have a problem stacking the jury with his friends, he didn't have a problem hiring the Air Force's most successful prosecutor, he didn't mind spending the money on a psychologist who so grossly tainted witness testimony that there is a question whether any contact ever occurred between Colonel Sills and his step-daughter. He didn't have a problem changing the inclusive dates of a charge to ensure it remained within the Statute of Limitations after the trial was over and Colonel Sills was already in prison. He didn't have a problem resentencing Colonel Sills to include his dismissal from the Air Force, even though the Court of Appeals for the Armed Forces chastised a lower court and a Convening Authority, not two years ago, for doing exactly the same thing.

Do Convening Authorities have too much power? Absolutely! They have the power to charge, investigate, prosecute, sentence and imprison military members for every crime in America. They wield authority over an entire justice system; a justice system that is wholly contained within the confines of the United States military. If this horror story can be the ugly reality that it is for a high ranking, highly decorated officer, how do you think our enlisted soldiers, marines and airmen are faring under the current UCMJ?

As part of the clemency process in Colonel Sills' case, his military counsel told the Convening Authority of numerous errors in the trial, inadmissible evidence and lack of credibility in the witnesses. Specifically, that:

- Findings to the Charge III specification 1 are Unconstitutionally Vague and must be set aside.
- Improper cross examination to force the Accused to Comment on the Truth-Telling of Other witnesses
- The Judge Erred in Admitting Hearsay Testimony
- Changing of the Time Frame the Morning of the Trial.

- The Prosecution Succeeded in Persuading the Court Members to Ignore Evidence.
- The Witnesses' Testimony was Self-Contradictory and Biased.

These issues were ignored and the convening authority showed his disdain by taking action on the day after he received the large clemency package.

Following an appellate court decision in another case which held that the statute of limitations under the UCMJ is 5 years, the military defense counsel again wrote the Staff Judge Advocate and asked that all charges be dismissed as they all fell outside the five year limit. The convening authority did dismiss some of the charges which fell outside the statute of limitations, however, based on the advice of his Staff Judge Advocate, he changed the date of the other charge to make it appear that Colonel Sills was convicted of an incident within the statute of limitations. He also decided to reassess the sentence himself, instead of sending it back to a court-martial panel. All this despite a personal presentation made by the military counsel, and substantial case law showing that what he was doing was wrong. The appellate courts state that the convening authority is the accused's "best chance" for clemency. How can that be, when the convening authority can choose to ignore the rules and case law?

V. Sentencing and Punishments
K. Should a sentence ordering separation from the service without loss of either retirement or other service connected benefits be authorized?

Absolutely! Colonel Sills' case is a perfect example of this. He spent 30 years in uniform. He has earned his retirement check. His dismissal amounted to a two million dollar fine and a permanent sentence to menial labor for the rest of his life. The members at his trial asked whether they could allow Colonel Sills to retire at a lower grade, to punish him without taking his retirement. They were told "no" and they thus elected to dismiss him from the service, taking his retirement.

VII. Trial Process.
The trial was conducted as guilty until proven innocent in total contravention to our civilian legal process. The psychologist who interviewed the stepdaughter presumed Colonel Sills' guilt from the outset. The trial judges allowed the prosecution to use tactics that were designed to produce emotional rather that rational decisions. The burden of the prosecution should be to prove guilt. In this trial, the burden of the defense was to prove Colonel Sills not guilty.

VIII. Appeals
The length of time between the action of a convening authority and a decision by the service court on appeal is inordinately long; causing great hardship on the accused. Colonel Sills has lost his liberty, privileges, and retirement. On release from prison, he faces a three to five year period before his appeal will be answered. During that time he will have no retirement and will have sexual misconduct charges hanging over his head.

No one will hire him professionally in this situation. His only available jobs will be menial tasks such as fast food or janitor. My company, founded and run by retired Army and Air Force Colonels, will have nothing to do with him despite his outstanding record of service and accomplishment. The Secretary of the Air Force could restore his salary until his appeal is heard but will not even acknowledge his petition. Is this the reward of a distinguished decorated high ranking officer who has give his entire career to his country? It is not! It is even worse for those who languish in prison for years as they wait for their appeal.

I offer additional comments from both Colonel Sills and the Fort Leavenworth prisoners:

- Stop requiring the defense to ask for witness funding from the convening authority, as that process requires the defense to provide extensive detail to the prosecutor about their theory of the case, while the government can get their own expert through a one sentence request of the convening authority. Authorize a pool of central witness funding for the defense to use or allow the defense to file their request ex parte with the judge or the convening authority.
- Centralize the military justice system in Washington, D.C. Make it a stand alone operation who acts as both defense and prosecution. Hire civilian judges. Pick jurors from across the country.
- Only prosecute cases which have a direct connection to the military, either by the nature of the offense (i.e. treason, desertion, failure to obey), or by virtue of location (i.e. on base, against another military member)
- Limit the authority of the Convening Authority to initial investigations, charging and administrative processing.
- Convening Authorities should be excluded from the court martial process with the exception of post trial processing responsibilities.
- Establish sentencing guidelines that provide for return to duty, probation and retirement.
- Stop the process of charging an individual with "everything under the sun" in the hope that something might stick (there are men in the USDB with 40 charges and a hundred specifications who face a thousand years in jail). The military does that to scare people into taking a pretrial agreement. With a 98% conviction rate, if you were facing life in prison plus 400 years and they offered you a 30 year pretrial settlement, wouldn't you take it? There is a prisoner here who took that "deal."
- All trials should be held in the Federal Courts, except those that are military related (i.e. AWOL, Desertion)
- Full review of defense attorney's actions at the trial and appellate level (i.e. failure to bring up key issues, failure to contact witnesses and failure to prepare for trial). Military attorneys should be held responsible for not representing their clients vigorously and zealously.
- Require a minimum of 12 jurors for any case which results in confinement over one year and a dishonorable discharge.
- Remove the use of military officers with law degrees as judges and replace them with actual Federal judges; thus eliminating command influence(s).

- Article 80 should not be a lesser included offense if it carries the same penalty.
- Jury members should not be composed of the accused's peers, not senior officers with degrees and Senior NCOs selected by the prosecutor.
- Jury members should wear civilian attire to eliminate rank and command influence.
- All attorneys in the military should be licensed as active attorneys just as the federal and state courts require. Military attorneys should be allowed to represent their clients in the Federal Court system to ensure that their clients receive a fair and complete review of their case.
- Military members should not have to exhaust their administrative remedies in the military justice system prior to utilizing the Federal Courts.
- Time limits should be placed on the appeals process, with regards to full and complete understanding of the record of trial, to avoid a "rubber stamp: system" or a "check the block" system. Reestablish mandatory time guidelines for post trial and appellate review
- Attorneys should be required to win a certain number of cases as defense attorneys as well as prosecutors.
- Military courts should only have the limited jurisdiction to try members for military specific crimes (i.e. AWOL, disobedience) and should be limited in their authority to punish commensurate with other Article I courts. Courts-Martial are courts of limited power and limited jurisdiction, and as are Article I courts such as Tax Court, Indian Courts and Claim Courts. Why are Military Courts given Article III court powers?
- There should be a way to account for the disparate sentences imposed on Officers and Enlisted members (i.e. General Hale and CSM Miller).
- Military Justice is for discipline, Non-judicial punishment and special courts- martial can achieve the same outcome. Keep the Federal Courts for all non-military related offenses.
- Article 98 and Article 15's should be utilized on officers who perform poorly.
- A post trial processing rule such as Dunlap should be maintained.
- Attorneys practicing law in the military courts should be required to maintain the minimum qualifications that are required of an "active" attorney practicing in a Federal District Court.
- The practice of probation should be used for first time offenders, especially for continued service and proven record.
- Article 134 should be rescinded.
- Adultery and Sodomy should not be UCMJ offenses
- Authorize the higher courts to set aside convictions and overrule the lower court's decision without constantly remanding cases back to the lower court.
- Military judges upon retiring should not be allowed to sit on the higher courts of Appeals as their minds are set towards ensuring the government a conviction.
- Article 32 Officer's recommendations should be followed.
- The Staff Judge Advocate is usually a Colonel or Lt. Colonel. It should be a Captain, considering the SJA usually does nothing towards providing serious advice to the Convening Authority. He also does not review the Record of Trial and doesn't really

inform the Convening Authority of any Constitutional matters. A Captain could do this job better.

- Military members should not be used as training aids to enhance an officer's career.
- During the Court-Martial, the accused should be provided with, at least, an attorney with experience such as Major or above. Captains should be paralegals for at least one year prior to representing their first client.

In summary, in order to render true justice, a centralized military justice system must be set up. It must be a stand alone operation who acts as both the defense and the prosecution. Use civilian judges and pick jurors from all parts of the country. Prosecute only cases which have a direct connection with the military determined either by the nature of the offense or the location of the offense. Limit the power of the Convening Authority to initial investigations, charging and administrative processing.

Thank you for the opportunity of speaking to you today. I hope these remarks may be of service in obtaining both an independent investigation authority for Colonel Sills and a UCMJ that is truly just.. Colonel Sills is a victim of this cruel and unjust system. His sentence included loss of liberty and privileges as well as loss of retirement on charges that would not even have appeared in a civilian courtroom. I continue to be available for any discussions that may help Colonel Sills in his quest for freedom or forward a massive rework of the UCMJ to achieve true justice The UCMJ is not a system of justice. It is a cruel farce that should be renamed "The Uniform Code of Military Discipline".

Overview Information

Attempts to Obtain Help

Letters were sent to Colonel Sills' Congressman, Joe Scarborough in November 2000 seeking help in an unbiased authority who could review and affect the outcome of this trial. The letters have been ignored as have all attempts by myself to see the Congressman. Colonel Sills has sent complete documentation to both the Inspector General and The Secretary of the Air Force. The IG simply referred a request for criminal prosecution back into the advocacy channel which has proved to be useless. The Secretary of the Air Force has not responded. A month ago, I sent letters to both U.S. Senators from Florida with no response. A letter to Senator John Warner, Chairman of the Armed Services Committee was deferred back to the Florida Senators. A letter to the President a month ago appealing to his program to improve the Military environment has gone unanswered.

Awards

Among Colonel Sills' awards are the Colonel James Jabara Award for Airmanship, the Ira Eaker Outstanding Airmanship Award and the United States Air Force Mackey Trophy. He was the mission commander on the most honored mission in Air Force history: the rescue of the crew of the merchant tug "Godinn" off the coast of Iceland in January 1994 For this accomplishment he was honored by the Government of Iceland and is written up in the February 1999 issue of Reader's Digest in an article titled "Rescue from the Sky". This highly decorated, distinguished man who has saved over 46

people from the sea and from the sides of mountains with his helicopter is now at the end of a brilliant career having to start over in the job market. What an incredibly cruel way for his country to reward his risk of life and limb to save others! If a distinguished man of this caliber is so rewarded by the UCMJ, imagine the fate of the minority enlisted who have no voice to speak for them!

THE UCMJ SHOULD NOT CRIMINALIZE ADULT, CONSENSUAL, PRIVATE, NONADULTEROUS, NONCOMMERCIAL HETEROSEXUAL ORAL SEX

by Michael Huber[1]

Oral sex[2] is a private and intimate association that is protected by the Ninth Amendment and the due process and equal protection guarantees of the Fifth Amendment of the U.S. Constitution (an aspect of what is often articulated as "the right to privacy"). Oral sex should be beyond the reach of criminal sanction, absent a special problem that would constitute a compelling government interest. But see United States v. Henderson, 34 M.J. 174 (C.A.A.F. 1992); United States v. Fagg, 34 M.J. 179 (C.A.A.F. 1992), cert. denied, 113 S.Ct. 92 (1992). Cf. Bowers v. Hardwick, 478 U.S. 186 (1986) (no constitutional protection for homosexual sodomy). This article argues in particular that UCMJ Article 125 should not criminalize oral sex.

The Supreme Court has found in a variety of contexts that there is a constitutionally protected zone of privacy that shields certain personal conduct and expression from government interference. Oral sex should fall within that protected zone of privacy.

The roots of the right to privacy go at least as far back as the Declaration of Independence and the idea that life, liberty and the pursuit of happiness are inalienable rights that no legitimate government would trample. The explicit articulation of certain personal liberties as a "right of privacy" followed the public dissemination of an article by Samuel Warren and Louis Brandeis (later to be Justice Brandeis), The Right of Privacy, 4 Harv. L. Rev. 193, December 15, 1890. The right to privacy finds its first clear appearance in Supreme Court jurisprudence in a dissenting opinion written by Justice Brandeis:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The first recognition of the right to privacy by a majority of the Supreme Court came in Griswold v. Connecticut, 381 U.S. 479 (1965). Griswold dealt with the constitutionality of Connecticut statutes criminalizing the use of contraceptives by married couples and the activities of those who aided and abetted in their use. The Court

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[1] Submitted to the Cox Commission 1 Mar 01. The bulk of this article is derived from a brief submitted 20 Aug 93 to C.A.A.F. (then C.O.M.A.) by the author as an attorney for the Army Defense Appellate Division. While most case law and statutes have not been shepardized since 1993 or updated, I believe they are generally still valid cites for the purposes of this article.

[2] Unless otherwise qualified, the term "oral sex" as used in this article will mean private, heterosexual, noncommercial, nonadulterous, consensual, adult fellatio or cunnilingus.

struck down the statute because it violated the right to privacy. Because of language in the opinion eulogizing the marital relationship and its importance to society (id. at 486), it was at first thought that the right to privacy might be limited to married persons.

This perception was dispelled in Eisenstadt v. Baird, 405 U.S. 438 (1972). In Eisenstadt, the Court relied on the right to privacy and the equal protection clause of the Fourteenth Amendment to strike down a Massachusetts statute that prohibited distribution of contraceptives to unmarried persons but not to married persons. The Court stated:

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital relationship is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See Stanley v. Georgia, 394 U.S. 557 (1969).

Eisenstadt, 405 U.S. at 453 (emphasis in original, footnote omitted). The cite to Stanley and the footnote following (omitted here but including the words from Justice Brandeis' dissent in Olmstead quoted supra) are especially telling because they show that the right to privacy includes sexual conduct beyond conduct closely related to the decision to beget or bear children. In Stanley, the Court struck down a Georgia statute criminalizing the possession of obscene matter within the privacy of the accused's home. Although the material itself was entitled to no constitutional protection (see Roth v. United States, 354 U.S. 476 (1957)), the accused's choice to seek sexual gratification by viewing it within the privacy of his home was covered by the constitutional right of privacy.

A major, and highly controversial, extension of the right of privacy came eight years after its first recognition. In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court held that the right of privacy included the right of a woman, married or unmarried, to choose whether to continue or abort a pregnancy. The Roe decision traced the development of the right to privacy and analyzed the areas to which the right had been extended. Id. at 152-53.

The same analysis was conducted in Carey v. Population Services Int'l, 431 U.S. 678 (1977). In Carey, the Court held that the right to privacy guaranteed access by adults to contraceptives. A New York law forbidding anyone but a licensed pharmacist to distribute contraceptives was an unconstitutional infringement on that right. The Court noted that:

> Although '[t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.' This right of personal privacy includes 'the interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of privacy have not been marked by this Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.

Id., 431 U.S. at 685-86 (citations omitted).

The Supreme Court limited the right of privacy in Bowers, supra. The Court stressed that the holding dealt only with homosexual sodomy. Id. at 189-92. The Bowers case did not hold that heterosexual oral sex was outside of the constitutionally protected zone of privacy.

As presently worded and interpreted, UCMJ art. 125 denies service members the right to decide for themselves whether to engage in heterosexual, private, noncommercial, consensual, adult oral sex. This can be changed without disturbing needed criminal sanctions against activity which is forcible, public, involves minors, or is otherwise considered appropriate for opprobrium and punishment.

While UCMJ art. 125 has a long history (see Bowers, 478 U.S. at 192-94, id. at 196-97 (Burger, C.J., concurring); Henderson, 34 M.J. at 176; United States v. Hall, 34 M.J. 695 (A.C.C.A. 1991), review granted, 36 M.J. 44 (C.A.A.F. 1992), remanded for limited purpose, 36 M.J. 80 (C.A.A.F. 1992), aff'd on remand, 36 M.J. 634 (A.C.C.A. 1992), at 697-701), the president, the legislature and the courts should not slumber when societal mores evolve and a statute becomes an oppressive infringement on a service member's constitutional rights. The system must answer Justice Holmes' eloquent plaint:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897), quoted in Bowers, 478 U.S. at 199.

UCMJ art. 125 begs for remedial action by Congress. The words of UCMJ art. 125 defining sodomy were substantially unchanged from the definition of sodomy in Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 204, and the sodomy statute still criminalizes oral sex between a husband and wife (although C.A.A.F. has indicated in dicta that it would be spurred to action if UCMJ art. 125 were used to invade "the sanctity of the marital bedroom." Henderson, 34 M.J. at 178, n. 8). The system has not reacted with sufficient speed or courage to evolving social mores.

> 'Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.' Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772, 106 S.Ct. 2169, 2184, 90 L.Ed.2d 779 (1986). In construing the right to privacy, the Court has proceeded along two somewhat distinct, albeit complementary, lines. First, it has recognized a privacy interest with reference to certain decisions that are properly for the individual to make. E.g., Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed 1070 (1925). Second, it has recognized a privacy interest with reference to certain places without regard for the particular activities in which the individuals who occupy them are engaged. E.g., United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984); Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960).

Bowers, 478 U.S. at 203-04 (Blackmun, J., dissenting) (emphasis in original).

Oral sex implicates both the decisional and the spatial aspects of the right to privacy. The military should not be in the business of prosecuting people for choosing "wrong" ways of conducting heterosexual, private, consensual, adult, personal relationships unless there is a significant impact on military effectiveness, morale, or discipline, or it somehow significantly discredits the armed forces.

Recognizing that the right to privacy is not set forth in so many words in the Constitution, the Supreme Court has articulated two tests "to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involve[d] much more than the imposition of the Justice's own choice of values on the States and the Federal Government." Bowers, 478 U.S. at 191. First, the right at issue may be among "those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" Id. at 191-92, quoting Palko v. Connecticut, 302 U.S. 319, 325-26. Second, the right at issue may be among "those liberties that are 'deeply rooted in this Nation's history and tradition.'" Bowers, 478 U.S. at 192, quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

The right of privacy regarding oral sex satisfies both tests. The decision to engage in sexual activity with a person is among the most private, intimate, and deeply personal of decisions. The form that sexual activity takes is also among the most private, intimate, and deeply personal of activities. Oral sex involves none of the rationales that traditionally justify criminal limitations on sexual activity.

By prosecuting a service member for an act of oral sex, the military violates the service member's right to due process of law and equal protection under the Fifth Amendment. Due process of law guaranteed by the Fifth Amendment includes the concept of equal protection for actions of the United States. See Bolling v. Sharpe, 347 U.S. 497 (1954); United States v. Schoof, 37 M.J. 96, 99 n.4 (C.A.A.F. 1993).

The right to privacy is a fundamental personal liberty. When a fundamental personal liberty or right is involved, that right can only be intruded upon by government regulation if the government can demonstrate that the intrusion is necessary to promote a "compelling state interest." See, e.g., Roe, 410 U.S. at 155. If the right is less than "fundamental", the government must at least demonstrate a rational relationship between the intrusion on the right and a legitimate government interest. See, e.g., San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973). The government cannot demonstrate a compelling interest in criminalizing oral sex. The government cannot demonstrate a rational relationship between criminalizing oral sex and any legitimate government interest.

The Constitution requires a rational connection between legislative means and ends. Id. at 55.[3] The mischief at which UCMJ art. 125 aims is "unnatural carnal copulation." The statute is over-inclusive because, while the statute is explicitly directed at "unnatural" activity, and the history of common law sodomy indicates that the statute

[3] For a discussion of the requisite relationship between classifications and legislative objectives, see Tussman and tenBroek, The Equal Protection of the Laws, 37 Calif.L.Rev. 341 (1949).

is directed toward male homosexual activity, the statute as presently interpreted and applied criminalizes heterosexual oral sex, which is not "unnatural carnal copulation."

Congress did not legislate against heterosexual oral sex because it was sexual activity, or unhealthy activity, or activity harmful to good morale or discipline in any meaningful sense.[4] Congress legislated against heterosexual oral sex in the misguided and unsupportable belief that it was unnatural activity.

The military courts have relied on a religious argument, an historical argument, and a natural law argument to support the proposition that heterosexual oral sex is unnatural. All three arguments fail to support UCMJ art. 125 when applied to heterosexual oral sex.

The argument that Judeo-Christian religious tradition supports a criminal ban on heterosexual oral sex is manifestly wrong. CAAF recognized in Henderson, 34 M.J. at 176, that the term "sodomy" originated from a Biblical account of homosexual activity, not heterosexual activity. See Genesis 19:4-10. The Army court, in United States v. Jones, 14 M.J. 1008 (A.C.C.A. 1982), erroneously cited Leviticus 18:22-23 and Deuteronomy 23:17 for the proposition that heterosexual oral sex is "unnatural or deviant." Id. at 1010. The Leviticus cite prohibited male homosexuality and bestiality. Nothing in the words or context could extend the quoted prohibitions to heterosexual oral sex. The Deuteronomy cite is an injunction against molesting or oppressing runaway slaves who have sought refuge with the Israelites. No stretch of the imagination could transform this into an injunction against heterosexual oral sex.

The religious and moral tradition represented by the Bible does not condemn as "unnatural or deviant" the use of the mouth as an instrument of sexual pleasure. The Bible's Song of Songs, sometimes known as The Song of Solomon, is one of the greatest love poems ever written. This book of the Bible is replete with references to the joy of kissing and erotic evocations of the sense of taste (id. 1:2; 2:3; 4:3, 10-16; 5:1-16; 6:6-7; 7:3, 8-14; 8:1-2, 5, 11-12).

According to census data available to me when I wrote my brief in 1993, five Christian denominations in the United States had membership of over five million members each. Together, they constituted over half of the population of the United States affiliated with a religious group. While all of the denominations have reservations

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[4] In light of the absence of a statute against fornication in the military (see United States v. Hickson, 22 M.J. 146 (C.A.A.F. 1986), no one can argue a general desire by Congress to regulate private, heterosexual, noncommercial, nonadulterous, consensual, adult sexual activity that does not impact on morale and discipline. The background material on the adoption of the UCMJ, and the legislative history of the UCMJ, 1950 and the Military Justice Acts of 1968 and 1983, indicate that Congress made no findings as to the possible harmful consequences of private sexual acts upon the military community. See United States v. Scoby, 5 M.J. 160, 165 (C.A.A.F. 1978); Legislative History of the Military Justice Act of 1983 (compiled by the U.S. Army Legal Services Agency Law Library and the Government Appellate Division, 1984); Military Justice: A Summary of Its Legislative and Judicial Development (The Library of Congress Legislative Reference Service, 1969); An Authoritative Index and Legislative History of the Uniform Code of Military Justice, 1950 (compiled by the U.S. Army Court of Military Review, 1985).

to various degrees about intimate sexual activity outside the context of marriage, none of these five denominations condemns heterosexual oral sex in and of itself.

Of the five, the Roman Catholic Church has the most articulated body of thought on the subject. Under the teachings of the Roman Catholic Church, heterosexual oral sex is not "unnatural or deviant," and is not morally objectionable in the proper context (between married persons under circumstances that do not interfere with the procreative aspect of sex). See Jones, 14 M.J. at 1013 n.2 (Badami, J., dissenting); The Second Vatican Council "Pastoral Constitution on the Church in the Modern World" (Guadium et Spes), nn. 47-52; Pope Paul VI, "On the Regulation of Birth" (Humane Vitae), 25 July 1968; The Code of Canon Law, 1983; Sacred Congregation for the Doctrine of the Faith, Declaration on Certain Problems of Sexual Ethics (Personae Humanae), 25 December 1975.

The Evangelical Lutheran Church in America[5] is the only denomination of the five that has expressed an official position on whether consensual sex acts (including oral sex) should be criminalized. The Lutheran Church in America's position is that consensual sex acts should not be criminalized. See Lutheran Church in America Social Statement on "Sex, Marriage, and Family". The American Lutheran Church position recognizes a difference of opinion among reasonable people on the subject. See American Lutheran Church Social Statement on "Human Sexuality and Sexual Behavior". In response to my queries while amassing information for my brief in 1993, representatives of the governing bodies or headquarters of the other three groups, the Southern Baptist Convention, the National Baptist Convention, and the United Methodist Church, all indicated that their denominations had no official position on whether heterosexual oral sex was in itself immoral. My own research indicates that the Church of Jesus Christ of Latter Day Saints was the only religious denomination I found that condemned heterosexual oral sex as immoral. Judaism, Islam, Hinduism, and Buddhism do not condemn heterosexual oral sex as immoral. The government cannot assert that any kind of religious consensus exists that heterosexual oral sex is unnatural and should be criminally prosecuted.

The historical argument is equally specious. The Army court in Jones, 14 M.J. at 1010, erroneously cites 4 Blackstone, Commentaries 215, and 2 Pollack and Maitland, The History of the English Law 556, for the proposition that heterosexual oral sex is "unnatural or deviant." Blackstone is deliberately brief and vague in dealing with an offense he found "detestable" (Commentaries, 215). Pollock and Maitland are not much more detailed. From references to the Bible, ecclesiastical courts, and statutes of Henry VIII and Elizabeth I, it is clear that both cites refer to buggery and bestiality, and cannot be even remotely linked to heterosexual oral sex. See also Harris v. Alaska, 457 P.2d 638 (Alaska 1969) (discusses the history of "the crime against nature").

While the old English common law statute was clearly directed against anal sex and bestiality, Blackstone's "taciturnity" bore strange fruit. The delicacy and disgust of

[5] The American Lutheran Church and the Lutheran Church in America are predecessor bodies of this church.

earlier times merged with Victorian obscurantism and a long period of conservative sexual mores. Out of the fog emerged a single-word declaration of "sodomy" as an offense in the Articles of War, with definitions that included heterosexual fellatio within its ambit. Manual for Courts-Martial, U.S. Army, 1921, para. 443 at 439. See Harris, 8 M.J. 52, 53 (C.A.A.F. 1979).

Any attempt to use natural law principles to support the criminalization of heterosexual oral sex must also fail. If natural law is to be more than a euphemism for officials forcing their personal moral or religious beliefs on the governed, the government must demonstrate some harm resulting from oral sex of a magnitude justifying criminal sanctions. The government cannot do so. Heterosexual oral sex is an activity so widely practiced that the government cannot claim anything like moral condemnation by the majority.

The use of natural law as justification for a criminal statute implies the idea of a settled rule, derivable by reason and cognizable by all persons of common understanding. In a society that universally esteems the kiss as a sexually exciting expression of romantic affection, any attempt to argue that eating and speaking are "natural" uses of the mouth, and use of the mouth as an instrument of sexual pleasure is "unnatural," must fail.

CAAF has held that "mere oral foreplay with [a] lover, without more, would not be criminally 'indecent' where the ultimate act of sexual intercourse was not illegal." United States v. Stocks, 35 M.J. 366, 367 (C.A.A.F. 1992). This means that, under military law, unless there are aggravating circumstances present, contact between mouth and genital region is not in itself criminally indecent. Only penetration separates conduct that is not criminal at all from criminal conduct which carries, inter alia, the possibility of a dishonorable discharge and confinement for five years.

One might measure whether conduct is unnatural or not by how widespread and or accepted that conduct is. Numerous studies of sexual behavior in America indicate that oral sex is widely practiced and becoming more widely practiced over time (see, e.g., J. Billy, et al., The Sexual Behavior of Men in the United States, Family Planning Perspectives, March/April 1993, at 52; J. Reinisch, The Kinsey Institute New Report on Sex 130-34, 432-33 (1990); P. Blumstein and P. Schartz, American Couples 236 (1983); M. Hunt, Sexual Behavior in the 1970's 198-99 (1974). Simulated oral sex is a staple of the steamier offerings of premium cable channels. Responsible health care professionals recommend oral sex in a variety of situations involving sexual dysfunction because it is often more intensely stimulating than vaginal intercourse. In 1993, only 16 states (and the District of Columbia) had statutes that criminalize heterosexual sodomy.[6] In two of

[6] See Ala. Code § 13A-665(a)(3) (1982); Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (1989); D.C. Code Ann. § 22-3502 (1989); Fla. Stat. Ann. § 800.02 (1976) (deviate sexual intercourse) (Florida now punishes sodomy under this statute after its sodomy statute (§ 800.01) was declared unconstitutional in Franklin v. Florida, 257 So.2d 21 (Fla. 1971); Ga. Code Ann. § 16-6-2 (Michie 1988); Idaho Code § 18-6605 (1987); La. Rev. Stat. Ann. § 14:89 (West 1986); Md. Ann. Code art. 27, §§ 553, 554 (1992); Mich. Comp. Laws Ann. § 750.158 (West 1991); Minn. Stat. Ann. § 609.293 (West 1987); Miss. Code Ann. § 97-29-59 (1973); N.C. Gen. Stat. § 14-177 (1991); Okla. Stat. Ann. tit. 21, § 886 (West 1983); R.I. Gen. Laws § 11-

these states, Maryland and Oklahoma, judicial action has narrowed the reach of the sodomy statute to prevent prosecution for private, consensual, heterosexual oral sex. See Schochet, 580 A.2d at 184; Post, supra.

It is impossible to derive from natural law any meaningful set of values and criteria which call for criminal sanctions for heterosexual oral sex. See generally Harris, 457 P.2d at 641-47.

Another facet of the issue is the equal protection problem that UCMJ art. 125 is being selectively enforced against single males. There are several reported cases in which single males have been convicted of acts of heterosexual oral sodomy. There are no reported cases in which a female has been convicted of heterosexual oral sodomy, and only two reported cases in which a married man has been convicted of engaging in heterosexual sodomy with his wife. The first was the bizarre case of United States v. Thompson, 47 M.J. 378 (C.A.A.F. 1997), in which the wife performed fellatio on her husband to (successfully) distract him from beating her and his attempt to shoot her in the head. The second, equally bizarre case, United States v. Allen, 53 M.J. 402 (C.A.A.F. 2000), involved a husband whose adventures with child pornography led to an investigation of his abusive and dehumanizing relationship with his wife, whom he encouraged to prostitute herself to help out the family budget, and whom he often pressured into having anal sex, even though she did not like it and found it painful. CAAF determined that, under the circumstances, the accused's acts were not in furtherance of the marriage and did not deserve whatever constitutional protection might be available for truly consensual sodomy between husband and wife. Neither of these cases can legitimately be considered as a prosecution for consensual sodomy in a reasonably normal marital relationship.

CAAF's seminal case dealing with UCMJ art. 125 and the right to privacy is United States v. Scoby, supra. The Scoby case dealt with homosexual fellatio that could not be protected by the right to privacy because the fellatio occurred in a squad bay and was observed by at least two other people. In dicta, however, CAAF examined the statute as it would apply to any adults acting in private, and found that no privacy right protected the conduct proscribed even if it was private heterosexual sodomy. CAAF left open the possibility of an exception for married couples. Id., 5 M.J. at 164-66.

In United States v. Harris, supra, CAAF wrote an extensive review of the history of sodomy as a military offense in determining that cunnilingus was included among the activities proscribed by UCMJ art. 125. CAAF noted the special relationship between the laws of Maryland and the UCMJ (id., 8 M.J. at 56-57). It is ironic to note that the citizens of Maryland no longer must live under a statute that criminalizes heterosexual oral sex. See Schochet v. Maryland, 580 A.2d 176 (Maryland 1990).

The next notable case dealing with heterosexual oral sex was the Army court's decision in United States v. Jones, supra. The Army court's various erroneous references

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10-1 (1981); S.C. Code Ann. § 16-15-120 (Law. Co-op. 1985); Utah Code Ann. § 76-5-403 (1990); Va. Code Ann. § 18.2-361 (Michie 1988).

to religious and legal authority are dealt with above. The oral sex at issue in Jones occurred during the course of a brutal and violent sexual encounter that was inexplicably charged as consensual sodomy. The case produced a lead opinion, a concurring opinion, and a dissenting opinion. The lead opinion relied on Scoby, supra, the misinterpreted religious and historical authorities discussed above, and Doe v. Commonwealth's Attorney for City of Richmond, 403 F.Supp. 1199 (E.D.Va. 1975), aff'd mem. 425 U.S. 901 (1976) (a case involving homosexual sodomy), in affirming the conviction. The concurring opinion was heavily influenced by the "outrageous" conduct of the accused in finding that he relinquished his right to privacy under the circumstances of his case. Jones, 14 M.J. at 1011-12 (Miller, Senior J., concurring in the result). The dissenting opinion asserted that "private sodomy between consenting adults in a heterosexual relationship" is constitutionally protected by the right of privacy. Id., 14 M.J. at 1012-14 (Badami, J., dissenting).

The Army court's decision in Hall, supra, dealt with heterosexual anal sodomy rather than oral sodomy, but ideas presented in Hall that apply to heterosexual sodomy as well require that the case be addressed here. The Army court expressed great esteem for Judge Moylan's lead opinion for the Court of Special Appeals of Maryland in Schochet v. Maryland, 541 A.2d 183 (Spec. App. 1988), rev'd 580 A.2d 176 (1990). This esteem is misguided and misplaced. The Court of Special Appeals either ignored language from various Supreme Court cases indicating that heterosexual oral sex could be conduct protected by the right to privacy, or fatuously tried to dismiss such as "language lifted out of context." Id., 541 A.2d at 191. The Court of Special Appeals simply abdicated its proper role in protecting the people from the excesses of the legislature by lamely and erroneously asserting, "We don't need Platonic Elders looking over the shoulder of the Legislature." Id., 541 A.2d at 201. Examples are legion that demonstrate the Court of Special Appeals to be dead wrong. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Education, 347 U.S. 483 (1954).

The Court of Special Appeal's analysis in Schochet is also inapplicable for two reasons peculiar to the military. First, the Court of Special Appeals pointed out that the people of Maryland can simply vote out the old legislators if they do not like the laws they make. Id., 541 A.2d at 200-02. Servicemembers, on the other hand, are at the mercy of Congress, a body they have only a tiny voice in electing. Since there is no federal statute prohibiting oral sex for civilians, and since most civilians live in states where heterosexual oral sex is not illegal, there is no hope for the kind of pressure that has caused many states to repeal statutes that criminalize heterosexual oral sex. See Annotation, Validity of Statute Making Sodomy a Criminal Offense, 20 ALR 4th 1009 (1983).

Second, most civilians do not live in as tightly controlled an environment as servicemembers. Lax enforcement and prosecutorial discretion would make a statute less onerous to a civilian population, even if that population included many who were indulging in the prohibited activity in private.[7] As Justice Jackson pointed out in Railway

[7] During the research for my original brief, several officials in jurisdictions that criminalized consensual sodomy candidly admitted that the law was not aggressively enforced.

Express Agency v. New York, 336 U.S. 106 (1949), "nothing opens the door to arbitrary action so effectively as to allow [officials] to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were affected." Id. at 112 (Jackson, J., concurring).

In addition to the inspiration derived from the Court of Special Appeals, the Army court in Hall quoted great long passages of Bowers, and echoed Jones in its reliance on Scoby, the inaction of Congress, and the silence of the Supreme Court. Hall, 34 M.J. at 699-703.

The most important cases on the issue of constitutional protection for oral sex are the CAAF decisions in Henderson, supra, and Fagg, supra. Both cases involved convictions for heterosexual oral sex. The issue was analyzed in Henderson, and the same analysis was applied in summary fashion in Fagg. CAAF relied on Bowers, sensing a retreat from earlier Supreme Court cases interpreting the due process clauses of the Fifth and Fourteenth Amendments as having substantive content. CAAF held that heterosexual oral sex does not fall within a constitutionally protected right of privacy, at least for persons not married to each other.[8] The wording of the CAAF opinions in Thompson, supra, and Allen, supra, leave open the likelihood that CAAF would find constitutional protection for married couples engaging in truly consensual, private oral sex.[9] It is unlikely that a convening authority will ever pursue such a case to test the statute.

The reliance of the military courts on Bowers is misplaced. As noted above, Bowers focused on homosexual conduct. While the Supreme Court denied a writ of certiorari in the Fagg case, the Supreme Court also denied writs of certiorari in Post, supra, and Onofre, supra, cases which determined on federal constitutional grounds that at least some kinds of private sodomy are protected by the right to privacy. The Supreme Court, for whatever reason, is letting the various jurisdictions resolve this issue without further guidance. This may be a tolerable solution for jurisdictions where the people can exert pressure on legislatures through the ballot box to work their will. Servicemembers, however, faced by military courts embroiled in a misapplication of stare decisis, have little hope of change unless Congress can be somehow spurred to action. The military courts should recall Judge Ferguson's words in United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960):

> While I have continually supported [the doctrine of stare decisis] in military law, it should never be applied in order to perpetuate a mistaken view. Indeed, it is our duty to overrule and modify decisions which are erroneous, although there has been no legislative change in the law as originally construed.

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[8] Many state courts have determined that either oral sex, or all heterosexual sodomy, or all private, consensual sodomy, homosexual or heterosexual, are protected by the right to privacy. See Post v. Oklahoma, 715 P.2d 1105 (Okla. Crim. App.), cert. denied, 479 U.S. 890 (1986); New Jersey v. Ciuffini, 395 A.2d 904 (NJ Super. 1978); Iowa v. Pilcher, 242 N.W.2d 348 (Io. 1976); Kentucky v. Wasson, 842 S.W.2d 487 (Ky. 1992); New York v. Onofre, 415 N.E.2d 936 (NY 1980), cert. denied, 451 U.S. 987 (1981).

[9] The government does not need to keep the present statute, which criminalizes all oral sex, so that a convening authority will have a sufficient arsenal to adequately prosecute an accused in cases like these two.

Id., 29 C.M.R. at 246 (citations omitted).

The sodomy statute in its present form is overbroad and should be amended to decriminalize heterosexual oral sex. Congress and the military courts have waited far too long to recognize that such conduct is within a servicemember's constitutionally protected zone of privacy.

Commission on the 50th Anniversary of the Uniform Code of Military Justice

Presentation by Susan M. Archibald

March 13, 2001, 3p.m.

Good afternoon. I'm here today to comment on the following hearing topics under "Offenses":

- IV.K. Should consensual sodomy be decriminalized?
- IV.L. Should adultery be eliminated as an offense, or in the alternative, should it be codified so that it is only a crime under circumstances that directly affect "good order and discipline"?

My proposal is to:

- Eliminate adultery and consensual sodomy as offenses.

As a replacement,

- Create a new punitive article, an offense of **Sexual Exploitation.**

I understand that cases where apparent consensual adultery and sodomy are involved present a dilemma to military authorities. What damage has been inflicted if any? Is there a guilty party? These questions become especially pertinent when two adults are involved. But a more important question needs to be addressed:

Was the sexual misconduct by someone in a position of power or trust?

It is in this question that the real military interest lies. If the answer is "yes," the act should be considered criminal, and more appropriately termed "Sexual Exploitation."

I believe this new offense is needed considering the lack of consistency in prosecuting sexual misconduct cases. I'm not a legal expert, psychologist, or women's activist. I'm here because of personal experience and a strong desire to see positive change in the military justice system.

When I was an 18-year-old freshman at the US Air Force Academy, a Captain, 20 years my senior, sexually abused me after I had been sent to him for counseling. He was a Catholic chaplain. The traumatic impacts from abuse were expected. Unexpected was the Air Force's interpretation of the chaplain's continued and more recent misconduct after he had been reported in 1999.

The important issues to consider are power and responsibility. Society has entrusted military professionals with power and authority over people's lives, and expects them to act honorably and ethically in that role. The military services rely on that power and authority within the ranks to maintain discipline and execute command decisions. Thus an imbalance of power exists in many military relationships: officer to enlisted, rater to ratee, supervisor to subordinate, higher rank to lower rank. Some other unique power relationships that we see in society also exist in the military: doctor to patient, lawyer to client, therapist to patient, and chaplain to congregant. The power imbalance in all of these relationships may be enhanced when there is a great disparity in age, rank, or influence.

What the "power bearers" have in common is that they are in positions of trust. Military members often turn to commanders or other military professionals for mentoring in career issues, health problems, personal and spiritual issues. The superior may have control over aspects of their future. So, when someone with less power in a relationship approaches a trusted person, vulnerability and dependency naturally exist. Since a victim believes the professional will act in their best interest, they may allow violations of their personal boundaries.

Who is at fault? The person in a position of power has a moral, legal, ethical, and military responsibility not to exploit that trust and vulnerability by engaging in sexual contact with a less powerful person. Power often means opportunity. To act on opportunity to violate sexual boundaries is an abuse of power.

Some may still wonder why such a sexual relationship is so wrong? Both people are consenting adults, right? The issue of **consent** is the heart of the matter. To have true consent, there must be equality in a relationship.

Dr. Peter Rutter, a psychiatric expert on trust betrayal, and ethics committee chair of the Jung Institute agrees:

> "Under these conditions, sexual behavior is always wrong, no matter who initiates it, no matter how willing the participants say they are. The factors of power, trust and dependency remove the possibility of a woman (or man) freely giving consent to sexual contact."[1]

If you accept Dr. Rutter's findings, any sexual contact under an imbalance of power is contrary to "good order and discipline." Is this standard too high for the military? I don't think so. Many of society's professions such as counselors, psychologists, doctors, attorneys, educators, emergency service workers, clergy, and law enforcement officers have professional standards and ethical codes that forbid sexual contact with a client or student or subordinate. And one could argue that Sexual Exploitation in the military is more severe than in civilian professions because of the greater degree of control and higher standard of discipline in the military. Yet, we find that many states have criminalized such behavior.[2]

For example, in Iowa, if a peace officer has sexual contact with a crime victim, he or she has committed an offense "Sexual Exploitation by a Law Officer" which is a Class D Felony.[3] In Colorado, any psychotherapist who knowingly inflicts sexual intrusion on a client in the course of therapy commits aggravated sexual assault, a Class 4 Felony.[4] And in Kansas, a parole officer who engages in consensual intercourse, fondling or sodomy with a parolee is guilty of Unlawful Sexual Relations, which is a Level 10 Person Felony.[5]

Why such a high civilian standard? The punishments may seem a bit harsh for adulterous behavior. It is because lawmakers have recognized a difference between adultery and sexual exploitation. The difference is in the devastating impacts sexual exploitation can have on victims. Impacts that include dissociation, loss of self-esteem, enforced silence,

depression, hyperarousal, inability to trust or establish relationships, nightmares, self-blame and suicidal thoughts. These psychological impacts can far outweigh, and last long beyond, the physical acts themselves.

Dr. Patrick Carnes, an expert on betrayal bonds and exploitive relationships, finds many sexual exploitation victims display severe trauma reactions similar to those in Vietnam Veterans. According to Carnes, reactions last long beyond the original experience, and are commonly manifested as Post-Traumatic Stress Disorder (PTSD).[6]

A 1998 study conducted by researchers at the Yale University School of Medicine concluded sexual harassment and abuse causes more post-traumatic stress in military women than the rigors of combat. The psychiatric researchers, Drs. Alan Fontana and Robert Rosenheck interviewed 327 female veterans treated in a VA clinical program for stress-related disorders. About 2/3 had served in either Vietnam or the Gulf War. 63% of the women reported experiencing physical sexual harassment during their careers, and 43% rape or attempted rape. The study concluded sexual stress was almost four times as influential in the development of PTSD as duty-related stress. Even more disturbing, many of the women felt that the sexual behavior of their perpetrators was an institutionalized "norm" in the military. [7]

If this "norm" is accurate and sexual exploitation cases are not prosecuted, the services may develop symptoms of what Dr. Carnes describes as "organizational incest."[8] Circumstances may lead some military members to believe that sexual misconduct is

normal and should be tolerated by victims. When an embarrassing case does surface, there are pressures to "keep it in the family." Many view adulterous relationships as voluntary and private conduct. But in the military, adultery cannot be truly private conduct because the relationship is not at its base, private.

In the military cases involving sexual misconduct often become high-profile when highly respected, trusted, or powerful people are involved. In other words, someone who society hopes "would never do this." A convening authority may weigh the threat of bad publicity, and embarrassment to himself and his command against the seriousness of the allegations when deciding whether or not to prosecute. There may be pressure to solve a problem quietly and administratively although clear elements of criminal sexual exploitation exist. Potentially, a sexual predator or pattern offender could return to civilian life with no notice and continue his or her criminal activity. To avoid a preference for secrecy, another change should accompany revisions to the UCMJ offenses. Commanders should not act as convening authority. I support the idea of shifting the decision to prosecute from commanders to legal officers in an independent command. The threat of exposing scandal to the public should not weigh in the decision to prosecute. Secrecy and accountability cannot coexist. General Norman Schwartzkopf once said:

> "The truth of the matter is that you always know the right thing to do. The hard part is doing it."

To reiterate, I feel that cases involving adultery or sodomy should be examined to determine if elements of sexual exploitation exist. If so, such conduct should be punishable in the UCMJ, not as Adultery or Consensual Sodomy, but as an abuse of power, perhaps best termed "Sexual Exploitation."

Why is this a good idea?

- First of all, An offense of sexual exploitation would separate criminal sexual misconduct from what is often judged private behavior.
- Second, it would align standards of military professional conduct with those of similarly empowered civilian professions.
- Third, it would diminish sexual exploitation in the military by enlightening all members to the elements of potentially abusive scenarios.

I did not come here as a victim to air my personal dissatisfaction in the system. My case is closed, but I hope that this hearing can contribute to change. The Uniform Code of Military Justice needs positive change in the area of sexual misconduct. Realistic change. Change that correlates to the honor, power, and responsibility inherent in the military profession.

Thank you.

References

[1] Peter Rutter, M.D. Sex in the Forbidden Zone. (New York: Fawcett Columbine, 1989), p. 25.

[2] AdvocateWeb, <http://www.advocateweb.org>"Professional Exploitation," (Austin, TX, 1999)

[3] Iowa Code 1997, Chapter 709, Section 15A. Sexual Exploitation by a Law Enforcement Officer.

[4] Colorado Code, 18-3-405.5. Sexual assault on a client by a psychotherapist.

[5] Kansas Statute 21-3520, Chapter 21. Crimes and Punishments, Article 35. Sex Offenses, Unlawful Sexual Relations.

[6] Patrick J. Carnes, Ph.D. The Betrayal Bond (Deerfield Beach, FL: Health Communications, Inc., 1997), p. 6-7.

[7] Alan Fontana, Ph.D. and Robert Rosenheck, M.D. "Focus on Women: Duty-Related and Sexual Stress in the Etiology of PTSD Among Women Veterans Who Seek Treatment." *Psychiatric Services* 49: 658-662. May 1998.

[8] Carnes, p. 60-63.

MEMORANDUM

TO: COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

FROM: SHANNON FRISON (CAPT, USMCR), ASSOCIATE, DWYER & COLLORA, LLP, 600 ATLANTIC AVENUE, BOSTON, MA 02210, (617) 371-1000, sfrison@dwyercollora.com

SUBJECT: PROPOSED CHANGES TO UNIFORM CODE OF MILITARY JUSTICE

DATE: 3/1/01

The purpose of this memorandum is to propose changes to the Uniform Code of Military Justice in response to the February 5, 2001 invitation by Judge Walter T. Cox, III and the Commission on the 50th Anniversary of the Uniform Code of Military Justice to submit comments on the topic. I served for three years as a judge advocate at Marine Corps Air Station, New River at Jacksonville, North Carolina (1997-2000), eighteen months of which were served in the capacity of Chief Trial Counsel.

The proposed changes would provide, among other benefits, the following much needed improvements to military justice: Fully utilize lawyers who become judge advocates and military judges; provide a more consistent and fair system of dispositions at each installation; and make military justice a system that can withstand scrutiny both from inside and without.

I. Changing the Role of the Convening Authority (Topic IIIA)

The role of the convening authority in all special and general courts-martial should be changed significantly. In military justice, the need for an objective, unbiased perspective in the factual analysis, charging decision, and choice of members is paramount because of the stakes involved – individual liberty. It is not by mistake or happenstance that lawyers are required to undergo three to four years of training and master the laws of at least one state before practicing. Law, including criminal justice, is a very specialized field and judge advocates and military judges should be accorded much of the authority that is now reserved for the convening authority.

As the one of the very few Military Occupational Specialties requiring formal civilian education and licensure, judge advocates are the most qualified and best positioned to make prosecutorial and post-conviction decisions that they are currently barred from making. As is, judge advocates in trial counsel billets simply carry out the will of the convening authority. Try as she might, there is never a guarantee that the convening authority will follow her legal advice. She has only moral persuasion at her disposal and no legal authority to go forward without the convening authority's permission. So, the judge advocates' skills are not being fully utilized, and commanding officers with no legal expertise must make decisions they are not actually qualified to make. Although there is much weight and value given to the wisdom and leadership capabilities of the men and women who are chosen for command billets, there is simply no substitute for law school and legal training. Under the present system, there is really no need for judge advocates to be lawyers who are licensed in the various states because the knowledge and experience that those qualifications afford are not respected by the services. Not only would changing the role of the convening authority

make dispositions more fair, evenhanded, and uniform across command lines, it would also ensure that military justice becomes a truer microcosm of American justice.

A. (2) Should Congress create an independent Court-Martial Command and provide that decisions to prosecute be made by a legal officer serving as the equivalent of a "district attorney?" and (5) Should the convening authority retain clemency powers, both with respect to findings and sentence, or should his powers be limited?

The decision to prosecute should be within the sole discretion of the Chief Trial Counsel of each office. There is certainly no need to create more bureaucracy by instituting a separate office to make these decisions. Again, a lawyer, and not a legal officer, is best qualified and positioned to determine which cases are prosecuted and which are not. In each case, these decisions require a detailed analysis of the facts, the laws as applied to those facts, the probability of success on the merits, and the interests of justice. This type of analysis is best done by an attorney who will be more familiar with the law, the judges, the docket, and other case dispositions rather than by a commanding officer who may be an infantry officer, pilot, adjutant or other completely non-legal specialist. In addition to the fact that most commanding officers do not have the expertise in legal matters to make such a decision is the fact that actual bias plays a role in their decisions more often than it should. What we judge advocates at Marine Corps Air Station, New River used to call the "good Marine" syndrome is prevalent among many commands. That is, if a service member is an asset to the command either by being very adept in his MOS, by being one of a few specialists in his field, or even by being well-liked and good at general military skills, he is often given great lenience with regard to charging decisions made by the commanding officer. This is the equivalent of the wealthy, rich, or famous in civilian society not being prosecuted because of those attributes. Although it sometimes happens in the civilian arena, it is clearly and openly condemned as a matter of policy.

Likewise, decisions as to clemency are best left in the hands of military judges. The present system allows commanding officers to basically overrule the decisions of the court-martial by giving him the final word on findings and sentencing. Again, this completely defies the purpose of the military judge and devalues his expertise and experience. The wisdom behind these proposed changes would be much more intellectually ascertainable to all concerned if the issue was whether or not lawyers should have the final say on which training missions pilots undertake in the *Osprey*. That is, however, just as nonsensical as the current state of criminal dispositions in the military branches. Not only does it usurp the role of both the military judge and the members panel, it subjects military justice to a much more random and unpredictable array of outcomes. The same factors that make it very difficult for commanding officers to make fair and consistent prosecuting decisions also make it difficult for them to make post-trial decisions regarding findings and sentencing.

B. The Jones Case at Marine Corps Air Station, New River

The best way to illustrate this problem is by way of a real life example. For the sake of keeping the parties anonymous, we will refer to the accused in this matter as SSgt Jones. The incident that put this case into motion occurred in Italy in 1996 when Marines on one of the popular six-month "floats" stopped there for a port call.

After a night of exploring the city and local attractions, SSgt Jones happened upon a young female native of the area, Ms. Smith. After following her for some time, Ssgt Jones attacked her. He grabbed her from behind, threw her to the ground, and began to drag her by her hair and arms to a secluded parking lot. An onlooker from a balcony of one of the nearby buildings yelled down to him. What would have, in all likelihood, ended in a rape or attempted rape, ended with SSgt Jones running down the streets of the city trying to escape after being interrupted by another citizen. Ms. Smith was assisted by other people in the area, and immediately called the police who found SSgt Jones a few blocks from the scene shirtless with blood on his arms. Ms. Smith was brought to the scene, identified Jones, and filed a full police complaint regarding the attack.

The sequence of events that followed the incident illustrates why commanding officers should not decide when and whom to prosecute. Although the local police insisted on keeping SSgt Jones in custody in Italy, the Staff Judge Advocate aboard the ship eventually negotiated for the Marine Corps to handle the prosecution of the case. Upon returning to his parent command, however, SSgt Jones was *never* prosecuted for the attack. In fact, despite prior investigations of SSgt Jones by the Naval Criminal Investigative Service regarding other complaints against him, he was allowed to return to work and serve as if nothing had happened. In 1998, almost two years after the incident the Joint Law Center at New River renewed its "encouragement" of his squadron commanding officer to pursue the matter. An international incident with a very interested victim (who had attempted to pursue the matter through the local police), however, did not sway the commanding officer. He had a staff non-commissioned officer who had served with him for several years, was a very competent embarkation officer, and was needed at the squadron. While on the other hand he had a foreign victim, a show-up identification, and legal counsel urging him to take the matter seriously.

After much prodding and heated debated as to the merits of the case, he finally agreed to allow the matter to be heard by an Article 32 officer. The victim was flown to the United States to provide her testimony for that hearing. After a very compelling and clear account of those events, the Article 32 officer recommended that the matter be forwarded to a general court-martial.

Despite this recommendation, SSgt Jones' commanding officer refused to prosecute him. This field grade officer, a *helicopter pilot* with no legal training (besides a cursory week-long legal class for new commanding officers) argued continuously with both the trial counsel and the director of the law center regarding the merits of case, the probability of success, the costs of the prosecution, and the seriousness of the matter. The judge advocates involved made a rare move and held an in-person meeting with the Staff Judge Advocate of the Wing to try to persuade him to convince the commanding officer of the Wing to take over the case because it was not being handled properly at the squadron and group levels. He, too, declined to take action.

C. <u>(3) Should this "district attorney" make pretrial agreements?</u>

Again, there is no need to create yet another billet or position within the legal offices. The person best suited to make pretrial agreements is the prosecutor

herself. Many of the same issues that put the commanding officer at a disadvantage in making charging decisions also make it difficult for him to fairly and consistently enter into pretrial agreements. Some of the major factors to be considered when negotiating for such agreements are: (1) judicial economy, (2) size of the current docket, (3) likelihood of success on the merits at trial, and (4) prior dispositions of similar offenses. It is at worst impossible, and at best a waste of time for prosecuting judge advocates to attempt to relay these factors to the convening authority so that *he* can make pretrial decisions. It is, after all, the trial counsel who must deal with managing his own docket. This entails knowledge of which cases are more serious, which are readily provable, and which are simply not worth trial. It is also the trial counsel who must navigate the judicial circuit's docket and understand the limits of judicial economy. And it is, of course, the trial counsel who knows how cases are being disposed *across* commands, giving him an aerial view of military justice on that base or installation. That is something with which commanding officers cannot and need not be familiar.

Combined, these changes would provide the following much needed improvements to military justice:

1. Fully utilize lawyers who become judge advocates and military judges;
2. Free up commanding officers to actually run their units and do *their* Military Occupational Specialties;
3. Provide a more consistent and fair system of dispositions at each installation;
4. Make charging decisions and negotiations for pretrial agreements more streamlined by eliminating the middle party – commanding officers;
5. Make dispositions of offenses more fair by ridding the system of bias and favoritism that is inevitable within commands; and
6. Making military justice a system that can withstand scrutiny from both inside and without, thereby greatly increasing its credibility.

Good Afternoon, Esteemed members of the Panel to Consider Reform of the Uniform Code of Military Justice. My name is Major Dusty Pruitt, currently US Army, Retired. I was a litigant from 1983-1995 as part of the gays in the military cause. My case, Pruitt v. Sec. Of Defense, was the precedent setting case which finally allowed gays to sue the government, and particularly the armed forces, in trying to obtain justice for themselves in the government, particularly defense against unfair termination of employment due only to the status of being homosexual.

In 1991, the Supreme Court refused to grant a "petition of certiorari" to the government in my case and thus upheld a 9th circuit court of appeals opinion that gays may not be ousted from the military based merely on the fact of the prejudice of its members against gays. After this win on procedure, my case fell back into the ranks to be heard on the merits. Under my case, others ahead of me in line were allowed to serve out their terms; Colonel Margarethe Cammermeyer, Chief Petty Officer Keith Meinhold, and Sgt. Mel Dahl were among the few who were allowed to serve. Following the change of administration from President Bush to President Clinton, the government, citing the

cost of further litigation, settled my case by allowing me to retain my promotion to Major, reinstating me into the Army, and allowing me to retire.

I will confine most of my comments today to the sodomy statute of the UCMJ, but most of what I say can also be applied to the adultery statute as well. When President Clinton was inaugurated into office, the debate over gays in the military changed. No longer would gays be ousted from the service under an administrative regulation subject to executive order of the President; now as a result of the "don't ask, don't tell" policy (whose chief advocate was Gen. Colin Powell, now Sec. Of State) the rules had the force of congressional law. As a result, the vast majority of gays and lesbians today are charged under the UCMJ sodomy statute. This clearly was a step backwards for gays and lesbians. The combined force of both legislative and executive branches made changing "don't ask, don't tell" a formidable task, one which the courts will not soon undertake to change. Now we can only hope to force administrations to enforce "don't ask, don't tell", and/or change the sodomy statute, which is the subject of my comments today.

As I said, today a great number of gays and lesbians who come to the attention of their command as being gay are then prosecuted under the sodomy statute. There are several things amiss with this approach: First, it criminalizes behavior classified as sodomy. Sodomy under the UCMJ is defined as oral or anal sex with anyone, including heterosexual married couples. Criminal behavior under the sodomy statutes, while still so classified in 28 of the 50 United States, is rarely prosecuted in any state today. The state sodomy statutes are usually seen as anachronisms by law enforcement and used only in the most backward jurisdictions to harass gay people. In almost no case is a gay person prosecuted as a criminal by the mere fact that he/she is gay, which requires law enforcement to assume sodomy. This, as many law enforcement communities have learned to their dismay and often to the detriment of their pocketbooks, is a false assumption. Just because a person identifies as gay does not mean they commit sodomy; many gay persons remain celibate and chaste. Many heterosexuals commit homosexual acts in certain situations, such as when in prison, yet these people would not label themselves "homosexual". Criminalizing a private, consenting sexual act is, as

many states have learned, sheer folly for the state. And in most states, as with the UCMJ, the act of sodomy can apply to heterosexual or homosexual behavior. Most people would not want to make the same mistake Sen.Strom Thurmond of South Carolina made during the hearings on gays in the military when he categorically exclaimed, "heterosexuals do not commit sodomy" (thus eliciting giggles from everyone present, including his staff).

Second, the sodomy statute is selectively applied. Almost 100% of the servicemembers prosecuted under the UCMJ sodomy statute are gay or lesbian. The statute is universally violated by heterosexuals, married or unmarried, particularly the part about oral sex. For example, many male servicemembers prefer oral sex to traditional sexual intercourse when visiting a prostitute, yet this behavior is tolerated and often tacitly or explicitly approved of by higher command. This double standard goes to the premise of my case, that gays and lesbians are not tolerated in the service not because they are detriments to "good order and discipline", but because of the homophobia tolerated in the military because of lack of leadership.

The statutes on adultery and sodomy should be incorporated into a single statute covering sexual misconduct, which can clearly be demonstrated as prejudicial to good order and discipline. These instances of what violates "good order and discipline" ought to be clearly spelled out and should be limited to command issues of superior-subordinate relationships. No heterosexual should be prosecuted and made a criminal for adultery in today's world, and no heterosexual, gay or lesbian person should be made a criminal for sodomy. Our prisons and military disciplinary facilities are full enough of petty criminals as well as violent offenders. We need not crowd them further with people who are otherwise law-abiding but who violate a statute that is routinely violated by a large majority of the people in America (and maybe the rest of the world!). If everyone who has ever violated the sodomy statute as currently written were suddenly to turn blue, I am sure the armed forces would just as suddenly be confronted with the need to throw all but a small percentage of its members out. And who would want to live with an armed forces of those left? Thank you for letting me speak today. I will be looking forward to seeing your recommendations in your final reports.

COMMENTS SUBMITTED BY LAMBDA LEGAL DEFENSE AND EDUCATION FUND TO THE COMMISSION ON THE FIFTIETH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

Introduction and Summary

Pursuant to a Notice issued on February 5, 2001, by the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice, Lambda Legal Defense and Education Fund ("Lambda") respectfully submits these comments addressing the following Topics for Consideration:

I. Need for Congressional Review

B. Do[es any or all of the] following indicate a need for revisiting the Code?
- 12. Evolving international human rights standards
- 16. Evolving standards of privacy/sexuality

IV. Crimes and Offenses

C. Should Congress enact a modern criminal sexual misconduct statute similar to the Model Penal Code and repeal the current statutes on rape and sodomy?

K. Should consensual sodomy be decriminalized?

The answer to each question is "yes." In light of modern-day Americans' beliefs about the proper degree of government involvement in the intimate lives of adults, the Commission should recommend review and repeal of Article 125 of the UCMJ, 10 U.S.C. §925, which provides in relevant part:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex . . . is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

No unique needs of the military support retention of this archaic, invasive criminal law.

Additionally, the Commission should recommend that a revised UCMJ include a criminal

sexual misconduct article so that sexual coercion, beyond that involving vaginal intercourse, will be criminalized under a specific provision of the UCMJ. At present, the Code reaches forcible acts other than vaginal intercourse only by way of the sodomy article. The wrongful aspect of this behavior – coercion – remains unacknowledged in the definition of the offense, because Article 125 broadly prohibits certain kinds of sexual activity even when it is unforced and consensual.

Lambda, founded in 1973, is the nation's oldest and largest legal organization dedicated to achieving full recognition of the civil rights of lesbians, gay men, and persons with HIV/AIDS. From offices in New York, Los Angeles, Chicago, and Atlanta, Lambda conducts impact litigation, public policy work, and public education on a broad range of legal issues nationwide. Lambda's attorneys have for many years played a key role in articulating and enforcing constitutional limits on government regulation of consensual, adult sexual activity. In court challenges and repeal efforts directed at "sodomy" or "crime against nature" laws, discussed below, Lambda has helped legislatures and courts reform their states' criminal law to conform to modern cultural and legal standards. Lambda's current docket includes constitutional challenges to consensual sodomy provisions in Arkansas, *see Bryant v. Picado*, 996 S.W.2d 17 (Ark. 1999); Texas, *see Lawrence and Garner v. State*, 2000 WL 729417 (Tex. App. – Houston (14 Dist.) June 8, 2000) (Nos. 14-99-00109-CR, -00111-CR); and Virginia, *see Commonwealth v. Fisher* (Va. App. No. 0278-00-4), three of the twelve out-of-step states that still have such laws on the books.

Lambda has also worked extensively for equal treatment of lesbians and gay men serving in, or seeking admission to, the armed forces. It mounted the most comprehensive challenge to

the "Don't Ask, Don't Tell" statute, 10 U.S.C. § 654. *See United States v. Able*, 155 F.3d 628 (2d Cir. 1998). It is important to emphasize here, however, that 10 U.S.C. §654 stands separate and distinct from the criminal law issues now before the Commission. Moreover, the criminal law on which these comments focus, Article 125, 10 U.S.C. § 925, applies to heterosexual as well as gay servicemembers, imposing an unnecessarily intrusive and punitive regime on all those who serve their country.

The Pervasive Trend Toward Decriminalization of Consensual Sodomy

As recently as 1961, every state had some form of prohibition on "sodomy" or "crimes against nature." William B. Rubenstein, Sexual Orientation and the Law 161 (2d ed. 1997). Of special significance with respect to military law, a 1948 statute had criminalized consensual oral and anal sex in the District of Columbia. *See United States v. Harris*, 8 M.J. 52, 56-57 (C.M.A. 1979) (discussing D.C. Code § 22-3502 and military courts' settled practice of resolving interpretive questions by reference to District of Columbia law). But 1962 brought adoption of the Model Penal Code, with its drafters' well reasoned decision to disapprove criminal penalties for consensual sex between adults, whether gay or non-gay. *See* II MODEL PENAL CODE §213.2 at 357 *et seq* (1980 Revised Comments).[1] As the Comments explain, the "exercise of the coercive power of the state against individual citizens diminishes freedom. Nowhere is this curtailment of liberty more pronounced than when the state, acting through the penal law, punishes by incarceration. . . . The 'decisive factor' favoring full decriminalization of private sexual "relations between consenting adults is 'the importance which society and the law ought

[1]The line drawn by the Model Penal Code, which continues to punish all forced sex as well as that which victimizes children or others incapable of giving consent, occurs in public, or

to give to individual freedom of choice and action in matters of private morality.'" *Id.* at 369-70 (quoting Report of Committee on Homosexual Offenses and Prostitution, Great Britain (American Ed. 1963) (the "Wolfenden Report"), at 52). Dissemination of the Model Penal Code spurred reform, igniting a trend of legislative repeals of sodomy laws throughout the 1970's and a series of judicial invalidations that continues to the present day. *See* Janet E. Halley, "Reasoning About Sodomy: Act and Identity In and After *Bowers v. Hardwick*," 79 VA. L. REV. 1721, 1774-76 (1993).

Today, consensual, private sex between adults is the subject of a penal statute in only twelve states – with challenges pending in three of the twelve. *See supra.* Changing public attitudes and successful legal challenges have greatly diminished the number of extant statutes, leaving them in force in only a few geographic areas of the United States. *See* Lambda Legal Defense and Education Fund, "State by State Sodomy Law Map" (attached hereto as an exhibit).[2] Their continued existence stands as a growing embarrassment to citizens in those states who believe in a modern society and penal justice system where personal freedom, consistent with the rights of others, is valued over moralistic inquiry into the intimate conduct of one's neighbors.

Sodomy laws have fallen by legislative act and by judicial ruling, on a variety of grounds and legal theories. Common to all repeals is the idea, expressed through the votes of elected representatives or interpretations of state constitutions, that a government "presence" in the

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involves prostitution, *id.* at 362-65, is wholly consistent with the position taken here.

[2]Available via the internet at www.lambdalegal.org/cgi-bin/pages/states/sodomy-map.

bedroom, if certain common sexual acts occur there, offends core values of individual autonomy and equal treatment while serving no valid state interest in the modern day. *See, e. g., Powell v. Georgia*, 510 S.E.2d 18 (Ga. 1998) (holding based on state constitutional right to privacy); *Gryczan v. Montana*, 942 P.2d 112 (Mt. 1997) (same); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996) (same); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (state privacy and equal protection rights relied upon); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980) (limit on state's police power, and equal protection provision, cited); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980)(privacy and equal protection rights), *cert. denied*, 451 U.S. 987 (1981); *State v. Ciuffini*, 395 A.2d 904 (N.J. Super. App. Div. 1978) (unspecific "inalienable rights" provision of state constitution cited); *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976) (privacy rationale). *See also Lawrence and Garner, supra* (citing state constitutional amendment banning sex discrimination, in challenge to statute criminalizing only same-sex conduct). Domestic reforms, moreover, comport with a modern consensus among developed nations against criminalization of consensual sex. *See* Smith, Charlene C. and Wilets, James, "Lessons From the Past and Strategies for the Future: Using Domestic, International and Comparative Law to Overturn Sodomy Laws," 23 SEATTLE U. L. REV. 49, 68 (2000) ("[W]ith the exception of certain states in the United States, all of the industrialized democratic nations of the world, including culturally disparate countries such as Japan, Taiwan, Australia, Canada, South Africa, and Russia, reject the criminalization of same sex consensual relations").

Indeed, the cascade of repeals and judicial decisions seen in the last few years stands as evidence that the United States has reached a "tipping point," a consensus that government has no justification for the tremendous intrusion on highly personal affairs that these laws represent.

Bans on consensual "sodomy" – literally, governmental directions about what kind of sex adults may engage in – have for decades appeared jarringly inconsistent with American's lived reality. *See* Edward O. Laumann et al., The Social Organization of Sexuality: Sexual Practices in the United States 103 (U. Chicago Press 1994) ("overall trend" with respect to participation in oral sex since 1933 "reveals what we might call a rapid change in sexual techniques, if not a revolution"). Thus by 1998, the Chief Justice of the Georgia Supreme Court, writing for all members of that Court save one, could say, "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than consensual, private, adult sexual activity." *Powell*, 510 S.E.2d at 24.

While judicial invalidation of unconstitutional laws is a legitimate, core function of the courts, most jurisdictions have abolished their sodomy laws through legislative repeal, reflecting widespread acceptance of how inappropriate such penal laws are today. *See* Rubenstein, *supra*, at 161. Among the numerous jurisdictions that have discarded their antiquated bans on consensual sex, it is especially noteworthy that the District of Columbia, subject to the oversight of Congress, repealed its sodomy statute in 1994. *See* D.C. Code § 22-3502 (1999) (Historical Note) (discussing D.C. Law 10-257, § 501(b), repealer effective May 23, 1995). That provision, cited as a model for Article 125, thus enjoyed one of the shorter lives of such statutes, remaining in force for less than fifty years before the affected community's elected representatives recognized that the statute was in derogation of that community's values.

The task before Congress is clear. Legislatures sit to amend or repeal statutes that are inconsistent with modern norms and understandings. When courts hesitate to strike down

statutes that are challenged as "outmoded," it is because the legislative branch bears the primary obligation of ensuring harmony between the rules that govern and the norms and attitudes of the governed. *See United States v. Henderson*, 34 M.J. 174, 178 (C.M.A. 1992) (recognizing trend toward repeal or invalidation of such laws and distinguishing role of reviewing federal court from role of legislatures and courts applying state law). As the Commission considers whether to recommend legislative repeal of Article 125, it should reflect on the transformation in Americans' public attitudes about sexual autonomy and about state involvement in intimate conduct since the time when sodomy was codified as an offense under military law. It should recommend prompt decriminalization of consensual adult sexual activity.

Congress Can Protect Individual Freedom Without Compromising the Unique Mission of the Military

The military occupies a distinctive place in American life. Within Constitutional constraints, servicemembers' see their rights and freedoms diminished to achieve the discipline and vigilant readiness that protects the domestic rights and freedoms of the larger society. Repealing the UCMJ's proscription against consensual sodomy will not, however, undermine the armed forces' legitimate goals. Rather, in view of the availability of other Code provisions that ensure good order, discipline, and cohesion through appropriate regulation of servicemembers' sexual relationships and other conduct, repeal of an antiquated provision that is out of step with prevailing legal and social trends will demonstrate the continued relevance of the UCMJ in the modern world. It will also ensure that individual rights bend only where necessary to achieve military goals, and further the fair and equal administration of military criminal justice.

Servicemembers understand that their sacrifice of personal freedoms furthers a critically

important, shared purpose. Military life affords less privacy, imposes greater limits on self-expression, and grants less freedom of movement than civilian life. But the restrictions should not be arbitrary; rather, the discipline they forge ensures the smooth working of the armed forces. While soldiers cannot and do not question their superiors' every order, they must understand generally how the burdens placed on them relate to the military's overall purpose and goals. The UCMJ forbids servicemembers to engage in a wide range of conduct that would be wholly permissible, or even constitutionally protected, in the civilian arena. Most of these strictures are doubtless necessary to the proper functioning of the military. To maintain the system's legitimacy, however, both the servicemembers who are subjected to the UCMJ's requirements and the larger community should be readily able to perceive a relationship between the Code's distinctively burdensome regulations and the mission of the armed forces.

Article 125 fails this test. It is obviously necessary to police nonconsensual sexual conduct and to regulate some sexual relationships, moreso in the military than in civilian society. But with one exception, the UCMJ already includes specific provisions addressing sexual activity that is properly punishable under either general criminal law concepts or in the interest of promoting good order and discipline. For example, the UCMJ should, and does, criminalize rape. Art. 120, 10 U.S.C. §920. It should, and does, protect minors from involvement in sexual conduct, under the rubric of "carnal knowledge." *Id.* With extraordinary breadth that would require a finding of unconstitutionality in the civilian world, the UCMJ allows punishment for conduct, sexual or otherwise, that is "unbecoming an officer and a gentleman," Article 133, 10 U.S.C. §933. And under the "general article," Article 134, 10 U.S.C. §934, any relationship giving rise to "disorder[or] neglect[] to the prejudice of good order and discipline in the armed

forces" subjects the offender to criminal punishment. Given the availability of these proscriptions, Article 125 is simply unnecessary to vindicate the military's concededly legitimate interests in deterring wrongful or disruptive behavior.

On repeal of Article 125, the sex offense provisions of the UCMJ will be deficient in only one respect: the absence of a provision punishing coercive sexual conduct that does not involve vaginal intercourse. To the extent that Article 125 is currently a "placeholder" for a statute addressing such conduct, it is a poor one, both because the elements of the offense do not reference the very aspect of the behavior that makes it punishable, and because such a broad statute is particularly subject to abuse through arbitrary or discriminatory enforcement. *See infra.* Taking the action suggested in the Commission's Topic IV.C., namely, enacting a sexual misconduct statute along the lines of the Model Penal Code's offenses entitled, "Deviate Sexual Intercourse by Force or Imposition," MODEL PENAL CODE §213.2, and "Sexual Assault," §213.4, would advance the goals of the military justice system by better targeting the reason certain behavior is considered wrongful. It would also ensure coverage of only that conduct that is properly proscribable.

Article 125 Criminalizes Behavior Known to Be Common and Healthy

Drawing the appropriate line between conduct that is predatory or contrary to effective lines of command, on the one hand, and that which is commonplace and deeply personal, on the other, has the salutary effect of cleansing the law of hypocrisy. An important reason to discard the sodomy prohibition is that it inaccurately signals social revulsion at conduct that is, in fact, broadly accepted by adults inside and outside the armed forces. As medical and social science experts emphasize, the conduct proscribed by Article 125, namely, oral and anal sex, though

historically labeled "deviant," is enjoyed by a large percentage of today's sexually active population. *See* Laumann, *supra*, at 102-04 (ninety percent of men born during period 1948-1952 reported engaging in heterosexual oral sex; over eighty percent of women born during period 1958-1962 reported same); *id.* at 107 (one quarter of men and one fifth of women have engaged in heterosexual anal intercourse) . This is true for both gay and non-gay persons. *See* American Psychological Association, "Just the FactsAbout Sexual Orientation and Youth: A Primer for Principals, Educators and School Personnel" at 5 (listing policy statements of organizations) ("[T]he idea that homosexuality is a mental disorder or that the emergence of same-gender sexual desires among some adolescents is in any way abnormal or mentally unhealthy has no support among health and mental health organizations") (available via internet at www.apa.org/pi/lgbc/publications/justthefacts.html). Whatever validity the Army Judge Advocate General's characterization of both fellatio and cunnilingus as "equally revolting" may have had in 1945, *see Harris*, 8 M.J. at 54 (quoting *United States v. O'Neal*, 51 B.R. 385, 397 (1945)), it is sufficiently out of step with social mores in 2001 to provoke sarcastic dismissals and, ultimately, pervasive disrespect for the law. Recognizing that sex acts long condemned by the criminal law are nearly universally engaged in today, to the fulfillment of consenting adults inside and outside the military, is no cynical surrender. Instead, it is a commonsense reason to enact reform. Any UCMJ provision that makes criminals of virtually every servicemember, while failing to advance the goals of the armed forces, has outlived whatever usefulness it may once have had.

Threats of Unequal Treatment: the Historical Misuse of Sodomy Laws

Lambda's experience in courtrooms and legislative chambers across the United States qualifies it as a witness to the gross misuse of sodomy laws to brand individuals as wrongdoers, even felons, in a variety of contexts. Today, prosecutions for unaggravated sodomy, that is, punishment for consensual sex occurring in private among adults, are rare, though not unheard of.[3] Yet the harms arising from the continued existence of sodomy statutes are real and profound in the lives of many Americans. Statutes enacted centuries ago to express the moral sentiments of those times today make convenient weapons in the hands of hostile litigants in child custody and visitation disputes, subverting children's best interests to the desire to punish a gay ex-husband or wife; public employers similarly cite sodomy laws to cast out highly competent employees, unconvincingly claiming that their "lawbreaker" status would undermine public confidence in their work. The same risk of unjustified harm exists in the military. Lambda, of course, disagrees vehemently with the anti-gay policy mandated by 10 U.S.C. § 654 and its accompanying Defense Department regulations. Anti-gay sentiment and the fact that sodomy laws are intextricably linked in the public mind to lesbian and gay identity make gay people especially vulnerable to arbitrary and discriminatory enforcement of Article 125. But the dangers attending such sodomy laws do not affect only lesbian and gay servicemembers. Rather, because Article 125, like its civilian counterparts, stands as a free-floating criminal ban on

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[3]The Lawrence and Garner cases, currently on *en banc* review before the Fourteenth District Court of Appeals of Texas, arose from a police intrusion into the bedroom of one of the defendants' private home. Officers found the two defendants engaged in consensual sex there, and a prosecution and convictions ensued. The incident calls to mind an observation in the Commentary to the Model Penal Code: "To the extent . . . that laws against deviate sexual behavior are enforced against private conduct between consenting adults, the results is episodic and capricious selection of an infinitesimal fraction of offenders for severe punishment." II MODEL PENAL CODE §213.2 at 370-71.

conduct that virtually every adult engages in, it is always available to officials or even private parties who would wield it in bad faith against individuals who are personal enemies or who are somehow disfavored even though they are living within the bounds of legitimate military laws and adhering to proper standards. It serves the military poorly, then, for the UCMJ to include a provision that is both unnecessary to the achievement of legitimate criminal justice goals and susceptible to misuse.

Conclusion

Article 125 should be repealed. It is a relic of the past that serves no purpose in the present, and as a source of danger to military cohesion and community in the future. The Commission should recommend adoption of a UCMJ article criminalizing coercive sexual conduct that does not involve vaginal intercourse.

Respectfully submitted,

Stephen R. Scarborough
Ruth Harlow
Lambda Legal Defense and Education Fund
1447 Peachtree Street, NE
Suite 1004
Atlanta, GA 30309-3027
(404) 897-1880

ZIMMERMANN & LAVINE, P.C.
ATTORNEYS AT LAW
770 SOUTH POST OAK LANE, SUITE 620
HOUSTON, TEXAS 77056
713-552-0300
FAX 713-552-0746

JACK B. ZIMMERMANN
JIM E. LAVINE
TERRI R. Z. JACOBS
KYLE R. SAMPSON

December 1, 2000

Dear Judge Cox and Frank Spinner:

Please consider the following items for the Cox Commission. Further justification can and will be provided if you want it. If you want me to actually serve on the Commission, I would gladly accept.

Respectfully,

Jack B. Zimmermann
Colonel USMCR (Ret)
Chairman, Military Law Committee
National Association of Criminal Defense Lawyers

Former Chairman, Military Law Section
Association of Trial Lawyers of America
Former Chief Defense Counsel, Chief Trial Counsel,
Military Justice Officer, SJA,
SPCM and GCM Military Judge
Former Artillery Battery Commander
Former Infantry Battalion Commander

Suggested Changes

I. Pre-trial

1. Art 32 conducted by SPCM Military Judge or field grade judge advocate
2. Art 32 Investigating Officer's finding of no probable cause binding
3. Right to transcript, audio recording, or defense-paid court reporter at Art 32
4. Military Judge rule on subpoena of witnesses, provision of experts, etc., not Trial Counsel or Convening Authority
5. Members' administration controlled by Military Judge's office not Trial Counsel

II. Trial Court

1. Random computer selection of members of appropriate grade – base wide
2. SPCM – 6 members, GCM – 9 members
3. Peremptory challenge increase: SPCM – 2, GCM – 3
4. Right to lawyer voir dire
5. Witnesses sworn by Military Judge or clerk of court
6. At members trial, Military Judge can sentence if accused chooses prior to trial
7. Military Judge can probate sentence (judge alone)
8. Members can probate sentence
9. Authorize sentence of separation without loss of retirement benefits

III. Post-trial

1. Convening Authority must approve finding of guilty, and be convinced beyond a reasonable doubt in order to do so
2. Automatic appeal for sentence of death or confinement greater than 5 years; in all others accused must file notice of appeal
3. Deferral of confinement if appellate issue could result in acquittal or new trial as in civilian federal court
4. Revocation of suspension of sentence decided by Military Judge

IV. Appellate Courts

1. Government appeals to CAAF (only on legal questions)
2. Right to oral argument at CCA and CAAF
3. Civilian defense attorney assigned to appellate defense office for continuity in death penalty representation

V. System

1. Fixed minimum terms for Military Trial Judges and Appellate Judges
2. Eliminate Summary Court-Martial

Subject: Comments/Suggestions on the Military Justice System-Proposed Changes
Date: Tue, 21 Nov 2000 16:08:09 -0500 (EST)
From: terryjw@webtv.net (Terry Woodhouse)
To: judgecox@earthlink.net

This responds to a notice in the 27 Nov 2000 issue of the AF Times notifying the public that the National Institute of Military Justice is seeking input for suggested changes for submission to lawmakers and defense officials.

The following are some thoughts:

1) Changes need to be made so that civilan GS lawyers with the DOD can be certified to act as Article 32 investigating officers and as trial counsel in special and general courts-martial. When I was on active duty it amazed me that an active duty CCTC could retire and then be hired by DOD and suddenly not be certified. This was particularly odd since civilian defense counsel representing military clients could practice before military courts and yet DOD civilians did not. This void leaves civilian DOD GS lawyer employees totally left out of the military justice area (as regards court appearances) and makes them appear to be second rate when in fact many of them have far more court experience than most active duty JAGs.

2) When an individual is sentenced by way of a court-martial they at most can be reduced to the grade of (E-1, airman basic, if enlisted)(not reduced at all if an officer).
-- Courts should have the option of reducing a serious offender to the grade of P-1. This new pay grade would be one grade below that of an airman basic. It never made sense to me that an individual convicted of child molestion or worste would be reduced to the grade of E-1, airman basic. What does this telll an airman basic--that they are no better in the eyes of their superiors (are in the same category) than the most serious offenders. Likewise officers that receive dismissals should be reduced to the grade of P-1. If you want a distinction for former enlisted and officers you could have the grade as P(E)-1 and P(O)-1. Courts should also be allowed to reduce officers in grade as appropriate. Courts now have their hands tied. They end up giving officers a dismissal or perhaps the opposite (a reprimand and/or forfeiture). Courts need to have more teeth in sentencing that can address officer misconduct with more precision. Reductions allow this.

Thanks for listening,

Terry J. Woodhouse, Col, USAF (Ret)

Subject: Ideas regarding MCM and UCMJ Changes
Date: Sun, 10 Dec 2000 14:42:08 -0600
From: "Wayne Johnson" <wayneljohnson@hotmail.com>
To: judgecox@earthlink.net

Judge Cox email December 10, 2000

Dear Judge Cox:

I am a retired Commander in the Navy's Judge Advocate General's Corps. I recently read in the Navy Times that you are heading a private group that is going to meet and formulate recommended changes to the MCM and UCMJ. Here are a few ideas I have.

Adultery should be kept a crime but define what it is better. Better guidance is needed in the UCMJ on what is service discrediting conduct or conduct prejudicial to good order and discipline regarding adultery. One guideline could be adultery with a spouse or other immediate family member of another military member where such behavior would be considered improper fraternization if it between the military members themselves would usually be prejudicial to good order and discipline. Sex with the spouse of a military or civil service worker that works in the same building, battalion, ship, or squadron as the accused. If such behavior would be considered sexual harassment or some sort of assault. The bottom line is that the Article 134 charge should clearly note that adultery in and of itself, although not condoned, is not a crime in the military without something more.

Consensual Sodomy should be decriminalized. In theory a husband or wife could be convicted for doing such things with their own spouse. The reality has been usually that a person is charged with forcible sodomy and ends up being convicted of the lesser offense, consensual sodomy, since they admit to the act but argue consent. The "victim" is NEVER later tried for consensual sodomy. This of course puts an accused at a great disadvantage at trial since it hinders one testifying at the trial. Even in states where consensual sodomy is still a crime I doubt seriously if the District Attorney would argue to a jury to convict for that as an alternative lesser charge in a forcible sodomy case. I have only seen that happen in the military.

If Congress does not want to decriminalize consensual sodomy then it should consider making it a federal crime for all members of Congress, the President, and the Cabinet. It makes no sense to make such behavior, particularly between a wife and husband, a crime for members of the military but not for them. We currently hold Privates and Ensigns to a higher standard than the President.

The article mentioned there was talk of doing away with the good military character defense. Considering the unique nature of the military it should be kept. Also polygraphs being offered by the defense should be allowed if the military judge finds it satisfies the requirements for scientific and expert opinions. A caveat should be that if the defense seeks to put such a test in the government must be given the right to polygraph the accused too for use in rebuttal. I have seen more than one case where the accused passed and NCIS polygraph and the victim failed and the charges for rape were dropped without there being a trial. The only reason they changed the rule on polygraphs several years ago was because the accuseds were getting

themselves found not guilty at such a high rate.

The Relford Factors test should be brought back by statute to overrule the Supreme Court case that made military personnel subject to UCMJ jurisdiction no matter where the offense occurred. Under the old Relford Factors off duty, off base, while in civilian clothes military personnel who committed crimes in the United States that do not involve military personnel or their family members were generally be subject only to being prosecuted by the state authorities. The only exception being drug use due to its lingering effects that could effect ones duty performance. The Relford Factors worked well in the 1970's and early 1980's prior to the Supreme Court ruling.

In closing my address is 5620 Rhodes Avenue, New Orleans, LA 70131-3922; (504) 391-3779; wayneljohnson@hotmail.com. If I can be further assistance let me know.

Sincerely, Wayne L. Johnson

P.S. About two years ago I submitted some ideas like the above to the DoD Joint Committee regarding the MCM/UCMJ. I am curious as to what ever happened to what I sent them.

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Dec 18. 2000

Mr. Cox, I have been in the Navy over 18 years. I am an Electricians Mate Chief. I'm in the Nuclear Field, and have been assigned to Submarines. Several of those years I've worked in Shipyards doing overhauls, New Construction and Decommissioning. It is in this working environment where many of our sailors are sent to Captains Mast and are awarded Non-Judicial Punishment. I went to Captains Mast early in my career. Because of this, I have been aware of many Masts. I have personally witnessed many people who have been sent to mast and have observed many lose much more than what I feel the drafters of the UCMJ intended. I feel there are several changes which need to be made.

1. A commanding officer should not be the one to perform the Mast. I am sure that in earlier times it was necessary for the commanding officer to be given the authority to punish wrongdoers. I feel that when a ship is at sea, a Commanding Officer needs to have the power to provide punishments necessary for the safe deployment of his vessel. However, many times the ships are in port, and there are people who are trained in the judicial system and they should be the ones to try our sailors. I was on the USS Omaha, we were in an overhaul which was several months behind. One of our junior sailors made an error in a tagout. All testing had to be stopped and there was a critique held. In the critique the Commanding Officer was asked by Naval Reactors why there were so many tagout violations on his ship. Even though the junior sailor was one of the hardest workers in his department, his nuclear NEC was removed, he was reduced in rank and removed from Submarine duty. The Engineer then told the Engineering Department that they had to make an example of this sailor. Several people to date had had tagout violations, but they made an example out of this one.

   A line officer receives little training in judicial matters. Let one who is trained in the legal field do their job. If there is still a need for Commanding Officers to perform masts, let it be one of the other commanding officers who is in port. Don't let a commanding officer try his own people. Let him Recuse himself due to prejudice. Wouldn't it be nice if a person ran into my car and I was able to be his judge. On Submarines, the Commanding officer knows every person by name. He knows the people he works with, and has formed opinions good or bad about each. Many of the outcomes of the masts are based on these prejudices.

2. Let there be spot checks on all masts performed. Because there are various types of people who are selected for command, there are many mast cases which are not just. I know of many mast cases which I feel were not just. After each mast is performed, let Navy Legal peruse the mast and check that the punishment metes the crime. I was on the USS Scranton (SSN 756).. I was the Leading Petty Officer of Electrical Division. My Division officer informed me that a new sailor (directly from prototype training) would be going to mast. He informed me that the sailor would be retained but he would be reduced in rank and probably be fined. I spoke with the sailor and found that the issue was due to a problem with his orders. I asked him if he had explained this to our Division Officer. He told me that he had explained everything. I then told the sailor that when he was asked to waive his rights, that he not do so. I told him that speaking with a Lawyer might let him know what to expect for punishment. The sailor did. He was asked why he had requested to speak with a lawyer, and the sailor informed the investigating officer that I had recommended this to him. I was reprimanded and threatened with mast by the command master chief when I informed him that it was my obligation to help this sailor. I was told to not meddle in that which did not pertain to me.

   When I went to my own mast, I was extremely frightened. I asked the investigating officer if I should see a lawyer. He told me that it wouldn't help. He told me that I wouldn't be able to use him anyway, because it was non-judicial punishment. I waived my rights. I know today, that if I had spoken with a lawyer I more than likely would not have gone to mast.

3. The punishments are often too severe. When the UCMJ was drafted, I am sure that they didn't take into account all that a simple mast could do to one of our sailors. Let me give you a worse case scenario. A first class Petty Officer is sent to mast. He makes $1800.00/ month in base pay, $310.00 per month for Sea Pay, $175.00/ month for Nuclear Proficiency pay and $275.00 per

month Submarine pay. He goes to mast, is reduced in rank, fined $1200.00, removed from Submarine duty, and his nuclear NEC is removed. This means he loses $350.00/month base pay, proficienty pay, Submarine pay, and receives orders to a tender and loses $310.00 per month Sea pay. But this was not all. Since the sailor had re-enlisted in the Nuclear field and received a bonus, he had to pay back nearly $8,000.00. The total cost for the first year is $22,000.00. Does it sound a little far-fetched. It happened to my Leading Petty Officer on the USS Scranton, for a minor infraction. In the civilian sector, I could tell someone that wanted to reduce my pay by such drastic measures that I quit. There is no such option in the military.

I was rear-ended by a man who had a suspended license and no insurance. My car was totaled, and so was the car in front of me, and there was thousands of dollars of damage to a third car in front of the second car. The **"Judicial"** system fined the man $50.00. It seems lopsided to me that my friend was punished so severely for doing relatively nothing.

4. Place a cap on how much a person can lose for a mast. The pay lost by the above person is nearly $2000.00 per month. I know I could not afford a pay cut so drastic. If a person is awarded such a drastic punishment, give him or her the choice to leave the military service.

5. A person who has been sent to mast is marked. In the Navy, if a person has 12 years of good service he wears gold service stripes and gold rating badges. You can tell by a persons uniform if he has been to mast. Since my mast was early in my career it didn't affect me too much. But I feel it is wrong when a person makes a mistake, he has to let everybody know for a minimum of 12 years that he was punished.

6. Navy Legal should be allowed to attend the mast proceedings. There could be very little which could improve the mast proceedings more than to let lawyers attend the mast proceeding. Let them keep their mouths shut if needed, but let them ensure that the Captain is living up to the charge of Justice.

7. It should be a requirement that a sailor be provided with Legal counsel prior to Mast. I have spent many years in a training command. Without exaggeration, the command had 7 to 14 mast cases per week. The cases were mostly for students. Through all of these mast cases, I never saw one student go to mast when he requested to see a lawyer. I asked our legal officer why this was so. She said that when a student requested to see a lawyer, they had to ensure that there was sufficient evidence so that the mast case could be tried by a court martial. As you know, on a shore command, you have the option to request a court martial vice non-judicial punishment. It surprised me that there were so few students who requested legal counsel.

I don't wish that people get away with doing wrong, I just feel that there are no checks and balances for our non-judicial system. There are many good Commanding officers who are just. I have had several. But I know that there are some who wrongfully feel that to be in command means to be Lord and King. I can provide many specific cases that are unbelievable. I have kept a journal of my navy experiences and have witnessed many wrong-doings by commanding officers pertaining to Mast proceedings.

If You need any further information, please let me know. I hope this has been helpful.

Sincerely,

Paul W. Burt Jr. EMC(SS/DV)

Cayle Comments

II JURISDICTION

A. When under the command and control of the armed forces and protected from other prosecution.

B. No. Military members should face the civil courts when it concerns civil law and military courts concerning military duties or on military property.

C. Only to the extent that they are not brought up on Article 15 after facing the civil courts. (i.e. DWI. Personnel are charged with Art. 134 Conduct unbecoming after being arrested by civilian authorities. I know this is not considered "Double Jeopardy" technically, however, it is truly seen that way).

D. Only if it is not prosecutable in the civil courts.

E. Retirees should not be subject to the UCMJ unless they are serving in an official capacity.

F. No. The service the member belongs to should have a review of all proceedings over their personnel.

G. Art. 2; Retirees and Fleet Reserve should not be subject.

IV CRIMES AND OFFENSES

A. No. Officers in the military are in a unique position with their authority over their subordinates and the example they are required to set.

B. NO. Rape is rape no matter if you know them or not.

(1) Article 120 is "sexist" in it's wording.

(a) Paragraph (a) states "Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape..." This clearly states that rape can only be committed by a man on a female and implies that forced sex on ones spouse is not wrong.
Recommend change to read; "Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape..."

(b) Paragraph (b) states "Any person subject to this chapter who under circumstances not amounting to rape, who commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge..." This clearly states that it is only illegal for a man to have sex with a female under the age of sixteen and completely misses any wrong doing if a female has sex with a male under the age of sixteen.
Recommend change to read; states "Any person subject to this chapter who under circumstances not amounting to rape, who commits an act of sexual intercourse with a person of the opposite sex, not their spouse, who has not attained the age of sixteen years, is guilty of carnal knowledge..."

D. No. These areas are already covered under U.S. Navy Regulations.

E. It should only apply in the event an officer is attempting to subvert the authority or competency of the official.

F. Yes.

H. No. Civil authorities already have more than enough jurisdiction in this area.

I. No. As soon as this is done a pair of idiots will try it out.

J. No.

K. Yes.

L. Adultery should remain an offense, but only applied when it involves the spouse of another service member.

V. SENTENCING AND PUNISHMENTS

A. No.

B. Those convicted should be punished by those who judged.

C. No.

F. No.

G. No.

H. No.

I. No.

K. Yes

L. No. The service member should consider their family situation as a motivator.

M. Yes. Whether it is a declared war or not the consequences are the same and the punishment should apply.

N. No.

P. Yes

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

Responses from HH Judge J.W.Rant CB QC, Judge Advocate General of the United Kingdom.

1. Introduction

I offer some thoughts on a few of the topics listed in the Commission's questions of which we now have some experience in our jurisdiction in the hope that they will be of interest for comparison's sake. I realise, of course, that many features of our two systems differ, and that it is not always possible to translate one way of doing things directly into the language of another jurisdiction.

2. Under **"II JURISDICTION (IN PERSONAM AND SUBJECT MATTER)"**

A : The Commission will probably be aware that certain UK civilians are subject, in a limited way, to military law but only when they are posted abroad with the armed services, or when they are part of an active service operation.

This is a very large topic, but as a very general guide, dependants of serving personnel and employees of the Ministry of Defence are so subject. They are answerable for only a handful of purely military offences, (about seven or so), but for all conduct that would amount to a civilian criminal offence if committed within the United Kingdom.

They are triable either by Standing Civilian Court, (An "SCC" where one has been designated), or by court-martial, depending upon the seriousness of the offence. The SCC has one magistrate (who is appointed from the ranks of the full time civilian judge advocates working in my office), and he is judge of law and fact and solely responsible for sentence, (except when juveniles are being tried). His powers of sentence are limited. A civilian who has been tried and convicted by an SCC has the absolute right to appeal against conviction or sentence to a court martial where the case will be re-heard. Typical cases are shop lifting, minor thefts and trivial assaults.

A court martial can and does try a civilian who is within the jurisdiction for any crime up to and including murder. We had a recent case of a 17 year old youth who was convicted of murder by court-martial in Germany, and who appealed to the civilian courts against his conviction on the ground that it was oppressive and wrong to try a

case involving such a young non-serviceman by a military court. The House of Lords rejected this submission and upheld the decision to try him by that means, (although if a murder is committed abroad a UK citizen CAN be tried in the UK for it in a civilian court).

The advantages of this machinery are probably obvious. A dependent or employee can expect the same level of justice and punishment as a serviceman if he is tried abroad, and there is no disparity of treatment between them Thus, for example, if a NAAFI civilian employee and a private soldier decide to break into a NAAFI canteen together and did so and stole various items, unless there is jurisdiction over both, the one would be handed over to the local courts and the other tried according to the Law of England and Wales. It is unnecessary to elaborate on the possible consequences of such a situation.

C. Our jurisdiction over service personnel is broadly the same whether they are serving in peace time or during hostilities. There are provisions for a Field General court martial in time of war which permits the members to dispense with some of the usual procedures, and some purely military offences are likely only ever to arise in a conflict situation, but, subject to those qualifications, there is little discernible difference between peace and war time. We do not, of course, distinguish between military and criminal offences as a matter of principle, and therefore there are no administrative steps that a CO can take, only punitive ones. In our system the powers of the CO (or his sub-ordinate) are all rated as powers exercisable in a criminal law jurisdiction. Such powers are accordingly clearly defined and circumscribed, but include the possible use of custody of up to 28 days or 60 days with the permission of a Higher Authority. There is a list of offences that are triable summarily, and it is a closed category.

We find that this means of dealing avoids confusion, assists in maintaining continuity and enables service personnel to be aware of their duties and rights in all circumstances since these do not change significantly whether or not there are current hostilities.

2. Under : **"III ORGANIZATION OF THE MILITARY JUSTICE SYSTEM"**

A 2. We now have a post *Findlay* independent court-martial administration authority. ("CMAO") .This authority is still within the overall chain of command, but is answerable only to a different organisation to that to which the Prosecuting Authority and the Reviewing Authority belong. The person holding that office is at present a retired officer and therefore a civilian. He has the duty to convene the court, to select the members, notify us and the Prosecuting Authority of the date, time and place of trial, (which he arranges with our co-operation), and also to summons witnesses and provide a clerk for the court.

The prosecuting function is now performed by a separate and quasi-independent arm of the Army and RAF legal service officers. The authorities are entitled the Army Prosecuting Authority and the Air Force prosecuting Authority respectively. A case starts its life as a police report and goes first to the accused's commanding officer. If he decides that the case should or must be tried by court martial he refers it to a Higher Authority who considers the case. If the HA decides that the case should go for court martial he refers it to the APA or the AFPA. They then take the case over, and have control of it from then on . They decide whether to prosecute, what charges to bring, what witnesses to call and have the complete conduct of and responsibility for the prosecution thereafter.

A 5. Under our new system (since April of 1997) confirmation of the finding and sentence of a District or General court martial has been abolished. There is, however, a compulsory "one stop" review of all court martial cases resulting in a conviction (whether by plea or finding) whether the accused requests it or not. He has the right to submit a petition against conviction or sentence or both if he wishes. There is no oral hearing. My office advises the Reviewer on paper, and he decides the review in his office. The accused is sent a copy of my advice together with the decision of the reviewer who gives reasons. The reviewer can quash a conviction and can mitigate a sentence but not impose any penalty more severe than that passed by the court. There are tight deadlines for the submission of a petition and for the reviewing authority to deal with a case, and these deadlines cannot be extended.

The accused has the right to appeal to the civilian appeal court either against sentence or finding or both if, (like his civilian counterpart), he is given leave.

C. 2 Requests for witnesses in our system are dealt with by the CMAO who has the power to warn them to attend or to issue a summons in cases where there is reluctance to do so. This also applies to expert witnesses.

A CO cannot order detention of an uncharged person for more than 48 hours. After that time an independent judicial officer (one of our full or part time civilian judge advocates or a judicial officer specially appointed by myself) decides whether to agree to a CO's request that custody should continue. There are clearly defined grounds upon which such an application may be based, and the CO cannot go outside them. Likewise if a CO wishes to keep in custody a person who has been charged, he must put him before a judicial officer as soon as practicable after charging.

Applications for custody can be heard by video link, and often are.

There are current proposals that search warrants should be issued by judicial officers.

D. 1. & 2 Our full time judge advocates are appointed by the Lord Chancellor, (who appoints all the civilian judges), and not by the Ministry of Defence. Their work is exclusively judicial. There are eight full time judges and 13 or 14 part-timers (also all civilians) upon whom we can call. They are practising advocates with court martial experience. They all come under my wing as Judge Advocate General. I am a civilian also and appointed by the Queen. I appoint part time judge advocates and juydicla officers, who are all civilians.

The conditions of appointment of myself and of the judge advocates are, I believe, somewhat similar to Federal appointments in the USA. There is security of tenure until retirement age, unless the post holder misconducts himself, a pension and various other benefits.

Any vacancies are advertised, and any practitioner with at least five years' experience may apply, although in practice no-one with less than about ten to twelve years would be likely to be considered. There is a panel of three to interview, a civil servant, myself and a member of the public. We make a recommendation to the Lord Chancellor, based on interview, what other judges say about the practitioner, the size and nature of his practice, and any references that he can provide. The competition is

reasonably stiff. The current level of pay for a judge advocate is about $112,000 p.a. at the current rate of exchange.

It might be thought that a civilian would not be able to understand the needs, ethos and environment of the services, but regular contact with serving troops quickly provides the right ideas and background. Unlike the USA, the officer members of the court, (three for a DCM, five for a GCM) all take part with the judge advocate in the sentencing process, so there is plenty of service input at that stage. Additionally, we offer training to a new recruit which will include some background data about the Army and the RAF.

D 5. Under our legal aid scheme service persons or civilians abroad are entitled to a civilian lawyer to defend him/her. He/she may have to pay something towards the cost (a "contribution" it is called), but will have it refunded in the event of a total acquittal. Such a person can also ask for a service lawyer. Most service persons prefer to have a civilian lawyer. The work is sufficiently well paid to attract competent advocates.

FEBRUARY 21st 2001

James W.Rant
22 Kingsway
LONDON

LAW OFFICE OF JOHN M. ECONOMIDY
204 Crossway Center, 6812 Bandera
San Antonio, Texas 78238
Work: (210) 521-7843; FAX: (210) 520-8002
E-mail: economidy@att.net
November 28, 2000

Honorable Walter T. Cox, III
Chair
Commission on 50th Anniversary of UCMJ
judgecox@earthlink.net

Re: Response to Topics of Cox Commission

Dear Judge Cox:

Attached to this e-mail are my responses to the topics designated by the Cox Commission on the 50th Anniversary of the Uniform Code of Military Justice, along with some other concerns of mine.

I regret that I have lacked sufficient time to address all the topics. I received notice of the opportunity to respond in mid-November. I am currently representing defendants in a murder case, a multi-state drug conspiracy (my client is a key witness for the prosecution in Arizona v. [Sammy "the Bull"] Gravano) and in three general courts-martial, plus fulfilling family obligations in the Thanksgiving holiday. Due to those time-consuming activities, I limited my responses to those areas I consider the most important to military justice.

As a civilian practitioner who devotes a significant part of my law practice to military law, I certainly appreciate your giving me this opportunity to respond to the Cox Commission.

Sincerely,

/s/ Transmitted from computer
without signature

JOHN M. ECONOMIDY

6 Atchs
1. Article 32 Investigation
2. Sentencing
3. Death Penalty
4. Composition of Court of Appeals for Armed Forces
5. Appointment of Court-Martial Members by Convening Authority
6. Vitae

P.S. for Judge Cox: My client Major Goldsmith in Clinton v. Goldsmith had his case heard by the Air Force Board for Correction of Military Records. The BCMR member

MEMORANDUM FOR COX COMMISSION

FROM: JOHN M. ECONOMIDY

SUBJECT: **APPOINTMENT OF COURT-MARTIAL MEMBERS BY CONVENING AUTHORITY**

1. The Cox Commission designated the following issue:

No. 10: Should court-martial members be appointed by a jury office rather than the convening authority?

2. Response: Absolutely not. The military mission is to fight and to win wars. Maintaining discipline through the military justice system is a responsibility of the convening authority in conducting the overall military mission.

A convening authority will have access to classified information on deployments and operations. A jury office clerk (or even a staff judge advocate) will not have full access to such information. The convening authority has far better insight into how best use scare manpower resources to conduct all military missions. There will be times when a convening authority can spare his best personnel (e.g. operations officer, weapons officer, intelligence chief, chief of maintenance) for a court-martial, but the senior commander needs complete discretion in fulfilling his military manpower needs consistent with the operational tempo of the times.

Article 25, U.C.M.J., requires the convening authority to detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." (Emphasis added.)

My 26 years experience practicing military law confirms that convening authorities comply with these selection criteria. I have defended criminal defendants in state courts, federal courts, and military courts-martial. The quality of court-martial members is vastly superior to jurors in state and federal courts. Military members are very well educated, react to logic and reason rather than to emotion, and have a strong sense of fairness and judicial temperament. I would rather have my fact-finders come from the military.

The Article 25 criteria and its proper employment insures that military accused will receive a fair hearing from the court-martial members appointed by the convening authority. No change to this statutory appointment procedure is necessary.

best judge advocates for prosecuting and defending death penalty cases. In San Antonio, a defense attorney is not appointed to a capital case unless counsel qualifies for the appointment. First, counsel must have experience in non-capital murder cases. Second, it certainly helps if the Texas Board of Legal Specialization certified the counsel as an expert in the area of criminal law (so many years of experience, passage of a specialization exam, and having the recommendations of judges and adversaries like prosecutors). Third, the judges selectively place the counsel on a list of qualified attorneys who can be appointed to capital cases. I believe the TJAGs should have a similar grooming procedure.

Third, the military lacks a good experience base on evaluating a case as a capital case. Several years ago, the staff judge advocate at Brooks Air Force Base decided to pursue capital murder charges on an average murder case. Retained civilian counsel lacked military justice experience but consulted me on strategy and tactics. That case was won by the defense at the Article 32 investigation when it was clear that this was manslaughter provoked by heat of passion. Members convicted the defendant of manslaughter, and the defendant got a 10-year sentence. Referral of a case as capital should be reserved for those cases truly deserving such a penalty and which can withstand appeals and habeas actions.

3. 12-Member Jury for Peacetime Military Capital Cases.

The Sixth Amendment right to a jury does not apply to the military. Ex Parte Milligan, 4 Wall (71 U.S.) 2, 123 (1866); Ex Parte Quirin, 317 U.S. 1, 40 (1942); United States v. Crawford, 15 C.M.A. 31, 35 C.M.R. 3, 6 (1964); United States v. Kemp, 22 C.M.A. 152, 46 C.M.R. 152, 154 (1973). Thus, it is inappropriate to loosely use the term "jury".

A capital case will consume significant time for each member of the court-martial whether the trial is held during war, up-tempo military operations, or peacetime. Mandating 12 members in a capital case in inconsistent with allowing the convening authority discretion in manning of a court-martial. Mandating 12 voting members (with likely alternate members) in a lengthy trial imposes a significant burden on the military at any time. There should be no mandatory requirement of 12 members in a capital case.

MEMORANDUM FOR COX COMMISSION

FROM: JOHN M. ECONOMIDY

SUBJECT: **DEATH PENALTY**

1. The Cox Commission designated the following issues about application of the death penalty:

No. 22: Should the peacetime military death penalty be abolished?

No. 23: Should a jury of 12 be required for capital cases in peacetime?

2. Retain Military Death Penalty in Peacetime. The military should retain the death penalty for offense that occur in peacetime.

When I was Chief of Military Justice at HQ Twenty-First Air Force, The Air Force Judge Advocate General sought input from all general court-martial legal offices for the forthcoming 1984 revision of the Manual for Courts-Martial. TJAG encouraged recommendations for changes to the UCMJ. My staff judge advocate, Colonel Gary Wendel, and I strongly advocated amending Article 106 to permit the death penalty for peacetime espionage. (Article 106 then permitted the death penalty only for spying during wartime.) Peacetime espionage puts a nation at risk. Peacetime espionage endangers a nation's people and its armed forces. Few crimes can be more threatening. Unfortunately, our recommendations were not heeded. It took the treason of the Navy's Walker family to provoke passage of Article 106a and its potential death penalty. This is an area in which there should be no tolerance in war or peace. See OSI Special Agent David J. Crawford, The Betrayal of National Defense Secrets by Air Force Traitors (HQ AFOSI Directorate of Counterintelligence 1988). The harm inflicted on the United States by the likes of Aldrich Ames, Christopher Boyce, or Jonathan Pollard or their counterparts in the armed forces should never be minimized by asserting that the offense occurred in peacetime.

Additionally, I fail to see how an offense is any less onerous because it occurs in peacetime.

I would like to address several areas regarding capital cases.

First, capital cases differ from other prosecutions mainly by the extended, individualized voir dire and the magnitude of the maximum sentence. Both areas require extensive preparation and execution of skills. Other than those two areas, capital cases are pretty routine, provided counsel has a grasp of the forensic and scientific evidence used to prove such offenses.

Second, the Judge Advocates General need to prepare and release their

4. Never Use Sentencing Guidelines in the Military. Please spare the military from the voodoo of the United States Sentencing Guidelines. One cannot adequately incorporate into military guidelines the concepts of performance reports, awards and decorations, honor, and service. I apply the federal sentencing guidelines in my federal practice and, like prosecutors and defense attorneys (and some U.S. District Judges), I find them difficult to apply, time-consuming, and unequally applied.* The average time from entry to findings to sentencing in San Antonio runs two months. The military should not have to deal with an ineffective servicemember while someone conducts a sentencing investigation. The present practice works. Let us not fix what is unbroken.

* The November 27, 2000 issue of *The Texas Lawyer* trade newspaper reports that federal judges in my Western District of Texas departed from the U.S. Sentencing Guidelines in 24% of the cases in FY 1999. The national average for FY 1999 was 35.1%. This is not a ringing endorsement for adapting the U.S. Sentencing Guidelines to the military. *Texas Lawyer* reported that the data came from the U.S. Sentencing Commission.

MEMORANDUM FOR COX COMMISSION

FROM: JOHN M. ECONOMIDY

SUBJECT: **SENTENCING**

1. The Cox Commission designated the following issues about sentencing:

No. 14: Should sentencing by members be abolished in all areas, or should an accused have the option of chosing members on the merits but military judge alone for sentencing?

No. 15: Should military judges have sentencing power in member cases?

No. 16: Should military judges or members have the power to suspend a sentence?

No. 21: Should the federal sentencing guidelines be applied to courts-martial?

2. Retain Sentencing Power of Members. A servicemember should always have the right to be sentenced by a court-martial consisting of members. All wisdom does not dwell in a military judge. My experience is that judge advocates are too far removed to appreciate the contribution of soldiers, sailors, airmen, and marines in the front line combat units. The last thing that should be desired is to let sentencing become a routine. Members have far more appreciation of the gravity of an offense and the meritorious contributions of a servicemember than a judge advocate serving as a military judge. Sentencing by members is an invaluable right of servicemembers.

3. Power of Suspension. I believe that the power of suspension of a sentence should remain the sole province of the convening authority. I have no problem with court members or military judges making a recommendation to the convening authority for suspension. That is how the present system works. However, I believe that I convening authority is in the best position to determine the military needs of his combat command without having an ineffective member forced upon the commander.

I vividly remember an event when I was Chief of Military Justice at HQ Twenty-First Air Force. The Commander, Major General Tom Sadler, had just returned from Pope Air Force Base. He unexpectedly called me into his office and ordered suspension of a term of confinement on a master sergeant who had been convicted of larceny. "It's two weeks before Christmas, and I want him out to be with his kids. He's one of my best mechanics in the C-130, and suspending his sentence will cause him to work twice as hard and let his subordinates know that we can be fair." The general was right. The NCO thereafter never let down General Sadler or his unit. That is how the system should work. The general used the military justice system as an extension of his overall combat mission.

The paramount, first point is that the military justice system must function in combat. Curry v. Secretary of Army, 595 F.2d 873 (D.C. Cir. 1979)(perhaps the best case reviewing the combat role of the U.C.M.J.). While it may be difficult to appreciate that basic fact, one only has to consider the fast-moving combat environment in which the court-martial was abated in Wade v. Hunter, 336 U.S. 685 (1949). As a result of the possibility of trial during combat, Article 35, U.C.M.J., permits only five days delay from service of charges to a general court-martial. A line officer may be the only available person to perform an Article 32 investigation in a fluid combat situation. Transportation resources will be restricted to combat needs, not to the need to insert a judge advocate. I can certainly foresee a convening authority using a wounded but recuperating line officer as an Article 32 investigating officer to make best use of limited combat resources.

Second, a line officer's service as an Article 32 investigating officer enhances that officer's ability to serve as a court-martial member and as a commander. Hard decisions are the privilege of command, and duty as a 32 investigating officer promotes invaluable training and experience for the line officer.

4. Defense Recording of Article 32 Investigation. I strongly advocate the right of the defense to record testimony of witnesses at an Article 32 investigation. Such recording can be by a court reporter employed by the defendant, audio recording, or video recording. On two recent occasions, I have had Article 32 investigating officers who were full colonel judge advocates put down their pen and never take a note for summarized testimony during defense cross-examination. The result was that key defense points never made it to the convening authority and there was no document to use at trial as a prior inconsistent statement. Complaining in the rebuttal to the pretrial advice or by motion at trial did not remedy the omission. This was blatant and deliberate unfairness. The accused can only protect himself or herself by recording the testimony. The defendant's ability to record the Article 32 investigation should be permitted even when a court-reporter is present, as the reporter often is quite selective in summarizing a witness' testimony.

Such a limitation does not mean that witnesses are deceitful. It just means that witnesses often lack an experience curve in providing a statement that details significant events. The limitation is compounded when investigators prepare a statement for the witness to sign. The Article 32 investigation permits testing of a witnesses' visual and aural observations and tests their recollections on the witness stand. This procedure exposes weak or discredited cases that should not advance to referral of charges.

c. Ending Unmeritorious Cases. The Article 32 generally exposes the unmeritorious case. When a case is exposed as unmeritorious, valuable time and manpower resources are not wasted on a court-martial. Further, the reputation and integrity of an accused is preserved by early dismissal of such a case.

Several years after I left the military and became a civilian practitioner, a colonel came to my office unannounced and asked if I remembered who is was. I did not. He then explained that court-martial charges had been preferred against him by a vindictive lover, that I had been the 32 investigating officer, and that I had recommend dismissal of unmeritorious charges against him at Little Rock Air Force Base. Now years later, he wanted to stop by and say thanks to the man who saved his military career and his medical license. He had subsequently been promoted to colonel and was flight surgeon to a B-1B bomber wing. He later became one of the top military researchers in the fight against AIDS.

d. Article 32 Aids Prosecution. The advantage of an Article 32 also benefits the prosecution. Specifications can be amended to conform to the proof that comes out at an Article 32 investigation. More importantly, Article 32 investigations often reveal other crimes--sometimes even more serious offenses than the charged allegations--that can be added to the charge sheet. Adding charges at this level avoids piecemeal prosecution and saves valuable military time and manpower resources.

e. Discovery. It goes without saying that the Article 32 promotes discovery in a military justice case. Such discovery aids both prosecution and defense. The prosecution learns the true merit of the case beyond a paper case for establishing a plea bargain. The defense attorney learns the weaknesses of a defense and can point to developments at the Article 32 investigation to encourage an accused to plead guilty or to enter a plea bargain. Few things are more helpful in this process than for a defense attorney to point to a creditable witness to tell a client that the witness killed the client and that the client need to cop a plea and a plea bargain. Having seen and heard the witness, the accused invariably concurs.

3. Retain Option of Non-JAG Investigators. I have defended Navy and Army clients where the Article 32 investigating officer was a line officer rather than a judge advocate (JAG). I strongly believe my client got justice from the line investigating officer in those cases. I recommend that neither the U.C.M.J. nor the Manual for Courts-Martial be amended to mandate a judge advocate as the Article 32 investigating officer. In addition to my experience, my view is supported by the two other points.

MEMORANDUM FOR COX COMMISSION

FROM: JOHN M. ECONOMIDY

SUBJECT: **ARTICLE 32 INVESTIGATION**

1. The Cox Commission designated the following issues about Article 32, U.C.M.J., investigations:

No. 6: Should the requirement of an Article 32 investigation be repealed?

No. 7: Should Article 32 investigating officers be required to be judge advocates or military judges unless precluded by military exigencies?

No. 8: Should an accused have a right to record an Article 32 investigation when the convening authority declines to detail a court reporter?

2. Retain Article 32 Investigation. The Article 32 investigation should be retained. The Article 32 investigation is one of the most important protections of a servicemember in the Uniform Code of Military Justice. It protects the servicemember by insuring that he gets the military equivalent to a grand jury and a preliminary hearing. As a civilian practitioner of military law since 1984, I have had 19 cases disposed of favorably to the military accused after the Article 32 investigation. That experience alone shows that the Article 32 is a bulwark in protecting servicemembers from unfounded or excessive charges. I have clients who have avoided the smear of a court-martial who went on to have distinguished careers in either military or civilian life. Several of the former subsequently made full colonel or held significant command positions.

a. Limits of Law Enforcement Investigations. Most allegations of military justice are investigated by military police (Army and Marine military police, Navy shore patrol, and Air Force security forces) and military investigative forces (Air Force Office of Special Investigations, Navy Criminal Investigative Division, and Army CID Command). As legal advisor to the Air Force's Security Police Academy in 1978-81, I introduced the investigation by the element-of-the-offense method, which the Air Force OSI subsequently adopted. Still, most investigators are enlisted personnel whose outlook differs from the judge advocates who must prosecute or defend a case. My observation is that force reductions have reduced the experience level of investigators and judge advocates in recent years. As a result, the quality of investigations is limited. An Article 32 investigation is needed to expand on the initial investigation, to expose its weaknesses, and to uncover need information that can disprove or substantiate existing charges, or lead to new charges.

b. Testing of Witnesses. An Article 32 investigation gives the opportunity for both prosecution and defense attorneys to test the strength of witnesses. Witnesses are not always good historians of events and observations when they make initial statements.

who wrote the opinion also had denied Goldsmith's clemency. This was an obvious conflict of interest. The BCMR merely adopted the Air Force advisory opinion and did no independent analysis, conclusions, or recommendations. Goldsmith lacked the funds to pursue the case in federal court. I already had litigated Goldsmith's case to CAAF, the Supreme Court of the United States, and AFBCMR on a *pro bono* basis. I was not going to do a fourth *pro bono* trial for Goldsmith.

Written Comments of Walter Donovan BrigGen USMC (Ret.) 2-28-01

Judge Cox, Admiral Jenkins, Professor Cheh, ladies and gentlemen of the Commission: thank you for your great service to the military justice system. It has been over 15 years since I retired as the senior judge advocate of the U.S. Marine Corps.

Readers may ask: "Who is this guy and why should we heed his comments?"
Fair question. In considering and weighing my comments, insights can be gained from reviewing my background, listed on the last pages.

In a nutshell, I have defended and prosecuted courts-martial in the 1950's as a line officer and then in later years as a judge advocate; I have imposed NJP many times during three tours as a Commanding Officer; have been a SpCM convening authority; was the first Military Magistrate on Okinawa; served as SJA for a GCM convening authority; was an appellate court judge; and, after retirement, prosecuted for 12 years in California and Idaho.

Commission on the 50th Anniversary of the UCMJ – Comments on Some Topics

I Need For Congressional Review

A. Not a "complete", but certainly a substantial overhaul. Only parts need change. By submitting a partial overhaul, the Congress will sense that the proposals are manageable; something that is legislatively digestible.

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II Jurisdiction

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B. The question asks whether commanders would have sole jurisdiction for any and all crimes by members. Or the question is ambiguous and means that civilian courts would have sole jurisdiction for all such crimes. Both are non-starters. I support concurrent jurisdiction by military commanders and local county district attorneys for off - base crimes; as well as by US attorneys for federal crimes.

C. No. Let us never revisit that "service-connected" nexus test.

D. No. Heinous crimes can be done with no classic "service connection".

...

III Organization of the Military Justice System

A. Convening Authority

1. No. I have been in a unit with only one school - trained armorer; in a unit which was down to only one driver who was authorized to drive a truck carrying explosives. As a commanding officer three times (and a battalion executive officer once), I have faced daily headaches on the issue of who was available to perform "unexpected"

tasks!! Deployed battalions and larger units, as well as CONUS-based ones, can compose fair panels for courts. Don't hobble them to administrative poohbahs, choosing their members for courts, officials who have zero operational responsibility.

2. No. Folks who propose these approaches please refresh your recollection: when the Founding Fathers crafted Article I, Section 8, Clause 14 of the U.S. Constitution, they knew what they had in mind. Many had served with a rifle as well as a quill. They knew that the military demands unique conduct, so must live under unique rules. The Commanding Officer decides.

3. No. I have been a charging or "issuing" deputy district attorney with delegated powers to decide if a case will be filed against a person. In California many crimes can be charged as either felony or as misdemeanor, depending on the facts and the defendant's record (or lack thereof). Once charged, even if later dismissed, the criminal printout will reflect that charge for years to come. It is a tremendously important decision, turning on discretionary judgement. (Given this comment, one can see where proponents would say, for that reason, let charging decisions be made by experienced lawyers. Yes, that is why our cities and counties have district attorneys.) But in the armed forces, for the state of discipline, for which the C.O. always answers and some judge advocate staffer never has to answer, that discretion must always remain in command hands.
4. Yes.
5. Yes to first; no to second.

B. Article 32 Investigations
1. Yes. Elements of the crime(s), identity of person charged, relative gravity of crime(s), availability of evidence, and jurisdiction over offender are usual matters shown at preliminary hearings. Convening authorities will know enough about the member to decide whether to go either via SpCM or GCM.
2. I favor a full verbatim record, eased however by use of "incorporated by reference" checklists which will have previously been initialed by the accused and his attorney.
3. On the same evidence ? Yes ! But with new or varied evidence, no.
4. Where convincing evidence was adequately presented but the hearing officer plainly erred, the government should be able to take the verbatim record up to a GCM judge for legal review. This is different from, but similar to, the manner in California where a defense attorney whose client was held to answer at preliminary hearing can challenge the adequacy of the evidence by a motion under Penal Code 995 where a senior judge, hearing no fresh evidence, simply assesses the contents within the four corners of the record.

C. Jurisdiction of Courts-Martial
1. No. No "continuing jurisdiction". This issue is the main reason I respond. It is intolerable that some staff officer attorney (denominated a military judge) would have continuing intrusive control over a soldier or sailor once the court is over. The Navy chief and division officer aboard a destroyer have enough problems and demands without getting the word that a "judge has ordered" that Seaman Doe must take x

hours of anger management by y date and may or may not have to appear ashore in building #123 to show cause re: contempt, etc. Or, perish the thought, ordering a C.O. to appear and explain to the judge why the sailor was not released to attend the session! Squadron, ship or battalion commanders having to"explain" to some judge advocate judge why a condition of probation, ordered by the judge, was not carried out? Our nation's adversaries would salivate at the notion. According such powers to military judges would increase their self esteem; it would feed their pride; but it would erode military readiness and derogate the commander's authority and esteem! Get over it. No continuing jurisdiction. (This does not mean that judges can not be accorded other helpful powers; see 2 below).

2. Yes, most, if not all, of these matters can be responsibly handled by judges. It can be done by investing various powers, without creating "continuing jurisdiction".
3. No.
4. Yes to the first; no to the second.
5. Yes I support the increase in number of court members; this should increase public, and specifically Congressional, confidence.
6. Yes. Capital cases are so rare and the stakes so high that I support 12 members. Even in war time, there will likely be adequate numbers of recovering wounded and backup staff personnel to handle it.

D. Military Judges, Trial and Defense Counsel

1. Nominated by service chiefs, actually appointed by the JAG's.
2. No.
3. No; no.
4. By the JAG's who would act on reports or recommendations of SJA's, and other trial or appellate court judges.
5. Yes.
6. Yes.
7. This question is vague; by word "supervisors" who is meant? Senior judges and JAG authorities should rate judges, with input by appellate court judges. They need fitness reports.
8. Yes as to GCM judges. I do not support SpCM judges doing so; where needed they can refer the matter to a GCM judge. Be aware that some State Bars ask applicants whether an attorney admitted elsewhere has ever been even cited, quite apart from whether contempt was found or discipline was imposed. So be very cautious here. In some 12 years of civilian practice I witnessed some 5 or 6 defense attorneys warned on the record of a likely contempt. (Usually the judge would mention that "we will address this at the end of these proceedings"). Yet after reflection, except for two cases, they later decided on an informal admonition; i.e. one that was not "contempt" and therefore did not require a report to the State Bar office.

9. By statute ? No. Should something be tried by service regulation and monitored for effectiveness or unforeseen problems ? Maybe.

IV Crimes and Offenses

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B. Yes. I defended two rape by stranger GCM's while on active duty in 1975 and later prosecuted four or five rapes in state courts. The latter were a mix of prior boyfriend and strangers. It is a distinction with a difference.

...

F. Yes

G. No. Many vehicle homicides are of simple negligence: inattention, moderate speeding, staring at some distraction while driving are a few examples. Surely many are killed or injured by gross negligence with or without alcohol impairment, but some also by simple negligence. Severe damage to delicate instruments in rainy weather can occur through s/n; if there is no wrong in s/n, do we create difficulties in trying to prove "dereliction of duty"?

H. Yes.

...

K. No. This is not civilian life! This is an armed force which obeys, crisply, instantly, and even when the orders are not of their personal preference. Read again Art. I, Section 8, clause 14.

...

V. Sentencing and Punishment

A. No. Some especially heinous crimes are committed in "peacetime"; if this is tweaked, pre-trial defense motions on proving up a Congressional declaration of war will consume reams of paper.

B. Only if the government also waives jury.

C. No.

D. No. The gravity of an offense can vary widely from service to service and even within the same service depending of the facts. I offer one example: making a false report. A junior cook who willingly and knowingly makes a false report to the mess sergeant as to the pounds of beef available in the messhall freezer does wrong and causes that unit problems. He might be officially punished. A submarine crewman, however, who similarly reports false valve settings just before submergence has likely done something dramatically more grave. I urge a big caveat as to "sentencing guidelines".

E. Yes.

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G. Yes, modified (close to abolition). With e-mail and satellite phones, mitigation can be easily presented.

H. Some expansion can be done in this area, but under the C.O., not under any "continuing jurisdiction" judge.

I. No. No "probationary" sentences with "conditions" imposed by judges.

J. No. This is at the core of many of the comments submitted to the Commission. Proponents please adjust your perspective: the military justice system ideally is one which best supports combat readiness to deter, capture or kill an enemy while living within the U.S. Constitution. The military justice system must not be melted and reforged into a twin of civilian life, with merely tolerated military overtones.

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N. Yes for expungement. I acted for the state on over 100 post- conviction expungement motions during 1992-96. California Penal Code 1203.4 provides for it and it is a

healthy public policy measure. Now one asks: how can he support expungement yet oppose continuing jurisdiction for judges who will set aside the convictions and grant the expungements? Easy; it will be the SJA and the commander who will do that. The C.O. will know if the member has been law abiding, etc. We can provide this relief measure and do it without having any memos or phonecalls to First Sergeants saying that Judge X wants to see Pvt Doe, etc.

...

VI Evidence

A. Yes, except where the trait is in issue, e.g. honesty in a forgery case.
B. No. We all know the recent case of the FBI agent accused of spying. This has raised attention to CIA and other agencies' use of polygraph tests. Many states, however, and this commentator do not have enough confidence in the procedure or in the polygraphers to support the proposal.
C. Yes. Allowing for guilty pleas where the defendant reserves a claim of partial or full innocence is a very valuable mechanism. Characteristically he admits to one or more of the counts with a knowing, voluntary, intelligent, counseled waiver. He states that he does so because, after consulting with his attorney, he knows that the government has convincing evidence which could nail him with much heavier prison exposure. He articulates that he is therefore doing himself a tactical favor by pleading out for lesser exposure. I would never have taken this view in the 1970's. But in subsequent years, I have had many juveniles and many adults who were charged with serious crimes. They had obviously lied to their parents or wives to avoid breaking their mothers' / wives' hearts. They simply could not then admit the truth by pleading out in open court. So they embrace the useful charade of the contrived plea.

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VII Trial Process

A. Yes
B. Yes

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E. Yes

VIII Appeals

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E Yes
G No; mandate his filing notice of appeal.

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I. Does every judge on the 9th Circuit so certify ? If yes, yes. If no, no.

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K Yes

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N. Yes
O. No

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IX Article 15 Punishment

A.

1. Yes
2. No. An Art. 138 complaint is onerous and laborious. The IG is not best fitted to handle this. Maintain the NJP appeal drill.
3. No, no, no. I have decided who is and who is not promoted to lance corporal, to corporal, to sergeant. When SecDef McNamara "helped" us with "proficiency pay" in 1961 many of us had occasion to decide who got extra money for a calendar quarter. Other decisions are made as to who attends service schools. In all these matters one needs to consider all known conduct. Service chiefs have rigorous criteria for recruiter duty, for embassy duty, for overseas advisor duty. If a service chief announces " no NJP's within a year" among the criteria, then the process should not be obstructed by some civilian- inspired personnel practice. If at court sentencing, a member claims no NJP's, why is justice blinded by foreclosing prosecutorial evidence of NJP's as to another who has some marks on his record? In 1971, I was in San Diego municipal court because two of my Marines were before a judge for off-base drunken vandalism. He asked me about them and I spoke freely. The wording of this proposal would bar revelation of, e.g. one NJP as to one of them but clean slate as to the other. Nonsense.
4. This proposal has great merit but requires extended brainstorming.

B No.

C Yes

D. No. I was CO of the Marine Detachment at sea for 2 years on the USS Hornet and also cruised, slowly, on an LST steaming round trip Hawaii – California with extensive "water hours" imposed. Very special powers must be available to command attention and to prompt special conduct from the crew and embarked personnel.

X Summary Courts-Martial

A. No, no.

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XI Post Conviction Remedies

A. No

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C. No. Aside from the maze of the Federal Sentencing Guidelines, we don't want our judge advocates under the thumb of a federal magistrate or an all powerful federal district judge. The filing rules are substantial, and varying federal "local rules" are challenging.

D Yes, no

XII Miscellaneous

A. No

B. Yes

C. No; there are identifiable mindsets. Hypothesize a search and seizure scenario and then ask participants what is "reasonable". After hearing their replies, one could almost pass out liberal / conservative tags.
D. No, although some "goals" are in order. If one was too demanding in selection criteria, finding replacements could become very challenging.
E. Yes
F. No. Returning to civilian life would be complicated if an attorney had dropped State Bar membership for membership in the military bar. Members would inevitably maintain both memberships and then rightly complain of military duplication.
G. No. One DACOWITS is enough.

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K No

---------- Background ----------

1998 – 1999 Deputy prosecuting attorney Ada County (Boise) Idaho; presented several grand juries, over 100 felony preliminary hearings; made numerous felony dispositions.

1985 – 1996 Deputy district attorney San Diego County; 90 jury trials to verdict; 125 felony preliminary hearings; decided to file or reject thousands of police / sheriff cases as a charging deputy; reviewed 200 search warrants and over 300 arrest warrants; dozens of juvenile court cases; acted for office on hundreds of defense felony motions: suppress evidence, sever defendants, sever counts, vacate pleas, strike prior convictions.

1983 – 1985 Director Judge Advocate Division, Headquarters USMC; supervised legal matters in Corps; advised CMC.

1981 – 1983 Staff Judge Advocate, 1st Marine Division and I Marine Amphibious Force; reviewed and advised on: courts-martial, administrative discharges and NJP appeals.

1979 – 1981 Associate judge, Navy-Marine Corps Court of Military Review; read and acted on 1,600 records of courts-martial.

1977 – 1979 Deputy Ass't JAG for Investigations: reviewed over 6,000 reports of non-natural deaths, disabling injuries, aircraft crashes, explosions, fires, suicides (including suicide gestures and attempts).

1975 - 1976 First Military Magistrate on Okinawa, implemented *Gerstein v. Pugh*, while serving as deputy SJA, 3rd Marine Division.

1974 – 1975 Chief defense counsel, 1st Marine Division; was DC in two separate GCM for rape / kidnap where capital exposure was reduced by GCM C.A. to life exposure; trial DC in many special and general courts-martial.

1970 – 1973 Commanding Officer, Marine Barracks, North Island, San Diego; SpCM convening authority and NJP powers. Associated with Congressional field investigation of violence on board USS Kitty Hawk.

1969 Executive Officer, 5th AmTrac Bn; one of many who were adapting to the Military Justice Act of 1968 which went into effect on 1Aug69. Commenced night law school.

1968 G-3 of Brigade in combat, RVN
1967 S-3 " Bn. " " "

1966 Commanding Officer, H&S Company, OCS, Quantico with NJP powers.

1962 – 1964 Commanding Officer, Marine Det. USS Hornet (CVS-12)

1957 – 1962 At Special Courts-Martial (under MCM, 1951) I prosecuted 15 cases, defended 12 cases, sat as a member in 6 cases; sat as GCM member twice.

Walter J. Donovan Jr.
Brigadier General USMC (Ret.)
California State Bar # 59311 Idaho State Bar # 5731
waltusmcda@aol.com

The Emergence of the Canadian UCMJ- MG Pitzel

The Canadian military justice system was redesigned with components and influences from other countries following the immense publicity surrounding the death of a young Somali boy at the hands of Canada's elite airborne soldiers. Investigation of this case focused on how the unit was selected for the mission but also how the unit involved had become so ill disciplined. Some other key issues: why were the police not called earlier, what was discipline of unit before deployment which likely led to conduct on date in question? The investigation led back to the court martial system because commanders felt that their ability to enforce discipline was hampered by poor faith in the archaic court martial system.

In response to these findings the Canadian government did not want to take power from commanders but mandated that commanders remain responsible for maintaining unit discipline. Also, the revisions to the old system recommended changes to enhance fairness of the investigation and prosecution areas and increasing judicial independence. From this self-evaluation and introspection the Canadian government created a totally new military justice system to facilitate the development of its armed forces into the new millennium.

1. Major changes:

The most significant change was the creation of a national office of independent military prosecutions which works under the general supervisory jurisdiction of the Canadian TJAG. A national investigative service was created, similar to the Military Police, which can lay charges for crimes. A major development is the modernization of the "Code of Service Discipline," to make it closer to the civilian legal counterpart. The new UCMJ provides for enhanced jurisdiction in Canada and on overseas deployments. There is now a right to judicial review of pretrial custody. Commanders can dismiss charges but they have an obligation to obtain legal advice before deciding whether or not to make the criminal charge.

Changes in the summary trial system penalties include streamlined procedures, a maximum of 30 days confinement, and the right to review if convicted at summary trial. At courts martial, the court administrator selects the panel via random selection of officers through 10 legal criteria and a computer provides a list of 5 members and 2 alternate members. Warrant and Noncommissioned officers can now be panel members. The random panel composition allows for trial advocacy and facts to be the key factors and not military preference. A random, fair panel will take their time in deliberating because of their varied experiences. Thus, there is no need for a strictly naval panel in a sailors case because the panel members are all dedicated military personnel who want to do good in this special capacity on the panel.

The unique aspect of special courts is that the judge imposes sentence because historically panels have been unsatisfactory and not imposing sentences that are adequate to the circumstances to maintain discipline. Also, keeping a jury for sentencing is expensive. Sentencing is not really a military issue on the big cases like drugs, so that is the reasoning behind judicial determination of the sentence.

There is also enhanced judicial independence by creation of fixed terms of appointment, and financial security because an outside committee handles funding and raises for judges and also handles the next fixed term of the judges. In essence, judicial appointment renewal is automatic. Canadian federal codes regulate military judge's for violations of judicial misconduct.

2. Immediate consequences of reform:

The institutional separation of key actors in the military justice system (Minister of Defense, JAG, military judges, etc...) and a clarification of their roles have directly contributed to the popularity of the new system. While the system is working so far, the Canadian government will continue to have oversight on the process. The TJAG will submit an annual report that must be reviewed by committees of the senate and house. TJAG must also report to the Minister of National Defense MND and report must be tabled before Parliament, currently that report is on the Canadian JAG website (http://www.dnd.ca/jag).

3. Trial statistics (see below):

The old system was modeled on the British system of military justice and the chain of command had difficulty with the system and so they were not using it. The military began an alternative means of enforcing discipline, which did not preserve the integrity of the force. With the new revisions the increase in trials is due in part to a familiarity and training on the new system. Commanders have found the confinement to barracks very effective because the Canadian military is too small to carry large numbers of individuals incarcerated and the force

is too sophisticated to waste time and money on bad soldiers. The detention sentence is a harsh "re-basic training" environment with high levels of direct physical control of the soldier.

There has been a shift in policy on imprisonment towards immediate release once the paperwork is done we process them for civilian society rather than maintain them in the military prison. The prison program is for 30-60-90 days, then the soldier is released from service. Anything longer in sentence goes to federal prison system but the parole system usually releases them because the sailor/soldier serving a sentence is not the same as the civilian sector hardened criminal. Lastly, if removed from service the individual is not held pending appeal, so that the individual will be cleared and then wait pending appeal results for reentry or other resolution. In fact, the first military case to ever be appealed to the Canadian Supreme Court is now underway and the individual will have a military lawyer throughout the appeals process.

Other comments on the imprisonment policy are that the modern military mission too complex to deal with bad apples. Each person is vital to success, when one person is not working then they are a threat to mission accomplishment. The judges will look at the circumstances of the individual's case as well career, etc in making sentence determinations.

A force twice the current size should support the rapid OPTEMPO of the modern military thus commanders do not have time to deal with discipline problems. There is a need to keep the summary trial system to allow commanders to impose discipline, but the major criminal issues must be given up to the military law experts to get rid of the person through the military justice system. While US policy appears to be discipline individuals and keep them because it may be hard to come by good recruits, the Canadian society is too small to handle this approach.

4. Other items of interest taken from the Canadian JAG website.

Statement of Defence Ethics

The Canadian Forces and the Department of National Defence have a special responsibility for the defence of Canada. This responsibility is fulfilled through a commitment by the department and its employees, the Canadian Forces and its members to the following ethical principles and obligations:

PRINCIPLES

Respect the dignity of all persons

Serve Canada before self

Obey and support lawful authority

OBLIGATIONS

INTEGRITY
We give precedence to ethical principles and obligations in our decisions and actions. We respect all ethical obligations deriving from applicable laws and regulations. We do not condone unethical conduct.

LOYALTY
We fulfil our commitments in a manner that best serves Canada, DND and the CF.

COURAGE
We face challenges, whether physical or moral, with determination and strength of character.

HONESTY
We are truthful in our decisions and actions. We use resources appropriately and in the best interests of the Defence mission.

FAIRNESS
We are just and equitable in our decisions and actions.

RESPONSIBILITY
We perform our tasks with competence, diligence and dedication. We are accountable for

and accept the consequences of our decisions and actions. We place the welfare of others ahead of our personal interests.

5. The Canadian Military Justice System

The statutory basis for the Canadian system of military justice is set out in the *National Defence Act* (Parts IV to IX.1) and is known as the *Code of Service Discipline*. The *Code*

- sets out who is subject to the military justice system
- establishes military offences such as striking a superior, disobedience of a lawful command and absence without leave
- incorporates all offences under the *Criminal Code*, other federal statutes, and foreign laws
- establishes service tribunals for the trial of service offences -- the summary trial and the court martial
- establishes a process for the review of findings and sentence after trial.

The military justice system is designed to promote discipline, efficiency, high morale and justice in the forces. As Chief Justice Lamer of the Supreme Court of Canada explained in *R.* v. *Généreux* in 1992:

> "The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own *Code of Service Discipline* to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the *Code of Service Discipline*. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military."

While a separate system of military justice is required to deal expeditiously, decisively and fairly with service offences, it is essential that the system respond to the requirements of the *Canadian Charter of Rights and Freedoms* and meet the expectations of Canadians. Unfortunately, military justice has been criticized in recent years and a number of incidents have highlighted deficiencies in the *Code of Service Discipline*. These deficiencies call into question the capacity of the *Code of Service Discipline* to promote discipline, efficiency, high morale and justice in the Canadian Forces.
In the last two years there were two special reports and one major inquiry that dealt with, among other things, issues of military justice in the Canadian Forces.

Dickson Special Advisory Group
The Special Advisory Group on Military Justice and Military Police Investigation Services was chaired by the Right Honourable Brian Dickson, former Chief Justice of the Supreme Court of Canada. The Special Advisory Group was given a mandate to assess the *Code of Service Discipline* in light of its underlying purpose and the requirement for portable service tribunals capable, with prompt but fair processes, of operating in time of conflict or peace, in Canada or abroad.
The report of the Special Advisory Group was submitted on March 14, 1997.

Somalia Commission of Inquiry
A Commission of Inquiry, chaired by the Honourable Justice Gilles Létourneau, was established to inquire into and report on the chain of command system, leadership within the chain of command, discipline, operations, actions and decisions of the Canadian Forces and the actions and decisions of the Department of National Defence in respect of the Canadian Forces deployment to Somalia.
The Commission of Inquiry submitted its report to the Government on June 30, 1997.

The Second Dickson Report

The Special Advisory Group prepared a second report, in response to a request by the former Minister of National Defence, on the quasi-judicial roles of the Minister under the *Code of Service Discipline*. This second report was submitted to the Government on July 25, 1997.

Responding to the Need for Change

The Special Advisory Group concluded in its first report that there was a clear need to retain a separate and distinct military justice system, workable in peace or conflict, in Canada or abroad. However, it recommended comprehensive changes touching all aspects of military justice and military police investigative services.

The need for changes to the military justice system and to military police investigation services in the Canadian Forces had been recognized by the Department and the Canadian Forces. The review by the Special Advisory Group complemented and supported ongoing internal reform.

In its report on the Minister's quasi-judicial roles, the Special Advisory Group recommended that the Minister be divested of the majority of these roles to better avoid potential conflicts of interest between these roles and the Minister's executive duties and powers.

Although more critical in tone than the Special Advisory Group Report, the Somalia Commission Report recommendations substantially track those of the Special Advisory Group in most areas related to military justice.

In response to recommendations from the Special Advisory Group and the Somalia Commission of Inquiry, the government has introduced amendments to the *National Defence Act* aimed at modernizing and strengthening the military justice system.

The proposed amendments involve a wide variety of specific changes that would strengthen the Canadian Forces as a vital national institution and more closely align the military justice system with current Canadian values and legal standards, while preserving those characteristics of the system required to satisfy the unique requirements of the Canadian Forces.

Amendment Highlights

- The amendments to the *National Defence Act* would modernize the *Code of Service Discipline* and would promote integrity and fairness within the military justice system by
- clarifying the roles and responsibilities of its various actors
- clearly separating, on an institutional basis, the system's investigative, prosecutorial, defence and judicial functions
- completing summary trial reform
- strengthening oversight and review
- eliminating the death penalty.

Key Actors in the Military Justice System

Minister of National Defence

The Minister of National Defence has a variety of discretionary oversight duties under the *National Defence Act*. For example, the Minister may suspend a period of detention or imprisonment awarded at a service tribunal.

Eliminating the Minister's quasi-judicial roles in respect of individual cases would remove the Minister from the routine administration of the *Code of Service Discipline* and therefore permit the Minister to focus on other duties. The Minister would still retain overall responsibility for the military justice system.

Amendments to the *National Defence Act* would eliminate or transfer the discretionary oversight duties of the Minister of National Defence in relation to the following areas:

- appointing superior commanders for summary trials
- convening General and Disciplinary Courts Martial
- approving the punishment of dismissal and dismissal with disgrace for officers
- deciding whether to dispense with a new trial ordered by the Court Martial Appeal Court
- suspending detention or imprisonment
- making final decisions in the grievance process.

Judge Advocate General

The requirement for specialized legal advice in the area of military law is of utmost importance to the Department of National Defence and to the operational effectiveness of the Canadian Forces. The Judge Advocate General (JAG) has, since 1911, acted as legal advisor to the Governor General, the Minister of National Defence, the Department and the Canadian Forces. Legal officers in the Office of the JAG give advice in respect of the investigation and charging of service offences, as well as serve as prosecutor and defence counsel before courts martial.

While the requirement for military legal advice is well established, there remains uncertainty and misconception about the duties and responsibilities of the JAG to provide such advice. Setting out these duties and responsibilities in the *National Defence Act* would clarify the roles of the Office and strengthen its institutional independence.

Amendments to the *National Defence Act* would

- set out the qualifications for appointment to the position of Judge Advocate General
- describe the principal duties of the Judge Advocate General, namely, to
    - act as legal adviser to the Governor General, the Minister of National Defence, the Department of National Defence and the Canadian Forces in matters relating to military law
    - superintend the administration of military justice in the Canadian Forces by conducting regular reviews of the administration of military justice.

Director of Military Prosecutions

Under the current *National Defence Act* and the *Queen's Regulations and Orders for the Canadian Forces*, the prosecutor for a court martial is appointed by the senior military authority who convenes the court martial. That authority decides the type of court martial to hear the case. The military prosecutor is the direct agent of the senior military authority who convenes a court martial and has no independent authority to amend charges or to proceed or not proceed to trial.

Enhancing the separation between the prosecution function at courts martial and the chain of command would provide greater assurance that prosecution decisions would be made free from external influences and that the potential for conflicts of interest would be reduced.

Amendments to the *National Defence Act* would

- authorize the Minister of National Defence to appoint a Director of Military Prosecutions for a term not exceeding four years
- make the Director responsible for the conduct of all prosecutions at courts martial
- authorize the Judge Advocate General to provide both general and case-specific instructions in writing to the Director and require the Minister to be informed of such instructions.

Military Judges

To enhance the institutional independence of military judges, amendments would be made to the *National Defence Act* that relate to the appointment, terms and functions of military judges, including the Chief Military Judge. These changes largely reflect rules that are already in place in regulations.

Amendments to the *National Defence Act* would

- authorize the Governor in Council to appoint military judges and to designate a Chief Military Judge to be responsible for assigning military judges to courts martial
- provide for a fixed term for military judges and security of tenure
- provide that the role of military judges is to preside at courts martial and to perform other judicial duties under the *Act*.

To further enhance the independence of the military judges, the Office of the Chief Military Judge has been established as a separate unit. Military judges are not responsible to the chain of command for the performance of judicial duties.

Court Martial Administrator

At present members of court martial panels are appointed by the Chief Military Judge. This administrative duty may be seen to conflict with the judicial duties of the Chief Military Judge.

Amendments to the *National Defence Act* would provide for the appointment of a Court Martial Administrator who would be responsible for

- convening courts martial

- appointing the members of court martial panels
- performing other administrative functions associated with the convening of courts martial.

Defence Counsel Services

Legal advice may be sought by a person arrested or detained under the *Code of Service Discipline*. If a court martial is convened, the accused may request legal representation by military defence counsel. Enhancing the separation between military defence counsel and the other actors in the military justice system would provide greater assurance that persons subject to the *Code of Service Discipline* receive independent legal advice.

Amendments to the *National Defence Act* would

- authorize the Minister of National Defence to appoint a Director of Defence Counsel Services for a term not exceeding four years
- make the Director responsible for the supervision of legal services provided to persons in proceedings under the *Code of Service Discipline*
- authorize the Judge Advocate General to provide general directions in writing to the Director.

Service Tribunals

There are two types of service tribunals that try military offences — summary trials and courts martial.

Summary Trials

Summary trials are service tribunals conducted primarily by commanding officers or their delegates. They have been designed to deal with minor service offences where the possible punishments are not too severe. The object is to deal with the alleged offences quickly, within the unit, and to return the member to the unit as soon as possible, thereby promoting and maintaining unit discipline and operational effectiveness.

Over 90% of all disciplinary proceedings are dealt with by summary trial.

Summary trials provide fewer procedural protections than courts martial. Reform is directed at modernizing the summary trial process, strengthening compliance with the *Canadian Charter of Rights and Freedoms*, and enhancing procedural fairness while maintaining its essential summary character.

The two most severe punishments that a commanding officer presiding at a summary trial may currently impose are detention (a form of incarceration) for a period not exceeding 90 days and reduction in rank from sergeant to private (a reduction of two ranks). The punishment of detention includes the accompanying punishment of reduction to the rank of private and forfeiture of pay. A decision to impose either punishment must be approved in most cases by a senior officer outside the unit. These punishments are considered to be too severe given that a summary trial is designed to deal only with the more minor service offences.

Amendments to the *National Defence Act* would

- reduce the maximum period of detention that may be awarded at a summary trial from 90 to 30 days
- limit the power to reduce an accused's rank to one rank below the rank held before the summary trial.

To complement these changes to the *National Defence Act*, amendments to the *Queen's Regulations and Orders for the Canadian Forces* will

- restrict the offence jurisdiction of summary trials to those offences, including a small number of criminal offences, that are more minor in nature
- ensure that an accused person would
  - have the right to elect trial by court martial in all but the most minor cases where there is no possibility that penal consequences will be awarded
  - receive all information in respect of a charge before trial and, where there is an election, before making the election
- ensure that an accused has access to legal counsel when deciding whether to elect summary trial or a court martial
- provide that members sentenced to detention would be paid at a private's rate of pay during the period of detention

- restore pay and rank on completion of a sentence of detention, unless reduction in rank was also awarded as a punishment at the summary trial.

In addition, commanding officers would receive more comprehensive training to carry out their military justice duties and responsibilities, including formal certification to conduct summary trials.

Courts Martial

The court martial is designed to deal with more serious offences and is conducted in accordance with rules similar to those at a civilian criminal court.

Functions of the Presiding Judge. General and Disciplinary Courts Martial are composed of a judge advocate who officiates and a panel of officers. The panel of officers is roughly analogous to a jury. The *National Defence Act* authorizes the President of a court martial panel, who is not legally trained, to make certain decisions that in Canadian criminal practice would be judicial decisions. The President and other officers on the court martial panel also determine the sentence. While these officers bring military experience to the military justice process, and also provide the input of the military community responsible for discipline and military efficiency, the members are not trained to determine sentences. Submissions by counsel and instructions from the judge advocate may not compensate for the deficiencies in experience and qualifications. Panels also do not give reasons for awarding a particular sentence.

Amendments to the *National Defence Act* would

- eliminate the position of "President" of court martial panels
- authorize the military judge presiding at a General Court Martial or Disciplinary Court Martial, rather than the President, to make decisions of a legal nature
- provide that the military judge presiding at a General or Disciplinary Court Martial, rather than the members of the court martial, determines the sentence.

Membership of Court Martial Panels. Currently, only officers can sit as members of General and Disciplinary Courts Martial panels. Senior non-commissioned members have experience and leadership responsibilities that can bring an important dimension to court martial panels and better reflect the spectrum of individuals responsible for the maintenance of discipline and morale.

Amendments to the *National Defence Act* would permit a non-commissioned member of the rank of warrant officer or above to serve as a member of a Disciplinary Court Martial or General Court Martial when the accused is a non-commissioned member

Sexual Assault. Sexual assaults committed in Canada by persons subject to the Code of Service Discipline may only be tried by civilian courts and not by service tribunals. This lack of jurisdiction to try sexual assault cases committed in Canada results in an inability to deal promptly with offences that undermine morale and unit cohesion, lessen mutual trust and respect, and ultimately impair military efficiency. The Canadian Forces presently has jurisdiction to try the vast majority of other federal offences.

Amendments to the *National Defence Act* would permit a court martial to try sexual assault committed in or outside Canada by persons subject to the *Code of Service Discipline.*

Detention. The *National Defence Act* currently authorizes the imposition of a maximum period of two years of detention. In light of the rehabilitative nature of the punishment, this two year maximum period is considered to be excessive, particularly where the alternative punishment of imprisonment is available at all types of court martial.

Amendments to the *National Defence Act* would reduce the maximum period of detention that may be awarded by a court martial from two years to ninety days.

Fines. The National Defence Act limits the amount of a fine that may be imposed by a court martial on a member of the Canadian Forces to three months basic pay and on a civilian subject to the Code of Service Discipline to $500. These maximums are inadequate for many first time offenders and do not leave the court with flexibility to deal with repeat offenders. Removal of the limits on the amount of a fine that can be imposed on either a Canadian Forces member or a civilian subject to Code of Service Discipline would provide greater sentencing flexibility and allow court martial fines to be brought in line with Criminal Code fines.

Amendments to the *National Defence Act* would remove the monetary limit on fines that may be imposed.

Limitation Period

The three-year limitation period on the prosecution of service offences under the National Defence Act can operate to frustrate disciplinary action in respect of service offences that are either not reported or disclosed within this period, or are complex and lengthy to investigate. The three-year limitation period would be repealed. However, a one-year limitation period would be appropriate for offences intended to be dealt with by summary trial proceedings, because summary trials are designed to deliver prompt but fair justice.

Amendments to the *National Defence Act* would

- remove the three-year limitation period in respect of service offences
- permit accused to have the benefit of any applicable civilian limitation periods where a civil offence is incorporated into the *Code of Service Discipline*
- impose a one-year limitation period for offences dealt with by summary trial.

Included Punishments

The National Defence Act provides for mandatory included punishments in certain cases. For example, where a non-commissioned member is given a term of imprisonment, the Act deems that a punishment of loss of rank is included as an additional sentence.

These included punishments can give rise to an injustice because they are arbitrary and apply without exception when the primary punishment is awarded.

Amendments to the *National Defence Act* would

- if a non-commissioned member above the rank of private is sentenced to detention, deem that person to be reduced to the rank of private for the period of detention only
- change other mandatory included punishments to discretionary accompanying punishments.

The regulations would provide that a non-commissioned member sentenced to detention be paid as a private for the period of the detention. Officers and non-commissioned members sentenced to imprisonment would not be paid.

Investigation and Charging

The current investigation and charging process lacks transparency and gives broad discretion to a commanding officer to make final decisions concerning not only minor offences but also serious and sensitive offences that implicate interests well beyond his or her individual unit.

In addition to a more independent role for the prosecutor, a number of changes to the legislative, regulatory and administrative provisions dealing with the investigation and charging of service offences would increase openness and impose better structure on the exercise of individual discretion, while retaining the valuable and essential participation of the chain of command.

Amendments to the *National Defence Act* would

- remove from commanding officers the power to dismiss charges
- require that a charge that is beyond the jurisdiction of commanding officers be referred to the Director of Military Prosecutions
- permit a charge to be referred to the Director of Military Prosecutions if a commanding officer decides not to proceed with the charge
- assign to the Director of Military Prosecutions the responsibility for
    - determining the charges to be tried by court martial
    - determining the type of court martial
    - conducting all prosecutions at courts martial.

Amendments to the *Queen's Regulations and Orders for the Canadian Forces* and administrative policies will

- establish a National Investigation Service (NIS), a specialized military police unit outside of the operational chain of command reporting directly to the Vice Chief of the Defence Staff through the Canadian Forces Provost Marshal
- assign to the NIS the primary responsibility to investigate all serious and sensitive offences
- require commanding officers to report all serious and sensitive service offences to the newly established NIS
- authorize investigators of the NIS to lay charges arising from their investigations, subject to the approval of the Director of Military Prosecutions
- require commanding officers to consult legal advisers in making investigation and charging decisions in respect of serious offences and to state reasons in writing where that advice is not accepted.

Strengthening Oversight and Review Functions

In order to ensure that the military justice system is fair and meets the expectations of those who are subjected to it, oversight and review mechanisms must be in place to ensure day-to-day decisions are effectively monitored and are capable of being reassessed.

Grievances

While court martial decisions may be appealed to a panel of civilian judges in the Court Martial Appeal Court, the internal grievance system is presently the only internal review mechanism available to Canadian Forces members who feel they have suffered any other personal oppression, injustice or other ill treatment. The grievance process has been generally seen to be achieving its objectives, but it involves too many levels of review and is perceived as being too close to the chain of command.

Amendments to the *National Defence Act* would

- remove the Minister's involvement in individual grievances
- create an external Canadian Forces Grievance Board with jurisdiction to deal with grievances related to the administration of the affairs of the Canadian Forces with the following major features:
    - the Board would make findings and provide recommendations in relation to grievances submitted to the Chief of Defence Staff
    - the Chief of the Defence Staff would not be bound by the findings and recommendations of the Board but would be required to provide reasons for not following the Board's findings or recommendations
    - the Board would have the authority to conduct oral hearings and compel the attendance of witnesses and the production of documents
    - the Board would report annually to the Minister and the report would be tabled in each House of Parliament.

litary Police

itary police exercise jurisdiction over all persons who are subject to the *Code of Service Discipline* in or side Canada, including civilians who accompany the Canadian Forces outside of Canada. As peace ers under the *Criminal Code*, they also have jurisdiction over a person not subject to the *Code of ice Discipline* while the person is on a defence establishment.

ary police have responsibilities both for police functions, such as crime prevention and investigations or military functions, such as route reconnaissance, custody of prisoners of war, and supervision of tion barracks.

y police are presently under the control of operational commanders in the field. The practical result reporting arrangement is that military police duties that are of an essentially military nature are ntly in conflict with their roles as police.

, there is no independent method of dealing with complaints that arise concerning the conduct of police. These two factors and inadequate training have created a lack of confidence in the ence and accountability of the military police.

To remedy the accountability problem, the control of intelligence and counter-intelligence work has been placed outside the military police chain of command. The control of military police when they provide operational support would remain with operational commanders.
The National Investigation Service (NIS), a military police unit of the Canadian Forces, has been established to provide specialized, independent and professional investigative services to the Canadian Forces on a national and international basis. The NIS will provide all investigative services for serious or sensitive matters or matters that require complex or specialized investigation.
Training for the military police will be enhanced by the introduction of a comprehensive training process.
Amendments to the *National Defence Act* would

- establish a Military Police Complaints Commission, independent of the Department of National Defence, to review, investigate and report on
    - complaints about the conduct of a member of the military police conducting an investigation
    - complaints about improper interference by military authorities or senior officials of the Department with a member of the military police conducting an investigation
- require an annual report of the Military Police Complaints Commission to be tabled in Parliament
- authorize the establishment of a professional code of conduct to govern the conduct of military police.

Reporting on the Administration of Military Justice
Concern has been expressed about the lack of systematic reporting on the administration of military justice. An annual report would be an effective management tool for the Minister, the Chief of the Defence Staff and the Government.
Amendments to the *National Defence Act* would

- require the Judge Advocate General to report annually to the Minister of National Defence on the administration of military justice in the Canadian Forces
- provide for the report be tabled in Parliament.

Review of the National Defence Act
A review of the *National Defence Act* in five years is necessary to ensure that the *Act* continues to reflect Canadian values and legal standards while preserving its capacity to meet essential military requirements.
Amendments to the *National Defence Act* would

- require the Minister of National Defence to have a review carried out of the provisions and operation of the *Act* five years after the amendments come into force
- provide for a report of the review to be tabled in Parliament.

Elimination of the Death Penalty
The death penalty is no longer considered to be required as a punishment for service offences under the *National Defence Act*. Eliminating the death penalty would align Canada's military law with civilian law and with the approach taken by most western nations with which Canada has strong ties.
Amendments to the *National Defence Act* would

- remove the death penalty from the scale of punishments that may be imposed in respect of service offences
- substitute for the most serious offences involving traitorous acts the punishment of life imprisonment with ineligibility for parole for twenty-five years.

Conclusion
The proposed amendments to the *National Defence Act* follow through on recommendations of the Special Advisory Group on Military Justice and Military Police Investigation Services, and respond to recommendations in the final report of the Commission of Inquiry into the Deployment of the Canadian Forces to Somalia.
Amendments to the *National Defence Act* would

- promote greater accountability and transparency in the military justice system

- maintain portable service tribunals capable, with prompt but fair processes, of operating in time of conflict or peace, in Canada or abroad.

These amendments, plus ongoing reform in regulations, orders and administrative policies, will strengthen the Canadian Forces as a national institution in which Canadians may continue to impose their trust and confidence.

FY 00/01 STRATEGIC LETTER
OFFICE OF THE JUDGE ADVOCATE GENERAL
15 DECEMBER 1999

FUTURE OUTLOOK

The Canadian Forces will continue to be drawn into international situations and be exposed to new circumstances, which are all lawyer intensive demanding advice, counsel and services in military law and military justice. Military procedures are becoming legally more complex. As such the demand for legal services will continue to rise just to ensure that operations and day-to-day activities are conducted in accordance with the rule of law.

The demand for legal officers also has an external dimension as other departments in government rely on DND for information and education on the international dimension of military operations. In addition, as Canada assumes command positions in the international arena, there will be increased demand for higher rank level military legal officers of more depth and experience to advise Canadian Commanders.

It is expected that military justice policies and regulations will continue to evolve in response to changes in the domestic and international environment. As well, in respect to developments on personnel matters, there will be continued pressure to enhance and develop CF personnel policies to ensure fairness and justice in the treatment of military personnel while ensuring compliance with both the letter and the spirit of the law.

The September passage of Bill C-25 has delayed the full impact of this legislation. It is expected that the number of courts martial will continue to increase as CF members take full advantage of the elective provisions.

3.1 CHALLENGES

A near term challenge in regard to military justice policies and regulations, is to keep progressing planned initiatives in the face of shortages of trained staff. For the mid-term we must assemble the team to support the external, independent five-year review of the Military Justice System. In addition, we must fully utilize the advisory structure of committees and boards to insure that we have timely input to military justice policy and practices.

We have entered a new era in respect to military justice. There are more elections available to CF members, new authorities, multiple charge layers, and multiple related legal activities. Our challenge will be to make the new system "live and breath" and function in a timely manner. As well, there is a substantial communications requirement to keep all the stakeholders informed.

One of the consequences of staff shortages within the Operations Division is that legal training for both lawyers and CF members has fallen behind. This situation presents a serious challenge as we endeavor to bring the knowledge level of the Canadian Forces in general and new legal officers in particular up to the knowledge level expected by the Special Advisory Group and the Somalia Commission.

Another pressing challenge is to stay abreast of international developments in military law so that we can ensure that operational staffs have the benefit of current military legal advice on evolving situations abroad.

3.2 OPPORTUNITIES

The opportunities we see are being able to invest and reap the benefits of:

- Training and developing our very bright young lawyers that have recently enrolled in the CF. The recruitment and development process while long (2-3 years) will provide us the base of competent lawyers necessary to meet the present and future demand for legal services;
- Establishing effective relationships with and between military justice stakeholders as well as with the policy development bodies to provide continuous, constructive input on military justice issues, in furtherance of the necessary and ongoing process of military justice review; and
- Using of Service Level Agreements (SLAs) and our performance measurement system to focus on key client needs as shortages prevent meeting all demands in timely fashion.

3.3 HIGHLIGHTS OF STRATEGIC TARGETS, INITIATIVES AND PRIORITIES

In view of the progress made on the strategic targets identified in the FY 99/00 Business Plan and the generation of a long-term strategy for the JAG, we now have the following strategic goals:

- Building confidence in the restructured Military Justice System;
- Delivering expanded and enhanced services in military law; and
- Fostering innovative leadership and management in the Legal Branch.

These goals will serve to focus and align our efforts on our primary functions as well as our initiatives.

3.3.1 *Key Initiatives*

Annex A describes the entire range of JAG initiatives associated with the JAG 2020 Strategy. This section will highlight only the key elements associated with each goal. The priorities within JAG will ensure that progress will be made on these initiatives as well as all high priority requests for services.

Building Confidence in the Restructured Military Justice System

- Conduct a review of legislation, regulations and orders affecting the administration of military justice to ensure they reflect the state of the law and promote transparency and fairness. This process will intensify in the FY 01-02 timeframe in anticipation of the statutorily mandated five-year review;
- Establish effective relationships with and between military justice stakeholders and the policy development bodies that have now been established to provide continuous, constructive input on military justice issues; and
- Staff the reserve force component of the prosecution and defence services and integrate them fully into these activities.

Delivering Expanded and Enhanced Services in Military Law

- Develop and disseminate a "Use of force Manual" to guide CF members in conducting operations. CF doctrine in respect to the use of force is not clear and this manual will provide practical assistance to CF members in planning and conducting operations;
- Increase the frequency of "Operations law" and "Law of Armed Conflict" courses for Legal and other CF Officers;
- Advance the development of a Status of Forces Agreement (SOFA) so that visiting forces have equivalent status to Canadian troops abroad;
- Establish an Interoperability Clearing House for NATO as this is an important Defence 2020 initiative;
- Progress the "War Affected Children" project as this issue will impact on operations and is a government priority;
- Participate in the Canadian delegation to the UN ICC process;
- Advance the NORAD mandate review as this also is a government priority;
- Provide advice on the concept of universality of service and the integration of this concept with the concept of employment equity;
- Provide oversight on the creation of a new Redress of Grievance manual which will implement a consistent professional standard for addressing an application for Redress of Grievance in a timely manner; and
- Review, revise and implement the Summary Investigation and Board of Inquiry DAOD to reflect changes in the law including the NDA.

Fostering Innovative Leadership and Management in the Legal Branch

- Gather and process data on summary trials and upload these statistics to the JAG web page. A similar initiative is being developed for courts martial and appeals. The statistics compiled will provide valuable information on the status and health of the military justice system and will facilitate the superintendence of the administration of military justice in the CF;
- Review the practical and legal ramifications pertaining to the publication of the results of individual disciplinary proceedings conducted at unit level; and
- Continue to enhance JAG management structures and processes particularly in planning, performance measurement and information management.

Priorities

Our enduring shortages of legal officers and the level of untrained personnel will mean that Directors and AJAGs must set priorities. Our long term strategy and related goals provide the framework for these priorities. Other than a clear commitment to the issues of most importance, I have not detailed direction

on priorities to these senior managers. Instead my approach is to rely upon the judgement and experience of Directors and AJAGs to determine what is done first and what must be delayed.
The determination of local priorities must remain at their level with minimum direction from above. They must operate in close contact with their clients to determine priorities and maintain their credibility. I am able to monitor their effectiveness in this regard through their monthly performance reporting and its interpretation through our decision support system as well as through monthly video conferencing sessions.

3.4 EXPECTED ACHIEVEMENT

The JAG vision is that Justice be done in the Defence of Canada. This vision means that CF operations are carried out in accordance with national and international law. This vision also requires the Canadian government, CF Commanders and any supporting agencies have ready access to competent and timely legal advice. With the highest priority being military justice, there will continue to be some shortfalls in service levels in respect to other areas of military law.
Over the long term, the timely delivery of our primary functions and continued progress towards our strategic goals will move JAG substantially towards the stated vision. We will be able to confirm this progress through our performance measurement system.
Service levels should hold or improve modestly in the field as on-job training progresses. In Ottawa, there will be no change in military law services until the summer of 2000 when a gradual improvement will begin. This may mean some delays in routine and relatively low priority work in military law. By the end of the first two years of this plan, there will be a significant improvement in military law operational training internally and within the CF.
In the same time period international legal service levels and operational support in general will improve. In this area alone, service shortfalls in timeliness are serious and running at a satisfaction rate of 35% on time. Filling this gap over time will see service levels in this area improve to 60% in the second year and to 80% in the third year. As well, legal operational training will improve with a published Law of Armed Conflict Manual in the first year of the plan. In the second year, there will be an increase in the number of Law of Armed Conflict courses. As well we expect to increase the level of our readiness for deployments with the implementation of a policy for deployments. Within three years we expect to have 40% of our JAG legal officers qualified for deployment on short notice.
Over the first 12 months of the plan, there will continue to be shortages in service levels at NDHQ for relatively low priority legal services. Everything will eventually get done, only some services will take a little longer. We will manage this situation through existing and expanded application of service level agreements, our performance measurement system and regular contact with clients to ensure that the right issues are being addressed in a timely fashion.
In regards to Military Prosecution Services, there will be improved levels of service for the NIS. Service levels for courts martial will also improve as we honour our commitments to timely pre-trial preparations and swift justice.

Recent amendments to the *National Defence Act* modernize the military justice System by enhancing its Transparency, Fairness and Effectiveness.

The *National Defence Act,* R.S.C. 1985, chapter N-5, was amended by the passing by Parliament of the *National Defence Act,* S.C. 1998, chapter 35 which was assented to on December 10, 1998 and is to come into force on a day to be fixed by order of the Governor in Council. All references are to the latter statute

These amendments modernize and strengthen the military justice system by:

- strengthening the Canadian Forces as a vital national institution,
- instilling confidence in the men and women of the Canadian Forces that their justice system is fair and open,
- more closely aligning the military justice system with current Canadian values and legal standards, and
- preserving those characteristics of the system needed to satisfy the disciplinary requirements of the Canadian Forces.

Transparency

Section 9.2

(1) *The Judge Advocate General has the superintendence of the administration of military justice in the Canadian Forces.*

(2) *The Judge Advocate General shall conduct, or cause to be conducted, regular reviews of the administration of military justice.*

Section 9.3

(1) *The Judge Advocate General is responsible to the Minister in the performance of the Judge Advocate General's duties and functions.*

(2) *The Judge Advocate General shall report annually to the Minister on the administration of military justice in the Canadian Forces.*

(3) *The Minister shall have a copy of the report laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Minister receives it.*

Section 165.17

(1) *The Director of Military Prosecutions acts under the general supervision of the Judge Advocate General.*

(2) *The Judge Advocate General may issue general instructions in writing in respect of prosecutions. The Director of Military Prosecutions shall ensure that they are available to the public.*

Section 249.2

(1) *The Director of Defence Counsel Services acts under the general supervision of the Judge Advocate General.*

(2) *The Judge Advocate General may issue general instructions or guidelines in writing in respect of defence counsel services.*

(3) *The Director of Defence Counsel Services shall ensure that the general instructions and guidelines are available to the public.*

Section 180

(1) *Subject to subsections (2) and (3), courts martial shall be public and, to the extent that accommodation permits, the public shall be admitted to the proceedings.*

Fairness

Section 230

Every person subject to the Code of Service Discipline has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters:

(a) *with leave of the Court or a judge thereof, the severity of the sentence, unless the sentence is one fixed by law;*

(b) *the legality of any finding of guilty;*

(c) *the legality of the whole or any part of the sentence;*

(d) *the legality of a finding of unfit to stand trial or not responsible on account of mental disorder; or*

(e) *the legality of a disposition made under section 201, 202, or 202.16.*

Section 249

(1) *The review authority in respect of findings of guilty made and punishments imposed by courts martial is the Governor in Council.*

(2) *The review of a finding of guilty made and any punishment imposed by a court martial must be on application of the person found guilty or the Chief of the Defence Staff.*

(3) *The review authorities in respect of findings of guilty made and punishments imposed by persons presiding at summary trials are the Chief of the Defence Staff and such other military authorities as are prescribed by the Governor in Council in regulations.*

(4) *A review authority in respect of any finding of guilty made and any punishment imposed by a person presiding at a summary trial may act on its own initiative or on application of the person found guilty made in accordance with regulations made by the Governor in Council.*

Section 162.1

Except in the circumstances prescribed in regulations made by the Governor in Council, an accused person who is triable by summary trial has the right to elect to be tried by court martial.

Section 167

(1) *A General Court Martial is composed of a military judge and a panel of five members.*

(4) *If the accused person is an officer, all of the members of the panel must be officers.*

(7) *If the accused person is a non-commissioned member, two non-commissioned members who are of the rank of warrant officer or above must be appointed as members of the panel and the other three members must be officers.*

Section 193

The military judge presiding at a General Court Martial or a Disciplinary Court Martial determines the sentence.

Section 249.17

A person who is liable to be charged, dealt with and tried under the Code of Service Discipline has the right to be represented in the circumstances and in the manner prescribed in regulations made by the Governor in Council.

Section 249.19

The Director of Defence Counsel Services provides, and supervises and directs the provision of, legal services prescribed in the regulations made by the Governor in Council to persons who are liable to be charged, dealt with and tried under the Code of Service Discipline.

Effectiveness

Section *69*

A person who is subject to the Code of Service Discipline at the time of the alleged commission of a service offence may be charged, dealt with and tried at any time under the Code, subject to the following:

(a) *if the service offence is punishable under section 130 or 132 and the act or omission that constitutes the service offence would have been subject to a limitation period had it been dealt with other than under the Code, that limitation period applies; and*

(b) *The person may not be tried by summary trial unless the trial begins before the expiry of one year after the day on which the service offence is alleged to have been committed.*

Section 162

Charges under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit.

Section 165.21

(1) *The Governor in Council may appoint officers who are barristers or advocates of at least ten years standing at the bar of a province to be military trial judges.*

Summary Trials Reporting Period from 1 September 1999 to 31 March 2000

All Commands

Number of direct referrals to Court Martial	23	4.94%
Number of election to be tried by Court Martial by the accused	7	1.50%
Number of Summary Trials	426	91.42%
Not proceeded with	10	2.15%
Total	466	100.00%

Language of Summary Trials	Number of cases	Percentage
Number in English	344	80.75%
Number in French	82	19.25%
Total	**426**	**100.00%**

Command	Number of cases	Percentage
ADM (FIN CS)	1	0.23%
ADM (HR-MIL)	25	5.87%
ADM (IM)	8	1.88%
AIR COMMAND	17	3.99%
DCDS	95	22.30%
LFC	192	45.07%
MARCOM	84	19.72%
SMA (MAT)	4	0.94%
VCDS	0	0.00%
Total	**426**	**100.00%**

Unit	Number of cases	Percentage
1 AIR MAINTENANCE SQUADRON	1	0.23%
1 AIR MOVEMENTS SQUADRON	1	0.23%
1 BATTALION PRINCESS PATRICIA'S CANADIAN LIGHT INFANTRY	16	3.76%
1 CANADIAN DIVISION HEADQUARTERS AND SIGNAL REGIMENT	1	0.23%
1 CDN MECH BRIG GROUP HQ & SIG SQN	2	0.47%
12E REGIMENT BLINDE DU CANADA	1	0.23%
14 AIR MAINTENANCE SQUADRON	1	0.23%
1ST BATTALION ROYAL 22E REGIMENT	3	0.70%
1ST BN THE ROYAL CANADIAN REGIMENT	7	1.64%
1ST HUSSARS	1	0.23%
1ST REGIMENT ROYAL CANADIAN HORSE ARTILLERY	7	1.64%
2 AIR MOVEMENTS SQUADRON	1	0.23%
2 BATTALION PRINCESS PATRICIA'S CANADIAN LIGHT INFANTRY	18	4.23%
2 COMBAT ENGINEER REGIMENT	18	4.23%
2 SERVICE BATTALION	2	0.47%

2ND BATTALION ROYAL 22E REGIMENT	5	1.17%
2ND BATTALION THE NOVA SCOTIA HIGHLANDERS (CAPE BRETON)	2	0.47%
2ND REGT ROYAL CANADIAN HORSE ARTILLERY	3	0.70%
3 BATTALION PRINCESS PATRICIA'S CANADIAN LIGHT INFANTRY	10	2.35%
3 BATTALION ROYAL 22E REGIMENT	4	0.94%
3 BN THE ROYAL CANADIAN REGIMENT	2	0.47%
3 CANADIAN SUPPORT GROUP	1	0.23%
31 CANADIAN BRIGADE GROUP HQ	1	0.23%
33 (HALIFAX) SERVICE BATTALION	2	0.47%
35 (SYDNEY) SERVICE BATTALION	3	0.70%
3RD FIELD ENGINEER REGIMENT (M)	1	0.23%
412 TRANSPORT SQUADRON	1	0.23%
426 TRANSPORT TRAINING SQUADRON	2	0.47%
427 TACTICAL HELICOPTER SQUADRON	1	0.23%
441 TACTICAL FIGHTER SQUADRON	1	0.23%
4TH BATTALION THE ROYAL CANADIAN REGIMENT	2	0.47%
5 COMBAT ENGINEER REGIMENT	3	0.70%
5 FIELD AMBULANCE	1	0.23%
5 SERVICE BATTALION	2	0.47%
56TH FEILD ARTILLERY REGIMENT RCA	1	0.23%
5E REGIMENT D'ARTILLERIE LEGERE DU CANADA	3	0.70%
705 (HAMILTON) COMMUNICATION SQUADRON	1	0.23%
722 (SAINT JOHN) COMMUNICATION SQUADRON	1	0.23%
744 (VANCOUVER) COMMUNICATION REGIMENT	1	0.23%
763 (OTTAWA) COMMUNICATION REGIMENT	4	0.94%
79 COMMUNICATION REGIMENT	1	0.23%
8 AIR MAINTENANCE SQUADRON	1	0.23%
84TH INDEPENDENT FIELD BATTERY, RCA	1	0.23%
ACOUSTIC DATA ANALYSIS CENTRE	1	0.23%
ARMOUR SCHOOL	1	0.23%
CANADIAN CONTINGENT CENTRAL AFRICAN REPUBLIC	5	1.17%
CANADIAN CONTINGENT UNITED NATIONS DISENGAGEMENT OBSERVER FORCE (MIDDLE EAST)	2	0.47%
CANADIAN DEFENCE LIAISON STAFF (WASHINGTON)	1	0.23%
CANADIAN FORCES ENVIRONMENTAL MEDICINE ESTABLISHMENT	1	0.23%
CANADIAN FORCES FLEET SCHOOL ESQUIMALT	10	2.35%
CANADIAN FORCES MEDICAL SERVICES SCHOOL	2	0.47%
CF AMMUNITION DEPOT DUNDURN	1	0.23%
CF LEADERSHIP AND RECRUIT SCHOOL	6	1.41%
CF NAVAL ENG SCHOOL HALIFAX	2	0.47%
CF SCHOOL OF ADMINISTRATION & LOGISTICS	2	0.47%
CF SCHOOL OF AIR CONTROL OPERATIONS	1	0.23%
CF SCHOOL OF ELECTRICAL & MECHANICAL ENG	7	1.64%
CF SUPPORT UNIT (OTTAWA)	1	0.23%
CFAD DUNDURN DETACHMENT EDMONTON	2	0.47%
CFB BORDEN	3	0.70%
CFB COLD LAKE	6	1.41%

CFB EDMONTON	3	0.70%
CFB HALIFAX	2	0.47%
CFB KINGSTON	1	0.23%
CFNES NAV CBT SYS TECHNICIAN TRG DET	2	0.47%
COMBAT TRAINING CENTRE HEADQUARTERS	6	1.41%
ENGR UNIT (KOSOVO)	1	0.23%
HER MAJESTY'S CANADIAN SHIP OTTAWA	8	1.88%
HER MAJESTY'S CANADIAN SHIP PROTECTEUR	7	1.64%
HMCS ALGONQUIN	2	0.47%
HMCS ATHABASKAN	5	1.17%
HMCS CALGARY	2	0.47%
HMCS CHAMPLAIN	1	0.23%
HMCS CHARLOTTETOWN	2	0.47%
HMCS GLACE BAY	2	0.47%
HMCS GOOSE BAY	1	0.23%
HMCS HALIFAX	1	0.23%
HMCS IROQUOIS	8	1.88%
HMCS MONCTON	5	1.17%
HMCS ONONDAGA	2	0.47%
HMCS PRESERVER	1	0.23%
HMCS REGINA	1	0.23%
HMCS SASKATOON	1	0.23%
HMCS ST JOHN'S	1	0.23%
HMCS VANCOUVER	5	1.17%
HMCS VICTORIA	2	0.47%
HMCS VILLE DE QUEBEC	3	0.70%
HMCS WINNIPEG	2	0.47%
HMCS YORK	1	0.23%
INFANTRY BATTALION GROUP (BOSNIA)	36	8.45%
INFANTRY BG (KOSOVO)	3	0.70%
INFANTRY COY GP (EAST TIMOR)	6	1.41%
INFANTRY SCHOOL	1	0.23%
JOINT TASK FORCE TWO	1	0.23%
LAND FORCE WESTERN AREA HEADQUARTERS	1	0.23%
LES FUSILIERS DE SHERBROOKE	1	0.23%
LES VOLTIGEURS DE QUEBEC	1	0.23%
LORD STRATHCONAS HORSE (ROYAL CANADIANS)	9	2.11%
MILITIA TRG AND SUPPORT CENTRE MEAFORD	27	6.34%
NAVAL RESERVE HEADQUARTERS	2	0.47%
NCE (BOSNIA)	1	0.23%
NSE (BOSNIA)	3	0.70%
NSE (KOSOVO)	10	2.35%
RECCE SQN (KOSOVO)	17	3.99%
ROYAL CANADIAN ARTILLERY BATTLE SCHOOL	1	0.23%
ROYAL MILITARY COLLEGE OF CANADA	4	0.94%
SEA TRAINING ATLANTIC	1	0.23%

TAC HEL UNIT (KOSOVO)	3	0.70%
TASK FORCE SERDIVAN (TURKEY)	1	0.23%
TASK FORCE AVIANO (ITALY)	5	1.17%
THE ARGYLL & SUTHERLAND HIGHLANDERS OF CANADA (PRINCESS LOUISE'S)	2	0.47%
THE HASTINGS AND PRINCE EDWARD REGIMENT	1	0.23%
THE LOYAL EDMONTON REGIMENT (4 BATTALION PRINCESS PATRICIA'S CANADIAN LIGHT INFANTRY)	2	0.47%
THE ROYAL CANADIAN DRAGOONS	2	0.47%
THE ROYAL HAMILTON LIGHT INFANTRY (WENTWORTH REGIMENT)	4	0.94%
THE SASKATCHEWAN DRAGOONS	2	0.47%
TRINITY-CF INT UNDERSEA SURV CENTRE	1	0.23%
WESTERN AREA TRAINING CENTRE	5	1.17%
Total number of cases	**426**	**100.00%**

Disposition by Case	**Number of cases**	**Percentage**
Guilty	407	95.54%
Not Guilty	19	4.46%
Number of cases	**426**	**100.00%**

Findings by Charge	**Number of charges**	**Percentage**
Charge not Proceeded with	6	1.11%
Guilty	466	85.98%
Not Guilty	53	9.78%
Charge Stayed	17	3.14%
Number of charges	**542**	**100.00%**

Summary of Charges			
Article	**Description**	**Number of charges**	**Percentage**
83	Disobedience of Lawful Command	14	2.58%
84	Striking or Offering Violence to a Superior	1	0.18%
85	Insubordinate Behaviour	21	3.87%
86	Quarrels and Disturbances	11	2.03%
87	Resisting or Escaping from Arrest or Custody	2	0.37%
90	Absence Without Leave	162	29.89%
93	Cruel or Disgraceful Conduct	2	0.37%
95	Abuse of Subordinates	3	0.55%
97	Drunkenness	54	9.96%
111	Improper Driving of Vehicles	1	0.18%
114	Stealing	4	0.74%
116	Destruction, Damage, Loss or Improper Disposal	1	0.18%
117	Miscellaneous Offences	7	1.29%
129	Conduct to the Prejudice of Good Order & Discipline - Offenses of sexual nature	2	0.37%
129	Conduct to the Prejudice of Good Order & Discipline - Drugs/Alcohol	25	4.61%

129	Conduct to the Prejudice of Good Order & Discipline -Election to be tried by CM Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol)	116	21.40%
129	Conduct to the Prejudice of Good Order & Discipline - Election to be tried by CM not Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol)	98	18.08%
130	Service Trial of Civil Offences	18	3.32%
Number of charges		**542**	**100.00%**

Findings by Type of Charge		**Findings**	**Number of charges**	**Percentage**
83	Disobedience of Lawful Command	Guilty	10	1.85%
83	Disobedience of Lawful Command	Not Guilty	4	0.74%
84	Striking or Offering Violence to a Superior	Guilty	1	0.18%
85	Insubordinate Behaviour	Guilty	17	3.14%
85	Insubordinate Behaviour	Not Guilty	3	0.55%
85	Insubordinate Behaviour	Charge Stayed	1	0.18%
86	Quarrels and Disturbances	Guilty	5	0.92%
86	Quarrels and Disturbances	Not Guilty	5	0.92%
86	Quarrels and Disturbances	Charge Stayed	1	0.18%
87	Resisting or Escaping from Arrest or Custody	Guilty	2	0.37%
90	Absence Without Leave	Guilty	153	28.23%
90	Absence Without Leave	Not Guilty	8	1.48%
90	Absence Without Leave	Charge Stayed	1	0.18%
93	Cruel or Disgraceful Conduct	Guilty	2	0.37%
95	Abuse of Subordinates	Guilty	2	0.37%
95	Abuse of Subordinates	Charge Stayed	1	0.18%
97	Drunkenness	Guilty	44	8.12%
97	Drunkenness	Not Guilty	7	1.29%
97	Drunkenness	Charge Stayed	3	0.55%
111	Improper Driving of Vehicles	Not Guilty	1	0.18%
114	Stealing	Guilty	3	0.55%
114	Stealing	Not Guilty	1	0.18%
116	Destruction, Damage, Loss or Improper Disposal	Guilty	1	0.18%
117	Miscellaneous Offences	Guilty	2	0.37%
117	Miscellaneous Offences	Not Guilty	3	0.55%
117	Miscellaneous Offences	Charge not Proceeded with	2	0.37%
129	Conduct to the Prejudice of Good Order & Discipline - Offenses of sexual nature	Guilty	2	0.37%
129	Conduct to the Prejudice of Good Order & Discipline - Drugs/Alcohol	Guilty	24	4.43%
129	Conduct to the Prejudice of Good Order & Discipline - Drugs/Alcohol	Not Guilty	1	0.18%
129	Conduct to the Prejudice of Good Order & Discipline -Election to be tried by CM Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol)	Guilty	101	18.63%

129	Conduct to the Prejudice of Good Order & Discipline -Election to be tried by CM Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol)	Not Guilty	9	1.66%
129	Conduct to the Prejudice of Good Order & Discipline -Election to be tried by CM Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol)	Charge Stayed	5	0.92%
129	Conduct to the Prejudice of Good Order & Discipline -Election to be tried by CM Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol)	Charge not Proceeded with	1	0.18%
129	Conduct to the Prejudice of Good Order & Discipline - Election to be tried by CM not Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol)	Guilty	88	16.24%
129	Conduct to the Prejudice of Good Order & Discipline - Election to be tried by CM not Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol)	Not Guilty	7	1.29%
129	Conduct to the Prejudice of Good Order & Discipline - Election to be tried by CM not Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol)	Charge Stayed	3	0.55%
130	Service Trial of Civil Offences	Guilty	9	1.66%
130	Service Trial of Civil Offences	Not Guilty	4	0.74%
130	Service Trial of Civil Offences	Charge Stayed	2	0.37%
130	Service Trial of Civil Offences	Charge not Proceeded with	3	0.55%
Number of charges			**542**	**100.00%**

Authority	**Number of Cases**	**Percentage**
Commanding Officer	154	36.15%
Superior Commander	25	5.87%
Delegated Officer	247	57.98%
Total	**426**	**100.00%**

Punishment	**Number of Punishments**	**Percentage**
Fine	260	52.00%
Caution	34	6.80%
Severe Reprimand	2	0.40%
Confinement to ship or barracks	123	24.60%
Detention	10	2.00%
Reprimand	37	7.40%
Reduction in rank	2	0.40%
Stoppage of leave	5	1.00%
Extra work and drill	27	5.40%

Authority	Authorized Punishment	Number of Punishments	Percentage
Commanding Officer	Fine	101	20.20%
	Caution	16	3.20%
	Confinement to ship or barracks	27	5.40%
	Detention	10	2.00%
	Reprimand	17	3.40%
	Reduction in rank	2	0.40%
	Stoppage of leave	1	0.20%
	Extra work and drill	5	1.00%
Superior Commander	Fine	21	4.20%
	Severe Reprimand	2	0.40%
	Reprimand	7	1.40%
Delegated Officer	Fine	138	27.60%
	Caution	18	3.60%
	Confinement to ship or barracks	96	19.20%
	Reprimand	13	2.60%
	Stoppage of leave	4	0.80%
	Extra work and drill	22	4.40%
Number of Sentences Modified		**2**	**0.49%**
Number of Summary Trials Quashed		**2**	**0.47%**
Number of Charges Quashed		**2**	**0.37**

Subject: Cox Commission
Date: Wed, 28 Feb 2001 08:22:06 -0500
From: "The Lewis Family" <amelia@bignet.net>
To: <judgecox@earthlink.net>

Honorable Judge,

My name is Nancy Lewis and I am the mother of one of the 47 young men killed aboard the USS Iowa in 1989.

The families of the IOWA 47 have been denied closure because of the way the Navy has handled the investigation. In the attempt to beat the statute of limitations, my lawyer, Lawrence P. Nolan presented a case to the Supreme Court citing the egregious behaviour of the Navy without knowing all of the facts that are now known hoping the Court would revisit the Feres Doctrine. We were not heard.

One example of the importance of the Navy's investigation would be IF the civilian participation in the unauthorized experiments had been addressed eleven years ago, we may not have seen civilians involved in the latest submarine accident.

The memories of the public have been tainted with the sexual overtones of the Navy's initial accusations and are soon to be the audience of a made for TV movie that will now skew history.

I would have an interest in making a statement at the Cox Commission Hearing on March 13, 2001 if you feel the Commission is the correct forum to address the above.

I will respectfully await your reply.

Nancy Jo Lewis
10222 Marshall Road
South Lyon, MI 48178
Home (248)486-7024
Work (248)347-8822
email: amelia@bignet.net

Subject: Corrected Version for Publication
Date: Tue, 27 Feb 2001 10:51:38 -0500
From: "Sally Allman" <sally_allman@nvlsp.org>
Organization: NVLSP
To: <judgecox@earthlink.net>
CC: <vickycox@earthlink.net>, "David Slacter" <DSLACTER@aol.com>

This e-mail is from David Addlestone. It reflects the corrections David wished to be incorporated before distribution.

I hope that the Commission will deal with the subject of less than fully honorable administrative discharges. While mentioned only in passing in Article 74(b), the UCMJ is otherwise silent on these stigmatizing discharges, which have from time to time been used by commanders to circumvent the UCMJ.

On several occasions current and former members of the Court of Appeals for the Armed Forces have addressed this problem, e.g. see Everett, "Military Administrative Discharges - The Pendulum Swings," 1966 Duke L.J. 41 (1966) and Effron, "Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates," 9 Harv. C.R. - C.L.L. Rev 227 (1974); see also Ervin [Senator Sam] "Military Administrative Discharges: Due Process in the Doldrums, 10 San Diego L. Rev. 9 (1973). (See also references to testimony of other USCMA Judges before Congress cited in these articles.) While there has been clear improvement in the "paper process" in the past five decades, the percentage of less than fully honorable administrative discharges issued by the services each year remains at a relatively constant rate, raising many of the same questions raised by the above-cited eminent commentators.

Subject: UCMJ
Date: Fri, 23 Feb 2001 20:13:47 EST
From: GretheC@aol.com
To: Judgecox@earthlink.net

Judge Cox:
I received information via e mail regarding the upcoming 50 year review of the UCMJ. As a retired military officer, having served 31 years in the military, and actually having challenged the military several times during my career if offer several suggestions for your consideration.

The UCMJ was created at a time when social mores were very different from what they are today. There is no question that adultery occurs within the military service. At every port of call, at every overseas assignment, even on military bases there are sexual activities that occur between unmarried individuals and same sex couples.
The reality is also that there are gays and lesbians serving in the military without adversely effecting morale, discipline and good order.

Within the UCMJ there are unrealistic, unenforcable, selectively enforced codes of behavior. There is no question that some of these are an incredible intrusion into personal private conduct of married and unmarried couples. Eliminating some of these components of the UCMJ would be beneficial to the military, assure equal treatment and still not undermine military discipline.

Since I am not an attorney but have had some insights into the inequities of the UCMJ, I will only mention those areas which I feel I can address.

II Jurisdiction (in Personal and subject matter)
E. Jurisdiction over retirees should be limited:
Ironically, the fact that is section of the UCMJ exists prohibits retired gay and lesbian servicemembers to disclose their service for fear of recrimination and subsequent loss of benefits. It would seem appropriate to either provide a statute of limitation or exemptions that only in the event of a felony occuring while in the military, should a retiree be subjected to reinstatement and prosecution. Another view would be that once homosexuality is not cause of separation from the military, retirees would no longer feel jeopardized or at risk of loss of benefits.

IV Crimes and Offenses
C: Sexual misconduct statues related to rape and sodomy should be revised to reflect Model Penal Code.
K. Consensual sodomy should be decriminalized.
L . Adultery should be eliminated.

Currently these sections are used specifically to target homosexual servicemembers and are used to define the "homosexual behavior", even off base, with civilian consenting partners and resulted in prosecution and jail time and military separation. As the UCMJ is written section K also includes heterosexuals both married and unmarried. These are absolutely an invasion of privacy and have are of no legitimate concern of the military. The section in no way implies tolerance of behavior between members of the same unit which would truely undermine disciple and morale, nor should there be fratenization between the officer and enlisted members.
Adultery, though not to be condoned, is absolutely a reality in the military. To selectively punish individuals based upon these behaviors is again an

invasion of privacy. Although one would want married couples to behave appropriately it should not be mandated by the military. This section too is selectively enforced. Again care must be taken not to eliminate the notion of innappropriate behavior between members of the same unit, or when power positions influence sexual conduct. However, Conduct unbecoming, would cover such inappropriate behavior.
These sections should all be reviewed and hopefully eliminated from an updated UCMJ.

XII Miscellaneous

K. The Boards for Correction of Military and Naval Records should only be reviewed only at the request of the plaintiff.

Individuals seeking correction of the military case have only the administrative recourse through the board of correction of military records. This can also be used by individuals who have been separated against their will, from the military. If the board rules in favor of the plaintiff the case should stand as ruled. If the board rules against the plaintiff, they should be able to appeal the decision. The reason for the review by the plaintiff only is the cost in time and money for any litigation and how difficult it is for individuals to challenge the military. It seems grossly unfail that tax monies and attorneys are used to prosecute but not to defend.

These suggestions are based upon my own experience within the military justice system, and hope their intent is taken as a serious consideration. If there is any information or questions regarding this letter I would be more than available for futher dialogue.

Sincerely,

Colonel Margarethe Cammermeyer USAR, (ret), R.N., Ph.D.
4632 S. Tompkins Rd
Langley, WA 98260
360-221 5882
e mail: grethec@aol.com

The Bar Association of the District of Columbia

Written Comments submitted

March 13, 2000

to the:

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE
(The "Cox Commission)

General Comments and Recommendations

("Specific Questions, Perspectives, and Matters for Consideration" relating to the "Final List of Topics" are submitted separately)

To: The Honorable Walter T. Cox, III, Senior Judge, United States Court of Appeals for the Armed Forces, Chair, and the Honorable Members, of the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice

The Bar Association of the District of Columbia (BADC), established in 1871, is the second oldest voluntary bar association in the United States. Throughout its history, the BADC has taken an active interest in developments of the law, and has conducted training programs and published numerous handbooks addressing various areas of the law. The BADC has frequently testified before Congress and various committees and commissions considering developments in the law.

BADC has taken an active interest in military law, and twice within the past few years has sponsored Recommendations adopted by the American Bar Association addressing military law issues. BADC considers it a privilege and a duty to participate and provide a civilian bar association perspective to the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice, popularly known as the "Cox Commission." It has been almost two decades since the Congress has held hearings on the operation of the military justice system, and more than three decades since the Congress has held hearings that went beyond very limited aspects of this system. We do not believe that in the last three decades there has been any outside effort to comprehensively examine the system as a whole, and to make recommendations to improve it to ensure it is operating as effectively and as fairly as is practicable. We view it as most appropriate that an effort to do that has now been undertaken under the sponsorship of the National Institute of Military Justice, and we hope that this will be the start of a process which will thoroughly examine and then make appropriate changes needed to modernize the Code and the military justice system.

This document provides BADC's recommendations for change in the military justice system. In a separate document we are providing "Questions, Perspectives, and Matters for Consideration" on many of the topics the Commission has promulgated for comment. Those are designed not so much to make recommendations or to suggest "answers" as to indicate lines of inquiry which ought to be pursued by this and subsequent studies. In the current document, however, we attempt to address the subject of military justice and the current state of the administration of the UCMJ, in broader and more pointed terms. To some degree, this discussion will give credence and substance to our answer to the first of the Commission's questions, whether there is a need for congressional review of the military justice system. The answer to that question is a categorical and definitive "YES!

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Summary

BADC has several general principles and perspectives which it urges the Commission to have in mind as it conducts its review. These general comments, further developed within, are summarized in the following specific points.

- BADC believes the fair and effective operation of the military justice system is a pivotal national security issue due to its impact on good order and discipline.

- There has not been a comprehensive public review of the operation of the military justice system in at least three decades, and such a review is much needed. BADC commends the National Institute of Military Justice for initiating this review by sponsoring the 50th Anniversary of the UCMJ Commission.

- BADC is presenting extensive comments on the individual topics which the Commission proposed for comment. However, BADC views it to be of crucial importance that the Commission keep in mind its place in history, and seriously consider prior studies and critical articles about this system, and establish at the outset its principles and ground-rules for any recommended change.

- The first question to be addressed should be the issue of "justice" or "discipline." BADC urges to Commission to align itself with the best thinkers of the past century, and conclude with such as General William Westmoreland and Major General Kenneth Hodson that a military trial should *not* have a dual function as an instrument of discipline and as an instrument of justice, but rather should be an instrument of justice and in fulfilling this function, it will promote discipline.

- The Commission should carefully study developments in military justice and in concepts of due process not only in our country generally, but in other allied military justice systems as well, which in recent years have experienced startling changes which challenge the continued primacy of the United States system as the "best" and "fairest" of the military justice systems in the world today.

- The Commission should bear in mind the subtle pressures imposed by the uniformed, hierarchical structure of this system, and recommend changes that will minimize not only "command influence" but the potential for (or the appearance of) other improper influences (especially on defense counsel) from seniors, whether within or outside the chain of command.

- BADC strongly recommends that the Commission commence it's consideration with a thorough review of the changes which General Hodson recommended almost 30 years ago as the preferred alternative to "abolishing" the military justice system. Of General Hodson's seven recommendations, only three have been implemented, and these only in part. Paraphrasing General Hodson, BADC suggests that the most important areas to be addressed by the Cox Commission are:

    - that military judges be independent and appointed by the President to permanent courts with full judicial powers;

    - that military juries be randomly selected;

    - that commanders, at all levels, be completely relieved of the responsibility of exercising any function related to courts-martial except, acting through their legal advisors, to file charges with a court for trial (and possibly, in the event of conviction, to exercise executive clemency by restoring the accused to duty);

    - that a Military Judicial Conference, headed by the Chief Judge of the Court of Appeals for the Armed Forces, be established and given power to prescribe rules of procedure and evidence (using a broadly constituted advisory committee and open and public procedures).

- Finally, BADC recommends that the American Bar Association Recommendation # 107 adopted in February 1997 be implemented, and that a moratorium on capital punishment be imposed until it has been demonstrated that all military policies and procedures are consistent with the four longstanding ABA policies intended to ensure that death penalties are administered fairly and impartially, in accordance with due process, minimizing the risk that innocent persons may be executed.

The Military Justice System is not static. The new system adopted in 1950 was is a far cry from that in place in General Sherman's time, about which he issued his warning to prevent lawyers from emasculating military discipline.[1] In Sherman's day, the court-martial and the discipline system was the agent of the commander; it was the commander who controlled its establishment, its procedure, and often its outcome.[2] Similarly, the system in place today is considerably different from that in place at various times over the past fifty years.

"Justice" and "Discipline" should not be confused. The evolutionary and revolutionary changes in the system, and in the underlying philosophies regarding the system, are crucially important. Following on the prior viewpoint of General Sherman, it is critical that the Commission have a clear view of the basic justification(s) for the military justice system, and have a solid philosophical understanding regarding the often referenced dual functions of the military justice system, namely: justice and good order and discipline. According to a commonly stated view, the "primary purpose of the military justice system is to maintain good order and discipline by holding miliary offenders accountable for their misconduct," and that "promoting justice in individual cases is a second, equally important purpose."[3] Such a view, however, must be carefully reviewed and nuanced, and can not be accepted uncritically, without running a risk of producing a detrimental effect on the work of the Commission. BADC would urge the Commissioners to carefully assess the sentiment expressed by General William Westmoreland, and quoted with approval by Major General Kenneth Hodson, perhaps this nation's most respected military justice expert in the last half century: "A military trial should *not* have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline."[4]

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[1] *See* Gen. William T. Sherman, *Military Law*, p. 130 (reprint from THE JOURNAL OF THE MILITARY SERVICE INSTITUTION OF THE UNITED STATES (1880). *See also* the fuller text of Sherman's quote in Walter T. Cox, III, *The Army, the Courts, and the Constitution: the Evolution of Military Justice*, 118 MIL. L. REV. 1, 17 n.81 (1987).

[2] S. T. Ansel, *Military Justice*, 5 CORNELL L.Q. 1 (1919), reprinted MIL. L. REV. BICENT. ISSUE 53, 57-58 (1975).

[3] *See, e.g.*, Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changes?*, 48 A.F. L. REV. 185, 187-88 (2000).

[4] Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 8 (1971), quoted in Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1973), reprinted MIL. L. REV. BICENT. ISSUE 577, 585-86 (1975)(emphasis added).

Other commentators have addressed this topic. "For the first 175 years, under the Articles of War, the military justice system was a command dominated system . . . designed to secure obedience to the commander, and to serve the commander's will. Courts-martial were not viewed as independent, but as tools to serve the commander."[5] Today the situation is vastly changed, and there are what ought to be viewed as two systems, a disciplinary system, and a criminal (justice) system.[6] Those service-members charged with minor offenses and who have potential for further service normally end up in the disciplinary justice system, administered under Article 15, UCMJ. Alternatively, those charged with serious offenses, often-times common law crimes, are put into the criminal justice system, and it is normal for this to act effectively as a "discharge" from the unit. At that point the commander's interest in good order and discipline is enhanced only to the degree that the justice system is widely viewed as being fair, and *not* as a "tool of command." This view was well expressed in the report to the Secretary of the Army of a 1960 committee chaired by LTG Herbert B. Powell, often called "The Powell Report":

> 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.[7]

This same philosophy was echoed a dozen years later by a committee appointed by the Secretary of Defense,[8] Applying this approach to the goal of "discipline," it is BADC's view that the commander's principal role in cases of serious crimes is to effectively excise the accused from the unit and to refer the matter for prosecution within the military's criminal justice system. That system should be modified to reflect these realities, and to remove those perceptions of "command control" of the justice system which remain in the current system.

The Commission should be well informed regarding past studies and perspectives. BADC would first urge that the Commission review carefully the literature, and the major studies of the military justice system, which have been conducted since the end of World War II, particularly those since the inception of the UCMJ. We similarly urge that the Commission be mindful of both the realities and the perceptions of military justice which formed the backdrop for the "Ansel/Crowder dispute" during and following World War I. We are convinced that this Commission's work and its recommendations will be most effective and persuasive if based on a careful examination not only of the current status of the system, but also on a thorough appreciation for the long history of military justice. In short, where we are now can only be fully appreciated in light of where we were when, and by what events and philosophies have precipitated the various changes to the system. We have in various footnotes made reference to many of these more important studies and articles.[9]

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[5] BGEN John S. Cooke, USA (Ret.), *Military Justice and the Uniform Code of Military Justice*, ARMY LAW. 1 (March 2000).

[6] This is not a new topic, Major General Hodson addressed it in the early 1970's, and Professor Schlueter discussed the nuances between a discipline and a judicial system in 1990. 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). Today the differences are more than mere nuanced word choice, they have a very serious practical effect on the life and career of the service-member.

[7] COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO THE SECRETARY OF THE ARMY at 11, 12 (1960); cited in Schlueter, *supra* note 6, at 11. *See also* Hodson, *supra* note 4, at 586 n. 35 and accompanying text.

[8] DEPARTMENT OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES (1972), cited in Hodson, *supra* note 4, at 583 n. 17, and 586, n. 36& 37 and accompanying text.

[9] Though not a "study" in itself, the Commission would do well to consider the recent comments by Senior Judges Cox and Everett of the Court of Appeals for the Armed Forces regarding various issues affecting the fairness and effective administration of the military justice system. *See, e.g.*, Major Walter M. Hudson (interviewer), *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III*, 165 MIL. L. REV. 42, 78 (2000); Hon. Robinson O. Everett, *The First 50 Years of the Uniform Code of Military Justice: A Personal Perspective*, [2000] FEDERAL LAWYER 28 (NOV.-DEC. 2000).

Updating and modernization to meet current perceptions of due process here and abroad. BADC submits that changed circumstances, and evolving perceptions of fairness, in both civilian and military justice systems, both within and outside the United States, should be carefully considered as the Commission conducts its review. It is axiomatic that "the only constant is change," and any system of criminal justice which is unable or unwilling to adapt to changing perceptions of what constitutes fundamental due process will soon be perceived to no longer achieve a just result in individual cases or in its overall operation.

When he signed the Military Justice Act of 1968, President Johnson said that, "the man who dons the uniform of his country today does not discard the right to fair treatment under law."[10] Since the 1968 amendments to the Code were adopted, and particularly in the years following the adoption of the UCMJ Amendments in 1983, the progress toward a fairer court-martial process has stagnated, if not taken a retrograde turn.[11] Not only must the system of criminal prosecution be fair, but we are constantly and properly reminded of the appearance doctrine in military jurisprudence, first traced back to Supreme Court justice Oliver Wendell Holmes.[12] "Discipline is enhanced far more by a belief that a soldier can get fair treatment than it is by any system of iron-fisted military justice which appears to be unfair."[13] The BADC perspective will focus primarily on the "justice" (court-martial) process, as opposed to the "discipline" process, because that is the area in which the need for change is the greatest.[14]

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[10] Quoted in Cox, *supra* note 1, at 19 n.85. *See also* MGEN Kenneth J. Hodson, *Perspective: the Manual for Courts-Martial – 1984*, 57 MIL. L. REV. 1 (1972).

[11] Some examples: Once in this system (mid 1970's), every court-martial which warranted a verbatim record had to receive an initial complete legal review (SJA Review) within 90 days of the completion of the trial, prior to action by the convening authority (or by the supervisory authority for special court-martial cases awarding a bad conduct discharge). If the review and action were not accomplished in 90 days, the remedy was immediate release from incarceration. Today, many sentences to confinement are fully served in the year to several years it takes before the case receives its first level of legal review at the court of criminal appeals. Similarly, this system once guaranteed an accused a right to the assistance of counsel of choice (individual military counsel - IMC). Though the right to an IMC remains, statutory and regulatory changes have allowed the Services to determine that attorneys filling certain billets, or stationed beyond a certain distance (e.g., 100 miles) from the situs of the court-martial, are "not reasonably available." This power has been abused. In one case tried in Washington DC, the trial counsel finally admitted to the civilian defense counsel that, except for those attorneys assigned to the local trial defense counsel office, *every other* uniformed attorney in that service had been, by regulation, deemed "not reasonably available." What was formerly a very substantial right has been reduced to a virtual nullity. The problem of the inability to obtain more senior and experienced counsel through the IMC process is compounded by a developing trend. The Services over the past several years have reported difficulty in getting young counsel fully trained and qualified, due to the lower numbers of courts-martial being tried. At the same time, the appellate courts, which in years past—when counsel were more experienced—were slow to invoke the doctrine of waiver (of client's rights due to failure of counsel to object or to raise the issue on the record), now apply the waiver doctrine (or the harmless error test) with such regularity that it is rare to see a case where waiver, a discretionary doctrine, is not invoked when available. Convictions are upheld today which in earlier times would not have been affirmed, raising concerns regarding the reliability and integrity of the system.

[12] "A system of justice must not only be good, but it must be seen to be good." Hodson, *supra* note 10, at 7.

[13] *Id.* at 16.

[14] We do not mean to imply that nothing needs changing in the area of Article 15, UCMJ practice, or in the area of administrative actions and administrative separations. We note that the issue of jurisdiction for the Court of Appeals For The Armed Forces over administrative and personnel matters is on the Commission's agenda. The BADC and the American Bar Association have strongly opposed any change to the current practice of open access to the federal district courts and the Court of Federal Claims, for servicemembers and former military personnel and dependents of military personnel, in the absence of careful study and clearly articulated justifications for further denigrating current options for these current and former military personnel. *See, e.g.*, Recommendation # ____ sponsored by BADC and adopted by the American Bar Association House of Delegates on July 10, 2000. We oppose any change which would make judicial review of such cases discretionary. Similarly, note the concerns long expressed by Senior Judge Everett, among others, of the potential for abuse since "safeguards of a court-martial often could be bypassed through administrative proceedings." Everett, *supra* note 9, at 31. Also of concern is the practice of instituting separation proceedings under other than honorable conditions in cases of acquittal or of a court-martial which declined to award a punitive separation. Such concerns are no less real today than decades ago. *Id.*

In its effort to ascertain the requirements of due process for this specialized system of military justice, the Commission would be well advised not to limit its focus to this system only. In the last decade there have been startling developments in military justice systems which share a common source with our system, in particular the changes implemented in the Canadian and the British systems, in part under the influence of the European Court of Human Rights. Ours is an era not only of soldiers and sailors operating side by side in "joint" U.S. commands, but of entire theaters in which United States military personnel operate shoulder to shoulder with allied forces. It would be myopic indeed to fail to carefully study military justice as it is currently implemented in those allied forces.[15]

[15] For a recent example surveying the field of comparative military justice law, *see* Eugene R. Fidell, *A World-Wide Perspective On Change In Military Justice*, 48 A.F. L. REV. 195 (2000).

In conducting its review, BADC urges the Commission to take note of the fact that the military justice system is unique among American criminal justice systems, both state and federal, in that it has been repeatedly subject to criticism for being (or being perceived to be) unfair, often due to the perceived improper influence of commanders in the operation of the system.[16] It is also unique in that only this system lacks certain protections mandated by the Constitution for every other system.[17] The perceptions underlying these observations and criticisms affect the system's ability to instill confidence. When such concerns are raised, it is insufficient, as is sometimes done, to argue that the system has withstood recent judicial challenge, or has been found not to be in violation of the Constitution. It is similarly unpersuasive to simply recall the former glory of the UCMJ, which at its inception was hailed was a marvel of fairness among military justice systems, and which then provided rights such as free defense counsel and a right's warning to accused persons years before similar rights were extended to civilians. It is irrelevant, in the 21's century, that at some time long in the past military members had rights which civilians then did not.[18]

Hierarchical system. The military justice system is a peculiarly hierarchical system where all wear their rank on their sleeve. There are thus subtle, and sometimes not so subtle, influences which pervade the system. The fact that defense counsel may operate in an independent command does not insulate them from, or remove all potential for, undue influence.

Ours is a system which generally places the most junior officers in the role of defense counsel, and which no longer requires real life trial experience and approval by a staff judge advocate and a military judge prior to certifying counsel as competent trial and defense counsel, since officers are now certified upon completion of the basic course. Ours is a system in which many officers, including many junior defense counsel, are career oriented, and are more likely to be concerned about the next evaluation report (unlike the defense counsel of a generation ago who frequently were in the JAG Corps for only one tour). All military lawyers are subject to transfer, and in their next position they may well be

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[16] The questions are not raised only by those outside the military justice system. The fairness of the system, and the question of whether one can receive a fair trial in this system, has in the past couple of years been seriously debated by respected legal panels. *See, e.g.*, Kevin J. Barry, *Modernizing The Manual For Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237, 239 n.10 (2000).

[17] *See infra*, note 26 for Justice Scalia's assessment of the constitutional requirements applicable to every system except this one to assure the independence and integrity of the judiciary.

[18] It is also worth noting that the military predecessors of those who now defend this system with such arguments vigorously opposed these provisions, as well as many of the innovative provisions which were incorporated in the UCMJ (e.g., a civilian court to oversee the system), which were adopted at the behest of civilians and generally over the objection of the senior military leadership. *See, e.g.*, JONATHAN LURIE, ARMING MILITARY JUSTICE - VOLUME I - THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, at 256-67.

supervised by the more senior officer who today serves as the staff judge advocate, trial counsel, or military judge. The pressures are subtle but real, even when all those in the system are "playing by the rules." Regrettably, senior officers are not always perceived to be operating in this fashion.

The instances where a senior officer military judge or staff judge advocate is perceived to exercise rank to influence or intimidate defense counsel generally do not make it into the reporters, but the anecdotal evidence should not be ignored. There are changes that can be made, such as ensuring that attorneys "cut their teeth" on the side of the prosecution, with only those who are most qualified being transferred to the defense.[19] Such policies were once in place in some services. Like fixed terms for military judges, such policies should be required to be part of every service's regulations.

[19] To the extent that current practice is to have junior counsel learn to try cases on the defense side, and only after demonstrating some competence to be allowed to represent the government, that practice is certainly not new, and it was the way Senior Judge Everett started out. Everett, *supra* note 9, at 28.

Substantive changes are needed, particularly in a few areas - mostly of of longstanding concern. BADC recommends that the Commission particularly study and address those relatively few substantive areas which have consistently, and for many years, been addressed (and criticized) by commentators, such as the independence of military courts and judges, the method by which court members are selected, the multiple roles of the convening authority, and the mechanisms in place for effecting changes to the system.[20] More recently, the ability of military courts to issue extraordinary writs has been called into question,[21] and the need for a mechanism similar to that in place in federal district court to address post-trial collateral attack on convictions has been raised.

Major General Kenneth Hodson's 1972 Recommendations. BADC urges that the Commission begin its assessment with a careful review General Hodson's 1972 Kansas Law Review article,[22] in which he made a series of recommendations which he seemingly viewed as necessary to *change* the system, as a preferred alternative to *abolishing* it. No commentator known to BADC in the 50 years of the UCMJ's existence is more respected or highly regarded than General Hodson. He served as both Judge Advocate General of the Army, and was the first general officer to serve as Chief Judge of the Army Court of Military Review.[23] BADC notes with concern that most of General Hodson's recommendations remain, almost 30 years later, still not implemented, and those which have been partially implemented could use some further work if they are to meet General Hodson's concerns. They involve areas which have remained sources of constant criticism, since they call into question the ability of this system to operate free from doubts about its fundamental integrity and fairness..

General Hodson made seven recommendations, Three have been, at least to some degree, implemented:

(4) an accused . . . be permitted to petition the Supreme Court for a writ of certiorari;
(5) defense counsel be made as independent of command as possible . . .;
(6) adequate administrative and logistical support be provided to permit the military judiciary to function

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[20] *See, e.g.*, Hodson, *supra* note 4; Schlueter, *supra* note 6, at 1; Kevin J. Barry, *A Reply to Captain Gregory E. Maggs' "Cautious Skepticism" Regarding Recommendations to Modernize the Manual for Courts-Martial Rule-Making Process*, 166 MIL. L. REV. 37, 44-50 (§ B) (2000).

[21] *See, e.g.*, Senior Judge Jim Young, *Clinton v. Goldsmith and the All Writs Act in the Military*, 2000 JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES (June 13 2000) (concluding that military appellate courts' jurisdiction to issue extraordinary writs is quite limited, and would never exist, for example, prior to a court martial determining findings and sentence).

[22] *See* Hodson, *supra*, note 4.

[23] Cox, *supra* note 1, at 17 n. 78.

independently and efficiently.[24]

The remaining four recommendations made by General Hodson, have not been implemented at all:

(1) military juries be randomly selected;
(2) military judges of general courts-martial (as well as military appellate judges) be appointed by the President to permanent courts for a term of years [and be given all writs authority, full sentencing authority, and contempt powers]. . .;
(3) a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence; . . .
(7) commanders, at all levels, be completely relieved of the responsibility of exercising any function related to courts-martial except, acting through their legal advisors, to file charges with a court for trial, to prosecute, and, in the event of conviction, to exercise executive clemency by restoring the accused to duty.[25]

BADC believes that it is long overdue for these issues, clearly raised more than a quarter century ago by General Hodson, to be not only addressed, but resolved in a way that will ensure that this system of justice is worthy of the full confidence of the American people, and particularly of those who are subject to it.

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[24] Hodson, *supra* note 4, at 605. The degree to which each of these has been implemented varies, but none have been fully implemented., and each is worthy of this Commission's careful scrutiny.

[25] *Id.*

Independent courts and judges. Perhaps no single item is more in need of attention than the question of establishing standing courts-martial, with judges whose indicia of independence equals those required in every state and federal court in this country.[26] Standing Courts and permanent judges who possess powers similar to federal district court judges to control pre-trial and post-trial issues, would immediately solve a variety of problems currently existing in this system.[27] It would also provide the structure in which post-trial collateral attacks on court-martial convictions could be resolved, since, in the final instance, the All Writs Act should ideally be exercised by "trial courts" with fact-finding power.

Court-martial member selection. The current process by which members are selected by the commander has been called "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."[28] The establishment of a neutral body to accomplish random selection of court-martial panel members is a second critical item that must be addressed. The analogy in the federal civilian criminal system would be

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[26] *See, e.g.*,the observation of Justice Scalia, in his concurring opinion in *Weiss v. United States*, 510 U.S. 163 (1994), where he stated:

> The present judgment makes no sense except as a consequence of historical practice. . . .[N]o one can suppose that similar protections against improper influence [as provided in the UCMJ] would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive. I am confident that we would not be satisfied with mere formal prohibitions in the civilian context, but would hold that due process demands the structural protection of tenure in office, which has been provided in England since 1700, was provided in almost all the former English colonies from the time of the Revolution, and is provided in all the States today. (It is noteworthy that one of the grievances recited against King George III in the Declaration of Independence was that "[h]e has made Judges dependent on his Will alone, for the tenure of their offices.")

510 U.S. at 198 (Scalia, J., concurring) (citations omitted). *See also* Barry, supra note 20, at 46, n.39 and accompanying text.

[27] *See, e.g., United States v. King*, 53 M.J. 425 (May 8, 2000) (court continued stay of Article 32, UCMJ proceedings until there was a showing that the stay should be lifted; issues involved defense counsel obtaining clearances and access to classified information without undue government restrictions on such access, or on attorney-client communications).

[28] *United States v. Smith*, 29 M.J. 242, 252 (CMA 1988) (Cox. J. concurring)..

for the U.S..Attorney to be required to hand select all the members of the jury from a venire limited to employees of the Department of Justice (and typically from persons on her own staff). Such a system would be not only unconstitutional, but unthinkable and obviously inherently unfair. But as long as the commander/convening authority is charged to both exercise prosecutorial discretion and to hand pick the jury, that is precisely the situation (and the appearance of evil) which adheres to this system. It is time for that system to be changed.

Commander/Convening Authority role. The third critical reform needed is the removal of the convening authority from any function inconsistent with the appearance of a fair system which can not in any way be perceived to be within the control of the commander (or of those who work directly for the commander[29]). Other nations have successfully limited the role of the convening authority, either on their own initiative or in response to the pressure of court decisions condemning the practice of having the officer who exercises prosecutorial discretion also exercise other inconsistent "control" functions which interfere with the appearance of a fair trial. This system needs to do the same.

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[29] *See, e.g., United States v. Hilow*, 32 M.J. 439 (CMA 1991) (unknown to the convening authority, his staff attorneys unlawfully manipulated the list of potential court-members for his consideration so it included only members they viewed as appropriate for the prosecution).

Rulemaking. The American Bar Association has called for reform in the manner in which amendments to the Manual for Courts-martial are prepared and implemented. Currently, the DOD's Joint Service Committee prepares proposed changes, in a process which remains largely secret, despite recent modifications. The ABA has called for a broad based advisory committee to prepare the proposed changes in an open, on-the-record public process. General Hodson went further and called for the establishment of a Military Judicial Conference to make the rules. The two positions are entirely compatible.[30] Reform in this area is long overdue.

It is now almost 30 years since General Hodson called for substantial reform as a preferred alternative to abolishing the military justice system. This Commission should ask the same question: "abolish or change?" BADC strongly believes that "change" is the preferred alternative.

BADC's final recommendation arises from Recommendation 107 adopted by the American Bar Association House of Delegates in February, 1997. That Recommendation reads as follows:

> RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed:
>
> (1) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted Feb. 1989) and Association policies intended to encourage competency of counsel in capital cases (adopted Feb.1979, Feb. 1988, Feb, 1990, Aug. 1996);
>
> (2) Preserving, enhancing, and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal *habeas corpus* proceedings (adopted Aug. 1982, Feb.1990);
>
> (3) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted Aug.1988, Aug.1991); and
>
> (4) Preventing execution of mentally retarded persons (adopted Feb.1989) and persons who were under the age of 18 at the time of their offenses (adopted Aug. 1983).
>
> FURTHER RESOLVED, That in adopting this recommendation, apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty.

The BADC has adopted this policy statement as its own, and urges that the military policy be set to implement this salutary recommendation.

BADC believes the military justice system has some aspects which make it more suspect than some other American justice systems with regard to meeting these ABA standards and guidelines, and which make it necessary for this system to implement a moratorium notwithstanding what action might be taken on the federal civilian criminal justice system.

BADC notes that the military justice system is one in which capital cases are tried with defense counsel who

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[30] Establishment of such a Conference would also conform military rulemaking procedures to those used in federal rulemaking practice, an advancement entirely consistent with Article 36's goal of modeling military rules on federal rules. *See generally* Barry, *supra* note 20, at 38.

are not required to meet the guidelines adopted by the ABA establishing minimum qualifications for counsel. When this fact is coupled with the questions raised in virtually every military capital case regarding the inexperience and lack of qualifications of the trial defense counsel, and the questions which have been repeatedly raised regarding the "revolving door" of appellate defense counsel during the course of lengthy appellate proceedings, a question of fundamental fairness is unavoidable. Notwithstanding that this system has been upheld in various cases where these challenges have been raised, the question must be asked whether, as a matter of conscience and policy, such a system ought to be continued. The death penalty has come under increasing challenge in a variety of states for a number of concerns, including race. Whether the military justice system has sufficient integrity and reliability to avoid similar issues is in doubt. These are issues which warrant implementing a moratorium until such time as it is clearly demonstrated that these ABA standards are being met.

BADC very much appreciates the opportunity to submit these Comments and Recommendations, and to participate in the Commission's most important work of accomplishing the first systematic review of the operation of this nation's military justice system in at least a quarter century.

The Bar Association of the District of Columbia

Resolution

WHEREAS the Uniform Code of Military Justice (UCMJ or Code) was enacted in 1950 and took effect in 1951; and

WHEREAS in § 556 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Congress commemorated the 50th anniversary of the Code, and noted that it had "enacted major revisions of the [Code] in 1968 and 1983 and, in addition, had amended the code from time to time over the years as practice under the code indicated a need for updating the substance or procedure of the law of military justice;" and

WHEREAS Congress, in Section 556, asked the President to issue a suitable proclamation, and called "upon the Department of Defense, the Armed Forces, and the United States Court of Appeals for the Armed Forces and interested organizations and members of the bar and the public to commemorate the occasion of [the] anniversary with ceremonies and activities befitting its importance;" and

WHEREAS the National Institute of Military Justice, believing that an integral part of those commemorative activities should be an appraisal of the current operation of the Code and an evaluation of the need for change, is, in coordination with The George Washington University Law School, sponsoring a Commission on the 50th Anniversary of the Uniform Code of Military Justice ("The Cox Commission"); and

WHEREAS the Cox Commission's goal is to solicit from all interested parties comments and suggestions regarding the operation of the military justice system and to submit to the House and Senate Committees on Armed Services, the Secretary of Defense, the Service Secretaries, and the Code Committee the record of its proceedings, including any recommendations for change or for further consideration by the Congress and the Executive Branch; and

WHEREAS The Bar Association of the District of Columbia, has in the past taken an active interest in military law issues, and has sponsored Recommendations addressing military law issues which have been adopted by the American Bar Association; and

WHEREAS The Bar Association of the District of Columbia believes that the fair administration of military justice is a matter of vital national security concern on which civilian bar association viewpoints will be of great value to the work of the Cox Commission, and to the development and improvement of the military justice system to make it as fair and effective a system of military justice as is feasible;

NOW, THEREFORE, BE IT RESOLVED that The Bar Association of the District of Columbia endorses the importance of the work of the Cox Commission, and authorizes the President of The Bar Association of the District of Columbia and his designees from its Military Law Committee to present oral and written recommendations directed toward improvement of the military justice system for further consideration by the Cox Commission at its scheduled hearing on March 13, 2001; and

BE IT FURTHER RESOLVED that The Bar Association of the District of Columbia urges that the Cox Commissioners conduct their review with the following principles in mind:

1. The Military Justice System is not a static system, and needs to be updated and modernized to meet current perceptions of due process both here and abroad;

2. As a hierarchical system, particular care must be taken to ensure that undue influences of seniors, particularly on junior defense counsel, are minimized;

3. That a military trial should *not* have a dual function as an instrument of discipline and as an instrument of justice, but must rather be an instrument of justice, and in fulfilling this function, it will promote discipline; and

4. That the Commission should be well informed regarding past studies and various scholarly works which have addressed the need for reform in this system, and regarding recent changes made in similar systems of military justice in other countries; and

BE IT FURTHER RESOLVED that The Bar Association of the District of Columbia endorses the following specific positions, and urges the Cox Commission to recommend suitable amendments to the UCMJ or to the Manual for Courts-Martial to ensure:

1. That military judges are independent and appointed by the President to permanent courts with full judicial powers;

2. That military juries are randomly selected;

3. That commanders, at all levels, are completely relieved of the responsibility of exercising any function related to courts-martial except, acting through their legal advisors, to file charges with a court for trial (and possibly, in the event of conviction, to exercise executive clemency by restoring the accused to duty);

4. That a Military Judicial Conference, headed by the Chief Judge of the Court of Appeals for the Armed Forces, be established and given power to prescribe rules of procedure and evidence (using a broadly constituted advisory committee and open and public procedures); and

5. That the American Bar Association Recommendation # 107 adopted in February 1997 be implemented, and that a moratorium on capital punishment be imposed until it has been demonstrated that all military policies and procedures are consistent with the four longstanding ABA policies intended to ensure that death penalties are administered fairly and impartially, in accordance with due process, minimizing the risk that innocent persons may be executed.

Adopted 7 March 2001
Board of Directors
Bar Association of the District of Columbia

The Bar Association of the District of Columbia
Military Law Committee

Written Comments submitted

March 13, 2001

to the:

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE
(The Cox Commission)

Specific Questions, Perspectives, and Matters for Consideration

Relating to the Commission's Final List of Topics
Published
February 5, 2001

(BADC's "General Comments and Recommendations" are submitted separately)

To: The Honorable Walter T. Cox, III, Senior Judge, United States Court of Appeals for the Armed Forces, Chair, and the Honorable Members, of the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice

The Bar Association of the District of Columbia (BADC), established in 1871, is the second oldest voluntary bar association in the United States. Throughout its history, the BADC has taken an active interest in developments of the law, and has conducted training programs and published numerous handbooks addressing various areas of the law. The BADC has frequently testified before Congress and various committees and commissions considering developments in the law.

BADC has taken an active interest in military law, and twice within the past few years has sponsored Recommendations adopted by the American Bar Association addressing military law issues. BADC considers it a privilege and a duty to participate and provide a civilian bar association perspective to the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice, popularly known as the "Cox Commission." It has been almost two decades since the Congress has held any hearings on the operation of the military justice system, and more than three decades since the Congress has held hearings that went beyond very limited aspects of this system. We do not believe that in the last three decades at least there has been any outside (non-governmental organization) effort to comprehensively examine the system as a whole, and to make recommendations to improve it to ensure it is operating as effectively and as fairly as is practicable. We view it as most appropriate that an effort to do that has now been undertaken under the sponsorship of the National Institute of Military Justice, and we hope that this will be the start of a process which will thoroughly examine and then make appropriate changes needed to modernize the Code and the military justice system.

In a separate document we have provided "General Comments and Recommendations" which The Bar Association of the District of Columbia believes will be helpful to guide the Commission in its deliberations. These arise from a broader philosophical perspective, and encompass specific recommendations for change. In the current document, BADC's Military Law Committee provides questions, considerations, and perspectives on many of the topics the Commission has promulgated for comment. The BADC has taken no position on any of these issues beyond those set forth in the "General Comments and Recommendations" submitted to the Commission today. This document contains comments and suggestions, which are intended not so much to make recommendations or suggest "answers" as to indicate lines of inquiry which we believe ought to be pursued by this and subsequent studies.

BADC suggests that there are many persons and groups with varied perspectives which need to be considered by those seeking to change and improve the military justice system. At this point in the process, BADC believes it can best

assist the Commission by simply suggesting lines of inquiry, and points to consider, as the Commission reviews the specific areas of potential changes which it has under consideration. Other studies will undoubtedly follow, hopefully to include congressional hearings, and hopefully leading to a comprehensive bill to modernize the military justice system. It is critically important that, wherever it is available, empirical data be assembled to inform the judgment of the Commissioners and other decision makers. BADC recognizes that it does not have access to much of the data which would assist in pointing to appropriate resolutions to the questions which are presented.

For all these reasons, BADC does not, in this document, attempt to provide detailed "solutions" or to outline the precise nature of proposed changes. Rather we hope to further the debate and discussion by presenting background information and perspectives to be considered, relying on the open and public process to ensure that the end result is the best that is achievable. In many cases, where we have provided no specific comment on one of the Commission's topics, other responses appropriately address the same subject matter.

We wish to emphasize that in our view many rights and options once available to persons accused within this system have been reduced or eliminated, particularly in the past two decades. We urge that further reductions in such rights or available options should be recommended or effected only when there is evidence clearly establishing that such reductions are manifestly necessary.

Respectfully submitted,

James F. McKeown
President
The Bar Association of the
District of Columbia

Philip D. Cave
Co-Chair
Neil A. Kabatchnick
Co-Chair
Military Law Committee
The Bar Association of the
District of Columbia

Kevin J. Barry
Past Co-Chair
Military Law Committee
The Bar Association of the
District of Columbia

Topics for Consideration

I. NEED FOR CONGRESSIONAL REVIEW

A. Do societal and systemic changes in the demographics and organization of the Armed Forces since enactment of the Uniform Code of Military Justice justify a complete congressional overhaul of the system?

It would seem that these factors, along with the passage of time, would justify a complete congressional *review* of the system. The changes to be made should be based on as much information, including empirical data, as is available.

B. Do any or all of the following indicate a need for revisiting the Code?

Yes. Each of the listed factors is a changed circumstance - in some cases a drastic change - from the time of the last thorough review of the system.

1. Greater number of women in uniform

As but one example, fraternization, once often a question of officers gambling with the troops, has taken on an entirely different connotation. The incidence of relationship offenses between members of the same unit has increased, and there is a concomitant need to regulate and police relationships amongst those members.

2. Volunteer forces

When the draft was in place, the entirety of the population was subject to service, and there were societal pressures to ensure the system was fair. In the years since the draft, a substantial number of "indicia" of a fair

system have been changed or removed.[1] It would seem that the voluntary nature of the force has lowered the demand for due process. Also, the reduced size of the force means that fewer citizens are exposed to the rights and wrongs of the system and their voices are not heard. This flaw is compounded as the manner in which the system is changed has become less transparent.

In an age of an "all volunteer" military, the expectations of the member, their parents, and the public about just dealings should be explored. It would seem that more and more expect that the military system will be compatible with what is constitutionally required in a civilian criminal justice system.

It is interesting to note that a high visibility incident such as that involving the USS GREENVILLE has attracted some attention to the fairness of military justice. It is interesting because not until a senior officer of some professional and personal stature is about to be affected, has there been any serious interest in recent years. Many of us have anecdotal evidence of senior officers who have suddenly become concerned about the fairness of the system, once they are about to become an object of it. Sadly, so long as the persons affected were young, junior, and enlisted, the media and others have found little reason to be concerned.[2]

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[1] Some examples: Once in this system (mid 1970's), every court-martial which warranted a verbatim record had to receive an initial complete legal review (SJA Review) within 90 days of the completion of the trial, prior to action by the convening authority (or by the supervisory authority for special court-martial cases awarding a bad conduct discharge). If the review and action were not accomplished in 90 days, the remedy was immediate release from incarceration. Today, many sentences to confinement are fully served in the year to several years it takes before the case receives its first level of legal review at the court of criminal appeals. Similarly, this system once guaranteed an accused a right to the assistance of counsel of choice (individual military counsel - IMC). Though the right to an IMC remains, statutory and regulatory changes have allowed the Services to determine that attorneys filling certain billets, or stationed beyond a certain distance (e.g., 100 miles) from the situs of the court-martial, are "not reasonably available." This power has been abused. In one case tried in Washington DC, the trial counsel finally admitted to the civilian defense counsel that, except for those attorneys assigned to the local trial defense counsel office, *every other* uniformed attorney in that service had been, by regulation, deemed "not reasonably available." What was formerly a very substantial right has been reduced to a virtual nullity. The problem of the inability to obtain more senior and experienced counsel through the IMC process is compounded by a developing trend. The Services over the past several years have reported difficulty in getting young counsel fully trained and qualified, due to the lower numbers of courts-martial being tried. At the same time, the appellate courts, which in years past when counsel were more experienced were slow to invoke the doctrine of waiver (of client's rights due to failure of counsel to object or to raise the issue on the record), now apply the waiver doctrine (or the harmless error test) with such regularity that it is rare to see a case where waiver, a discretionary doctrine, is not invoked when available. Convictions are upheld today which in earlier times would not have been affirmed, raising concerns regarding the reliability and integrity of the system.

[2] *See e.g.* March 3, 2001, *Legal Fund Created for Commander of Sub Greeneville*, The Virginian-Pilot; Brad Knickerbocker, *How Just Is US Military Justice?* Christian Science Monitor, 03/05/2001.

Several ideas seem worthy of review. Should the United States Constitution and the Amendments thereto apply to the UCMJ and to courts-martial, unless Congress states an exception? Should any such exceptions be narrowly tailored? Secondly, to the extent that Congress exempts the UCMJ from a constitutional requirement, should Congress narrowly tailor the exception and give a detailed rationale? Or, alternatively, when the military establishment proposes to vary its practice from that in civil court should the military be called upon to justify such a deviation. BADC notes that in Canada, Europe, South Africa, India, New Zealand, and Australia, the courts and/or the national government have called upon the military to justify a departure from relevant "constitutional rules." Should our system meet similar standards?

3. Modern war doctrine

The challenge in this area will be in the application of international legal concepts surrounding war and peacekeeping operations.

4. Joint service commands

The changed nature of the business we do and the way we do it seemingly makes necessary some changes to the discipline system, to address concerns of joint commanders in having disciplinary control over all units and personnel assigned to them regardless of Service affiliation. UCMJ art. 17, 10 U. S. Code ' 817, appears to set forth a basis for joint commanders taking disciplinary action over personnel assigned to their command according to any Presidential regulation. Therefore it is important to study whether or not Article 17 should be changed, or whether the President should continue to set out a scheme suitable for joint forces in the Manual for Courts-Martial. The President already has the power to decide who in a joint command may exercise disciplinary authority. Either the Article or RCM 201 should be reviewed to ensure that a joint commander has the appropriate authority to act to ensure good order and discipline within the command. As currently set forth, the division of disciplinary authority is subject to Presidential regulation and to the political decisions inherent in giving a commander authority over members from another service. A close review of Rule for Courts-Martial 201(e) is in order to ensure that a joint commander has the appropriate authority to discipline those who serve under his command. We invite the Commission's attention to the Manual of the Judge Advocate General of the Navy. Section 0108, provides that units embarked in a vessel become subordinate to the commanding officer of that vessel for disciplinary matters.[3] The commanding officer then can adjust this relationship with embarked commands through a ship's instruction. Perhaps some study can be made of the experiences in Canada.[4]

5. Multinational commands

If concepts of due process seen in allied units are inconsistent or incompatible with those embraced in our Code, our failure to modernize could be problematic. It is difficult to address a situation where U.S. units are serving in a combined command (NATO), a UN mission, or a multi-national force (OPERATIONS DESERT SHIELD/DESERT STORM). We suspect that each commander of such an operation would want to have the prime and ultimate disciplinary authority over her units and personnel. That is the essence of military command. The sheer number and diversity of such operations justifies a serious review, but this is an area where systems may need to be tailored to the circumstances. Flexibility and discretion appear to be warranted.

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[3] The Manual of the Judge Advocate General of the Navy (JAGMAN) is the Secretarial regulation. Thus Marine units and Navy aviation units come under the disciplinary authority of the commanding officer of the aircraft carrier or amphibious ship in which they are embarked.

[4] The instruction usually permits the commanding officer of an embarked unit to discipline his personnel for offenses occurring solely within his unit. The commanding officer handles cases affecting more than one unit or occurring ashore.

6. Many service members are married and have dependent children

The young, single male service-member living in a barracks has been replaced by a young married service-member living in family housing or on the economy. Once this was a system which worked to rehabilitate members, and restore them to duty, but that is a much rarer occurrence today. Certain punishments for minor offenses may be less appropriate (such as loss of pay or restriction which directly affect these family members). An expansion of sentencing options seems warranted.

A further point on the impact of sentences, taking into account the educational, age, and marital make-up of the Services. More and more families feel the impact of reductions in rank, forfeitures of pay, and punitive discharges. The maximum suspension of pay for a civilian employee is 30 days. For a service-member, a reduction in paygrade may well be equated to the forfeiture of two to four years of a portion of her pay.[5] High Year Tenure requirements may cause discharge making the reduction tantamount to a separation from service earlier than the retirement eligibility date. This of course has a lasting effect on the military family. Due to the long term impact of such punishments, provision for automatic remission to the prior paygrade might be an appropriate consideration which would be an incentive to rehabilitation

The permanent stigma of a punitive discharge is well known. *See United States v. Rush*, 54 M.J. 313 (2000).[6] Those in private practice know of the stigma because of the constant flow of clients wanting to change or upgrade their discharge because of the lasting impact of the punitive discharge (or UOTHC). Considering the number of military offenders who are first offenders, Congress, or the President, might consider a statutory provision that automatically commutes a punitive discharge after five or ten years of proven good behavior.

7. Many military operations abroad without declaration of war

The Commission is aware that the Uniform Code was intended and designed to operate in war and in peace. The police action in Korea, military operations in Vietnam, DESERT SHIELD/STORM, and deployments in Europe, were not declared wars. However, the UCMJ and the Manual for Courts-Martial were the guiding documents for disciplinary and military justice action. The Commission should study very carefully how the criminal justice aspects of the Uniform Code operated in those environments. Certainly the Commission should be hesitant to recommend changes to the Uniform Code which withdraw protections for the accused absent clear documentation of the need. Not only should the need be documented, but care should be taken to determine whether the need is a profound problem or something merely inconvenient or transitory.

8. Civilians accompanying services abroad

Whether this problem has been solved by recent legislation is a question warranting this Commission's review.[7] Congress has already shown an interest in the subject and has taken significant steps toward ensuring proper disposition of charges against civilians accompanying the services overseas.

9. International interest in human rights

A very important issue warranting Congress' attention. Further discussed below.

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[5] This assumes that the person later becomes eligible to retake, and then passes, the promotion examination and criteria necessary to get back to his previous grade. This does not include the effect on the paygrade to which the person might have aspired absent the reduction. Within the senior enlisted ranks this may be even longer, or perhaps never, because at the E-7 and above grades selection by a selection board is necessary. A selection board is less likely to accept a black mark.

[6] "A bad-conduct discharge.. . . deprives a soldier of virtually all benefits administered by the Veterans' Administration and the Army establishment.. . . You are advised that the ineradicable stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that (he)(she) has served honorably. A punitive discharge will affect an accused's future with regard to (his)(her) legal rights, economic opportunities, and social acceptability." *United States v. Rush*, 54 M.J. 313, 314 (2000) citing Dep't of Army, Pam. 27-9, Military Judges' Benchbook 70 (30 Sep. 1996).

[7] *See, e.g.*, Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad Problem Solved?* [2000] THE ARMY LAWYER 1 (DEC. 2000).

10. International changes in military codes of justice

Same as prior answer.

11. Impact of the International Criminal Court (ICC)

We encourage the Commission to consider that the U.S. military justice system should become, again, the model for military justice systems world-wide. However, we also wish to note that the basic fairness of any military justice system to the person accused is not necessarily relevant to the ICC. It is probable, but not assured, that the current system of military justice would satisfy the requirements of complementarity, as would military justice systems in many countries. The question for ICC jurisdiction is whether or not a system of justice exists that could (and would) be used to punish war crimes committed by military members.

12. Evolving international human rights standards

Same as # 9 above.

13. Technological changes, e.g., as they apply to command and control issues

Practitioners do not appear to use technology to the degree it is used in other federal courts. The delays in processing records seem to increase year to year, even as technology advances. The availability of systems to allow electronic filings, virtually instantaneous creation of transcripts, etc., should be explored with a view to reducing the time required to conduct review of court-martial records, as well as other advantages. There does seem to be room to use technology such as video-conferencing to conduct *some* business of a court-martial, for example an arraignment. The use of new technologies can enhance the efficiency of military justice, improve access to justice, and perhaps reduce some costs. However, each of the Services has to commit to the up-to-date equipment and the trained personnel to operate and maintain the equipment. Electronic filing or motions and appellate briefs, video-conferencing to hold sessions of court (e.g. arraignment) are all areas to be explored. We would invite your attention to the discussion by the lower court and the Court of Appeals for the Armed Forces in *United States v. Reynolds*, 49 M.J. 260 (1998).

14. Information age changes, such as the access and shift to an Internet and electronic banking society

See above.

15. Increased long-term peacekeeping operations

This does not seem to be an issue warranting further consideration. The events in Korea and Vietnam were "long-term."

16. Evolving standards of privacy/sexuality

The Congress should look at the need for a privacy regulation which prohibits the use at court-martial of medical information, FAP information, or other disclosures from a service-member. A full patient-physician privilege should be enacted which prohibits the use of such privileged information in any disciplinary proceeding. The commander has a legitimate interest in the health and welfare of her command. However, using information gained from mandated disclosures in a court-martial goes beyond the need to ensure the individual service-member is healthy or not a danger to others. Rather than hurt the commander's interest in the welfare of her command, the knowledge that information can't be used for disciplinary purposes may foster a more open and cooperative attitude from service-members. Protecting the health and welfare and prosecution are not synonymous. For the same reasons, some restriction on the medical exception to search and seizure and admissions rules should be considered.

17. Better educated force

C. Do the experiences in Vietnam, Southwest Asia, Bosnia, or other operations demonstrate a need for study of changes that would make the system work better in operational theaters in time of war?

The Code was designed to operate in wartime. Peacetime operation was appropriate to ensure trained personnel and processes were in place in wartime. It seems it would be inappropriate to reduce options or protections currently available to military personnel in any wartime environment absent some solid empirical evidence that it was necessary. This same Code, with many more protections, operated with apparent efficiency in Vietnam, and with substantially lessened protections, in Desert Storm. Any further reduction in the protections afforded accused members should be accompanied by clear evidence of necessity.

II. JURISDICTION (IN PERSONAM AND SUBJECT MATTER)

Active duty military personnel have always been subject to a separate code of law and justice. At first, there were the Articles of War adopted from the British Articles of War – which evolved into the Uniform Code of Military Justice. During the Vietnam War, however, the military justice system gained a poor reputation for justice. The 1969 Supreme Court decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969), seemed to be an outgrowth of that reputation and military jurisdiction was limited. The limitation was further explained in *Relford v. Commandant*, 401 U.S. 355 (1971). The court established the "*Relford* Factors" to assist in showing a "service connection" to a crime, before the military could assume jurisdiction.[1] Subsequently, after additional changes to the UCMJ and the Manual for Courts-Martial, the Supreme Court overruled *Relford* and *O'Callahan*. In *Solorio v. United States*, 483 U.S. 435 (1987), the court held: "The jurisdiction of a court-martial depends solely on the accused's status as a member of the Armed Forces, and not on the '*service connection*' of the offense charged." The BADC believes that the issue of military jurisdiction is one of the more important topics to be considered. There should be serious consideration given to limiting military jurisdiction to offenses that occur on base, or overseas, or in a military vessel/aircraft; and where the victim is either another service-member or military property or funds.

A. Should civilians ever be subject to court-martial jurisdiction?

In view of Congressional action in not adopting the recommendations for court-martial jurisdiction over certain civilians when it enacted legislation in 2000 (The Military Extraterritorial Jurisdiction Act), and the history of this subject, it seems inappropriate to consider extending court-martial jurisdiction to civilians. However, there is some doubt whether that statute has in fact solved the problem. *See*, Schmitt, *supra* note 7. In addition, we understand that the military now cannot deploy without civilian contractors, and that these civilians are now a necessary part of the military effort. If this is the case, perhaps some very limited court-martial jurisdiction over a special category of such "sine-qua-non" civilian contractors would be a proper subject for review.

B. Should there be exclusive jurisdiction over military members for all crimes, state, federal and military?

It seems inappropriate to deprive civilian jurisdictions of the right to prosecute civilian type crimes which happen to be committed by service-members. In the absence of any data indicating a problem with the current opportunity for the local jurisdictions to prosecute those crimes they choose to, it is doubtful that an effort to deprive the states of jurisdiction for any crimes would be either favorably received or justified.

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[1] 1. The serviceman's proper absence from the base. 2. The crime's commission away from the base. 3. Its commission at a place not under military control. 4. Its commission within our territorial limits and not in an occupied zone of a foreign country. 5. Its commission in peacetime and its being unrelated to authority stemming from the war power. 6. The absence of any connection between the defendant's military duties and the crime. 7. The victim's not being engaged in the performance of any duty relating to the military. 8. The presence and availability of a civilian court in which the case can be prosecuted. 9. The absence of any flouting of military authority. 10. The absence of any threat to a military post. 11. The absence of any violation of military property. 12. The offense's being among those traditionally prosecuted in civilian courts.

C. Should jurisdiction over military members in peacetime be restricted to service-connected offenses?

Initially it would seem that some limitation on jurisdiction is appropriate. In the case of *United States v. Hutchinson*, 49 M.J. 6 (1998), a service-member who committed civilian type crimes in South Carolina was prosecuted by the local jurisdiction, but was allowed to enter a pretrial diversion program in which the state promised to defer prosecution in exchange for appellant's satisfaction of numerous state-imposed conditions, such as paying restitution, entering the diversion program, performing community service, etc. Since he had not actually been tried by the state, the Air Force elected to try him under the military justice system. Because of his military conviction and incarceration, he was unable to complete all of the conditions of the state program, and a warrant was issued for his arrest upon release from military confinement. The CAAF found this to be a legal result, but it is one which is hard to understand from a policy or fairness perspective. Had the state actually tried him, the military would have not been able to try him under applicable instructions. Because the state chose to defer the actual trial and to treat him in a diversion program as an alternative to trial, the military was able to prosecute. Arguably as a matter of policy, such cases with no apparent military connection should be left to the local jurisdiction to handle as they see fit. Here instead of a rehabilitated person with no convictions, the member likely ends up the day with two convictions, one from each jurisdiction, a highly questionable result.

D. Should jurisdiction over peacetime death penalty cases be limited to service-connected offenses?

BADC notes with concern the fact that the military justice system is one in which capital cases are tried with defense counsel who are not required to meet the guidelines adopted by the ABA establishing minimum qualifications for counsel. When this fact is coupled with the questions raised in virtually every military capital case regarding the low experience level and minimal qualifications of the trial defense counsel, and the questions which have been repeatedly raised regarding the "revolving door" of appellate defense counsel during the course of lengthy appellate proceedings, a question of fundamental fairness is raised. Notwithstanding that this system has been upheld in various cases where these challenges have been raised, the question must be asked whether as a matter of conscience and policy such a system ought to be continued. The death penalty has come under increasing challenge in a variety of jurisdictions, this one included, for a number of concerns, including race. Whether the military justice system has sufficient integrity and reliability to overcome these issues is in doubt. These are issues which fully warrant implementing a moratorium until such time as it is clearly demonstrated that these ABA standards of fairness and justice are being met. These are also issues which should lead to recommendations to limit the occasions for charging or referring cases as capital. This Commission should consider such issues, keeping in mind the first case in this system in which a death warrant may be signed, and the scrutiny with which the system will be viewed at that time.

E. Should jurisdiction over retirees or those on the Temporary Disability Retired List (TDRL) be limited?

Whether the issue is viewed as one of jurisdiction, or as one of the application of certain of the Military Rules of Evidence, the questions raised by the recent case of *United States v. Stevenson*, 53 M.J. 257 (2000) warrant consideration by this Commission from the perspective of policy and future amendments to the UCMJ and/or the Manual for Courts-Martial.

F. Should Article 17 be revised in recognition of the fact that joint commands are now common?

See paragraph 4., Need for Congressional Review, above.

G. Do Articles 1 and 2 of the Uniform Code of Military Justice need to be reevaluated in light of increased command authority?

III. ORGANIZATION OF THE MILITARY JUSTICE SYSTEM

A. CONVENING AUTHORITY

Should the role of the Convening Authority be changed in the following ways?

As a general proposition, BADC has followed General Hodson's recommendation that the Commander's Role in the court-martial process should be reduced to two basic decisions: should a service-member be referred for criminal prosecution and should a convicted service-member be granted clemency? Contemporary commanders already make that first decision about rehabilitation and retention or consignment to the court-martial system. It appears today, that if the decision is for court-martial, the commander's focus quickly shifts to timeliness and cost. Accordingly a transfer out of the command for prosecution may be the expedient route. The commander is then relieved of the management and financial burden of the offender's presence in the unit. If a decision later is made not to prosecute, for evidentiary reasons perhaps, the person is reassigned to another unit, where hopefully the person can get a fresh start. If the person is prosecuted there will be little change in what is now current practice. Therefore, allowing the commander to decide to save or consign, and then be removed from the process, fits with the current reality and will likely not have a negative impact on good order and discipline.

1. Should court members be randomly selected by a jury commission or by a random computer selection process?

a. This was an item which BADC submitted as a potential topic, with the following rationale. BADC now submits the rationale for the Record and for the Commission's consideration. BADC has favorably endorsed this as one of General Hodson's 1972 proposals.

Rationale: This is perhaps the most glaring deficiency of military justice. The perception, if not the reality, of unfairness is overwhelming when the same individual who sends a case to trial handpicks the jury. There is simply no valid reason, in this day and age of computers, why an adjutant can not have a list of 25 available members at any given time and, when a trial is convened, tell the next 12 or 15 that their time is up. If a member requests excusal, after referral, we can take a page from the civilian courts, and the request goes straight to the military judge. If the judge feels we need more members, he tells the trial counsel, who calls the adjutant who sends over more members. This would completely eliminate the perception that panels simply "give the old man what he wants."

b. In addition a number of other points should be considered. The commander's selection of court-martial members is one of the most frequently criticized aspects of the military justice system. Rather than being chosen on a random basis, court-martial members are hand-picked by the same officer who has decided to send a particular case to a court-martial. A recent internal study completed by the Department of Defense into the methods of selecting court-martial members does not recommend change to the current practice. See DoD Joint Service Committee on Military Justice, *Report on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial*, 19 August 1999. The underlying themes of the study focus on the need for commanders to control the court-martial selection process because the military is different; junior personnel cannot be trusted to exercise judgment in a criminal case; and because the military mission must take priority over doing justice. The most frequently posited example is of the small deployed unit that must, under a different selection system, look outside the unit for court-martial members. The assumption is that the unit already has sufficient "best qualified" members available and that they will be made available. However, that may not in fact be the case. Take for example a ship in a battle group. That ship has a finite number of officers available to select members from. The commanding officer and executive officer are likely disqualified for various reasons. If the unit is mobile, a certain number of officers are required to operate the unit. Therefore,

the court-martial members are likely the officers not performing mission critical functions or who are not on watch. Accordingly the junior officers are most likely to be the court-martial members.[9]

[9] For examples of criticism of the convening authority's selection of court-martial members, *see United States v. Smith*, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring) (contending that the convening authority's selection of court-martial members "is the most vulnerable aspect of the court-martial system; the easiest for the critics to attack"); 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, 19-20 (1991); 1 FRANCIS A. GILLIGAN & FREDRIC I.LEDERER, COURT-MARTIAL PROCEDURE ' 15-31.00 (1991) ("Arguably, the most critical and least necessary vestige of the historical origins of the military criminal legal system is the personal appointment of the members by the convening authority.");Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992); Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 AIR FORCE L. REV. 343(1978).

The European Court of Human Rights concluded that the British military justice system's similar practice of allowing the "convening officer" to hand-pick court-martial members violates the European Convention on Human Rights' requirement for "independent and impartial" criminal tribunals. *Findlay v. United Kingdom*, 1997 I Eur. Ct. H.R. 263. ("In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court-martial which decided Mr.Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr. Findlay's doubts about the tribunal's independence and impartiality could be objectively justified.").[10] Parliament has since adopted a substantial revision of the British court-martial system which gives a neutral "court administration officer" the power to select court-martial members. Armed Forces Act, 1996, ch.46 (Eng.). Minister of Defense Nicholas Soames explained: The main features of the changes are as follows: there will be changes in the formal part played in court martial proceedings by the military chain of command. Its functions, such as settling charges, responsibility for the prosecution and appointing court martial members, will remain in the services but generally be independent of the chain of command; . . . 268 PARL. DEB., H.C. (6th ser.) w344-45 (1995). Defense Minister Soames added, "The court martial system has served the services very well over the years. See also J. W. Rant, *The British Court-Martial System: It Ain't Broke, But It Needs Fixing*, 152 MIL. L. REV.179 (1996) (commentary by the Judge Advocate General of the Armed Forces of the United Kingdom on the European Commission of Human Rights report on *Findlay v. United Kingdom* and the resulting changes in the British court-martial system).

The decisions invalidating the procedures for selecting British Army and Royal Navy court-martial members are particularly significant. John Adams, principal author of the 1775 Rules for the Regulation of the Navy of the United Colonies of North America and the 1776 Articles of War for the Continental Army, patterned both after their British counterparts. See 5 J. Cont. Cong. 670-71 n.2 (1776); 3 Papers of John Adams 147-56 (Robert J. Taylor ed., 1979). The Uniform Code of Military Justice thus shares a common ancestry with the British systems found insufficiently independent in *Findlay* and *Lane*. The Canadian system invalidated in *Généreux* shares that common ancestor as well. *See* Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195, 206 (2000)(noting that common law democracies trace their military justice systems to the British Articles of War).

2. Should Congress create an independent Court-Martial Command and provide that decisions to prosecute be made by a legal officer serving as the equivalent of a "district attorney?"

In our introductory remarks to this part we noted the desire to remove the commander from the court-martial process once that referral decision is made. The creation of a Court-Martial Command, or similar entity, and also an independent Clerk of Court or Court Administrator, would enhance the actual and perceived fairness of the administration of justice. The Commission should consider the creation of a Prosecuting Authority similar to that now established in the United Kingdom or of a Court-Martial Command. The Authority or the Command would prosecute and act as the "district attorney," once the commander is removed from the process. While the lack of experience is a criticism directed toward defense counsel, the Commission should not ignore the likelihood that similarly inexperienced counsel are often also assigned to prosecute cases. The prosecutor does have more resources available and certainly the command is more likely to be cooperative with the prosecutor; however, there are many aspects of the prosecution function which would benefit from the input

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[10] The European Commission of Human Rights similarly concluded that convening authorities' appointment of naval court-martial members deprived those tribunals of independence and impartiality in violation of Article 6 of the Charter. *Lane v. United Kingdom*, App. No. 27347/95(Eur. Comm'n of H.R.Oct. 21, 1998). This conclusion was later adopted by the Council of Europe's Committee of Ministers. See Resolution DH (2000) 92(Comm. of Ministers, Council of Eur. July 24, 2000). The European Court reached a similar conclusion regarding Royal Air Force courts-martial. *Coyne v. United Kingdom*, 1997 Eur. Ct. H.R. 1842, and the Supreme Court of Canada reached a similar conclusion in *R. v. Généreux*,[1992] 1 S.C.R. 259.

and work of experienced counsel. The BADC recommends that the process in the United Kingdom and Canada be studied.

To relieve the commander of the administrative burdens attendant to a court-martial and to enhance the appearance of fairness, a Court Clerk or Court Administrator System should be considered. The Clerk would act in a similar fashion to the clerk of court in any federal district court. The Clerk's office would manage all aspects of the docket, financial matters, and the forming of a jury pool. The "care and feeding" of the court-martial members would be the responsibility of the court clerk and bailiff. Removing the trial counsel's involvement in the managing of the court-martial members during the course of a trial would enhance the appearance of fairness and relieve the trial counsel of a burden so that she may concentrate on the prosecution of the case. The current practice of regular contact between the trial counsel and members during the course of a trial would not be tolerated in a civilian court. For example, the simple matter of the trial counsel entering the deliberation room to brief the members in advance of trial gives the appearance of partiality.

3. Should this "district attorney" make pre-trial agreements?

This idea seems to have merit, although there should be some mechanism to get the input of the commander(s).

4. Should funding for courts-martial, including expenses for experts, witnesses, etc., be centralized in each service rather than treated as a budget item for convening authorities?

a. This was an item which BADC submitted as a potential topic, with the following rationale. BADC now submits the rationale for the Record and for the Commission's consideration.

Rationale: All funding for witnesses, expert witnesses, investigators, forensic examinations, should be approved at the Secretarial level. There should be one fund for trial and one for defense. The funds could be delegated down to the Chief trial and Chief defense counsel of each service to administer as any other budget. This is good not just for the defense but for the entire system, including the government. Unit funds would not have to be expended therefore taking away the disincentive to prosecute appropriate cases and the opportunity for "greymail." Also, the defense would have greater and more equal access to funding in a confidential manner. It would also resolve the current dilemma facing the defense, when seeking witnesses, be they fact, character, or expert, to first go to the prosecutor and seek to obtain "permission" and funding to bring these witnesses, and must disclose in substantial detail the testimony anticipated from each, while the prosecutor has carte blanche to seek and call any witnesses desired without seeking any authorization form the defense.

b. In addition a number of other points should be considered. The funding of courts-martials (or lack of funding) can have an adverse effect for both good order and discipline generally, and on the defense counsel, in a specific case. Accordingly we suggest that funding of courts-martials be a separate budget item that is approved at the Secretarial level. We also suggest that a separate prosecution and a separate defense fund be established. This is not to suggest that the service Secretary has to approve each request, but that she establishes a central funding mechanism that is effected through a Chief Prosecutor and Chief Defense Counsel.

Removing funding decisions from the commander and the unit involved may well enhance the ability of the unit to seek a court-martial in the appropriate case. With central funding the commander does not need to worry about the impact of a court-martial on his or her budget. Thus, cases that should go to court-martial will, all else being equal. The possibility of "grey-mail" being used against a command's limited budget is also lessened.

Separate funding for defense counsel would enhance the actual and perceived access to justice and to resources necessary, for this system that seeks to command respect. Defense counsel in individual cases will be able to secure witnesses and resources in a privileged manner. Neither the commander nor the trial counsel need be involved in selecting which witnesses and resources a defense counsel may have, regardless of need. The current interest of the commander is in saving money. The time-worn argument that the commander must approve these expenditures, for financial expediency, should no longer exist. The issue of the witness being made

available is a question to be resolved separate from the question of the availability of travel funds. Where issues are raised, the issues should be decided by the military judge, not by the trial counsel and convening authority.

5. Should the convening authority retain clemency powers, both with respect to findings and sentence, or should his powers be limited?

B. ARTICLE 32 INVESTIGATIONS

Should the Article 32 investigation be changed in the following ways?

1. Should the requirement for an Article 32 investigation be repealed and a preliminary hearing substituted for it?

The investigation under UCMJ art. 32, 10 U.S. Code ' 832, should probably remain unchanged, in the absence of some compelling argument otherwise. Commentators and courts frequently compare the Article 32 investigation to the federal preliminary examination and the federal grand jury. Although the Article 32 investigation is not exactly equivalent to either federal proceeding, it has elements of both and serves as the member's best opportunity in guaranteeing that the accused will not be tried on baseless charges.[11]

Currently, the convening authority cannot refer a specification to a general court-martial if the staff judge advocate concludes in the pretrial advice that the specification is not warranted by the evidence indicated in the Article 32 report of investigation. UCMJ art. 34(a)(2).

Consideration should be made for putting the probable cause decision with the Investigating Officer. The Investigating Officer is the one who sees the evidence, sees the witnesses, and can assess the merits of the case. Further, consideration should be given to mandating that either a military judge or military magistrate conduct the Article 32 investigation.

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[11] *See* Major Larry A. Gaydos, *Comprehensive Guide to the Military Pretrial Investigation*, 111 Mil. L. Rev. 49 (Winter, 1986), for a useful and instructive guide to the Article 32.

The Article 32 has had an unusual beneficial effect for the accused, which if care is not exercised will be lost to the accused through efforts of convening authorities and trial counsel to restrict the discovery process. That benefit has been engrafted primarily through court decisions. Whether or not the Article 32 investigation was meant to be a defense discovery procedure is a subject of debate. There is some support in the legislative history for both sides of the issue and in the case law.[12] *Compare* testimony, Mr. Larkin before the House Committee on Armed Services, *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 997 (1949) with the absence of language in the statute about defense discovery. Appellate courts have recognized a legitimate defense discovery purpose. And so have the drafters of the Manual for Courts-Martial. However, the BADC is concerned that overly aggressive prosecutors have and will make efforts to restrict the discovery function. Therefore, BADC believes the appropriate course now is to consider taking steps to make defense discovery at an Article 32 investigation a matter of right.[13]

2. Should all Article 32 proceedings be recorded and a partial or complete verbatim transcript be prepared at the request of either the government or the defense?

The preservation of Article 32 testimony is an important consideration to both sides. An accused should be entitled to some method of preserving witness testimony in order to effectively prepare and present a case at trial. We are aware of cases where the accused at an Article 32 has been denied even the option of making a tape recording of the testimony received. This seems an abuse, and the Commission should consider a remedy.

3. If an Article 32 investigating officer returns a finding of "no probable cause," should that finding bar subsequent prosecution?

It seems this should be the rule, unless the prosecutor later brings forward additional evidence to establish probable cause. *Compare* Rule 5.1(b), Fed. R. Crim. Pro. *And see* UCMJ art. 36, 10 U. S. Code ' 836.

4. What avenue of appeal should be available to the government in the event of a finding of "no probable cause?"

There are at least two options that could be reviewed: the prosecution should be allowed to present additional evidence at a reopened Article 32, or the prosecutor could be allowed to apply to a military judge for a review *de novo* of the Article 32 record. The second option is not found in the federal courts because it is a federal magistrate judge, a judicial officer, who is conducting the hearing. Likewise, in the Commonwealth of Virginia courts a General District Court judge conducts the probable cause hearing and then the case is set for trial in the Circuit Court (absent a guilty plea under certain circumstances).

We have addressed elsewhere the recommendation that there should be a military magistrate judge who would sit and act on various pretrial issues. Amongst those judicial duties would include presiding at an Article 32 investigation. The Article 32 is already considered a judicial proceeding, therefore having a military magistrate judge preside seems consistent with the Article 32's place in the pretrial process. *Cf. San Antonio Express-News*

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[12] *See, e.g., United States v. Roberts*, 10 M.J. 308, 311 (C.M.A. 1981) (There is no doubt that a military accused has important pretrial discovery rights at an Article 32 investigation. Nevertheless, such pretrial discovery is not the sole purpose of the investigation nor is it unrestricted in view of its statutory origin.); *United States v. Payne*, 3 M.J. 354, 357 n.14 (C.M.A. 1977) (One of Congress' intentions in creating the Article 32 investigation was to establish a method of discovery.); *United States v. Samuels*, 10 C.M.A. 206, 212, 27 C.M.R. 280, 286 (1959) (It is apparent that the Article [32 investigation] serves a twofold purpose. It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.); *United States v. Tomaszewski*, 8 C.M.A. 266, 24 C.M.R. 76 (1957) (The Article 32 investigation "operates as a discovery proceeding."). *But see* United States v. Eggers, 3 C.M.A. 191, 194, 11 C.M.R. 191, 194 (1953) (Discovery is not a prime object of the pretrial investigation. At most it is a circumstantial by-product – and a right unguaranteed to defense counsel.); *United States v. Connor*, 19 M.J. 631 (N.M.C.M.R. 1984), petition granted, 20 M.J. 363 (C.M.A. 1985). Major Larry A. Gaydos, *Comprehensive Guide to the Military Pretrial Investigation*, 111 Mil. L. Rev. 49, 52 (Winter, 1986).

[13] The government shall produce, no later than three days before the hearing is due to commence, the following matters in discovery; statements and confessions of the accused, including summaries of oral statements; statements of all witnesses interviewed by the government; results of laboratory tests; all evidence in connection with the taking of statements from the accused and searches; all evidence tending to mitigate the severity of the offense; all evidence tending to impeach one or more of the government witnesses.

v. Morrow, 44 M.J. 706 (A.F.Ct.Crim.App. 1996) (pretrial investigation of charges under Article 32, UCMJ, although not a court-martial, is a judicial proceeding)(citations omitted).

C. JURISDICTION OF COURTS-MARTIAL

1. Should courts-martial be standing courts, along the lines of the Federal District Courts, having continuing jurisdiction over service members within a "court-martial district"?

This was an item which BADC submitted as a potential topic, with the following rationale. BADC now submits the rationale for the Record and for the Commission's consideration.

Rationale. Until court-martial charges are REFERRED, there is no military judge who has cognizance of the case. All pretrial decisions are made by the convening authority (frequently with little or no understanding of military justice), on the advice of the staff judge advocate. Serious decisions in complex cases are made early, without the ability for the defense to provide meaningful, effective input. In such cases it is often difficult to recover once a judge is available.

The convening authority is the official who exercises prosecutorial discretion, and the SJA is the principal legal advisor (and thus effectively the chief prosecutor). It is contrary to due process for the prosecutor to be able to control a case with no defense recourse to any official but the convening authority, who exercises prosecutorial discretion on the advice of that same prosecutor. Attempts to obtain adequate relief through extraordinary writs have been tried and are completely ineffectual. There is need for a permanently available trial judiciary to which ongoing issues can be brought, to the same degree that federal district courts are now available to address those issues in federal court cases. *See e.g., United States v. King*, 2000 CAAF Lexis 482.

Alterative approach: Instead of REFERRAL being the operative act to involve the judiciary - make PREFERRAL the operative act for a military judge to take cognizance. There will have to be some corresponding changes to the MCM to change the rules now highly in the governments favor. If either side wants something (and it usually will be the defense) they go to the military judge. Not a complete fix, but better than what we have.

2. Should military judges have the power to rule on all requests for release from pre-trial confinement, search warrants, requests for witnesses, or expert witnesses?

The BADC has elsewhere recommended that consideration be given to the appointment of a standing judiciary. If there was a standing judiciary, a military judge or a military magistrate judge could reasonably be tasked with such pretrial issues. The federal magistrate judge program, authority, and responsibilities should be studied in this regard. Again, in the Commonwealth of Virginia, a General District Court judge performs these tasks.

3. Should military judges oversee the jury commission in the selection of court members rather than leaving administration of the process to the staff judge advocate and convening authority?

An independent Clerk of Court or Court Administrator should oversee the selection and assembly of the members.

4. Should an enlisted military accused continue to have the right to be tried by a court composed of at least one-third enlisted members from a unit other than his own under Article 25(c), or is the right to be tried by a military judge alone sufficient to protect the enlisted accused's interests?

This is an important right that should be continued.

5. Should the minimum size of courts-martial be increased, e.g., to six for special courts-martial and to nine for general courts-martial?

A 12 person jury is not required in State courts, but a jury of 12 is required in federal court.[14] In *Ballew v. Georgia*, 435 U.S. 223 (1978) the Supreme Court has declared that a jury of five or less violates the Sixth and Fourteenth Amendments.[15] Because this is a constitutionally guaranteed right, there should be an affirmative showing on the part of the Department of Defense that they cannot provide juries of six or more. Not only should there be consideration of a jury of at least six members, but the requirement for a unanimous verdict on findings should be closely examined. At present a service-member can be convicted on the vote of two out of three members at a special court-martial, and on a vote of four out of five at a general court-martial. While there might be some argument in favor of a lower jury size in a combat zone, the voting ratio cannot be justified on any basis.[16] (We do note that the Supreme Court has approved a non-unanimous vote where the vote required seven of nine.[17]) An additional nuance of this question is that of challenges and their effect on the size of the panel.

6. Should courts-martial be required to have 12 members for capital cases?

This is worthy of serious study. Note that the military is the only jurisdiction that permits imposition of the death penalty with a jury of less than 12. Otherwise we defer to and incorporate the comments of Dwight H. Sullivan, representing the American Civil Liberties Union, on all aspects of military capital cases, except as to the need for abolition. We have stated our opinion elsewhere in regard to a moratorium on the military death penalty.

D. MILITARY JUDGES, TRIAL AND DEFENSE COUNSEL

1. How and by whom should military judges be selected?

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[14] *Williams v. Florida*, 399 U.S. 78 (1970); Rule 23, Fed. R. Crim. Pro. UCMJ art. 36, 10 U.S. Code ' 836, requires that procedure be similar to that in federal district court, so far as practicable.

[15] The Commonwealth of Virginia requires at least seven jurors. And they must come to a unanimous vote. Va. Const. art. I, ' 8; Va. Code Anno. ' 19.2-262(2).

[16] *Burch v. Louisiana*, 441 U. S. 130 (1979). *And See* Howard C. Cohen, *The Two-Thirds Verdict: A Surviving Anachronism in an Age of Court-Martial Evolution*, 20 CAL. W.L. REV. 30 (1983).

[17] *See* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1 (December 1998); Robert H. Miller, *Comment: Six of One is Not a Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries*, 146 PA. U. L. REV. 621 (January 1998).

This is one of the most significant issues to be addressed that has clear due process implications. We recommend starting with the Lederer-Hundley article on judicial independence[18] and using that as the benchmark to evaluate various alternative proposals. We also note that the U. S. Department of State, through the U.S. Information Agency, advocates judicial independence and tenure as a cornerstone of a fair judiciary in a democracy. Stephen G. Breyer, *Rule of Law: Judicial Independence in the U.S.* (This document is published on the Department of State, United States Information Agency website. The website and the Agency is an, "Authoritative resource for foreign audiences seeking information about American society, political processes, official U.S. policies and culture.[19]) Justice Breyer sets out the basic principles of judicial independence in the United States. A primary issue is tenure.[20] As Judge Cox has recently said, "I look at tenure and judicial independence like the Wizard in the Land of Oz. If you want to give the lion courage, give him a medal, and if you want to give the straw man brains, give him a degree. If you want to give judges independence, give them tenure." ARTICLE *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III*, 165 Mil. L. Rev. 42 (September, 2000). Justice Scalia addressed the historical anomaly of this system *not* requiring tenure in his concurrence in *Weiss*.[21]

2. Should civilians be permitted to serve as military judges?

This idea seems worthy of study. There seems no reason why a civilian should not be selected to serve as a military judge. And there seems no reason why they could not deploy in the same manner as any other civilian who is required to accompany the force overseas and into combat situations. Such service could be open to retired officers as well as others. UCMJ art. 26, 10 U. S. Code ' 826, would need amending to parallel UCMJ art. 66, 10 U. S. Code ' 866. Chief Judge Baum is an excellent example of a "civilian" performing as a military appellate judge. Military appellate judges may be civilians, including retired officers. UCMJ art. 66, 10 U. S. Code ' 866.

3. Should military judges serve for a fixed term and be subject to a separate pay and allowance scale not fixed by military rank or grade?

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[18] Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary–A Proposal to Amend the Uniform Code of Military Justice*, 2 WM. & MARY BILL RTS. J. 629 (1994).

[19] http://usinfo.state.gov/

[20] "The primary basis of judicial independence in the United States is the protection guaranteed to judges under Article III of the Constitution, which creates the federal judiciary.. . . These provisions assure that Congress or the president cannot directly affect the outcome of judicial proceedings by threatening removal of judges or reduction of their salaries.

The institutions that allow the judiciary to control the environment in which judges do their work are a second factor of judicial independence. This aspect is not always at the center of considerations of judicial independence, but if one thinks about how a working environment affects one's work, then one understands that the question of who controls the context in which judges decide cases matters a great deal to the idea of the independence of the judiciary. There are three primary institutional pillars on which U.S. judicial administration is based. The first is the Judicial Conference of the United States. . .. The Judicial Conference is the national policymaking body for the judiciary, and supervises the Administrative Office of the U.S. Courts. Most important is the role that the Judicial Conference plays in the rulemaking process." The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals. 28 U. S. Code ' 2072(a).

[21] *See, e.g.*,the observation of Justice Scalia, in his concurring opinion in *Weiss v. United States*, 510 U.S. 163 (1994), where he stated:

> The present judgment makes no sense except as a consequence of historical practice. . . .[N]o one can suppose that similar protections against improper influence [as provided in the UCMJ] would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive. I am confident that we would not be satisfied with mere formal prohibitions in the civilian context, but would hold that due process demands the structural protection of tenure in office, which has been provided in England since 1700, was provided in almost all the former English colonies from the time of the Revolution, and is provided in all the States today. (It is noteworthy that one of the grievances recited against King George III in the Declaration of Independence was that "[h]e has made Judges dependent on his Will alone, for the tenure of their offices.")

510 U.S. at 198 (Scalia, J., concurring) (citations omitted).

There seems to be a strong argument for such a structure. *See* Lederer/Hundley. On the specific issue of tenure, the Services have argued against traditional forms of judicial tenure citing the need for flexibility in military assignments. That argument seems to be accepted without question. This is one of the areas where it would be helpful to have some empirical evidence. A series of questions regarding recent operations might be quite revealing on the issue."

4. How should military judges be disciplined or removed from office?

" Such questions could include: During OPERATIONS DESERT SHIELD/DESERT STORM:

a. How many military trial and appellate judges were there on active duty assigned to judicial duties?

b. Of this number, how many deployed in support of the OPERATIONS (regardless of the length of time)?

c. Of this number, how many deployed in a capacity other than as a military judge?

And: During the last five years:

a. How many military trial and appellate judges were there on active duty assigned to judicial duties in each year?

b. Of this number, how many deployed in support of a military operation (regardless of the length of time)?

(1) Of this number, how many deployed in a capacity other than as a military judge?

c. Of this number, how many were removed from judicial duties (regardless of the length of time) for a reason other than misconduct or completion of "a tour?"

(1) Of this number, what duties were the persons assigned to, e.g. staff judge advocate, trial, defense.

The Court of Appeals for the Armed Forces has suggested that a judicial commission is the proper vehicle.[21] Currently, the matter probably rests with the appointing officer, the Judge Advocate General. Having judicial officers answer to executive officials is extremely problematic.

5. Should civilians be allowed to serve as trial counsel (e.g., Assistant United States Attorneys, Department of Justice attorneys, etc.)?

For the same reasons that consideration should be given to allowing civilians to be able to sit as trial or appellate judges, the issue of civilians being able to serve as trial or defense counsel should be examined. This might be accomplished in ways similar to that in any number of jurisdictions which have panel attorneys or attorneys on a roster of those willing to take court appointed cases. Certainly there would need to be a form of screening for those permitted on the roster. Such screening could be accomplished through the application process. Civilians so employed might be employed on contract for a particular service or by the case at the federal EAJA rate. In Australia, military reservists are called to active duty to represent the accused in a court-martial. This is done to ensure that the accused has competent and experienced counsel to represent him/her. Some method of access to experienced counsel would go a long way to addressing concerns about the experience level of counsel in serious cases.

6. Should there be minimum standards for defense counsel in capital cases?

BADC endorses the ABA Recommendation calling for a moratorium on capital punishment until certain conditions are met. Minimum standards for counsel is one of those conditions. See also the comments of Dwight H. Sullivan for the American Civil Liberties Union.

7. Should the practice of permitting supervisors to rate military trial judges be terminated?

There should be consideration of a judicial ethics panel that would regulate the judicial conduct of military trial and appellate judges. The concept of rating military judges against each other does not seem to favor judicial independence.

8. Should military judges have explicit power to hold counsel in contempt for abusing process during any phase of military proceedings?

To the same extent permitted in a federal district court. However, great care should be taken to ensure such a power would be applied equally to witnesses, jurors, and both counsel. *Compare* Rule 42, Fed. R. Crim. Pro.

9. Should there be a separate trial defense service required by statute for each service?

There seems no good reason for this. A thorough review of the way in which defense counsel services are provided, in particular the independence of such counsel should be studied. The concept of a joint defense organization appears to have merit, especially if this could result in the more efficient and balanced provision of resources to the defense. Certainly the federal public defender system could be looked to as a model.

IV. CRIMES AND OFFENSES

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[21] *See, e.g.,* Barry & Baum, *United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence,* 36 Fed. B. News & J. 242 (1989).

A. Should Articles 133 and 134 be repealed and new, particularized punitive articles enacted to address General Article offenses that have previously been acknowledged by case law or enumerated by the President in the Manual for Courts-Martial?

The Articles in their present form do present a viable alternative when there is no specific article in the code already. However, it does appear that many Article 134 provisions could be assimilated into the various codal provisions. This would be especially helpful if there were a sexual offenses statute similar to the Model Penal Code. As to Article 133 there is some objection to it, not so much as to its existence, but that it seems to be used as a means of piling up an additional charge(s) when perfectly valid charges are available and have been charged. An example is the practice of charging adultery twice.

B. Should there be a distinction in degree and maximum punishment for the offenses of being raped by an acquaintance and being raped by a stranger?

There does not appear to be any compelling reason to make such a distinction. Such distinctions seem better left to the fact-finder at the time of sentencing.

C. Should Congress enact a modern criminal sexual misconduct statute similar to the Model Penal Code and repeal the current statutes on rape and sodomy?

See answers above.

D. Should Congress enact a specific punitive article to proscribe relationships between and among officers and enlisted personnel, e.g., fraternization, undue familiarity, adultery?

This issue is worthy of study to ensure that there is uniformity amongst the Services.

E. Should Congress repeal Article 88, which prohibits officers from uttering contemptuous words regarding certain public officials, or at least limit it to active-duty personnel?

The purpose for the Article appears to be the prevention of calls for disorder and disobedience and to preserve the fundamental principle of civilian control over the military. A study should examine whether or not the Article should be limited to those actually serving on active duty. For those not serving on active duty, either retired or reserve, the Article might not need to be applicable, except for situations where they identify themselves as a military officer - "wrap themselves in their rank" or military status.

F. Should Congress modify Article 46 to authorize contempt procedures for civilian and military witnesses and participants in courts-martial?

Compare Rule 49, Fed. R. Crim. Pro.

G. Should offenses based upon a simple negligence element be deleted from the Code?

Perhaps the consideration here should be to removing simple negligence offenses that are unrelated to military duties. It might well be that a different standard or degree of guilt is proper in regard to a dereliction charge, or to a charge dealing with an orders violation, or to a charge dealing with some military duty. However, to the extent that the charge relates to a typical common law offense, consideration should be given to removing simple negligence as a standard of guilt.

H. Should Congress enact a punitive article prohibiting child neglect and abuse?

The question here relates not to the ability to prosecute a case of child neglect and/or abuse, but to the question of jurisdiction. The BADC has suggested, earlier in this submission, that military jurisdiction might appropriately be limited. To the extent that it is necessary to have a punitive article for offenses against children, occurring on base, or overseas, then such a provision is appropriate. Otherwise, offenses against children might best continue to be left to the local authorities where the offense does not occur on military property.

I. Should Article 124, Dueling, be repealed?

The BADC notes that since 1840, dueling as method of solving personal differences between officers has declined.[11] Accordingly, repeal of UCMJ art. 114, 10 U.S. Code ' 914, seems timely.

J. Should the definition of grievous bodily harm under Article 128 be revised?

K. Should consensual sodomy be decriminalized?

Private acts between consenting adults, that do not otherwise have a direct impact on good order and discipline should likely not be subject to criminal prosecution.

L. Should adultery be eliminated as an offense, or in the alternative, should it be codified so that it is only a crime under circumstances that directly affect "good order and discipline"?

Adultery should not be proscribed except to the extent that there is a direct provable effect on good order and discipline. The cases of former Air Force lieutenant Kelly Flinn and of, MGen Hale seem appropriate for proscription because of the direct connection to good order and discipline. However, cases like that of Gen. Ralston might not be proscribed.

V. SENTENCING AND PUNISHMENTS

More flexible ways to sentence a person without lasting stigma must be studied. In *United States v. Rush*, 55 M. J. 313 (2000), the Court of Appeals for the Armed Forces reminded everyone about the lasting stigma of certain punishments. In particular, ways should be considered to reduce the long term financial impact of sentences that include reductions in grade or reductions in pay. This recommendation should be considered regardless of the marital/family status of an accused, although as a practical matter there is likely a more adverse effect on families. But, it should be considered that in this day and age many service-members have established significant financial obligations – purchase of a home, car, etc. Such ramifications should be considered and studied. Thus, the long-term impact of a reduction should be considered long-term loss of pay, stagnation in paygrade leading to high-year-tenure issues, or inability to compete for additional promotions, or the inability to regain the previous rank. Consideration should be given to the automatic commutation or remission of punitive discharges after passage of a defined number of years in the civilian community. For example, it might be appropriate to remit a bad conduct discharge after the applicant affirmatively shows five or ten years of good behavior. In addition, acts of good citizenship might warrant earlier remission. The person need not be issued an honorable discharge (only an under honorable conditions discharge) and could be prohibited from receiving certain benefits.

A. Should capital punishment be eliminated for peacetime offenses?

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[11] James E. Valle, *Rocks & Shoals: Order and Discipline the Old Navy 1800 - 1861*, Naval Inst. Press 1980, page 3.

While the BADC takes no position on the abolition of the military death penalty, the issue seems worthy of study. We would draw your attention to the BADC support of the ABA moratorium on the death penalty for the reasons stated by the ABA.

B. Should the accused have the option of being tried by a court-martial of members on the guilt or innocence but sentenced by a military judge in the event of a conviction?

The various procedural methods of reaching a sentence are worthy of study. It does seem that judge sentencing following members findings of guilt ought to be considered as an option. The UCMJ was intended to operate in war. The UCMJ existed and survived Korea, Vietnam, Desert Shield/Storm, and lesser deployments. There should be great concern about any change which actually or by perception lessens the rights and protections available to a service-member at court-martial.

C. Should member sentencing be abolished?

This would eliminate an option now available, and should not be considered except upon clear evidence of manifest necessity. See above.

D. Should sentencing guidelines be adopted in order to eliminate the need for a contested sentencing proceeding?

See C. above.

E. Should pre-trial agreements be binding on both parties thus eliminating the need for a sentencing hearing?

See C. above.

F. Should sentencing in time of war always be by judge alone, except in capital cases?

See C. above.

G. Should the requirement to produce witnesses for sentencing proceedings in time of war be abolished?

See C. above.

H. Should new sentencing considerations be authorized, such as community service, suspension of eligibility for promotion or pay increases, required counseling for violent or sex offenders, or other measures that would return a convicted accused to duty rather than incarceration, discharge, or dismissal from service?

The life-long damning and damaging effects of military punishments should be reviewed and more flexible punishment alternatives developed.

I. Should a military judge have the right to suspend a sentence and adjudge a probationary sentence?

BADC supports an independent judiciary with full judicial powers. This idea is worthy of serious consideration. In addition, it appears sensible to consider a bar to administrative discharge processing after a case has been disposed of at court-martial. A service-member, not infrequently, is able to persuade the trier of fact that he or she should not be punitively discharged as a result of the trial. At that point, again not infrequently, the command will then process that person for an administrative discharge Under Other Than Honorable Conditions. Some consideration ought to be given to restricting such a practice. There may well be circumstances which justify separating a person who has been convicted, but not punitively discharged. However, as a general rule there ought to be a demonstrated need to do this, and it should be limited to separation under honorable conditions. The prosecution already has a substantial opportunity to introduce all of

the aggravating evidence available both as to the offense and as to the accused's character. Therefore, it seems appropriate under that circumstance to accept the judgment of the sentencing authority. The members are the best qualified "board of officers," and accordingly are able to make fine judgments about rehabilitative potential, amongst other judgments.

J. Should the military judge or his successor in office retain jurisdiction over the accused until the sentence has been served?

Such a change seems appropriate. As part of an integrated post-trial process the military judge should retain jurisdiction over the accused and the case until it is docketed at the Court of Criminal Appeals for cases to be considered under UCMJ art. 66, 10 U. S. Code ' 866. Further, power of a trial judge (and of the Courts of Criminal Appeal) to issue orders under the All Writs power should be spelled out explicitly in a statute.

K. Should a sentence ordering separation from the service without loss of either retirement or other service-connected benefits be authorized?

This is worthy of serious study. In addition the power to award or direct such a separation might also be given to the military judge, the military appellate judges, the Service Clemency & Parole Boards, and the Service Discharge Review Boards.

L. Should the Code be reevaluated in light of the fact that most accused members have families, and thus existing punishments may not be the most effective in meeting discipline goals?

The Code and Manual should be reevaluated. See above.

M. Should enhanced punishments for certain offenses committed in time of war (e.g., desertion) be reevaluated in recognition of the frequent deployment of forces to hostile areas not technically qualifying as war?

The current charging and sentencing options available already contemplate the ability of the prosecution to introduce evidence in aggravation. Therefore missing ship's movement for a training exercise might be treated differently than missing a deployment to conduct a NEO operation.

N. Should a provision to allow consideration for expungement of a conviction after a specified number of years be enacted?

Some consideration should be given to a combination of discretionary and mandatory expungement after a period of time. The focus here should be toward lessening the long term impact and stigma of the punitive discharge, rather than the fact of conviction itself.

O. Would adoption of any sentencing guidelines be fruitless in light of the reality that most accuseds do not become repeat offenders due to separation proceedings?

P. Should sentencing be made more equitable by permitting reduction in rank or loss of numbers for all officers?

VI. EVIDENCE

A. Should evidence of good military character be barred at the findings phase of courts-martial?

The rules of evidence permit certain bad acts or bad military character to be used as evidence to convict someone at court-martial. There seems no justification for prohibiting a service-member from showing good military character or law-abidingness.

B. Should exculpatory defense polygraph evidence be allowed?

There should be a reconsideration of the absolute ban on polygraph evidence. The rule in question was effected under a rulemaking process which the ABA has challenged, and which did not allow for serious or public consideration of options.[25]

C. Should pleas without admissions of guilt be permitted at courts-martial as they are in most jurisdictions?

Such a plea is appropriate in other systems, and would be in this also. *Compare* Rule 11(b)(c), Fed. R. Crim. Pro. *See also* UCMJ art. 36, 10 U. S. Code ' 836.

D. Should conscientious objection be a permissible affirmative defense?

It is worthy of study, as for example where the accused shows that a request for CO status was properly and timely submitted and that the government was dilatory in acting on the request or acted upon it in bad faith.

VII. TRIAL PROCESS

A. Should the military judge, rather than trial counsel, administer the oath to witnesses?

We are aware of no strong arguments in favor of such a change. The BADC supports a complete review of the interactions that the trial counsel has with the members of a court-martial. As noted elsewhere, the BADC believes that the trial counsel should be relieved of *all* duties in connection with the calling, selection, management, and administration of members. Such functions should be transferred to the Clerk of Court or Court Administrator as is done in all civilian courts. The BADC believes that only in the military is it not considered professional misconduct for the prosecutor to be involved with the members in the current fashion. The BADC believes that a prosecutor in civilian court who tried to have the same or similar access to a jury would be severely critiqued by the judge and might well be subject to professional discipline action. The trial counsel involvement with the members should be limited to the interactions had in open court on the record.

B. Should *voir dire* of court members by counsel be a matter of right?

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[25] *See* Kevin J. Barry, *Modernizing The Manual For Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237, 242 n.17 (2000).

There should be serious study of this matter. Practice in the federal and state courts is not consistent. However, the accused has the right to a trial by members who it is believed will be fair and impartial. A military members trial should be constitutionally sound. There is a difference of opinion within the civilian bars about how effective, for Sixth Amendment purposes, a counsel can be who cannot/does not personally voir dire prospective jurors. In addition, it is a matter of debate whether or not denying counsel voir dire deprives the accused of a jury fully consistent and qualified within the U.S. Constitution. In Virginia for example, counsel and the Court may voir dire.[24]

C. Should more peremptory challenges be authorized to an accused and the government?

Consideration should be given to allowing the defense more peremptory challenges than they have now, and possibly more than the prosecution. As has been noted elsewhere, under the current system, the prosecution already has an unlimited number of challenges by virtue of the court-martial member selection process. In federal district court, where the prosecutor had no involvement, there is a ratio of six prosecution to ten defense peremptory challenges (20 each in a death penalty case). *See* Rule 24(b), Fed. R. Crim. Pro. *And see* UCMJ art. 36, 10 U. S. Code ' 836. One other important difference is that an excused potential juror is replaced with another potential juror until there are twelve jurors (and occasionally alternates).

D. Should Racial Justice Act instructions be required in capital courts-martial?

This was an item which BADC submitted as a potential topic, with the following rationale. BADC now submits the rationale for the Record and for the Commission's consideration.

Rationale: Of all the death penalty jurisdictions in the country, the military has the highest percentages of minorities on death row. The military justice system lacks a vital protection to minimize the risk that race will play a factor in determining who is sentenced to death. In civilian capital cases, Congress has required that the judge "instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race . . . of the defendant or the victim." 21 U.S.C. ' 848(o) (1994). Congress further required the judge to instruct the jury that it may not recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race . . . of the defendant, or the victim, may be." *Id.* Finally, Congress required each juror to sign a certificate stating that he or she did not consider prohibited factors, including race, and that his or her sentencing decision would have been the same regardless of the defendant's and victim's race. *Id. See also* 18 U.S.C. ' 3593(f) (1994). Together, these are called the Racial Justice Act instructions. No statute or Rule for Courts-Martial requires such instructions in capital courts-martial. The military justice system should go to any length to ensure that racial discrimination does not affect cases' outcomes. The instructions that Congress requires in Article III capital cases are no less appropriate, or necessary, in the military justice system. *See* Uniform Code of Military Justice art. 36, 10 U.S.C. ' 836 (1994).

E. Should a jury of 12 be required in order to sentence an accused to death?

This was an item which BADC submitted as a potential topic, with the following rationale. BADC now submits the rationale for the Record and for the Commission's consideration.

Rationale: Every death penalty jurisdiction in the country with the exception of the military justice system provides for 12-member juries in capital cases. Even though a five-member jury cannot try any case that could

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[24] *See e.g. Charity v. Commonwealth*, 471 S.E.2d 821 (Va. 1997); VA. CODE ANNO. ' 8.01-358. *And see* David P. Baugh, *Jury Trials in Virginia and Other Issues Relating to the Preparation of a Criminal Case for Trial*, 31st Criminal Law Seminar, Va. State Bar and Va. CLE, February 16, 2001.

result in confinement for more than six months, in the military a court-martial panel with as few as five members can impose a death sentence. Military capital cases are sufficiently rare that requiring 12-member panels would not prove burdensome to the services. Accordingly, no military necessity justifies departure from the universal practice of 12-member panels. Additionally, the lack of a fixed number of members threatens the fairness of capital courts-martial. Convening authorities have no guidance concerning how many members to detail to capital cases, thus resulting in enormous disparity in the number of members in such cases. The size of the court-martial panel is an arbitrary factor that could well influence who is sentenced to death and who is not. Additionally, because death sentences must be unanimous, the prosecution has an incentive to challenge members from the panel while the defense has an incentive to try to keep all of the members on the panel. *See United States v. Simoy*, 46 M.J. 592, 625-27 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring), *rev'd on other grounds*, 50 M.J. 1 (1998). With just one side engaging in vigorous voir dire and challenges, a court-martial panel skewed toward the prosecution is the almost inevitable result of the current system. Thus, the size of capital court-martial panels must be fixed. In keeping with Congress's general preference for military justice procedures that mirror those used in Article III Courts, *see* Uniform Code of Military Justice art. 36, 10 U.S.C. ' 836 (1994), the capital court-martial panel size should be fixed at twelve.

VIII. APPEALS

A. Should the government have the right to appeal to the United States Court of Appeals for the Armed Forces and should the power of the Judge Advocate General to certify cases be repealed?

This proposal has merit, and it is now appropriate to review the need for or appropriateness of the certification power. Caution should be exercised to prohibit review of a decision of the Court of Criminal Appeals when that decision is based on an insufficiency of the evidence or which results in a reduction of the sentence for reasons of disparity or inappropriate severity.[27]

B. Should the Courts of Criminal Appeals be eliminated or their function reduced to reviewing the record for sentence appropriateness?

The Courts of Criminal Appeals have their place in the hierarchy of military appeals. An intermediate appellate court is appropriate especially where they have the actual attributes of an independent judiciary. However, the stature and independence of these courts should be enhanced as we have recommended elsewhere.

C. By whom should military Courts of Criminal Appeals judges be selected, and should their service be for a fixed term of office?

BADC supports appointing all military judges at the Presidential level, as proposed by General Hodson. One would assume that the President would have the recommendations of a panel; and that the military judge should have tenure and other indicia of independence, as for example was proposed by Prof. Lederer and LT Hundley. The panel should might appropriately consist of judges, at least one law professor, and at least one judge of the Court of Appeals for the Armed Forces.

D. Should Senior Judges of the United States Court of Appeals for the Armed Forces and retired military judges be allowed to serve on the Courts of Criminal Appeals without being recalled to active duty?

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[27] To demonstrate that nothing is ever simple, we would note that the United States could appeal the setting aside of a guilty finding which then causes a sentence reassessment and reduction of sentence. If the United States prevailed on appeal in having the guilty finding reinstated, then so to could the sentence be reinstated.

The example of Chief Judge Baum of the U.S. Coast Guard Court of Criminal Appeals shows both the advisability and efficacy of proposal that a retired military judge (civilian) so serve. Presumably a senior judge on CAAF could also serve, but this seems a more problematic suggestion.

E. Should an accused have to file a Notice of Appeal in order to have his case considered by a Court of Criminal Appeals?

There should be consideration for such a proposal. However, if that is to be the case, some consideration should be made to the experience, knowledge, training, and expertise of today's trial defense counsel, and to making mandatory the filing of a brief pursuant to Article 38(c), UCMJ. If an appellant is required to "petition" for an appeal, such requirement might be limited to guilty plea cases and only with the guidance of an appellate defense counsel. We assume, however, that filing a notice of appeal would not allow for a discretionary review, but would invoke the current mandatory appellate review provision.

F. Should there be threshold requirements before an appeal is automatic to the Court of Criminal Appeals, such as a sentence of five or more years' confinement?

The current threshold appears appropriate.

G. Should there be an automatic right of appeal to the Court of Criminal Appeals in a guilty plea case, or should an accused be required to file a Notice of Intent to Appeal?

Some consideration should be given to this proposal. However, such a procedure should require that the service-member have access to the advice and assistance of an appellate defense counsel in giving such a notice. The concern should be the ability or inability of the trial defense counsel from recognizing appellate issues. Further, what impact if any, would such a procedure have on the requirements set out in *United States v. Grostefon*, 12 M.J. 431 (1982).

H. Should a decision of a Court of Criminal Appeals ever be rendered by fewer than three judges?

This question goes to the very heart of compliance with UCMJ art. 66, 10 U. S. Code ' 866.

I. Should every judge who sits on an appeal at a Court of Criminal Appeals certify that he or she has read the entire record of trial at the time a decision is rendered?

The unique power of the Courts of Criminal Appeal seems to require that each judge who sits in a case must personally affirm that the sentence is appropriate, and in a not guilty case, that the evidence was legally sufficient.[28] And as we know, if they do not agree, then they have the power to substitute their judgment.[29] We fail to see how each judge voting on a case can abide by such a standard if they have not personally read the record in its entirety. The recent litigation in *United States v. Lee*, 54 M.J. 285 (2000), addressed the issue of a quorum of a Court of Criminal Appeals panel. A panel of three judges is necessary for a proper review. The dissonance between the mandate of UCMJ art. 66, 10 U. S. Code ' 866, and the quorum rule was evident. If nothing else, the Congress should examine the need to overrule the decision in *United States v. Petroff-Tachomakoff*, 19 C.M.R. 120 (C.M.A. 1955)

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[28] *See United States v. Grostefon*, .12 M.J. 431 (C.M.A. 1982). *But see United States v. Lee*.

[29] The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). While the Courts of Military Review are sometimes viewed as an "800-pound gorilla," *United States v. Parker*, 36 M.J. 269 (C.M.A. 1993), with "awesome, plenary, *de novo* powers of review," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), "with *carte blanche* to do justice," *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991), instances of the blanket use of such power are rare indeed.

J. Should confinement be deferred if an appellate issue could result in an acquittal or if a new trial could be ordered, as is allowed by the bail process in many jurisdictions?

Release from confinement pending appeal should be studied, and seemingly should be permitted if it appears a new trial may be ordered, or the findings of guilty vacated on appeal. In addition, consideration should be given to a required release from confinement should the record of trial has not been prepared and forwarded to the military judge for authentication within a specified time. If, as proposed a military judge retains jurisdiction of a case until docketing at the Court of Criminal Appeals, then the military judge should be permitted to hold a post-trial 39(a) session to direct release of a confinee. Alternatively, there might be some provision, similar to *Allen* credit for post-trial delay. As noted elsewhere, there is currently no incentive for speedy submission of the record of trial. This is particularly distressing because the transcription is under the direction and control of the prosecutor. Anecdotally, we note that the U.S. Air Force does not seem to have difficulty in the timely forwarding of records of trial. Additionally, each record is accompanied by a detailed chronology (by the hour) of the transcription process.

K. Should the United States Court of Appeals for the Armed Forces dismiss a petition if no issues are assigned for review?

The issue is worthy of consideration. There is a need to study the long-standing debate about specified issues. *See*, Eugene R. Fidell and Linda Greenhouse, *A Roving Commission: Specified Issues And The Function of The United States Court of Military Appeals*,122 Mil. L. Rev. 117 (Fall, 1988); Robinson O. Everett, *Specified Issues in The United States Court of Military Appeals: A Rationale*, 123 Mil. L. Rev. 1 (Winter, 1989). Also, to what extent then would a "*Anders*" brief be required from trial or appellate counsel?

L. Should the United States Court of Appeals for the Armed Forces be required to hear any appeal from a case in which the sentence includes five or more years' confinement?

The present requirement of one year or a punitive discharge seems sufficient for the low end of their jurisdiction. The discretionary nature of their jurisdiction is occasionally troubling, and a requirement to hear an appeal in any case in which a "notice of appeal" is filed is worth considering.

M. Should there be a right to oral argument before the appellate courts upon request by the accused or the government?

It would seem that it should be a rare case in which an appellant would be denied a requested oral argument.

N. Should the United States Court of Appeals for the Armed Forces be permitted to sit in panels of three, like other federal courts of appeals?

We understand one of the purposes of expanding the Court to five judges was to encourage the settlement of thorny legal questions. Would sitting in panels enhance or detract from that goal?

O. Should membership on the Courts of Criminal Appeals be limited to retired judge advocates who are voluntarily recalled to active duty for a term of years?

The idea of retired judge advocates recalled for a set period should be considered along with any recommendation on how military judges are selected and what tenure, if any, they should have. Certainly the appointment of Magistrate Judges in the federal district courts could be studied. However, the question should not be restricted to appellate judges but should also include trial judges.

P. Should the practice of supervisors rating military appellate judges be abolished?

This is worthy of serious study . . . for the same reasons stated as to the rating of trial judges. See above.

IX. ARTICLE 15 PUNISHMENT

A. Should Article 15, Nonjudicial Punishment, be repealed or amended?

This was an item which BADC submitted as a potential topic, with the following two discussions. BADC now submits these for the Record and for the Commission's consideration.

a. Amend Article 15 so that when a service member declines to accept an action under UCMJ art. 15, and a decision is made to refer charges to trial by Court-Martial, the charge for which the accused refused Article 15, any offense not known to the command at the time of offering Article 15 (or which could not have been known to the command at the time with reasonable diligence), and any subsequent misconduct, are the only charges for which he or she can be tried. This would help to eliminate the practice, routine in some commands, of allowing trial counsel to charge the member with matters that had previously been dealt with administratively as a means to load up the charge sheet. It would not be unusual for a person to be acquitted at court-martial on the charge initially considered for Article 15 punishment, but be convicted on something previously dealt with administratively. The purpose on such a rule would be to ensure the accused is not punished for exercising a right. As an additional matter, consideration should be given to limiting the maximum sentence available in an Article 15 refusal case.

b. Further amend Article 15 to provide that when an individual has previously been punished at Article 15, that misconduct may not later be made the subject of a court-martial; unless the prosecution demonstrates by clear and convincing evidence that prior disposition at Article 15 was procured by fraud, or through a failure of the commander to fully appreciate the nature and seriousness of the offense disposed of at Article 15.

Rationale: Both these current practices have the clear appearance of "piling on" and the first has a chilling effect on the exercise of statutory rights. They detract from the respect that the system needs to operate effectively.

1. To abolish the right of the member to refuse punishment for minor infractions with serious limitations upon available punishments.

There may be some consideration given to this point for units forward deployed in a combat zone under very limited circumstances. The ability of the Army and Air Force to operate in a combat zone and in contingency operations with the "refusal" right should be studied. Also, the current manner and availability of legal resources to deployed naval units should be studied. The current "vessel exception" was initially considered and specifically rejected by the other services, and it appears that the right to refuse has not hindered the effective administration of the system in these services.

2. To abolish the right of appeal for minor infractions but allow an Article 138 complaint or IG complaint if the member feels aggrieved.

The present system seems adequate. An Article 138 complaint presumably travels the same path as Article 15 appeal. Appeal of a punishment does not seem the appropriate work for an inspector general.

3. To forbid a record of nonjudicial punishment for minor infractions from becoming a part of a member's service record and making the results inadmissible in other judicial or administrative proceedings including bar to reenlistment, promotion boards, etc.

4. To create a military magistrate by statute with the power to adjudicate more serious but albeit minor allegations of misconduct referred to the magistrate by an accused's commander with the power to order punishment under circumstances similar to existing non judicial punishment with the corresponding right to refuse such punishment and demand a trial. The results of the proceedings would become part of the member's record. Also, adjudication by the magistrate would bar further prosecution under double jeopardy rules.

B. Should the vessel exception to the right to demand trial by court-martial be repealed?

Rather than repeal the exception efforts should be taken to limit the exception to its intended, or perceived intended purpose. In the days of sail and infrequent communications with land, the refusal right could have had a severe impact on naval operations. However, deployment schedules, technology, and other changes have seemingly reduced the need for the exception. *See* Sullivan, *Overhauling the Vessel Exception,* 43 NAV. L. REV.57 (1996).

C. Should be vessel exception to the right to demand trial by court-martial be extended to personnel of unified commands whose units may be deployed under analogous circumstances?

Before doing this, some empirical data should be gathered. It is believed that some data might exist within the Marine Corps, about the impact of the refusal right in Desert Shield/Storm.

D. Should the punishment of bread and water be abolished?

X. SUMMARY COURTS-MARTIAL

A. Should Article 20 be amended to (a) permit punishment of officers and (b) extend the scope of enlisted punishment?

No change should be made in the absence of empirical evidence of some problem to be solved.

B. Should the summary court-martial be abolished?

Same.

XI. POST-CONVICTION REMEDIES

A. Should the Code be amended to provide a comprehensive statutory scheme for collateral attacks on courts-martial similar to the one found in Title 28, U.S. Code, for habeas corpus in Federal District Courts and in state post-conviction relief acts?

Under current law, federal habeas review does not provide a meaningful assessment of whether constitutional error tainted a court-martial conviction. Two factors combine to rob federal habeas review of its importance: a lack of counsel for the petitioners and an extremely narrow scope of review. In addition several other factors compound the issue of post-trial relief: the lack of a standing judiciary where the military judge retains jurisdiction of a case until the case is received by the appellate court, and the lack of a hearing mechanism. The current statutory authority for habeas corpus relief for military accused is 28 U.S.C. " 2241. In *Burns v. Wilson*, 346 U.S. 137 (1953), a majority of the court adopted the position that civil courts on *habeas corpus* could review claims of denials of due process rights to which the military had not given full and fair consideration. Most habeas corpus cases have arisen in the Tenth Circuit because that is the federal jurisdiction over the U. S. Disciplinary Barracks.[30] Until new data comes in, we should assume that the restrictive standard of review in the Tenth Circuit for military cases is the guidepost. In *Lips v. Commandant, U.S. Disciplinary Barracks*, 997 F.2d 808 (10th Cir. 1993), cert. denied, 114 S. Ct. 920 (1994), the initial scope of review was limited to determining whether the claims Lips raised in his federal habeas corpus petition were given full and fair consideration by the military courts. If they were given full and fair consideration, the district court should have denied the petition. In the Tenth Circuit, an issue that is raised before a military court is deemed "fully and fairly considered" even if the military court rejects the claim without explanation. On the other hand, if a claim has not been presented before a military tribunal, absent "cause excusing the procedural default and prejudice resulting from the error," the claim has been waived for federal habeas purposes. Accordingly, a claim not raised before the military courts will not be reviewed, but a claim that was raised before the military courts cannot be the basis for relief. The only escape from this "Catch-22" is if the military courts *expressly* refused to consider an issue. As part of any further study, the Commission should consider the Military Habeas Corpus Reform Act proposed by Dwight H. Sullivan.[31]

B. Should *United States v. DuBay* and its progeny be codified to provide jurisdiction and authority for military judges to entertain collateral attacks on courts-martial?

Should the concept of a standing trial judiciary be instituted with full authority over a case from beginning to docketing at the CCA, *United States v. DuBay* need not be codified. A post-trial 39(a) session could accomplish the same types of inquiries as in *DuBay*.

C. Should judge advocates be authorized by statute to represent military defendants in Federal District Courts and the geographical Courts of Appeals?

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[30] That might change now that the Services appear to be upgrading other facilities. For example, the Army Regional Confinement Facility, Fort Lewis, Washington, has recently been upgraded to a ten-year facility and is now receiving prisoners with lengthy prison sentences.

[31] Captain Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 Mil. L. Rev. 1 (Spring, 1994).

We believe this is fraught with problems. Federal district and appellate court practice is vastly different to that of the military courts. For example, a federal judge is unlikely to tolerate frequent changes of counsel, regardless of the reasons. How will the counsel be admitted to practice.

D. If a comprehensive post conviction relief scheme is adopted in the UCMJ, should that be the exclusive remedy for a military defendant or should habeas corpus in a Federal District Court be available thereafter?

XII. MISCELLANEOUS

A. Should the Code Committee be abolished?

Rather than continue the Code Committee, consideration should be given to establishing a military Judicial Conference, as proposed by General Hodson, which would have the UCMJ review and rulemaking responsibility. Also, serious consideration should be given to the establishment of a formal military bar which is regulated by the Judicial Conference. We commend you to Stephen G. Breyer, Judicial Independence in the U.S. Judicial power over rulemaking is considered a prime attribute of a fair and independent judiciary.

B. Should retired regular officers be eligible for appointment to the United States Court of Appeals for the Armed Forces?

The CAAF is intended to be a civilian court. Note the comment of Judge James Baker, on 1 March 2001 at the retirement of Thomas F. Granahan, Clerk of the Court, regarding the surrender of his reserve officer commission.

C. Should the political balance test for appointees to the United States Court of Appeals for the Armed Forces be repealed?

If the political balance test is an appropriate mechanism to ensure the full independence of the Court, then its continuation is appropriate. However, whether the premise is supported is in doubt.

D. Should there be certification requirements by the Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces for appellate counsel?

There is no such requirement in the federal appellate courts or the courts of most states. Further, such a question should not be considered separate from the question of a Bar of the Court of Appeals for the Armed Forces. *See below.*

E. Should all military judges and military lawyers be required to maintain active status in good standing as a member of a state bar or the District of Columbia Bar?

No other courts in the country permit a lawyer to practice in the court unless they are in active status, are in good standing, and have been admitted. In addition the Equal Opportunity Commission, the Merit Systems Protection Board, and many other Commissions and Boards require a lawyer/judge to be an active member of the bar.

F. Should the Code Committee or the United States Court of Appeals for the Armed Forces be given the additional responsibility of administering a single military bar with uniform standards of professional responsibility, thereby replacing the requirement that military members be admitted to a state bar?

Such a system requires substantial study, including a look at the need for a statutory revision. It seems unlikely that military lawyers would want to give up their active license in a state jurisdiction. For the young lawyer who may leave active duty early they would probably want to retain their state license. For the long term judge advocate, the considerations may well become reciprocity and readmission considerations. Whoever is charged with the professional responsibility function, it should be with the Courts, not The Judge Advocates General. In addition such a practice might add to the transparency the public expects of a profession. While not all of the disciplinary activities of the state and federal regulating arms are public, there is sufficient transparency in the process that members of the public, those affected, can properly evaluate the professional credibility of the bar.

On balance, it seems doubtful that there is substantial benefit to replacing the requirement that military members be admitted in a state.

G. Should the rulemaking contemplated by Article 36 be conducted by a broad-based advisory committee with civilian as well as military membership?

This was an item which BADC submitted as a potential topic, with the following rationale. BADC now submits the rationale for the Record and for the Commission's consideration. BADC has favorably endorsed this as one of General Hodson's 1972 proposals.

Rationale: The federal civilian court rulemaking process has used a judicial conference with advisory committees for years, with the result that the rules are proposed and adopted in a pubic on- the- record process which enables the adoption of carefully considered rules in a process designed not only to result in the most appropriate rules being adopted, but to enhance the prestige of the courts and the public's confidence both in the courts and in their rulemaking process." ABA, Report accompanying Recommendation 100 (adopted Feb. 1997) at 7. The ABA, which proposed an advisory committee and an open and public process for military rulemaking believed that the same benefits would carry over to the military system, as succinctly stated in its conclusion: Both the quality of the resulting military court rules, and the public's confidence in the military justice system, will be enhanced. The military court rulemaking process will then be deserving of the same respect and public confidence presently afforded rules for civilian Federal courts. *Id.* at 12. *See* Kevin J. Barry, *Modernizing The Manual For Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000).

H. Joint Trial and Defense offices

The BADC recommends serious consideration be given to a joint trial and appellate prosecution and defense office. While the argument can be made that nuances in practice between the services make it harder, practice may not in fact prove that out.

a. The Court of Appeals for the Armed Forces has not had any apparent difficulty in applying the Uniform Code of Military Justice, the Manual for Courts-Martial, Service regulations, or federal law to the decision in a particular case regardless of service.

b. Based on their own experiences and the experiences of others reported to them, the Military Law Committee of The BADC, believes that many cases today have multiservice counsel and accuseds. Cases have been heard in Panama, Bosnia, Azores, Italy, and Japan.

I. Should the arrangements for independent investigative support for military defense counsel be made statutory?

There appears to be no good reason why the defense is deprived of adequate resources, to include investigative resources, especially resources afforded them in all civilian jurisdictions. *Compare* 18 U. S. Code ' 3006A.[n] Only in the military does the prosecutor have the ability to control the manner in which the defense investigates and prepares for trial. Only in the military does the prosecutor and convening authority (read U.S. Attorney or Attorney General) have absolute power to grant or deny access to resources prior to referral of charges, and a significant influence over access after referral. Only in the military does the prosecutor have the power to deny witnesses, or at the very least force the defense to justify calling a witness. The military risks creating two types of military accused's. Those who have money and those who don't. (Note: those with the personal resources are more likely to be officers.) Research should be conducted on how many accused's now routinely hire their own investigator, expert, or transcriber, because the prosecutor denies such access.

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[n] Services Other Than Counsel. -

(1) Upon Request. - Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services. 18 U. S. Code ' 3006A(e).

J. Should JAG officers or Law Specialists be required to serve at least one year as trial counsel who litigate a minimum number of contested cases before being assigned as defense counsel, in order to provide more effective assistance to enlisted personnel, who usually cannot afford civilian representation?

Whether myth or reality, there has always been a perception that the new and inexperienced counsel go to defense, while the experienced go to the prosecution. It was so for Senior Judge Everett in the 1950's. *See* Hon. Robinson O. Everett, *The First 50 Years of the Uniform Code of Military Justice: A Personal Perspective*, [2000] FEDERAL LAWYER 28 (NOV.-DEC. 2000). What is clear is that being a prosecutor can make you a better defense counsel *and vice versa*. This is not just a defense counsel issue. But if someone has to lose because of inexperience, it should be the sovereign and not the accused!

K. Should decisions of the Boards for Correction of Military and Naval Records be reviewable by the United States Court of Appeals for the Armed Forces?

There has been much discussion regarding the subject of changing the availability and scope of judicial review of military administrative personnel decisions. The BADC has twice in the past three years sponsored Recommendations which were adopted by the ABA calling for a moratorium on any changes to judicial review of such military personnel decisions until such time as Congress had an opportunity to hold hearings on the entire area, including the current structure and operation of the Boards for Correction of Military and Naval Records. Clearly there is need for an extensive study of these areas.

As pointed out by BADC in the two reports accompanying the ABA Recommendations, two studies were commissioned by the Congress in the 1996 DOD Authorization Act, and accomplished by the Department of Defense. One addressed the Correction Boards, and found them operating acceptably—in some substantial measure because there was a right to seek judicial review. The other addressed the right to judicial review, and recommended substantial limitations on that right—in some substantial measure because the Correction Boards were viewed as operating properly. These two studies were, in a real sense, like the proverbial "two ships passing in the night." Neither study was well grounded, and each reached its conclusions based on invalid assumptions regarding the subject of the other study.

BADC believes that prior to any change to—particularly any limitation or curtailment of—judicial review of military administrative personnel decisions, a serious and well grounded study, conducted by an adequately diverse body, is needed. That study should not, absent compelling reasons fully set forth and justified, recommend any limitation or curtailment on the right currently available to service members and veterans to judicial review in the Court of Federal Claims or in federal district court. Military personnel are the ones who commit themselves to go in harms way to defend fundamental freedoms for the rest of us. There is simply no justification to deny to those military members and veterans the very rights they defend for the rest of us.

Additional Items Suggested for Consideration by BADC but not included in Final List of Topics

Each of the following were items which BADC received from members or advisors and submitted to the Commission as a potential topic, with a rationale. BADC now lists these topics and their rationales for the Record and for the Commission's consideration.

1. Change the current practice which has been interpreted to allow a convening authority to convert a punitive discharge to a period of confinement unless the accused requests or concurs in such an action.

   Rationale: The MCM has always authorized an action in "clemency" to mitigate a harsher penalty to a lesser one. In recent cases, this authority has been used to attempt to convert a BCD or DD to a period of confinement of a year or two years. In some cases, both the accused and the sentencing body (members) clearly believed that *any* period of confinement was a distinctly harsher penalty than the BCD with no confinement which was awarded. *See, e.g., United States v. Frazier*, 51 M.J. 501 (1999). A Manual change will eliminate the appearance of vindictiveness in such cases which now taints the appearance of fairness in the operation of the system. In addition, the job market - and society's views of the military has changed so the imposition of a BCD is no longer a significant impediment to civilian employment, and most service members would rather get a BCD than go to jail. Plain and simple

2. Motion for Judgement of Acquittal.

   After a finding of guilty on any charge or specification announced by the members, a military judge may enter a judgment of acquittal on one or more of the charges and specifications, in the same manner as a federal district court judge acting under Rule 29, Fed. R. Crim. Pro. *And see* UCMJ art. 36, 10 U. S. Code ' 836.

Crozier, Connie, CTR, USCAAF

From: Diane Dufresne [Diane_Dufresne@RID.USCOURTS.GOV]
Sent: Wednesday, December 20, 2000 12:44 PM
To: 'judgecox@earthlink.net'
Subject: 10 U.S.C. 942(b)(4)

~max0002.PCX

Dear Judge Cox:
At the suggestion of General Nelson SCAFL,ABA, I ask that your commission consider my proposal to the Code Committee Uniform Code of Military Justice to study the repeal of 10 U.S.C. § 942(b)(4). As you know, 10 U.S.C. § 942(b)(4) prohibits the appointment of judges to USCAAF who are persons that have retired from the Armed Forces after twenty (20) or more years of active service. Attached is a copy of the statement which I read into the record at the last session.

Frankly, I am unaware of any other statutory provision which pertains to the appointment of Article I or Article III judges that systematically discriminates against those who have retired from military service after serving twenty (20) or more years and who are in fact in civilian life.

<<~max0002.PCX>>

Some Comments to Topics for Consideration
Commission on the 50th Anniversary of the
Uniform Code of Military Justice

I. NEED FOR CONGRESSIONAL REVIEW

No Comments

II. JURISDICTION (IN PERSONAM AND SUBJECT MATTER)

Preliminary Comments

Both types of jurisdiction should, first and foremost, be a function of the availability of other United States Federal Courts of otherwise competent jurisdiction. Within the jurisdiction of such Courts, military jurisdiction should be limited to service-connected offenses. The service connection could be either the nature of the offense or the identity of parties/victims.

A. 1) Only in time of war for offenses which violate strictly military standards or customs and might not, therefore, be cognizable or justiciable in civilian court, e.g. Articles 83-110, 113, 115, 134, or 2) with the consent of the accused.

B. No, based upon the rationale of the introductory comments.

C. See preliminary comments.

D. See preliminary comments.

E. Retirees, yes, to offenses occurring within two years of the actual date of retirement; any longer "sword of Damocles" would unfairly inhibit their return to and integration into civilian life. TDRL no, since they are still only "temporarily" disabled.

F. Article 17 currently permits the President to prescribe regulations to deal with the exercise of joint command jurisdiction over courts-martial.

G. See comments to paragraphs A, B, and F.

III ORGANIZATION OF THE MILITARY JUSTICE SYSTEM

A. CONVENING AUTHORITY

1. a. Removal of the Convening Authority from the process of selecting panel members is desirable from a public confidence perspective. The method by which the potential venire members are nominated will still be subject to critical scrutiny. Using a random, computer generated selection process will eliminate most

Law Offices David Court
Attorney at Law

Kasinostrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301268
David.Court@t-online.de

criticisms. Convening Authorities should be given the power to remove individuals, by name or duty position, from the available data bank. This should reduce the number of challenges (Judge Advocates, Convening Authority aides), and requests for excusals (mission essential TDYs).

b. Using a random, computer generated selection process will enable each accused to be tried by a "new" panel. Potential venire members who have been nominated as prior panel members can be removed from the available data bank. There will be no need to have standing court-martial panels which may be out of date (eliminating the need for vicing orders the day of trial), nor will there be a danger of having panel members who are jaded, bored or anxious to return to their military duty from having had too much court-martial duty.

2. NO! The fundamental basis for military justice is the military and its over-riding need for discipline. The command must be able to decide what offenses are to be tried at court-martial and what offenses are to be dealt with in other ways. Commanders at all levels, to include Convening Authorities, currently have legal advice to help them determine what level of disposition is appropriate for each offense and each accused. Commanders understand the purpose and function of a system of discipline. Commanders need the option of the full range of discipline decisions. Vesting the decision to prosecute in an "independent Court-Martial Command" would necessarily remove the entire chain of command from ALL discipline decisions (except in a non-binding, advisory capacity) since any alleged violation of the UCMJ could, theoretically, be tried by court-martial.

3. See paragraph III/2, supra.

4. No. If the Convening Authority wishes to convene a trial, one of the considerations should be his ability to fund the activity. Someone at some level will have to fund the activity. Convening Authorities are used to having to budget available funds, whether for training or otherwise. There is always another level of command from whom a Convening Authority could "borrow" should he run out of funds budgeted for courts-martial. There are few checks on a Convening Authorities decision to convene a court-martial. Deleting this one could encourage a Red Queen approach which could undermine, rather than strengthen, military justice.

5. There should be no limitation on the clemency power of the Convening Authority. Although not used as often as the appellate courts might surmise given their language in published decisions, it is crucial to the fair administration of justice that corrections to aberrational trial results or punishments can be made short of the formal appellate process.

Law Offices David Court
Attorney at Law

Kasinostrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301268
David.Court@t-online.de

B. ARTICLE 32 INVESTIGATION

1. This would depend entirely upon the scope, the function, the procedures, and the accused's rights in effect at a "preliminary hearing".

2. Witness testimony and objections by either party during any part of an Article 32 hearing should be recorded. Witness testimony should be routinely transcribed verbatim for three purposes: First, to assist the Investigating Officer in making a valid, informed recommendation. Second, to provide both parties with impeachment evidence by prior inconsistent statement at trial, or to provide each party with rehabilitative prior consistent statement evidence at trial. Third, to provide a record from which the military judge can determine whether a government denied witness should be produced.

3. YES, in the absence of additional evidence not available for presentation at the initial hearing and assuming a legally trained investigating officer with some criminal justice experience, perhaps similar to a military magistrate in training, experience and background. The use of field grade officers who have no idea of the gate-keeping function which should be the goal of an Article 32 Investigation (as is now the case in the Army) provides little reliable guidance to the command. Their recommendations are, all too routinely, ignored, if they make any recommendation at all (as opposed to merely checking off the blocks).

4. The only "avenue of appeal" should be the presentation of further evidence to the same investigator in the presence of the accused and counsel within a reasonable time limit (perhaps 72 hours, subject to defense delay). If the government is unable, with the totally relaxed, almost non-existent rules of evidence in effect in an Article 32 hearing, to convince a legally trained investigator that the low threshold of "no probable cause" has been met and overcome, there should be no appeal. This will cause the government to approach an Article 32 hearing as more than a mere rubber stamp that can be ignored if the answer is not what the government representative wants to hear. This will not turn an Article 32 hearing into a mini-trial due to the myriad ways of providing evidence to the investigating officer.

C. JURISDICTION OF COURTS-MARTIAL

1. No comment.

2. a. Pre-trial confinement. Rule for Courts-Martial (RCM) 305(i) should be expanded by a new subparagraph (3) to permit the pre-trial confinee to appeal the decision of the 7-day review decision to a military judge, whose review could be limited to an "abuse of discretion" standard.

Law Offices David Court
Attorney at Law

Kesinostrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301268
David.Court@t-online.de

b. Search warrants. RCM 303 can be expanded to incorporate procedures for obtaining search authorization (other than of installations or pursuant to legitimate Health and Welfare objectives, including seizures for urinalysis testing purposes). The expansion should require that a military magistrate make the determination to authorize a search. If this is accomplished, then a military judge need not be involved, absent a motion to suppress at trial.

c. Request for Witnesses. Initial authority for this should remain with the Convening Authority (see answer to III, A, 4, supra). The military judge is already empowered to "overrule" the Convening Authority [RCM 906(b)(7)].

d. Request for Expert Witnesses. Initial authority for this should remain with the Convening Authority (see answer to III, A, 4, supra). The military judge is already empowered to "overrule" the Convening Authority [RCM 703(d)].

3. If procedures similar to those advocated in III, A, 1, supra are adopted, there will be no need for a military judge to oversee the selection process. The military judge is already empowered to address issues of impropriety in the selection process [RCM 906(b)].

4. Yes. There will never be a chance for a military accused, regardless of rank, to be tried by a jury of his peers for historical and rank-respecting reasons. Permitting an enlisted accused to be tried by a panel consisting of at least one-third enlisted members comes closer to the Constitutional ideal than trial by military judge alone.

5. Yes. One of the reasons enlisted accuseds frequently give for selecting trial by a panel is that they do not want just one person making the decision, believing that more people talking makes for a fairer result. By increasing the size of the panel, there is also an increase in the potential for a variety of viewpoints, perspectives and personal observations. If the pool from which panels are drawn is expanded consistent with the ideas espoused in the response to III, A, 1, supra, an increased size should not be a logistical burden to the command.

D. MILITARY JUDGES, TRIAL AND DEFENSE COUNSEL

Preliminary Comments

All services should develop a litigation track within their respective Judge Advocate departments. Judge Advocates could elect to remain in a litigation oriented duty position throughout their military career. Individuals making that choice would be required to acknowledge certain limitations on

Law Offices David Court
Attorney at Law

Kasinostrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301268
Court@t-online.de

their advancement, e.g., no opportunity to become a Staff Judge Advocate advising a Major Command. Litigation track duty positions could include, trial counsel, defense counsel, immediate supervisor of trial or defense counsel as chief of justice or senior defense counsel, assistant US attorney positions, litigation instructor at the service JA school, contract litigator positions, military magistrate, Article 32 investigating officer, and military judge.

This would foster professionalism and litigation expertise, thus improving the administration of military justice. It should also promote increased respect from the public for the military justice system as a system of individuals dedicated to the fair administration of military justice, not individuals who are fulfilling a (perhaps to the individual) distasteful job on the career ladder.

1. Military Judges should be selected from among those practitioners of military justice, to include but not be limited to Judge Advocates, who have indicated a high degree of knowledge of, and understanding for, the Uniform Code of Military Justice and the Rules for Courts-Martial. Comments concerning possible Military Judge candidates should be sought from at least three currently sitting (or who have recently sat as) military judges before whom the candidate should have practiced. A committee should be established within each service to appoint military judges. If a litigation track exists as urged in the Preliminary Comments, that should be the source for the vast majority of the committee members. Otherwise, the service Judge Advocate General should establish the committee.

2. Yes, if they meet the professional criteria (other than being uniformed) established for the position.

3. a. Yes, and in a fixed geographic location or within a fixed geographic circuit. A fixed term and a fixed location would enhance actual and perceived judicial independence.

   b. Yes. The pay could be pegged to any number of federal or state judiciary positions of similar magnitude, responsibility and importance.

4. RCM 902 shall remain effective and be expanded, by employment contract, to cover any non-uniformed military judge. The service appellate courts should be vested with the oversight responsibility to recommend discipline or removal from office to the service Judge Advocate General. Recommendations for removal shall be binding upon the service Judge Advocate General, subject to appeal to the United States Court of Appeals for the Armed Forces.

Law Offices David Court
Attorney at Law

Kasinostrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301268
David.Court@t-online.de

5. No. There is already (or should be) a civilian involved representing the respective department. The purpose of an additional member of the trial team is (or should be) to present the unique military perspective to the case.

6. In addition to those found in [Strickland v Washington, 466 US 668 (1984)], there should also be a further requirement that at least one member of the defense team (to include a Toledo protected consultant) has been involved in a previously litigated capital case. The litigation could be negotiation from a capital referral and subsequent sentencing phase. If there is such a requirement imposed, it should be understood that defense counsel so qualified should be freely "loaned" between services". Obtaining the necessary expertise within each service would be enhanced by creation of a litigation track (see Preliminary Comments).

7. Yes. If there is consideration of re-appointing a military judge after his or her fixed term expires, the same procedure as suggested in III, D, 1, supra, should be employed, except the requirement for comment from three sitting judges. Confidential comments from counsel practicing before the military judge at issue could be sought or voluntarily submitted.

8. Yes, BUT abusing process would need to be clearly, precisely and unambiguously defined so that it would apply to each side equally. Also, the sanctions available would need to be sufficiently well known to permit fair notice and implementation.

9. See Preliminary Comments. If a litigation track is not established, yes.

IV CRIMES AND OFFENSES

A. No, but they should both be pared down as suggested in the wording of the question.

B. No. First, it would be impossible to draft a sufficiently clearly precise definition for an "acquaintance" as opposed to a stranger. Second, sentencing authorities in each case should make the determination whether such hair-splitting is really a distinction without a difference or not. Finally, philosophically, this is the camel's nose creeping back into the tent of blaming the victim.

C. No comment.

D. Yes, as long as culpability may extend to both sides of the relationship. If the conduct is voluntary and non-coercive, there is no basis in fairness for punishing one half of the relationship and not the other.

Law Offices David Court
Attorney at Law

Kasinostrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301268
David.Court@t-online.de

E. Article 88 should be refined to focus on those individuals who are or could reasonably perceived by objective viewers as being in the chain of command of the utterer.

F. No. Military witnesses can already be charged under various UCMJ Articles (90, 92, 98, 133, 134) for actions amounting to contempt. Properly timed advice to a military witness of these possible consequences should cure any possible contempt problems. If civilians are not subject to UCMJ jurisdiction (see answer II, A, supra), they should not be subject to its contempt authority. As a practical matter, there is always a civilian judiciary with *in personam* jurisdiction over necessary civilian witnesses who can be relied upon to issue subpoenas, and enforce them.

G. Yes, unless the negligence results in death or grievous bodily harm to an adult, or any quantifiable harm, physical or psychological, to a child.

H. No. To do so would be an unnecessary political reaction to offenses which are already covered under the UCMJ (Articles 124, 128, 134).

I. Article 114 should not be repealed, but should be limited to the actual duelling itself. Promoting a duel and Conniving at fighting a duel are each covered elsewhere (solicitation and conspiracy).

J. No. It is presently clearly defined in a way that makes sense to non-judicially trained individuals. Why change it?

K. Yes. Truly consensual sexual activity, in private, between two adults should not be criminalized. If it were to be decriminalized, it would have to be decriminalized for all adults. This means that homosexual as well as heterosexual private, consensual sodomy would be decriminalized. There is no valid disciplinary purpose to be served by continuing to criminalize this behavior in the armed forces.

L. The latter.

V. SENTENCING AND PUNISHMENTS

A. No. Numerous studies have shown that American society wants capital punishment. Removing it from the military "in peace time" would alienate the military justice system from the public. None of the five principle reasons for sentencing offenders would be served by a "peace time" exception to the maximum punishment for three specific offenses.

B. Yes, and the decision is to be made after announcement of findings. The accused could fear that a majority (but not two-thirds) of the court wished to convict him of a greater offense, but had to settle for a lesser included offense to

Law Offices David Court
Attorney at Law

Kaiserstrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301268
E-mail:
David.Court@t-online.de

convict him at all. In that situation, he may wish to be sentenced by a judge who can fairly sentence him for the offense of which he was convicted, not by a panel. He may justifiably fear that some of the panel members, convinced he committed the greater offense, will want to filibuster for an excessive sentence with members who want to get back to duty.

C. No. The accused should retain the right to chose to be sentenced by members of the community of which he is a part, and which has the most right to speak on the issue of an appropriate sentence.

D. No. No set of guidelines can be sufficiently inclusive to be fair to both sides in a contested case. If that is so, an accused should not be penalized when entering a plea of guilty by being required to accept matrix-generated, non-personalized sentencing. Each accused is different. Each offense is different. Each conviction affects each accused, each victim and each community differently. Further, the military justice system is not so bogged down in a deluge of cases as to require less than personalized attention to each case from accusation through referral to trial.

E. No. An adversarial sentencing procedure is the fairest method of setting forth all of the information relevant to a fair, just sentence. There are many reasons for the numbers negotiation inherent in a pre-trial agreement. Elimination of a sentencing proceeding in pre-trial agreement cases would return the Convening Authority to the omnipotent disciplinarian pedestal from which the military justice system has been removing him, and should continue to remove him if the public is to have a sense of trust in military justice.

F. Yes. In time of war, the military has one function, that being to win the war. Any function which can be taken from the military without degrading either the war-fighting mission or the other matter (in this case, the fair, impartial administration of military justice) should be done.

G. Not abolished, but strictly limited consistent with the situs of the trial and logistical considerations.

H. Yes. The more options available to a sentencing authority, the more individualized the punishment can be (see V, D., supra). In this regard, Article 58a should be abolished. There should be no automatic connection between any of the various punishment components.

I. Any sentencing authority, either the military judge or a panel, should have this power, consistent with V, D, and H, supra.

J. No. This is both impractical and unnecessary. It is impractical given the length of some sentences, the remaining time in service uniformed military judges have, and the idea

Law Offices David Court
Attorney at Law

Kasinostrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301268
Email:
d.Court@t-online.de

that military judges should serve for a fixed term (see III, D, 3). There is no benefit to establishing continuing jurisdiction in a specific military judge's chambers given the likelihood that the accused will serve any significant confinement at a facility geographically removed from the situs of the trial.

K. Yes, consistent with V, D, H, and I, supra.

L. No. If the ideas found in V, D, H, I and K, supra are adopted, the range of punishments is adequate for service members who are single, married, sole parent, childless, divorced, adoptive parents or guardians of other family members.

M. No. If Congress wants to be able to punish service members as if in time of war, they can declare one. Anything less than a declared state of war will be too open to interpretation as to what enhanced punishment is applicable at any given time.

N. Yes.

O. Sentencing guidelines should not be adopted for a plethora a reasons (see V, D, supra).

P. No. The reality of military life is that a convicted commissioned officer will not have a future in the service. Since all officers have the authority to issue orders that must be obeyed, it would not enhance the ends of good order and discipline to allow an officer who has violated the UCMJ, and is a convicted felon (or even one convicted of a misdemeanor) to issue orders, the disobedience of which would subject the subordinate to UCMJ action.

VI EVIDENCE

A. No. It may be permitted by MRE 401 and should not be arbitrarily barred. Since every offense requires a finding of some culpable state of mind, the nature and character of the accused may be relevant in assisting the trier of fact in determining whether the government has established beyond a reasonable doubt that the state of mind existed at the time of the alleged offense.

B. Yes, if and when the threshold burden established for admissibility of scientific evidence can be met.

C. No. A thorough and detailed exploration of the accused's reasons for entering a plea of guilty serves to combat an extension of any perceived coercive environment of the military as a whole into the military justice arena.

Law Offices David Court
Attorney at Law

Kaiserstrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301268
E-mail:
David.Court@t-online.de

D. Yes, but only to those offenses an element of which is a military action inconsistent with a pacifistic philosophy.

VII TRIAL PROCESS

A. No. This is a ministerial function better performed by someone other than the military judge. Should a military witness commit an offense while under oath (false swearing, perjury, obstruction of justice) this also keeps the military judge from becoming a witness in that subsequent trial.

B. Yes, subject to prior *voir dire* by the military judge and subject to the control of the military judge.

C. If the Convening Authority continues to detail the panel (see III, A, 1, supra), the accused should be authorized peremptory challenges of up to one third of the panel members who are sworn in (before *voir dire*). The government should be authorized no peremptory challenges since the government already controls the selection of the panel and the government's client has detailed those members whom he wishes to have try the case.

If neither the Convening Authority nor the Staff Judge Advocates office has any meaningful input into the panel selection, then both the accused and the government should have an equal number of peremptory challenges, and that should be more than one.

D. No comment.

E. Yes.

VIII APPEALS

A. 1) Only when an appeal to the Service Court of Appeals has been denied.

2) No, unless another avenue for non-automatic appeals by an accused is created.

B. 1) No. Elimination of the Courts of Appeal would increase the workload of the United States Court of Appeals for the Armed Forces exponentially for no valid reason. Also, each Service has an interest in reviewing the brand of military justice dispensed within it. In theory, this will enable service appellate judges to "clean up their own act" before finishing with a case.

2) No. This will reduce a valid appellate function to a clemency review board function, checking up on Convening Authorities to see if they grant clemency.

Law Offices David Court
Attorney at Law

Kaiserstrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301268
E-mail:
David.Court@t-online.de

C. See comments to III, D, 1, supra.

D. If civilians are allowed to function as trial judges (see comments to III, D. 2, supra), there should be no need to recall anyone to active duty.

E. No comment.

F. The current threshold requirements [RCM 1201(a)] are both appropriate and adequate.

G. The accused currently has the right to withdraw his case from appellate review [RCM 1201(a)(2)(B)]. If permitting him to offer to do so as part of a pre-trial agreement would not be held to violate public policy, such a condition could be incorporated in pre-trial agreements with the same effect.

H. Never by only one judge.

I. How can a fair, just review and decision be rendered unless those rendering the decision are fully conversant with the matters at issue? If certification is the only way to ensure that judges read records before announcing support or opposition to a result, it is a sad day for jurisprudence.

J. No, if that could mean that the accused would likely to return to duty. Even if a mechanism could be established to allow an appellant to be placed on some form of voluntary leave without pay and still be subject to some form to control (bail, parole), when should it be allowed? Every accused thinks his appeal could result in an acquittal or a new trial (and many defense counsel think so, too).

K. Yes, except in cases of automatic review. Appellate attorneys are presumed to be competent and thorough. Failing to assign issues should be seen as tantamount to a concession that there are no issues worthy of the Court's time.

L. Article 67(a) should be amended to require the United States Court of Appeals for the Armed Forces to hear appeals in any case in which the sentence, affirmed by a Service Court of Criminal Appeals includes either death or confinement in excess of 10 years. Confinement in excess of 10 years can only be adjudged by a three-quarter vote of the panel. It has already, therefore, been treated differently at trial and should continue to be treated differently on appeal.

M. No. Appellate Judges must be presumed to know when they require oral argument for issues which they have agreed to hear and review.

N. No. Having a five member panel provides for more diversity of discussion and, hopefully, more uniformity of decision. This, in turn, provides more finality and certainty among the practicing bar.

Law Offices David Court
Attorney at Law

Kasinostrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301268
E-mail:
David.Court@t-online.de

O. Not limited to, but open to. Limiting the membership to retired judge advocates who voluntarily agree to return to active duty could reduce the pool of potential judges such that ANY retired judge advocate (not just those with the best qualifications) would be greeted with open arms in order to maintain the necessary number of appellate judges to keep up with the case load.

P. Yes. Having military appellate judges subject to being rated by military supervisors creates a picture of control over the military appellate judges' authority, independence and neutrality. As a practical matter, what purpose would the ratings serve?

IX. ARTICLE 15 PUNISHMENT

No comments

X. SUMMARY COURTS-MARTIAL

A. (a) No. No valid military discipline purpose will be served by adding this level for punishment. While the actual, immediate punishment meted out at Article 15 is not severe, the undeniable impact on an officer's career makes an Article 15 a severe proceeding. For officers' whose alleged misconduct warrants the possibility of confinement, a General Court-Martial, with the attendant protections of an Article 32 hearing, is appropriate.

(b) No. The closer the potential punishment comes to that possible at a Special Court-Martial, the less the incentive for the enlisted soldier to accept proceedings at a Summary Court-Martial.

B. No. It serves a valid function and fills what would otherwise be a void between Article 15 and Special Court-Martial. It can allow an enlisted person to have a decision made at a relatively low level (not federal court) while allowing that individual to be judged by someone other than his or her commander whose impartiality may be questioned.

XI. POST-CONVICTION REMEDIES

No comments

XII. MISCELLANEOUS

A. No.

B. No. The civilian nature of the United States Court of Appeals for the Armed Forces should not be breached. If it

Law Offices David Court
Attorney at Law

Kaiserstrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301266
Email:
vid.Court@t-online.de

were, there would then be an inevitable balancing test to assure equal or at least balanced representation by each of the services on the Court. That would not enhance the perspective of a military justice system subject to civilian oversight and review.

C. No comment.

D. Not unless those courts believe that certification would improve the character of appellate argument in ways that can not be currently addressed, and only if uniform requirements are established which will also allow civilian practitioners to meet them.

E. Yes, and those qualifications should be incorporated to those found in RCM 502(d)(3) for all trial counsel.

F. No. Military courts currently exercise effective control over those who practice before them.

G. Civilians should be voting members, but not a majority.

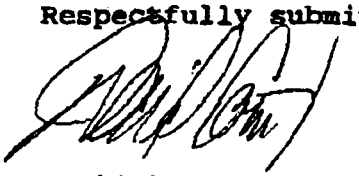
H. Each service should retain its individual appellate and defense bar, consistent with its character and history. Each service has a different mission and each service has a different way of handling discipline within its ranks, administered in accordance with the Uniform Code of Military Justice, the Rules for Courts-Martial, and the service's own sense of pride and history.

I. Yes. Allowing the Staff Judge Advocate to control the investigative support for the defense services is an unfair thumb on the scales of justice. If the defense must apply to the Staff Judge Advocate for support, then defense thoughts, ideas and strategy will be an open book. It may even allow the government to discover new, damaging evidence against an accused based solely upon analysis of defense work product.

J. This should be a goal, not a requirement, given the relative dearth of contested cases.

K. No. These are administrative boards with administrative functions. Oversight should be through administrative channels, rather than judicial channels.

Respectfully submitted,



David Court
Attorney at Law

Law Offices David Court
Attorney at Law

Kaisnostrasse 35
D-65929 Frankfurt/Main
Telephone: 069-301072
Telefax: 069-301268
E-mail:
David.Court@t-online.de

From: "Fidell, Eugene R." <efidell@feldesmantucker.com>
To:
Subject: Commission on the 50th Anniversary of the Uniform Code of Militar
y Justice
Date: Fri, 9 Mar 2001 11:43:57 -0500
X-Mailer: Internet Mail Service (5.5.2650.21)

The following announcement has been released by Judge Walter T. Cox III, Chairman of the Commission on the 50th Anniversary of the Uniform Code of Military Justice. Please note that there will be an opportunity for media questions immediately before the Commission recesses for lunch.

HEARING ANNOUNCEMENT

This is the schedule for the March 13, 2001 hearing to be held in the Jacob Burns Moot Courtroom, The George Washington University School of Law, 2000 H Street, N.W., Washington, D.C. If I have omitted anyone from the speaker list, please forgive me and let me know that you desire to speak. We will continue the hearing late into the afternoon if necessary to accomplish our goals.

SCHEDULE

10:00 Bar Association of the District of Columbia, Jim McKeown, President

10:05 Kevin J. Barry, Bar Association of District of Columbia

1020 Philip D. Cave, Bar Association of District of Columbia

10:30 Dwight H. Sullivan, American Civil Liberties Union of Maryland

10:50 William Galvin, Center of Conscience and War

11:00 J.E. McNeil, Center of Conscience and War

11:10 Jeffrey Trueman, VERPA (Veterans' Equal Protection Advocacy and Publishing, Inc.)

11:30 Robert Brannum, The Bloomingdale Fund

11:45 The Honorable Robinson O. Everett, Center for Law, Ethics and National Security, Duke University School of Law

12:00 Media Availability/Lunch Recess

1:00 Sharra E. Greer and Larry Rowe, Servicemembers Legal Defense Network

1:20 Glenda Ewing, CAMI (Citizens Against Military Injustice) and COVA (United States Council on Veteran Affairs)

1:40 Walter Fitzpatrick, CAMI and individually

2:00 Colonel and Mrs. William Schneider

2:20 Art Sills, representing inmates at U.S. Disciplinary barracks

2:40 Michael Huber

3:00 Susan Archibald

3:20 Shannon Frison, Dwyer & Collora, Boston

3:30 Dusty Pruitt

3:40 David Stanton

4:00 Gerald Baum

On behalf of the 50th Anniversary Commission, I want to thank all of you on this email list for your interest in Military Justice and our work. The work has been an experiment in cyberspace to see if we could involve many citizens who have come into contact with military justice matters in their everyday life as well as involve the professional community that deals with the subject. The 20+ speakers represent almost every point of view that has been expressed. Regrettably, there are no representatives from the "establishment" who have asked to speak at the hearing, but I have received numerous emails from former and current service members who are satisfied with the status quo. All comments as well as all speakers' presentations will be considered by the Commission.

We hope to file a report of our work with the Executive Branch of our government as well as with the Congress in late May or early June. I will notify you when this document is available.

Most sincerely,

Walter T. Cox III
Chairman
Commission on the 50th Anniversary
of the Uniform Code of Military Justice

X-WM-Posted-At: mail.law.gwu.edu; Thu, 8 Mar 01 12:02:14 -0500
From: "Jenkins, John" <jsjnlc@main.nlc.gwu.edu>
Organization: GW Law School
To: walter cox <judgcox@aol.com>,
"Fidell, Eugene R." <efidell@feldesmantucker.com>,
"Kathleen.Duignan" <Kathleen.Duignan@wdc.greenpeace.org>,
Guy Abbate <guyabba678@aol.com>, Mary Cheh <mcheh@main.nlc.gwu.edu>,
John Jenkins <jsjnlc@main.nlc.gwu.edu>, Frank Spinner <lawspin@aol.com>,
Beth Hillman <hillman@crab.rutgers.edu>, Vicki Cox <judgecox@earthlink.net>
Date: Thu, 8 Mar 2001 11:52:42 EST
Subject: Re: March 13
X-Confirm-Reading-To: "Jenkins, John" <jsjnlc@main.nlc.gwu.edu>
X-pmrqc: 1
Priority: normal
X-mailer: Pegasus Mail for Win32 (v3.12)

Date sent: Wed, 07 Mar 2001 10:08:18 -0500
From: Vicki Cox <judgecox@earthlink.net>
To: walter cox <judgcox@aol.com>,
"Fidell, Eugene R." <efidell@feldesmantucker.com>,
"Kathleen.Duignan" <Kathleen.Duignan@wdc.greenpeace.org>,
Guy Abbate <guyabba678@aol.com>, Mary Cheh <mcheh@main.nlc.gwu.edu>,
John Jenkins <jsjnlc@main.nlc.gwu.edu>,
Frank Spinner <lawspin@aol.com>,
Beth Hillman <hillman@crab.rutgers.edu>
Subject: March 13

> I have this date mailed materials to all parties except Frank Spinner
> and Guy Abbate. I do not have a street address for either to send the
> materials via FEDEX.
>
> I will bring their materials with me to Washington.
>
> Dean Jenkins is going to send us an administrative email re parking,
> lunch etc.
>
> Walter
>

Herewith the information on parking lunch, etc.

Professor Mary Cheh and I look forward to welcoming you to the George Washington University Law School. If you drive, you can park in the Marvin Center Garage which is on H Street between 21st and 22nd Streets. We will validate your parking ticket so there is no cost to you. If you are riding the METRO the closest stop on the Blue or Orange line is Farragut West 18th Street exit. The Law School is located at 2000 H Street, NW, corner of H and 20th Streets. The Moot Court Room is on the first floor to the right of the H Street entrance.

We will have lunch at the school in one of our seminar rooms. University Catering turns out an adequate sandwich - but it will never be awarded a four star rating.

If you need to leave your office a contact number, please use 202 994-7484. My office can bring us messages.

We look forward to seeing you on Tuesday, March 13th

John S. Jenkins
Senior Associate Dean for Administrative Affairs
The George Washington University Law School
2000 H Street, NW
Washington, DC 20052
(202) 994-7484
FAX (202) 994-5157
jsjnlc@main.nic.gwu.edu

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND
UNITED STATES COURTHOUSE
PROVIDENCE, RI 02903-1720

CHAMBERS OF
JACOB HAGOPIAN
U.S. MAGISTRATE JUDGE

Chief Judge Crawford and distinguished members of the Code Committee:

I have a statement that I would like to read into the record.

Title 10, Section 942 of the United States Code provides for the qualifications for the judges who sit on the United States Court of Appeals for the Armed Forces. Section 942 specifically provides that each judge shall be appointed from civilian life. Section 942 then limits what is classified as civilian life. It provides, in pertinent part:

> (b)(4) for purposes of appointment of judges to the court, a person retired from the armed forces after 20 or more years of active service (whether or not such person is on the retired list) shall not be considered to be in civilian life.

Discrimination, as defined in Black's Law Dictionary, is "[a] failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored."

With respect to Section 942(b)(4), this statutory provision, in my view, discriminates against those who are in fact qualified for the position of a judge of the court by precluding them from being appointed due to their retired military status. I have no objection to limiting appointment to those who are in 'civilian life'. However, I do object to systematically excluding those who have retired from military service after serving 20 or more years, and who are in fact in civilian life. Systematically excluding qualified people based on this arbitrary, capricious, and unreasonable standard is, just plain and simply, wrong.

Accordingly, I recommend that a subcommittee be appointed to report and recommend to this Code Committee whether this provision should be repealed and if so, take appropriate action to bring about that result.

Subject: FWD: Question to GLBT Vets From the Honorable Judge Walter T. Cox III, Chairman, Cox Commission
Date: Tue, 27 Feb 2001 21:38:26 EST
From: Cliff4Vets@aol.com
To: judgecox@earthlink.net, sldn@sldn.org, belkin@sscf.ucsb.edu, jimdave@rnet.com

New England Gay, Lesbian & Bisexual Veterans, Inc.

John F. Kennedy Station

P O Box 6599

Boston, MA 02114
http://www.glbva.org

Tuesday, 27 February 2001

Dear Honorable Judge Walter T. Cox III, Chairman, Cox Commission:

Thank you for your notice to file our comments for the record of the proceedings of the Cox Commission, and for your inquiry as to if anyone from our organization would desire to make an oral presentation before the Commission on March 13.

To this end, I will forward to our members in Boston, MA, as well as to the president of the National Gay, Lesbian & Bisexual Veterans of America ; the Executive Director of the Servicemembers Legal Defense Network in Washington, DC.; and to Dr. Aaron Belkin, Director, Center for the Study of Sexual Minorities in the Military at the University of California, Santa Barbara-for their consideration. The E mail addresses of the aforementioned organizations will appear in your window for your convenience.

Again, I thank you and the Cox Commission for your attention to our concerns regarding our request to consider the modification or abolition of (ARTICLE 125) of the sodomy laws of the Uniform Code of Military Justice.

Sincerely and Respectfully your,

Cliff Arnesen
President

US Army : (1965-1967)
617-387-2658

****
In a message dated 2/27/01 1:12:38 PM, judgecox@earthlink.net writes:

<< I will file your comments for the record of the proceedings. Does anyone from

your organization desire to make an oral presentation on March 13?
==========

Cliff4Vets@aol.com wrote:

> New England Gay, Lesbian & Bisexual Veterans, Inc.

>

> John F. Kennedy Station

>

> P O Box 6599

>

> Boston, MA 02114

> http://www.glbva.org

>

> Monday, 26 February 2001

>

> THE FOLLOWING STATEMENTS ARE RESPECTFULLY SUBMITTED AS FORMAL TESTIMONY FOR

> THE RECORD OF THE COX COMMISSION'S PUBLIC HEARING ON THE 50TH ANNIVERSARY OF

> THE UNIFORM CODE OF MILITARY JUSTICE:

>

> Dear Honorable Judge Walter T. Cox III, Chairman, Cox Commission at:

> judgecox@earthlink.net

>

> Please know that on Inauguration Day, Saturday, 20 January 2001, six members

> of the New England Gay, Lesbian & Bisexual Veterans, Inc., Boston,

> Massachusetts, mailed a letter to President George W. Bush, seeking relief
in

> several areas relating to the military's inhumane "Don't Ask, Don't Tell,

> Don't Pursue, Don't Harass" policy.

>

> One of the "key areas" we asked President Bush to address was the arbitrary

> and selective enforcement of existing military sodomy laws against bisexual,

> homosexual, heterosexual and transgendered military servicemembers.

>

> To this effect, below this missive, please find the full text of the New

> England Gay, Lesbian & Bisexual Veterans' letter to President Bush, which
> includes our statements in opposition to the existing sodomy laws and
> statutes of the Uniform Code of Military Justice.
>
> In turn, we respectfully request that the Cox Commission panel consider
> recommending the modification or abolition of (ARTICLE 125) of the UCMJ to
> the Pentagon and to President Bush -- Commander in Chief of the US Armed
> Forces -- after the completion of the Commission's public hearings which
> begin on Tuesday, 13 March 2001, in Washington, DC.
>
> On a personal note, I wish the Commission to know that in 1965, at age 17, I
> dropped out of high school and talked my mother into signing a waiver for me
> to join the US Army -in an attempt to escape from a life of physical abusive
> at the hands of a violent alcoholic father and pervasive poverty, as my
> mother was separated from my father and we lived on public welfare in
> Brooklyn, NY.
>
> However, after completing basic training at Fort Dix, New Jersey ; earning a
> (DANTES) military high school GED diploma; and being selected by my
superiors
> to attend "Trainee Leadership School," while still in Advanced Infantry
> Training School, I could no longer live my life as a lie and told my Company
> Commander that I was gay/bisexual.
>
> Thereafter, I was transferred to the stockade and interrogated by agents of
> the Central Intelligence Division (CID), who told me that they did not
> believe my story--maintaining that I was a coward who was lying about my
> sexual orientation in an attempt to get out of being shipped to Vietnam.
>

> Judge Cox, I now break my self imposed silence of the last thirty-four years

> of my fifty-two on God's green Earth, to tell you and the Cox Commission that

> one of the CID Agents told me that they needed "proof" in the form of an "act

> of sodomy" to PROVE that I was gay/bisexual and not lying. I was shocked!

> Shocked to think that the CID would paint me into a corner because they did

> not believe me.

>

> Therefore, due to this ultimatum by the CID, and against my inner will, I had

> no recourse and committed an act of sodomy with another soldier.

>

> Thereupon, I was ordered to see a psychiatrist; sent to a priest for

> counseling; and marched to a court house in public view through Fort

> Dix--while a 17 year old soldier trained a . 45 caliber gun at my back,

> telling me he would "shoot to kill" if I tried to escape.

>

> Arriving at the courthouse, I was Court Martialed and sentenced to a year at

> hard labor in a military prison -- of which I served four months in

> "segregated confinement," as other prisoners had threatened to rape and kill

> me due to my sexual orientation.

>

> Upon completion of my sentence, I was sent back to my AIT unit to face

> further threats of death and humiliation, until the army finally gave me an

> "Undesirable Discharge," based on

> "homosexuality" --as the military makes no distinction between one who is

> homosexual or bisexual!

>

>

> Later, in 1977, I petitioned the army for an upgrade in discharge, which was
> granted and changed from "Undesirable "to "General Under Honorable
> Conditions."
>
> Judge Cox, I relate my personal story of humiliation and betrayal by the
> military and the US government, so that you may know of the pain and
> suffering endured not only by veterans like me, but by thousands of other
> gay, lesbian, bisexual and transgendered servicemembers who have been
> discharged by the military - forcing them to forever live a life of lies to
> family and friends due solely to their sexual orientation(s). A "Scarlet
> Letter," if you will.
>
> Having said this, please know that the 6,000 servicemembers discharged under
> the current inhumane "Don't Ask, Don't Tell, Don't Pursue, Don't Harass"
> military policy, truly wanted to proudly serve our great nation with honor
> and dignity.
>
> Furthermore, I wish you and the Cox Commission to know that countless
> thousands of brave and patriotic gay, lesbian, bisexual and transgendered
> servicemembers, laid down their lives in service to our country, so that we
> as Americans could enjoy the many freedoms afforded to us as a
> Democracy--which so many take for granted!
>
> In sum, despite the inhumane treatment I endured at the hands of my own
> government, I wish all to know that I love my country and would do it all
> again -- with the exception that knowing what I know now I never would have
> "told."
>

> May God Bless America, and her gay, lesbian, bisexual and transgendered
> military servicemembers and veterans.
>
> Sincerely and Respectfully Yours,
>
> Cliff Arnesen
>
> President
>
> Member: Alexander Hamilton, American Legion Post 448
>
> Former Medical Clerk, Department of Veterans Affairs
>
> (1 Of 5) Co-Founders Gay, Lesbian & Bisexual Veterans of America, Inc.
>
> Board Member: National Bisexual Advisory Board
>
> Member: National Blinded Veterans Auxiliary
>
> E Mail: Cliff4vets@aol.com
> 617-387-2658
>
> US Army : (1965-1967)
>
> TO:
> US Senator Edward Kennedy
> US Congressman Joe Moakley
> US Sen. John Kerry
> US Congresswoman Tammy Baldwin

> US Sen. Dianne Feinstein

> US Sen. Barbara Boxer

> US Congressman Richard A. Gephardt: House Democratic Leader

> US Congressman William Delahunt

> US Congressman Lane Evans

> US Congressman John Olver

> Forward to US Congressman Barney Frank

>

> BCC:

> Members: NEW England GLB Veterans Boston, MA

> GLBVA Pres. Jim Donovan & Members

> Commander: American Legion, Alexander Hamilton Post 448

> Servicemembers Legal Defense Network (SLDN)

> DR. Aaron Belkin, Dir. Center for the Study of Sexual Minorities in the

> Military, U. Santa Barbara, CA

> Clinton Fein, Director, Apollomedia Corp.

> Miriam Ben-Shalom, Founder GLB Veterans of America (GLBVA)

> Gay and Lesbian Advocates & Defenders (GLAD)

> Parents & Friends of Lesbians & Gays (PFLAG)

> Members: National Bisexual Advisory Board, BiNet USA & New Hampshire Bisexuals

> Boyce Hinman, Editor, Lambda Letters Project

> Bill Py, Administrator at: Rainbow@RainbowUniverse.com

> Stacy Roth: The LGBT Political Alliance of Western MA

> Penni Ash: Transgender, Co-founder, It's Time, Massachusetts

> Nancy Nagragosi, Director, Transgender Network

> MISC. GLBTH VETERANS

> COL. Grethe Cammermeyer (RET)

> Jeff Epperly, Editor, Bay Windows, Boston, MA

> Fred Kuhr, Editor, InNewsweekly, Boston, MA

> Mark koerber, CEO, Huddlestone online, Spain

> Doret Kollerer, Publisher North Coast Xpress, CA

> Ed LeMay, TV Producer, Massasoiet Community College, Brockton, MA

> Lisa Neff, Publisher, Chicago Free Press

> Marc Wolf, Producer, "Another American Asking and Telling"

> Renowned Author, Patricia Nell Warren

> Rev. Troy Perry, Founder, Metropolitan Community Church (MCC)

> National Gay & Lesbian Task Force (NGLTF)

> LT. Steve May, Arizona State Legislature

>

> ==========

>

> COPY OF ORIGINAL LETTERTO PRESIDENT GEORGE W. BUSH:

>

> New England Gay, Lesbian & Bisexual Veterans, Inc.

> John F. Kennedy Station

> P O Box 6599

> Boston, MA 02114

> http://www.glbva.org

>

> Inauguration Day: Saturday, January 20, 2001

>

> President George W. Bush

> The White House

> 1600 Pennsylvania Avenue NW

> Washington, DC 20500

>

> Military Justice (UCMJ) laws should be updated, at a yet unscheduled public

> hearing to be held in the spring of 2001. The new panel is called the Cox

> Commission after its chairman, Walter T. Cox, III, who, until last year, was

> chief judge of the U.S. Court of Appeals for the Armed Forces.

>

> We have written to Judge Cox regarding the arbitrary and selective

> enforcement of the (UCMJ) sodomy laws against GLBT servicemembers, requesting

> that he and the Cox Commission panel consider modifying or abolishing the

> UCMJ sodomy laws when the Commission meets in the spring. In response to our

> letter, Chairman, Walter T. Cox III replied with the following comment:

>

> In a message dated 12/29/00 8:05:30 AM, judgecox@earthlink.net writes:

>

> "We will give your views careful consideration. Thank you for your interest

> in the project."

>

> Thus, Mr. President, we wish for you to recommend the modification or

> abolition of Article 125 of the (UCMJ) sodomy laws to Judge Cox, the Cox

> Commission, the Pentagon and the Department of Defense.

>

> Also, we strongly urge you to call upon your Secretary of the Department of

> Veterans Affairs, to make expeditious and compassionate improvements in the

> treatment of veterans with HIV and AIDS at Veterans Administration hospi tals.

>

> (2) Vigorously prosecute all military superiors for any and all violations of

> the guidelines of the inhumane "Don't Ask, Don't Tell, Don't Pursue, Don't

> Dear President George W. Bush:

>

> As homosexual, bisexual, heterosexual, and transgendered military veterans,

> we write with utmost urgency to plead that you consider granting relief to

> homosexual, bisexual, heterosexual, and transgendered servicemembers and

> veterans who have been victimized and discharged from the US Armed Forces due

> to their actual or perceived sexual orientations.

>

> Since the current "Don't Ask, Don't Tell, Don't Pursue, Don't Harass"

> military policy has been codified into law by the US Congress -- and can only

> be countermanded by the U.S. Supreme Court or majority vote of the U.S.

> Congress -- we respectfully ask that you consider the following requests to

> grant the aforementioned relief:

>

> (1) As Commander in Chief of the U.S. Armed Forces, send a clear and forceful

> message to the Pentagon and military superiors, that they are to refrain from

> arbitrarily applying the sodomy laws of the Uniform Code of Military Justice

> (Article 125) against gay, lesbian, bisexual and transgendered servicemembers

> -- which act in many cases as the lynch-pin for discharge.

>

> The truth is, the preponderance of military evidence makes it quite clear

> that these same sodomy statutes are rarely enforced against heterosexual

> servicemembers.

>

> To this end, the December 21, 2000, edition of the Army Times reports that a

> new, independent panel will examine whether the 50 - year-old Uniform Code of

> Harass" military policy -- including murder!

>

> Mr. President, during the seven years that this inhumane policy has been in

> effect, not one superior officer or non commissioned officer has been

> criminally prosecuted for blatant violations of the guidelines of the policy.

>

> Violations which include superiors not held accountable on their watch for:

> the brutal murders of U.S. Navy Seaman Allen Schindler and U.S. Army PFC.

> Barry Winchell; the attempt by right-wing extremists in the military's

> (NIS/NCIS) to frame even heterosexual sailors- claiming they were gay- for

> the massive explosion aboard the USS Iowa on APRIL 19, 1989 which killed 47

> sailors; and the illegal procurement by Naval Intelligence which obtained

> confidential information from America Online on former Navy veteran Tim

> McVeigh --without a legal court order.

>

> (3) Direct the Pentagon and Department of Defense to review and upgrade to

> "Honorable," ALL less-than-honorable discharges given to bisexual,

> homosexual, lesbian, transgendered, and "accused" heterosexual

> servicemembers. Also, review of these discharges should be retroactive to

> include all GLBTH veterans who have ever served in the US Armed Forces; and a

> program should be established to render outreach to those veterans affected.

>

> (4) Put an end to efforts by the military to seek recoupment of expenses for

> training from servicemembers who are discharged for being gay, lesbian,

> bisexual and transgendered.

>

> (5) Strongly urge the U.S. Congress to enact a "Hate Crimes Act" to protect

> the lives of those who are assaulted, maimed and murdered due to their race,

> ethnicity, gender, religion or sexual orientation.

>

> To this end, we need not look for further proof nor justification of the

> necessity for a "Hate Crimes Act", when we recall the brutal murders of:

> African American, James Byrd, dragged to death by three white men while

> chained to a pickup truck for no other reason than the color of his skin;

> Matthew Shepard, entrapped, pistol whipped, hung on a fence, and viscously

> murdered by two homophobic teenage thugs because he was gay; and the brutal

> murders of U.S. Navy Seaman Allen Schindler in Sasebo, Japan, on October 27,

> 1992, and of U.S. Army PFC. Barry Winchell at Fort Campbell, Kentucky, on

> Monday, July 5, 1999 - both murdered in cold blood by their fellow

> servicemembers due to their actual or perceived sexual orientations.

>

> Thus, Mr. President, this baseless policy--codified into law by the U.S.

> Congress and placed into effect on February 28, 1994 --is directly

> responsible for the pervasive, hostile atmosphere which led to the brutal
and

> cowardly murders of PFC. Barry Winchell and Seaman Allen Schindler; and has

> caused the discharge of approximately 6,000 servicemembers due solely to

> their sexual orientations, costing in excess of a quarter billion dollars to

> American taxpayers.

>

> However, the cost in terms of human suffering to the individuals discharged,

> their families, friends, loved ones, and our society -- is incalculable!

>

> Also, the inhumane "Don't Ask, Don't Tell, Don't Pursue, Don't Harass"

> military poli

Subject: Comments on revision of UCMJ
Date: Sun, 25 Feb 2001 18:15:42 EST
From: RevPru8@aol.com
To: Judgecox@earthlink.net

Dear Judge Cox,

My name is Dusty Pruitt of the legal case Pruitt v. Sec. of Defense. As you

may know, I am keenly interested in the abolition of the "don't ask, don't tell" policy, and more importantly, the abolition of outmoded sexual articles
concerning consenting adult sex in the UCMJ. Prior to the Clinton "don't ask, don't tell", few gay people were prosecuted under the UCMJ sodomy article. Now that "don't ask, don't tell is in, many gays are prosecuted, and to be fair, commanders are also prosecuting heterosexuals under the adultery laws. Both laws are anachronisms that hark back to another time in

the sexual history of America, before the sexual revolution. Both need to be
changed as a result of as your inquiry states, "changing standards of sexuality/privacy. Below are my comments on specific questions asked about revising the UCMJ:

C. Should Congress enact a modern criminal sexual misconduct statute similar

to the Model Penal Code and repeal the current statutes on rape and sodomy?

I am opposed to any statute criminalizing consensual sexual acts between adults which do not directly affect the chain of command; i.e. acts which do

not happen as a result of sexual harrassment in a superior-subordinate relationship. Why make criminals out of otherwise law-abiding military members? It is a waste of good talent and manpower.

K. Should consensual sodomy be decriminalized?

Absolutely. This article, while technically applying to both straights and gays, is routinely violated and tolerated when participated in by heterosexuals (oral and anal sex, particularly oral sex) and is selectively applied almost exclusively to homosexuals. Extremely discriminatory and were
everyone in the military who had participated in this definition of "sodomy"

to be prosecuted, I daresay there would be few soldiers, sailors, airmen or marines left and we probably wouldn't want the ones who WERE left, so uptight
would they be!

L. Should adultery be eliminated as an offense, or in the alternative, should
it be codified so that it is only a crime under circumstances that directly affect â€œgood order and disciplineâ€□? Adultery and all sexual offenses should be codified under sexual misconduct so that it is only a crime under circumstances outlined above.

Thanks for the chance to comment,

United States Council on Veterans Affairs

USCOVA.ORG

Official Response and Summary on the "Topics for Consideration" promulgated by the Commission on the 50th Anniversary of the UCMJ (Uniform Code of Military Justice), W.T. Cox III, Chairman

Submitted By Glenda Ewing of CAMI (Citizens Against Military Injustice) on behalf of USCOVA, Inc., to be made part of the official record

March 13th, 2001

United States Council on Veterans Affairs

449 Compo Ave., Las Vegas, Nevada 89123
Ph: 702-269-7583 Fax: 702-269-9214
Website: www.uscova.org Email: ceo@uscova.org

From: The United States Council on Veterans Affairs (USCOVA)

To: The Commission on the 50th Anniversary of the Uniform Code of Military Justice
Judge Walter T. Cox, III, Presiding

Subj: Topics for Consideration, Response to

I. Need for Congressional Review

A. Yes, changes since the establishment of the UCMJ 50 years ago do warrant a complete Congressional overhaul of the system.

B. All of items 1-17 warrant a need for revisiting the Code.

C. Vietnam has shown us that during the heat of armed conflict, all the books are thrown out the window making fertile ground for selective prosecutions. When the fog of war sets in a new code begins to emerge to handle situations in the field. Completely revamping the UCMJ will do little to change this.

II. Jurisdiction (In Personam and Subject Matter)

A. Civilians should never be subject to court-martial jurisdiction. To do so would only expand the numbers of abuses at the hands of self-serving military commanders.

B. NO! There should not be exclusive jurisdiction over military members for all crimes, state, federal and military. Civilian authorities are much better equipped to handle domestic abuse issues and child molesters, for example, than military units who either go way overboard in sentencing or, sadly, look the other way allowing the abuses to continue. For real justice to preside, steps must be taken to remove the power from the military good old boy network.

C. YES! Peacetime should limit jurisdiction to deter abuses by military commanders.

D. Only civilian authorities should handle death penalty cases. Only the People of the United States should have the power to hand down a death sentence.

E. YES but!!!!! Officer should not be allowed to retire to avoid prosecution. The only reason General David Hale was brought out of retirement to be prosecuted is because of the tenaciousness of a Congressional Representative. Limiting jurisdiction is fine but do not give flag ranking officers a safer haven then they already enjoy from lawful accountability.

F. YES! Article 17 should be revised.

G. YES! Articles 1 and 2 of the UCMJ should be reevaluated in light of increased command authority.

III. Organization of the Military Justice System

A. Convening Authority

1. YES! Something needs to be done to correct the chronic problem of "unlawful command influence" which is, in our opinion rampant throughout the military and ensures a nearly perfect conviction rate. Random selection may help. We also think that half of the jury should be civilians who are not DOD employees to lend reason to the determination of guilt or innocence and to the sentencing phase.
2. YES! An independent Court-Martial Command with a "district attorney" type of structure may inject more fairness into the system provided that every effort is made to ensure independence!!!!
3. We have trouble with "pre-trial agreements." We know that without them our civilian system of justice would come to a screeching halt. We also know that more truth gets out in a full-blown court proceeding. The only way to ensure true justice is to get the truth out. This includes the truth about the application of regulations within the military unit from which the accused was attached.
4. YES! Centralized funding is an important step to give the accused a more equal standing before the court.
5. Clemency is something that is rarely used by convening authorities. Limiting clemency powers serves no purpose.

B. Article 32 Investigations

1. YES! They should be substituted for a preliminary hearing.
2. YES! It's only fair to provide both parties with a transcript of trial even if it's only a preliminary trial like an Article 32 investigation.
3. YES! "no probable cause" should bar subsequent prosecution and act as a preventative measure against a convening authority who seeks a conviction and not the truth.
4. NONE! Or I believe appeal rights should flow consistent with civilian doctrine.

C. Jurisdiction of Courts-Martial

1. YES! A standing court makes sense. The change from present day practice would help to streamline the system.
2. Military judges should be civilian judges with a minimum of 120 days of active service in any of the branches of the armed forces. Then they should be given the power to rule on all requests.
3. YES! Judges should oversee the jury commission in the selection of court members provided the above is true. Taking the administration of this task from the staff JAG and the convening authority will take some of the manipulation out of the system by the

convening authority and battle against (at least a little bit) the chronic problem on unlawful command influence.

4. In keeping with being tried by a "jury of your peers" we recommend the entire jury be made up of enlisted personnel or (one third being civilian with the balance being enlisted).
5. Special Courts-Martial should be eliminated and the number of jurors of a General Courts-martial be increased to nine with one third being civilian.
6. YES! Capital cases should have a minimum of 12 members with one third being civilian.

D. Military Judges, Trial and Defense Counsel

1. Military Judges should be selected by the Federal District Courts
2. YES! YES! YES! They not only should civilians be "permitted" but they should be required as long as they have at least 120 days of active military service.
3. YES! Anything to remove a judge from the thumb of the military is a good thing
4. A judicial review committee convened by the Federal District Courts should be empowered to remove military Judges.
5. YES! Civilians should be allowed to serve as trial counsels as well as Asst. US Attorneys and DOJ attorneys
6. YES! Standards are important.
7. YES! Allowing supervisors to rate military trial judges only tends to corrupt the system by placing unneeded and unwanted pressure on trial judges to achieve a certain "success" rate as viewed by others. This introduces yet another dynamic into the courtroom which should be eliminated.
8. YES! There must be some type of forceful, effective and corrective action for those who abuse the process. Abuse of the process is to interfere with "due process" and clearly should not be allowed.
9. YES! There should be a separate trial defense service that is required by statute for each service.

IV. CRIMES AND OFFENSES

A. YES! It is vitally important to lay out the specific infraction/violation and break down the elements of the crime. Having a "catchall" statute, which can be bent, and changed or skewed, as the government desires is wrong. These statutes have long favored the government's cases and gave the government the opportunity to conduct "charge loading." The juries many times have adopted an attitude that there were so many charges, he must be guilty of something. Saying that an individual's actions were "service discrediting" or "conduct unbecoming" only makes the charge sheet two pages instead of one and fuels the jury psychological reaction of, he must be guilty of something.

B. NO! Rape is rape and if the elements of the crime are proven, then whether it's an acquaintance or total stranger, punishment should be the same.

C. YES! Current statutes on rape and sodomy are archaic and should be replaced with a modern criminal sexual misconduct statute that more clearly reflects the changes in American society.

D. YES! Without question, Congress must enact legislation to correct the ambiguities. A member of our organization was dishonorably discharged for 1 count of fraternization and 1 count of improperly submitting a $75.51 travel claim that he never receive any money from. He was

selected for promotion to lieutenant commander and was in the active reserves. This issue really hits home with our organization.

E. YES! Article 88 must be repealed. It harks back to John Paul Jones and the days when military members were not allowed to vote.

F. YES! Military courts need to mirror wherever and whenever possible the courts that preside over our population. Article 46 should mirror the civilian courts.

G. YES! Offenses based on a simple negligence element should be deleted from the Code.

H. YES! Congress should enact a punitive article prohibiting not only child neglect and abuse but also spousal abuse that are the military's dirty little secret. And commanders who are made aware of the abuses who do not take action should they themselves be held accountable in a court of law.

I. YES! Dueling should be repealed from the Code.

J. YES! The definition of grievous bodily harm under Article 128 should be revised to mirror the civilian courts definition.

K. YES! Sodomy should be decriminalized. This is yet another archaic law that has got to go. This is nothing but a sword for the commander who is also a religious fundamentalist to harm military members whose lifestyle or sexual habits he finds distasteful. It has become like fraternization, only a law they enforce when they want to.

L. Adultery should be completely removed from the Code. If something is service discrediting, military commanders have more than enough administrative power to deal with the problem. Most of these issues only affect the "good order and discipline" of a unit because commanders do not know how to address the problem. The first thing they want to do is pick up the code and court-martial someone because of their own inability to deal with issues that, in many cases, do not adversely affect the "good order and discipline" of the unit. We know from experience that adultery only has been applied to junior officers and not to flag ranking officers.

V. SENTENCING AND PUNISHMENTS

A. YES! Capital punishment should be eliminated for peacetime offenses.

B. YES! All too often we have heard of sentences that are far to harsh because the jurors who are hand picked by the convening authority and who may have felt pressured by the convening authority handed down sentences that were extremely harsh because that's what they thought the convening authority wanted.

C. YES! For the reasons stated in "B." above, member sentencing should be abolished.

D. YES! Sentencing guidelines should be adopted in order to eliminate the need for a contested sentencing proceeding.

E. YES! Pre-trial agreements should be binding on <u>both</u> parties which would eliminate the need for a sentencing hearing.

F. YES! Sentencing either in war or peace should be by judge alone (except in capital cases) to battle against the severe problem of over-sentencing. For nearly the same offense, a civilian will receive 3-5 years and the military man or woman will receive 40-50 years. Over-sentencing is a severe problem that must be addressed.

G. YES! The requirement to produce witnesses for sentencing proceedings in time of war should be abolished.

H. Absolutely YES! The military must and should mirror the civilian court system especially in the application of alternative sentences designed to specifically address the nature of the "crime."

I. YES! A military judge should have the authority to suspend a sentence and adjudge a probationary sentence.

J. YES! The military judge should have jurisdiction over the accused until the sentence has been served.

K. YES! Many times the real victims of the man or woman who is convicted and thrown out of the service are his or her children. In one of our cases, a Navy lieutenant received a dishonorable discharge for his affair with an enlisted woman while he was separated from his wife and two children. The Navy's decision cast not only the lieutenant into poverty but the soon to be x-wife and both his children. A single count of fraternization is considered a felony conviction and the airlines refused to put his aviation talents to work saying the airline insurance carriers would not allow them to put a convicted felon in the cockpit. If a portion of him military benefits were available for the x-wife to attach and perhaps in recognition of 14 years of flawless naval service with the exception of a lapse in judgment late one night as a naval reservist, much needless suffering could have been alleviated.

L. YES, YES and YES! Based on the reasons stated in item "K" above.

M. NO! If the Congress of the United States has not the will or courage to declare war before engaging members of the United States military in mortal combat. Then this should not be changed. Congress needs to ask themselves why are we sending so many people into battle and not declaring war?

N. YES! In the aforementioned lieutenant's case above (item "K") his dishonorable discharge is for life and a life sentence, for a single count of fraternization, is simply wrong.

O. The answer to this is unclear but, the issue needs to be addressed and debated.

P. YES! Anything to make sentencing more equitable USCOVA is in favor of. The practice of allowing flag ranking officers to retire to avoid prosecution is wrong.

VI. EVIDENCE

A. YES! This has no place in the finding's phase of a trial.

B. NO! It is yet another instrument which can be manipulated to render a desired result.

C. YES! Wherever and whenever possible, the military judicial system should mirror civilian justice in an effort to eliminate manipulations of the system to produce a desired result.

D. YES! Deeply held beliefs such as conscientious objections are and should be a legitimate defense.

VII. TRIAL PROCESS

A. YES! If the military judge administers the witness oath, the tone of the trial is set as to the seriousness of the proceeding.

B. YES! *Voir dire* of court members by counsel should be a matter of right.

C. YES! Anything that would make the proceeding fairer and less likely to be manipulated is a positive thing. More peremptory challenge can only serve to clean up the court better before the trial of the merits begins.

D. YES! Again, if this is successfully being used in the civilian court system – then so to should it be used in the military court system.

E. YES!

VIII. APPEALS

A. YES! This single act alone may tend to battle against the "rubber-stamping" effect to all to often allows for over-sentenced individuals to have very little recourse.

B. YES! We vote for complete abolition of the Court of Criminal Appeals.

C. (See item "B" above)

D. YES! If not abolished, judges should be able to serve without being recalled to active duty.

E. We believe the Court of Criminal Appeals should be abolished.

F. YES! If the Court of Criminal Appeals is not abolished.

G. YES! If the Court of Criminal Appeals is not abolished.

H. NO! If the Court of Criminal Appeals is not abolished.

I. YES! We have heard horror stories that judges have rendered a decision without reading the entire record of trial. This, again, is predicated on the fact that the aforementioned appeals court is not abolished.

J. YES! Without question!

K. YES! We believe that such a move would help to move things along so other cases with a legitimate basis for appeal could be examined more thoroughly and carefully.

L. YES! This action would hopefully preclude serious judicial mistakes and abridgments of true justice.

M. YES! Oral arguments will allow the full force of matters in mitigation, extenuation and aggravation to visit the court with greater intensity and allow for a better understanding of the situation before the court.

N. YES!

O. NO!

P. YES! The rating of judges places influence upon the court to offer a certain desired decision and is very wrong. It should be abolished.

IX. ARTICLE 15 PUNISHMENT

A. Amended Yes! We believe item #4 is the way to go by creating a military magistrate with the power to adjudicate more serious but albeit minor allegations of misconduct referred to the magistrate by the accused's commander. The magistrate should be a civilian who has served in the jag core for at least one tour of duty. It is vitally important to remove the entire military structure and inherent influences from the judicial branch of the military as much as possible. Then the judge can render the decision that is geared toward justice instead of self-aggrandizement or career preservation.

B. YES! Providing many other changes occur to allow for justice to be handed down free of encumbrances and influences that end up in over-sentences and those convicted that are actually innocent. People who simply have the wrong politics or who blow the whistle on their commanders.

C. YES! If not repealed, it should be extended to personnel of unified commands.

D. YES! This is long over due. In an effort to preserve the aura of the old wooden ship Navies, our country has allowed our own Navy to preserve sacred "traditions" that are long outdated and should have been tossed out a century ago. Personal experiences of the members of our Board of Directors say the tradition of "bread and water" sentences have very little effect and is all for show.

X. SUMMARY COURTS-MARTIAL

A. Summary Courts-Martial should be completely abolished.

XI. POST- CONVICTION REMEDIES

A. YES! We believe that every effort to make the military court system similar to the civilian system is a good thing. A comprehensive statutory scheme for collateral attacks as those found in Title 28, U.S. Code, for habeas corpus in Federal District Courts and in state post-conviction relief acts --- should be adopted.

B. We are unfamiliar with United States v. Dubay and therefore cannot comment.

C. YES! Such authorization will allow for continuity of defense if needed.

D. Habeas corpus should be available as in Federal District Courts.

XII. MISCELLANEOUS

A. YES! If it has been proven to be ineffective in improving the military judicial system by making the entire system more credible.

B. YES! Retired regular or reserve officers should be eligible.

C. YES! It does not seem to work anyway.

D. YES! There should be certification requirements

E. YES! If they are found to be guilty or suspected of judicial misconduct and the military refuses to take action, then the victim can have the right to submit a case of judicial misconduct to the state in which credentials are held.

F. If this method works better to keep the officers of the court from committing frequent occurrences of misconduct, then YES.

G. YES! A "broad-based" advisory committee with civilian membership may help.

H. We believe there should be a consolidated defense service for all services with lawyers moved frequently from one station to another much in the same way the FBI will move agents frequently to avoid the cronyism that begins to occur in any community. If the military defense core could be formed into a group immune from the normal influences of each service; this would be the best setting for an unbiased court. We like the way the United States Air Force security team is not under the thumb of the base commander. Having the Naval Investigative Service under the thumb of the Chief of Naval Operations has lead up to one cover-up after another.

I. YES! But the key there is "INDEPENDENT"

J. YES! Anything to allow for a viable defense.

K. YES! It goes to the old saying, "who's policing the police?"

XIII. SUMMARY

As with other similar organizations dedicated to making the military judicial system equal and fair, USCOVA feels the most serious problem confronting the military judicial system is the handpicking of the juries by the convening authority, unlawful command influence and the tendency of military juries to over-sentence the accused. The present practice of using a jury pool of those officers in the command of the convening authority is a recipe for victory for the government and disaster for the accused. With a mere wisp of a pen, the convening authority can destroy an officer's career on his fitness reports (work performance evaluations). The structure and statutes of the military

judicial system create a favorable atmosphere for unlawful command influence on handpicked juries. Command influence in any form is unlawful and is rampant throughout the military. Unfortunately, it's very difficult to prove because the accused has no investigative force of his/her own. But, those who have had any occasion to witness the military judicial system in action know, without a doubt, it does exist. A "judicial" system that boasts of a 95 to 98 percent conviction rate would certainly suggest a bias in favor of the government and that unlawful command influence certainly does indeed exist. It comes in many forms; both subtle and direct. Most of the time it's projected through an emissary of the convening authority. Example: *"You're on the jury aren't you? The admiral says you have a great career going; don't blow it now."* No matter what the outcome of the trial, if command influence were suspected, who in the world would launch an investigation? Even with the strongest of suspicions that jurors were pressured by the command, seldom, if ever, does anyone launch an investigation into the matter.

Over-sentencing of violators is a result of the other two problems; handpicking juries and unlawful command influence. All too often, military members who were charged with crimes similar to those found in the civilian sector (unlike "fraternization" or "missing ships movement" for which there is no civilian equivalent) receive sentences that are much more severe. Military leaders are proud of this fact, implying that violators in the military actually get a more deserving punishment. In other words, it's the civilian sector that is messed up, not us!

One Navy lieutenant who was court-martialed said, when he checked aboard the base where he was to ultimately lose his military career, he went to the bank to open a new bank account. The bank teller took one look at his name and said, "You're the guy they're all talking about." Apparently, the base had been alerted of his arrival. Military and civilian workers alike all knew that a lieutenant who "fraternized" was to be tried at a general court-martial and that the admiral (convening authority) clearly desired a conviction. If the Cox Commission addresses anything else, the problems of handpicked juries, command influence and over-sentencing should be a top priority.

Non-prosecutions are also a serious problem that degrades the credibility of the military judicial system. In an effort to maintain a very high level of credibility in the eyes of the American public there is an unwritten law of allowing flag-ranking military officers to avoid prosecution if they opt for early retirement. Such a practice is terribly wrong and flies in the face of real justice, and sadly, has been occurring without impunity for many years. The law of the land should not be for sale; even if the price results in a public relations embarrassment. The tactics to avoid accountability in a court of law are as varied as the numbers of admirals and generals who have dodged the judicial bullet. The most effective tactic is to prevent the investigation from even being initiated and, if started, influence it's outcome by strategically placing friends of the accused in a position to influence the investigation for the purpose of yielding a desired conclusion. A witness can tell if the investigator is seeking the truth, the whole truth and nothing but the truth or if the questions are tailored to illicit a desired result.

USCOVA believes that military personnel should be held to civilian standards of justice; evidence, due process and conduct. Military personnel should be allowed to have civilian counsel at public expense. We believe that bearing false witness should never be construed as in the "line of duty" and that damages should be paid by the perpetrator and not by the treasury. This goes to the heart of the main problem, which prevents real accountability; the Feres Doctrine. Even though the Feres Doctrine is not before the Commission, it must be mentioned as it, has since it's adoption, prevented military personnel from holding the military accountable in a civilian court of law for investigations and convictions that were nothing but a sham. If money is the root of all evil, then, the Feres Doctrine is the root of all that's that is wrong with military justice.

Our organization tracks the problems of accountability in the American military. Over the years we have kept watch as one admiral and general after another was allowed the retirement option to avoid accountability while junior ranking military personnel feel the full brunt of the military judicial sword. We submit for the record, our web site (www.uscova.org) with particular attention called to the segment known as the "Wall of Shame" (The Good, The Bad and The Ugly). Our mission is to educate the American People who are concerned about the fairness and viability of the military judicial system.

USCOVA was established after Chief Petty Officer, Michael Tufariello, was whisked away to a military mental hospital by his commanding officer in an effort to hide his own dubious, and possibly, criminal misconduct. Tufariello testified before a House sub-committee in an effort to pass legislation to prevent military psychiatric wards from being used as a secret military judicial system where all rights are suspended. This is done to effectively neutralize a potential whistleblower and enables military commanders to completely bypass the military judicial system. We believe that if the military judicial system allows commanders the option of bypassing it completely, then, the system itself is badly flawed. Commanders who have been caught using psychiatric examinations to undermine the credibility of the accuser have never been prosecuted or even investigated in most cases. Moreover, USCOVA is continually amazed at how many military physicians are attacked by commanders who illegally use psychiatric examination to eliminate someone who threatens to expose their misconduct. And, even though a law has been passed to prevent this type of retribution, the military has been less than enthusiastic about informing people of their rights under the law or enforcing the law; a law they (the senior echelons of the various military branches) do not agree with.

USCOVA feels very strongly that some statutes in the UCMJ (Uniform Code of Military Justice) should be abolished or removed from the criminal category. Adultery should be removed from the code. Fraternization should be removed from the code as military commanders have more than enough administrative power to deal with any threat to good order and discipline of their unit. Receiving two years at hard labor and a dishonorable discharge for making love to a woman hardly makes any sense. Something of this nature that bears no malice and has such a harsh sentence is truly a travesty of justice especially when so many military commanders commit similar offenses with complete immunity from the law. Sodomy, Dueling and a punishment of "bread and water" should also be abolished.

There will be those who will lobby hard to keep things as they are and maintain the status quo. They will say that all those who were court-martialed and found guilty, were in fact, guilty and got what they deserved. They will say the UCMJ has worked fine for 50 years and it should not be changed at all. And the numbers of those making such a case in favor of leaving the UCMJ alone will outnumber those of us who believe the system is terribly flawed by 100 to 1. American history is littered with similar cases. In the years leading up to the Revolutionary war, many colonists were loyal British subjects and saw no problem with taxation without representation. They wanted to leave things just as they were. Until three civil rights workers were murdered in Mississippi, America didn't really think we had any kind of inequality. Our nation was content with leaving things as they were. If a hundred wolves went to dinner with one cow and ate the cow; then you would have 100 wolves that would tell you "tonight, dinner was pretty good." The cow, of course, would have a different opinion.

It all depends on what end of the spear you find yourself. We believe the UCMJ has been subjugated by political expediency and a strong desire for the military to protect itself first rather than seeking and divulging the truth first. This was clearly shown recently on February 9, 2001. A United

States submarine USS Greenville struck the Ehime Maru a Japanese fishing and training vessel off the coast of Hawaii resulting in nine dead, four of whom where high school students. For nearly two weeks, the Navy refused to release the names of the civilians aboard the submarine and then refused to cooperate with the NTSB (National Transportation Safety Board). The NTSB is a segment of the United States government and for the Navy not fully cooperate with the NTSB meant that it was not cooperating with an investigative arm of the United States government. The United States Navy not taking instructions from, or cooperating with, the United States government sounds alarm bells.

We are an organization who is connected with thousands of active and retired military personnel from throughout the world who constantly feed us information about the abuses in the system. We track, monitor, investigate when able and report these abuses on our web site www.uscova.org. We therefore submit our web site to be made part of the official record. Additionally, we submit the investigative novel by Gregory L. Vistica, FALL FROM GLORY the Men Who Sank the U.S. Navy (ISBN 0-684-83226-7) as additional proof the military judicial system is broken. And finally, we submit the made for T.V. movie "Glimpse of Hell" scheduled to air nationally on FOX channels, March 18, 2001, which is based on a true story about the facts leading up to the explosion of gun turret #2 aboard the USS Iowa resulting in the loss of 47 lives.

We believe the importance of a complete judicial review by the Congress of the United States cannot be understated. USCOVA believes the military justice system is slanted heavily in favor of the government and is occasionally manipulated to silence and remove military whistleblowers. Our organization respectfully requests the Commission on the 50th Anniversary of the UCMJ, commonly referred to as the Cox Commission, to recommend a complete review and overhaul of the military judicial system to the President and Congress of the United States.

Respectfully Submitted,

David Smallwood
Chief Executive Officer, USCOVA, Inc.

AUTHOR: Thomas Jefferson (1743–1826)

QUOTATION: Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce, and honest friendship with all nations,—entangling alliances with none; the support of the State governments in all their rights, as the most competent administrations for our domestic concerns, and the surest bulwarks against anti-republican tendencies; the preservation of the general government in its whole constitutional vigour, as the sheet anchor of our peace at home and safety abroad;...freedom of religion; freedom of the press; freedom of person under the protection of the habeas corpus; and trial by juries impartially selected,—these principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation.

ATTRIBUTION: *First Inaugural Address. March 4, 1801.*

Subject: Please Consider Us in your Power to Make a Difference
Date: Tue, 6 Feb 2001 20:58:34 -0800 (PST)
From: Annette <mknuthnk@yahoo.com>
To: JudgeCox@earthlink.net

Your Honor, Judge Cox,

Your time is valuable and your wisdom is even more so. So I truly appreciate your time to read this. I'll be brief. I'm just a woman who loves and cares about her family.

My nephew, Donald Bramlett, is currently a resident of at the Leavenworth, Kansas military facility. He doesn't deserve to be there. A United States court would have never brought him to trial. Even if they had tried there are so many discrepancies and lies that would constitute a mis-trial it is unthinkable that he is wasting away in a military prison when he has been so willing to give his life to his country, to serve in the Navy....his dream since youth.

I pray you will review the Military Code of Justice and make it just that ..... one of Justice. I know mine is only one of thousands of stories of military injustice. But I think that sentence alone gives credence to your awesome task at hand.

May God's hand of Guidance and Wisdom be with you during this time of review.

My sincerest appreciation,
Annette Morgan
1613 Ocean Bay Drive
Virginia Beach, Va. 23454
(757) 426-7498
mknuthnk@yahoo.com

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http://auctions.yahoo.com/

Subject: Re: 50th Anniversary of UCMJ Commission [S/MIME]
Date: Tue, 06 Feb 2001 13:24:34 -0500 Invalid
From: "GERALD R. BAUM" <gerald.baum@mail.dss.mil> Signature
Organization: Defense Security Service
To: Vicki Cox <judgecox@earthlink.net>
CC: "Kathleen.Duignan" <Kathleen.Duignan@wdc.greenpeace.org>

Thank you for giving me this opportunity to comment on potential changes to the UCMJ. In an e-mail last month I did provide comments about how some changes to the UCMJ may affect national security, specifically in regard to DoD clearances, SF86 and the like. I stressed that I was speaking as an individual, though with the background as a retired Naval Intell Officer, former NCIS Special Agent and current Def Sec Serv SA. Essentially, if some areas are weakened in the UCMJ, these could have repercussions for a person's suitability for obtaining/retaining a security clearance, Would the 8 DoD Central Adjudication Facilities be provided with enough information to intelligently adjudicate someone's suitability? Good luck with this; undertaking. Gerald Baum

Vicki Cox wrote:

> Attached is the official announcement about the hearings to be held in
> Washington, DC, on March 13. Your earlier comments are on file for the
> Commission. If you would like to submit any formal comments on any of
> the topics, you may do so by March 1 per the announcement.
>
> The topics may be found at www.nimj.org.
>
> Thnaks for your interest in the matter to date.
>
> Walter T. Cox III
> Chairman
>
> ----------
> Name: Commission Announcement & Topics.doc
> Commission Announcement & Topics.doc Type: Microsoft Word Document (application/msword)
> Encoding: base64

Subject: UCMJ
Date: Thu, 8 Feb 2001 21:45:14 EST
From: KatBreshears@aol.com
To: JudgeCox@earthlink.net

Honorable Judge Cox.
I am writing in order to hopefully see a change come about with the UCMJ. This is an outdated set of guidelines that desperately needs to be reformed.
As opposed to writing a lengthy letter I am choosing an outline of several issues that I feel need to be addressed.

The right to privacy in this country should alone be reason enough to repeal

the adultery and consensual, mutual, sodomy offenses in the UCMJ, this should be changed, retroactively so that those that are being punished for those crimes could be relieved of that charge.

The Convening Authority should have limited power in a case, he/she is usually somewhat close to the case and a bias could certainly affect the outcome of a hearing or trial. In a perfect setting, this position should actually be held by someone not connected to the accused at all.

Military Judges should be allowed to suspend sentences, alter sentences and

provide sentences outside the current guidelines, such as community service,

therapy, or even a strict probation. The goal should be to rehabilitate, not
incarcerate, of course there are exceptions to that, but I'm sure you see my
meaning. These men and women are almost all first time offenders, yet they

are treated as habitual criminals with no chance at regaining a normal life.

Sixteen years after my husband's conviction we still deal with these issues and more on a daily basis. I know that had he been convicted in a the federal system his time served would have been enough, and more would have been done to help him.

The men and women that enlist in the Military enlist to fight for their country, they are not given the same rights that civilians are given, and they are punished for a much longer time than civilians would be, in every single case. We need to take care of our men and women that take care of us, modifying the UCMJ would be one small step to doing that.

Thank you for your time.
Kathy Breshears
6436 West Monticello Ave.
Littleton, CO 80128
303-948-1098
303-932-2020

Subject: FW: Reform of the UCMJ
Date: Tue, 13 Feb 2001 10:38:43 -0500
From: Joy Brosius <jbrosius@eriercd.org>
Organization: Diocese of Erie
To: "'JudgeCox@earthlink.net'" <JudgeCox@earthlink.net>

-----Original Message-----
From: Joy Brosius [SMTP:jbrosius@eriercd.org]
Sent: Tuesday, February 13, 2001 9:29 AM
To: 'JudgeCox@earthink.net'
Subject: Reform of the UCMJ

TO: Judge Walter T. Cox, III
George Washington University Law School
2000 H. Street, NW
Washington, DC

Dear Sir:

I am in firm agreement that a major reformation or the ELIMINATION of the UCMJ is in order. As a mother of a American soldier who served this country for over four years and was willing to lay down his life if need be was court-martialed over ten years ago of a crime he DID NOT commit. He and I have seen the brutal injustice at the hands of the military courts! I am still in the process, through the Federal Courts, to right an injustice that has been done to him.

I truly believe that the young men and woman who are willing to serve our country in every branch of the military deserve the SAME RIGHTS that our constitution states each American is entitled to, this simply does not happen in the military. The command influence that presides over the so called military justice system is blatantly apparent to anyone who has come in contact with the system. Even when a young man or woman has committed a crime of whatever magnitude, there is no fair or just conduct on the part of the military to handle the issues at hand. How can anyone get a fair trial when the Convening Authority appoints all the members of the court martial staff - including the defense attorneys and, the panel selected to hear the trial and make a judgement are all directly accountable to the Convening Authority not to mention the fact that the panel that is selected is NOT the "peers" of the accused.

The military has a job to do, it is prepare young men and women to defend our Country against those who might try to take our freedoms away. It is a big job and one that military should direct all it's attention to and leave the business of trying those who may have committed a crime to the civilian courts, where it belongs. To do anything less is to re-enforces, what many of us who have dealt with the military justice system as come to realize, that "there is no true justice in the military" and "the constitutional rights of our young people in the service does not exist".

May God bless you with the insight to see the truth and the wisdom to make the decision that will right the wrongs.

Respectfully yours,
Joy Brosius
jbrosius@eriercd.org

"It is only when there is one who willing to stand up for what he believes in, for what is right and just for all that a change for the better can

become a reality."

Subject: USS IOWA Turret #2 Explosion Discussion Board
Date: Tue, 20 Feb 2001 20:44:21 -0600
From: "Cindi W." <cjrw57@netins.net>
To: <judgecox@earthlink.net>

Dear Sir,

I understand you will be holding hearings about the military judicial system. One of the former crew members of the USS IOWA was contacted by the NAVY and told to stay away from your hearings!!

This alone is a red flag!

You may want to contact this person, below is the link to his statement about the hearings and a link to the USS IOWA Family Forum. We talk about the Explosion on April 19. I would hope by now you have come to realize that WE the Families of THE USS IOWA 47 were dealt a great injustice by the United States and The US NAVY, by having the cover-up of the explosion swept under the judicial carpet.

This sailors life was also ruined by the Military and He never was able to work again for the Government.His career was ended and his pensions lost. His personal story may be better told by he himself.

Please take this simple request by a Sister of a Dead Sailor who served his country with pride and detection only to be destroyed by NAVY SCANDAL and a massive cover-up, to uncover the faults and gross misconduct of NAVY BRASS into your consideration for these hearings. I am positive you will not be disappointed and justice can be served.

Sincerely,
Mrs. Cynthia Werthmuller
USS IOWA 47 Family Member
http://www.boards2go.com/boards/board.cgi?action=read&id=982546789&user=johnnyz

Name: USS IOWA Turret #2 Explosion Discussion Board.url
Type: unspecified type
Encoding: quoted-printable

USS IOWA Turret #2 Explosion Discussion Board.url

(application/octet-stream)

Subject: RE: 50th Anniversary of UCMJ Commission
Date: Tue, 6 Feb 2001 13:40:40 -0600
From: Jon Cornett <Jon.Cornett@usaa.com>
To: "'Vicki Cox'" <judgecox@earthlink.net>

For Judge Cox,

Your Honor,

After reviewing the approved list of topics I find there is one more I would like to comment on, briefly. It regards the article concerning abolishment of member sentencing, the option of being tried by members but sentenced by a judge. Having seen it work in many variations during my time on active duty, I am of the opinion that it should be up to the individual servicemember's discretion as to their choice in such matters. Military personnel inherently lose many of the rights or privileges their civilian counterparts enjoy, just by virtue of their military service. In such a matter they should be able to choose their own poison so to speak. Although I have seen many instances where the servicemember chose the option of trial by a jury of their peers, when it may not have been in their best interest to do so, they still had the option to do as they saw fit to judge their case, not as someone else may have felt. This is something that has been the right of an individual for some time now, and it should continue to be their right. As long as they are informed as to their options, they should have the choice in how to proceed, they have earned that right. I thank you once again for the opportunity to comment on these issues. Vr

Jon Cornett

CSM USA (RET)

-----Original Message-----
From: Vicki Cox [SMTP:judgecox@earthlink.net]
Sent: Tuesday, February 06, 2001 9:30 AM
To: Kathleen.Duignan
Subject: 50th Anniversary of UCMJ Commission

Attached is the official announcement about the hearings to be held in Washington, DC, on March 13. Your earlier comments are on file for the Commission. If you would like to submit any formal comments on any of the topics, you may do so by March 1 per the announcement.

The topics may be found at www.nimj.org.

Thnaks for your interest in the matter to date.

Walter T. Cox III
Chairman << File: Commission Announcement & Topics.doc >>

Subject: Military Justice
Date: Mon, 12 Feb 2001 22:02:30 -0800
From: enum1924@juno.com
To: judgecox@earthlink.net

Judge Walter T Cox. 2-12-01

Thank you for looking into the military justice system

The Kevin Holt case was in a local paper is where my interest started. I have talked to the mother and the father.

We must take the appeal system out of the hands of the military. A law is needed that would allow the prisoner to appeal to civilian courts to review the evidence used in the sentencing . And if the person was wrongly sentenced, over ride the military.

I for one am disgusted with their idea they are never wrong and like some police forces, they protect each other. In their hypocrisy think more of their reputation than true justice. They will not be objective on any appeal.

Thank you for your courage.

Robert C. Hawkes
1-425- 776-6010

Subject: Re: 50th Anniversary of UCMJ Commission
Date: Tue, 06 Feb 2001 12:29:00 -0600
From: "Wayne Johnson" <wayneljohnson@hotmail.com>
To: judgecox@earthlink.net

I received an email from Vicki Cox today seeking any further inputs for the topic list for you upcoming conference. Under the Article 15 heading I did not see the subject concerning Article 15 that I sent you in December. I have provided it below in case in got lost in the shuffle. Respectfully, Wayne Johnson

December 16, 2000

Dear Judge Cox:

Several days ago I emailed you some thoughts on the MCM/UCMJ. Since then I remembered something that has troubled me over the past few years. It involved Navy legal policy as to how it conducts Article 15, UCMJ, actions. If you agree with me that what the Navy has been doing is improper a solution would be for the MCM to clarify what proper Article 15 attorney/client counseling is to involve. As you will see below the Navy and Marine view is the exact opposite of that of the Army and Air Force Trial Defense Services.

Mast counseling by Navy JAGC officers is done under the JAG Manual, para. 0109d(2) and COMNAVLEGSVCCOMINST 5800.1C, para. 0615a(5). Currently they are forbidden to form an attorney/client relationship. All they are allowed to do is explain what is already in the mast rights form. They are not allowed to get into the facts of the case or recommend whether one should accept mast or not. The Air Force and Army policy on this is the exact opposite of our view as to what Booker rights entail. Their lawyers are required to form an attorney/client relationship and give advice. Booker rights should be the same regardless of service if one is not assigned to a ship. Please contact them for their current instructions and policies in this area.

U.S. v. Kelly, 45 MJ 259 (1996), made note of this difference and came pretty close to addressing the issue. From CAAF's tone it would appear likely they would NOT follow the Navy position. Fairchild v. Lehman, 814 F.2d 1555 (Fed. Cir. 1987) dealt with the insufficiency of premast counseling. The Federal Court of Appeals' "fix" was to set aside both the mast and the resulting other than honorable discharge requiring reinstatement into the Marines with back pay. What made the matter even worse was that Fairchild admitted to his illegal drug use from the start.

I have submitted this to you in the hopes that these matters get the attention they deserve. If you have any questions my number is (504) 589-3136 during the day. Home is (504) 391-3779. Thank you for taking these matters under consideration.

Very respectfully,

WAYNE L. JOHNSON

CDR, JAGC, USNR (Retired)

>

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Dec 18, 2000

Mr. Cox, I have been in the Navy over 18 years. I am an Electricians Mate Chief. I'm in the Nuclear Field, and have been assigned to Submarines. Several of those years I've worked in Shipyards doing overhauls, New Construction and Decommissioning. It is in this working environment where many of our sailors are sent to Captains Mast and are awarded Non-Judicial Punishment. I went to Captains Mast early in my career. Because of this, I have been aware of many Masts. I have personally witnessed many people who have been sent to mast and have observed many lose much more than what I feel the drafters of the UCMJ intended. I feel there are several changes which need to be made.

1. A commanding officer should not be the one to perform the Mast. I am sure that in earlier times it was necessary for the commanding officer to be given the authority to punish wrongdoers. I feel that when a ship is at sea, a Commanding Officer needs to have the power to provide punishments necessary for the safe deployment of his vessel. However, many times the ships are in port, and there are people who are trained in the judicial system and they should be the ones to try our sailors. I was on the USS Omaha, we were in an overhaul which was several months behind. One of our junior sailors made an error in a tagout. All testing had to be stopped and there was a critique held. In the critique the Commanding Officer was asked by Naval Reactors why there were so many tagout violations on his ship. Even though the junior sailor was one of the hardest workers in his department, his nuclear NEC was removed, he was reduced in rank and removed from Submarine duty. The Engineer then told the Engineering Department that they had to make an example of this sailor. Several people to date had had tagout violations, but they made an example out of this one.

   A line officer receives little training in judicial matters. Let one who is trained in the legal field do their job. If there is still a need for Commanding Officers to perform masts, let it be one of the other commanding officers who is in port. Don't let a commanding officer try his own people. Let him Recuse himself due to prejudice. Wouldn't it be nice if a person ran into my car and I was able to be his judge. On Submarines, the Commanding officer knows every person by name. He knows the people he works with, and has formed opinions good or bad about each. Many of the outcomes of the masts are based on these prejudices.

2. Let there be spot checks on all masts performed. Because there are various types of people who are selected for command, there are many mast cases which are not just. I know of many mast cases which I feel were not just. After each mast is performed, let Navy Legal peruse the mast and check that the punishment metes the crime. I was on the USS Scranton (SSN 756).. I was the Leading Petty Officer of Electrical Division. My Division officer informed me that a new sailor (directly from prototype training) would be going to mast. He informed me that the sailor would be retained but he would be reduced in rank and probably be fined. I spoke with the sailor and found that the issue was due to a problem with his orders. I asked him if he had explained this to our Division Officer. He told me that he had explained everything. I then told the sailor that when he was asked to waive his rights, that he not do so. I told him that speaking with a Lawyer might let him know what to expect for punishment. The sailor did. He was asked why he had requested to speak with a lawyer, and the sailor informed the investigating officer that I had recommended this to him. I was reprimanded and threatened with mast by the command master chief when I informed him that it was my obligation to help this sailor. I was told to not meddle in that which did not pertain to me.

   When I went to my own mast, I was extremely frightened. I asked the investigating officer if I should see a lawyer. He told me that it wouldn't help. He told me that I wouldn't be able to use him anyway, because it was non-judicial punishment. I waived my rights. I know today, that if I had spoken with a lawyer I more than likely would not have gone to mast.

3. The punishments are often too severe. When the UCMJ was drafted, I am sure that they didn't take into account all that a simple mast could do to one of our sailors. Let me give you a worse case scenario. A first class Petty Officer is sent to mast. He makes $1800.00/ month in base pay, $310.00 per month for Sea Pay, $175.00/ month for Nuclear Proficiency pay and $275.00 per

month Submarine pay. He goes to mast, is reduced in rank, fined $1200.00, removed from Submarine duty, and his nuclear NEC is removed. This means he loses $350.00/month base pay, proficienty pay, Submarine pay, and receives orders to a tender and loses $310.00 per month Sea pay. But this was not all. Since the sailor had re-enlisted in the Nuclear field and received a bonus, he had to pay back nearly $8,000.00. The total cost for the first year is $22,000.00. Does it sound a little far-fetched. It happened to my Leading Petty Officer on the USS Scranton, for a minor infraction. In the civilian sector, I could tell someone that wanted to reduce my pay by such drastic measures that I quit. There is no such option in the military.

I was rear-ended by a man who had a suspended license and no insurance. My car was totaled, and so was the car in front of me, and there was thousands of dollars of damage to a third car in front of the second car. The **"Judicial"** system fined the man $50.00. It seems lopsided to me that my friend was punished so severely for doing relatively nothing.

4. Place a cap on how much a person can lose for a mast. The pay lost by the above person is nearly $2000.00 per month. I know I could not afford a pay cut so drastic. If a person is awarded such a drastic punishment, give him or her the choice to leave the military service.

5. A person who has been sent to mast is marked. In the Navy, if a person has 12 years of good service he wears gold service stripes and gold rating badges. You can tell by a persons uniform if he has been to mast. Since my mast was early in my career it didn't affect me too much. But I feel it is wrong when a person makes a mistake, he has to let everybody know for a minimum of 12 years that he was punished.

6. Navy Legal should be allowed to attend the mast proceedings. There could be very little which could improve the mast proceedings more than to let lawyers attend the mast proceeding. Let them keep their mouths shut if needed, but let them ensure that the Captain is living up to the charge of Justice.

7. It should be a requirement that a sailor be provided with Legal counsel prior to Mast. I have spent many years in a training command. Without exaggeration, the command had 7 to 14 mast cases per week. The cases were mostly for students. Through all of these mast cases, I never saw one student go to mast when he requested to see a lawyer. I asked our legal officer why this was so. She said that when a student requested to see a lawyer, they had to ensure that there was sufficient evidence so that the mast case could be tried by a court martial. As you know, on a shore command, you have the option to request a court martial vice non-judicial punishment. It surprised me that there were so few students who requested legal counsel.

I don't wish that people get away with doing wrong, I just feel that there are no checks and balances for our non-judicial system. There are many good Commanding officers who are just. I have had several. But I know that there are some who wrongfully feel that to be in command means to be Lord and King. I can provide many specific cases that are unbelievable. I have kept a journal of my navy experiences and have witnessed many wrong-doings by commanding officers pertaining to Mast proceedings.

If You need any further information, please let me know. I hope this has been helpful.

Sincerely,

Paul W. Burt Jr. EMC(SS/DV)

Subject: Opportunity to Comment -- Topics for Consideration
Date: Tue, 6 Feb 2001 15:14:43 -0600
From: Laedlein Charles Civ AFCA/JA <Charles.Laedlein@scott.af.mil>
To: "'Judgecox@earthlink.net'" <Judgecox@earthlink.net>

Reference: Commission on the 50th Anniversary of the UCMJ/Comments on Final List of Topics

Sir --

Thank you once again for opportunity to put in two cents worth. Something every lawyer, military or civilian, always appreciates. Have reviewed proposed topics and respectfully offer following observations:
-- Section IB, number 8, civilians accompanying services abroad, is definitely a keeper. With increased emphasis on contracting out, there is corresponding growth of contractor service personnel arriving on scene. When military trade magazines routinely portray contractor personnel in BDUs supporting military forces in AOR, it is well past time to examine this subject from both an UCMJ and Law of Armed Conflict standpoint. As practical matter, believe it will be extremely difficult to bring civilian personnel within jurisdiction of UCMJ, particularly in age if expanding "peace-keeping" operations. Further, see conflict in increasing military reliance on contractor personnel within combat zone and responsibility of military commanders to protect civilians within their area of responsibility, to include evacuation in order to preserve life. Finally, wonder if employee exercise of right to strike would at same time constitute disobedience of lawful order?
-- Section IIB, exclusive jurisdiction over military members: My response would be no. Present system represents correct recognition of both military and federal/state interests.
-- Section IIC, limitation of offenses to service-connection: Have lived through O'Callahan era, my response would be no for same reason as that immediately above.
-- Section IIIA, number 1: Yes, favor random selection of juries. With increased educational level of service members, coupled increased skill of counsel in conduct of voir dire, should be no decrease in competency of military court members.
-- Section IIIB, number 2: As long-time SJA, believe function of Article 32, and rights of accused, best served by present process. Would not institute mandatory requirement for verbatim record.
-- Section IIIC, number 2: Yes. Recognize ability of military judges and give them this authority. Will enhance and expedite process; definitely promoting concept of speedy trial.
-- Section IIIC, number 3: Yes. While SJA, recognize recurring problem of appearance of conflict. Better to remove all possible grounds for suspicion.
-- Section IIIC, number 6: Yes. Would mirror most stringent civilian requirement for same reason as that immediately above.
-- Section IVD: Yes. Individual service positions all over map. If this to continue as viable offense, experience suggests it must be clearly defined and uniformly prosecuted.
-- Section IVI: Yes. While there have been some clients I have felt like skewering, this provision (dueling) was obsolete at time it was originally enacted. Its antiquity only reinforces civilian suspicion that military justice out of date and out of step with civilian world.
-- Section IXD: Yes. Again, punishment of bread and water out of date with current standards of justice. Appearance of antiquated punishment does not

enhance public view of military justice system.
-- Section XB: Yes. Redundant.
-- Section XIIF: No. Think this too political. Can see real problem with selling concept to all state bars, resulting in backlash impacting other military attorney responsibilities such as legal assistance. Believe present system effective means of promoting understanding and advocacy of military legal practice within state bar associations.
-- Section XIIJ: Yes. This essentially is AF approach. Works well.

Again, thank you for opportunity to participate in this process.

V/R Charles Laedlein
Chief Counsel, AFCA

Subject: UCMJ Reform
Date: Tue, 13 Feb 2001 20:43:27 -0600
From: "Mary Latorre" <latorre@idir.net>
To: <JudgeCox@earthlink.net>

Honorable Judge Walter Cox,

I am the wife of a inmate at the United States Disciplinary Barracks at Fort Leavenworth, Kansas. I am also a member of Citizens Against Military Injustice, I am currently the Kansas State Coordinator.
I am in the minority here as my husband is guilty of his crime. He gave 18 years to the United States Air force, before the commission of his crime. without incident.
I did want to bring to your attention the injustice of the Military judicial system otherwise known as the UCMJ.

How can anyone receive a fair and impartial trial when everything is handled by the same entity? The military member is investigated, prosecuted, defended, judged, jury of peers selected by, imprisoned by the same entity. It doesn't make sense to me.

This kind of justice is only one thing EVIL. It is done in the name of justice ,but the truth is that it's GREED. In my husbands case, he admitted guilt, he lost his retirement which the military gains in hundreds of thousand dollars, they have him for slave labor for 12 more years, even if he only earned minimum wage that is still thousands of more dollars that they get in the way of free labor.

I believe that there shall be fair and impartial trial process, that everyone is innocent until proven guilty. I believe that just because you maintain you are innocent that you should not be subjected to harsher sentence.
These all seem to be contraries to the way of the military court system works.

I am blessed in away, I am sure you are wondering how. Well, I know with out a doubt in my mind that he is guilty...I have peace of mind in that. What of the so many other inmates and family members who are innocent. Yet, because of the freedom in passing out its own form of justice the military has gone unchecked for to many years and gave harsher sentence to those who maintain their innocent.

Defense counsel is not expected to win any case before they are promoted. As a matter fact it stand to reason that if they do defend their client to vigorously they will likely lose their line number for making rank. What is wrong with this picture. Why does the defense have to beg the Judge Advocate for funds to defend their client. This all comes down to one thing COMMAND INFLUENCE!

Below is some answers to your questions dealing with the UCMJ.

1. Civilians should never be tried by court-martial, that’s why there is a federal courts.

2. Court-martial was original design for war-time, and should be only for service connected offenses.

3. Should not be utilized for Death cases, Military Defense attorneys are not qualified.

4. Article 15s, and summary court-martial should be the only form of punishment, everything else should be held in Federal courts.

5. Article 32, Investigation should be used just like a Grand Jury, and should be a neutral officer with legal background, and a reporter should be utilize to provide a copy of the whole proceedings.

6. There should be a separate court-martial administration or local Clerk of Court be responsible for all aspects of court-martial member administrator once they have been appointed, it decrease the chance of command influence or its appearance.

7. All financial aspects of court-martial should be centrally funded from DOD, with separate funding for trial counsel and defense counsel, so defense team will not have to report to trial counsel for witnesses funds.

8. Jury members should be selected by a jury office and from other post also, and should be required to wear civilian attire to avoid rank problems, and the convening authority should be totally removed from the picture.

9. Civilian judges should be allowed to serve on a court-martial.

10. Military judges should not have fixed terms.

11. Sentence by members should be abolished.

12. As a Article I court, the military judge has limited powers as far as sentences.

13. Adultery and sodomy, and the general Article should be repealed as offenses under UCMJ.

14. Good military character should still be utilized.

15. Federal sentence guidelines should be applied to court-martial, since we are Federal employees.

16. Limit all the Convening Authority power, decreases command influences.

17. SJA should be legal advisor and required to review legal matters as well as the record of trial, should also be responsible for abuse of position.

18. CCAS should do their jobs as judges and not place their careers first, should also be held responsible if they violate the law.

19. There should be at least three judges on the panel, and all three should review the complete record of trial.

20. All court-martial should be reviewed (limited review on PTAs)

21. The Court of Appeal should be changed, instead of constantly remanding cases back to lower courts, dismiss charges, and place the lower court judges on notices, and place letters of reprimand in their files.

22. No retire regular should be allowed on the Court of Appeals due to their mind set, of you are guilty till you prove yourself innocent.

23. If a judge or military attorney fails continually at performing their job, they should be reprimanded and given a article 15, and placed in administrative law, whereas, they arena’t effecting other people lives.

24. The Article 36 rule making should be conducted by civilian and military members.

25. All services’ law school should be consolidated.

26. Jury members should be from different branches of the service to eliminate any type of command influence.

27. There needs to be some form of checks and balances in the system, (example, if a trial counsel services three years and wins 15 cases, and then three years as a defense counsel they should be required to win at least 12 cases before going to administrative law, regardless if it takes six, seven, or eight years, they will not advance in rank until this is achieved), whereas, this is what’s happening in the system now, the Government is ensured over a 97% conviction rate.

28. The defense attorney should have its own investigator, expert witnesses, and funds to prepare their case without going to trial counsel and he and the SJA making a decision and recommending whatever to the C.A..

29. UCMJ was a war time process, why not utilize the Federal court system?

30. Military attorneys should be required to perform paralegal work before handling any felony cases, the military is the only place where a college student can graduate and six months later be handling murder cases, its not fair to the client, who is being denied his "Due Process".

31. The sentencing between officers and enlisted is a outrage, whereas, enlisted members are being held to a higher standards at court-martial then officers are, which is very wrong, and considering in the unit the officer sets the standards, (example General Hale, CSM Miller).

In closing the whole system needs a overhaul, and attorney’s should be held responsible for poor performance, and enlisted members should not be utilized as training aids to enhance a officers career. All military attorney’s should be held to the same standard as civilian attorney’s

Also considering 85 to 90 % of all court-martial are first time offenders, and UCMJ, ruins their careers and destroys the whole family, due to one

mistake, whereas, if the same offense was tried in the Federal system, the military member would be fined and still be a productive member and probably placed on some form of probation. At least now this person has been given a chance.

Written by Inmates located at the USDB Fort Leavenworth, KS. I believe they were so right on that I felt it deserved to be restated into your many responses. In the words of Winston Churchill "Hit the point once. Then come back and hit it again. Then hit it a third time -- a tremendous whack."

Sincerely,
Mary LaTorre

"No problem can be solved from the same consciousness that created it. We must learn to see the world anew."

Albert Einstein

Subject: (no subject)
Date: Sat, 10 Feb 2001 23:46:27 EST
From: MAGICALPA@aol.com
To: JudgeCox@earthlink.net

This letter was written by another but I sincerely agree with her.

To the Honorable Judge Walter T. Cox,
>
> Dear Sir,
> I am writing to you on behalf of the organization I joined recently. It is also
> for Kevin Holt, who is currently serving a life
> sentence at Fort Leavenworth in Kansas. Though I am not related to Kevin Holt,I like many other Americans applaud you for taking on such an awesome
> responsibility as considering the reform or abolishment of the UCMJ. As you know, every year, thousands of Americans in uniform find themselves facing court-martial. They get NO bail, NO trial by peers, NO guarantee of an impartial judge and NO due process. 95% of the defendants are convicted, for military justice is
> prefabricated according to the wishes of the local commander, and the "trial" is tantamount to a verdict of GUILTY. Does it make sense to speak of "reforming" military justice? Previous attempts at reform have largely failed. A perfect example is the Court of Military Appeals, generally viewed as the finest and most progressive thing to come out of the 1950 reform of military justice. It was supposed that this highest court in the military system would thus establish civilian control over the military. As you know, this has turned out to be not true at all. In fact, the
> philosophy of the Court of Military Appeals is RARELY if at all, distinguishable from the military's.
The Military Justice Act of 1968 is typical of the trivial "patchwork" by which the Pentagon and it's allies in Congress hope to keep the UCMJ in force. The
> boards of review still operate about the same as always with their nice title as Courts of Military Review. This is supposed to be an independent review.
> The Pentagon claims that now, military judges are free of command influence because they are responsible only to the Judge Advocate Generals office, free at last
> of pressures from unit commanders. NOT TRUE! Command influence is very much alive and flourishing on our bases here in the United States and in Europe and
> whoever says it is not, has their head in the sand!!
> Movement, if it comes, must come from an outraged and fearful public and elected officials, outraged by the things the military has done to it's young men
> and women in the name of "disciplinary necessity and justice", fearful because of the national tolerance of injustice that results over a long period of time.
CAMI (Citizens Against Military Injustice) is raising up an army of outraged citizens in this country and around the world, joining forces with the United States Council on Veteran Affairs and other organizations devoted to exposing the corruptness in
> the United States Military. We do not advocate that every man or woman in a
> military prison is innocent but we do advocate that many are truly innocent and at the very least, many are serving far greater sentences than in the civilian world. Please help us to know what is wrong with a country that will give a presidential pardon to one of this countries 10 most wanted men and at

the same time, throw away it's young people and destroy their families both emotionally and financially at the rate of hundreds of thousands of citizens a year!
I pray with all my heart that God will give you the wisdom and the courage to give the military justice system back to the American people and once and for all, take it out of the hands of the military. It's time for justice to prevail!
This letter is not very original but very sincere.

> Respectfully,
>
> Ruth Wardlaw
> C.A.M.I.

> "Injustice will not be destroyed until those who are not affected by it are just as outraged as those who are."
> ....Author unknown
>

Subject: UCMJ
Date: Tue, 13 Feb 2001 21:03:38 -0700
From: "MARK JON" <mark67john@hotmail.com>
To: JudgeCox@earthlink.net

Dear Judge Cox,

My husband has been in the military for 15 years and is being released after he lost his rank because a Commander didn't like him. She railroaded him for the longest time and then when he finally decided to take stand against her. She had him reduced in rank.

we feel that the laws of the military need to change and the UCMJ regulations need to reflect what is happening in the military now.

Thank you,

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Subject: The UCMJ
Date: Tue, 20 Feb 2001 12:05:21 -0800 (PST)
From: islander00603@webtv.net (Teresa Masaniai)
To: JudgeCox@earthlink.net

Honorable Judge Cox,

I am writing in reguards to the reviewing of the UCMJ. The UCMJ was established in 1950. And I want you to know that in 50 years the military has still NOT gotten it right. I think 50 years is long enough! The UCMJ needs to be removed out of the hands of the military. OR used in ONLY war times.

By enlisting in the military and once signing the papers agreeing to follow the UCMJ, this person has given up their civil and constitutional rights. This has happen in my son's case, Donald Bramlett.

Command Influence is also alive and well in the military. Again referring to my son's case. Or how about a Judge ruling in error? Again referring to my son's case.

The list goes on and on. And this only happen back in February of 1999. Not too long ago.

The military job is dealing with national security, not the justice system. They ARE failing at this! The UCMJ is under the Legislative and Excutive Branch of our government. It is NOT under our Judicial Branch of our government. Meaning our men and women in the military who are willing to lay down their life for our country and some even die for our country, are NOT even getting the same justice that they themselves are protecting. That's sad!!!!

In my son's case, the NAVY (yes, the Navy) violated the Geneva Convention of 1961. The NAVY called the Bahrain Government and then turned my son over to a Foreign Government with NO Americans present. My son was strip of all his clothes, beaten naked for over 6 hours, before he finally agreed to write some statement. Which was later used against him. Now you call this justice in the UCMJ?

Command influence was also present in my son's case. One man was scared so badly that he told my son, if he was called to the stand he would neither deny or confirm ANYTHING!!! Who has the power to do this?

I am requesting that Glenda Ewing speak on my behalf at the hearing. Please allow her some extra time.

Thank you for the time you have already given me in your busy schedule. I will make sure that you have the necessary paperwork before the hearing.

Sincerely,

Teresa Masaniai
http://www.militaryinjustice.org
The search for static security--in the law and elsewhere-
is misguide. The fact is security can only be achieved through constant
changed, adapting old ideas that have outlived their usefulness to

current facts.
----William O. Douglas, U.S. Supreme Court Justice
(1898-1980)

Subject: RE: Uniform Code of Military Justice
Date: Mon, 12 Feb 2001 00:11:34 EST
From: BMcke0349@cs.com
To: JudgeCox@earthlink.net

To The Honorable Judge Walter T. Cox,

Dear Sir:
Thank you for your courage and wisdom in reviewing the Uniform Code Of Military Justice. I am sure since you have served in both the civilian and military court systems, you have first hand knowledge of the differences. My reason for writing is to plead with you and your Commission to take a hard and realistic look at the unfairness of the Uniform Code of Military Justice

and the entire military court system.

I apologize for not getting this to you by the specified date, but I did not

know of this Commission and it's purpose until yesterday. I have very strong feelings concerning this and I felt the need to express them to you.

Until a year ago, I wasn't aware of the UMCJ and the military court system.

I was painfully made aware of it when my youngest son was court martialed for rape. His case was a he said, she said case plain and simple. Having served as a juror in the civilian court system, I was truly astounded at the difference of the two courts. While nothing positive coud be said about my son, nothing negative could be said about the victim. I cannot understand how the scales of justice can be balanced in this way.

In my research to find answers that would make sense to me, I was appalled to find how many court martials are done each year and how unjust and unfair the entire military court system truly is. Any military man and woman faced witht his ordeal face a rude awakening when they see how quickly the military seeks to ruin their very being as a member of the human race and society. Unless of course, the accused is an officer. It appears to me the military treat their officers differently than the enlisted giving them many more options to resolve the ordeals they face. The enlisted don't have these options available to them and this is not fair or just. Therefore they are left to the mercy of the Commander's wishes and command influence. They say

command influence is no more, but it is blatantly obvious in a cour martial proceedings or it was in my son's case. The conviction alone brands the accused for life and in many cases takes away their civil rights. Total forfeiture of all pay and allowances ruins a person's credit and makes a hardship on the accused's family. It is illegal in this country for any company to take away the retirement of an employee that has put in 18 years service just for getting into trouble. And yet, the military can do this repeatedly and get away with this scott free. It also makes them lose any veterans benefits they may have had access to when their military careers

are
over. The dishonorable discharges that are given makes it very difficult for
the accused to find good employment when they are finally free again. This
says nothing about the years of confinement they have to serve. I just don't
understand the need the military seems to have in completely destroying a
person's life. How do they expect a person to overcome all of this and have

any kind of life when their ordeal is over. How can you call this fair and
just punishment? I do not proclaim that all who are in the military brigs
are innocent. But I do feel there are hundreds that truly are. Most have
only been guilty of making a one time mistake in judgement. Who on this
earth has not been guilty of a mistake in judgement at one time or another in
their lives. Does this mean we all should be locked away? Prime example
would be the Commander in Chief the military has had for the past eight
years. He not only disgraced the office, but felt the need in his last day
in office to give a pardon to one of the top 10 most wanted fugitives in our

country. Where is the justice?

Over the years, the laws have been changed to protect women and rightfully
so, but they have gone to the extremes. A woman no longer has to accept
responsibility for her actions. Case in point would be the number of
abortions done yearly just for the sake of birth control. A woman is
protected in doing this simply because of her right to choose. The UCMJ was

approved in 1950 and went into effect in 1951 when the majority of the
military were men. Since there has been a great number of females entering
the military, I do not see where the UCMJ has been changed to include them in
the Code. There should be provisions made to include them also, because they
are not perfect by any means. They make mistakes too. If they are
responsible enough to serve in our today's military wanting to hold the same

positions as men, then they should be held accountable just like the men. If
they put themselves in positions for things to happen to them, then they
should have to take the consequences for their actions instead fo being able

to lay the blame on someone else. Just like a man, if he puts himself in a
position for something to happen to him, he is forced to take responsibility.
The Code should be just as fair for a man as it is for a woman. They both
take the same oath when entering the military, therefore they should be
treated equally in everything and in every way.

After seeing the number of court martials done each year, I have to wonder,
who is left to serve. I cannot blame today's youth for not going into the
military. I would certainly caution any young person with that desire to
think twice before doing so. No one on this earth is perfect and we all make
mistakes in our lives. I foresee the draft having to be reinstated in the
near future, because the military have court martialed a lot of good men and

women. There has to be a better way.

Until a year ago, I was very proud of our military. Today, I struggle to be proud again for the son I still have in the military. I have to respect his choice to stay in, but it is with words of caution. I am very proud of both my son's. They both have served their country to the best of their abilities and have gone above and beyond the call of duty in their service. The military lost a good man when they chose to make an example of my son at his court martial instead of listening to the evidence.

I hope and pray that God will guide you and this Commission in the right way when you take the challenge to review the UCMJ and the military court system.

I commend you all for your efforts. Thank you for your time.

Sincerely,
Beth McKenzie
bmcke0349@cs.com

Subject: UCMJ
Date: Sat, 10 Feb 2001 23:18:29 -0800
From: "Raymond Olafson" <r.olafson@worldnet.att.net>
To: <JudgeCox@earthlink.net>

February 10, 2001

Your Honor

I am pleased to know the UCMJ will be reviewed. My hope is that good things will come from this review and that the injustices that are allowed to be carried out through the use of the UCMJ will be stopped once and for all.

One point in particular that I am concerned with is that the UCMJ states "you have the right to face your accuser" yet the military will accept anonymous letters and allow them to be used to charge the military member to begin with and will not inform the accused of the accuser. This goes against the stated right to face your accuser. How can an anonymous letter be used to charge a person yet the person writing it does not appear in court or have their name divulged. Even when you ask to see that there really is an anonymous letter you are denied that right until the trial is underway. By the way our last name was not even spelled right in the letter. My husband's Courts Martial went on for 21 days and had only one newspaper reporter present during the whole proceeding.

People are being convicted even in Courts Martials where there is no physical, documentary, evidentiary or witness testimony. Why are these people going to prison in spite of this? My husband is one of these people.

I for one, along with two of our daughters, were put on the Victim/Witness list without our knowledge or request and this was used to shut us off completely from my husband and their father. In spite of letters from ourselves and our lawyer we are continued denial of any type of contact with my husband. This has gone on since October 3, 1999 just two days before my birthday. I received a letter banning my daughters and myself from any contact and yet he had not been informed. He called me on my October 5th birthday and I was forced to be the one to have to tell him we could not phone, write or visit anymore. Quite a birthday present.

I am thankful he will be home hopefully in June because this has been an agonizing time for all of us. This June 4th we will have been married 35 years. Can you even begin to imagine what it must be like to be shut off from a spouse suddenly like this after all these years. I don't want to ever be away from my husband again after that.

My husband is not young, he is 56, has Parkinson's and Bipolar Depression II. He is a highly decorated and respected Navy Physician who also has a Ph.D. in Anatomy. He has served over 21 years active duty and will be unable to continue his practice of Medicine and is losing all of his pay as well as being given a dishonorable discharge and striped of his medals and ribbons. My husband earned everyone of those and striping him of all of them will not the change the fact he did EARN everyone of those.

He will not be able to work again due to his physical condition. All who know him and have served with him respect him highly. These people span the gamut from the lowest enlisted rank to the highest of several branches of service.

Subject: Re: 50th Anniversary of UCMJ Commission
Date: Mon, 12 Feb 2001 12:33:31 EST
From: OVERUK@aol.com
To: judgecox@earthlink.net

Thanks for your reply, What can I expect from this commission, Judge Cox or who ever concerning my earlier comments. Am I to expect this situation to be addressed under section IV Crimes and Offenses, C, "Should Congress enact a modern criminal sexual misconduct statute similar to Model Penal Code and repeal the current statutes on rape and sodomy?" If so, would they use current federal statute USC 18, 3283 as the statute of limitations for crimes commited by military members effected by that statute? If this were the Judge Sullivan Commisions, I believe that would be the direction of this commission.

On Sec. III, A. Convening Authority, 5. I believe the convening authority's power be limited. In the case of US vs Col. Sills, I believe the SJA delayed releasing the record of trial with knowledge that a CAAF decision on a related case was forthcoming in several months. Similar cases that relied on this same CAAF decision were not adjudicated
by their convening authorities.

On Sec VIII. Appeals, Should there not be an appeals process for the victims under UCMJ. When asked whether a writ of certiorari would be considered on the split decision by the CAAF in the McElhaney Case, the SJA said it would be too expensive, and probably wouldn't be considered by the Supreme Court based on the 2 against 1 ruling by the CAAF.

On Sec VIII. Appeals, Should the victims be advised on all recommendations that the SJA is proposing to the convening authority?

How many oral presentations are being considered at this time? Do you have an agenda as to how this hearing will progress. Will they tackle each of these topics? How long will the hearing be? one day, many days.

Thanks

David Stanton.

Subject: Reform of the UCMJ
Date: Sun, 11 Feb 2001 00:21:57 -0500
From: "Elaine Proti" <kep1@peoplepc.com>
To: <JudgeCox@earthlink.net>

I am writing to you as a mother of a son who was courtmartialed for a drug offense. I will not go into the details of his case. He was guilty, but it was a first offense and I think a courtmartial was too harsh a penalty. I had been under the impression that courtmartials were for traitors or for murderors not for a drug user. Punishment yes, but a courtmartial for a first offense, no. He had never been in trouble before and had an exemplary record in the army. They prosecution could find no one that would testify against his character. I understand that courtmartials have gone way up since World War II. Why? Reform is definitely needed. Thank you for your attention to this matter.
Elaine Claudio

Subject: Cox Commission Submission
Date: Tue, 6 Feb 2001 13:36:08 -0600
From: "Robert Don Gifford" <dgifford@tulsacounty.org>
To: <judgecox@earthlink.net>

Sir,

If I understood the Military Gazette, comments on the final list of possible issues to be reviewed (on the NIMJ website) should be sent to you. If I am mistaken, please forgive the E-mail.

I recently left active duty (Army JAG) and will be a Reservist upon expiration of my terminal leave, and am now a state prosecutor. As a military defense counsel and trial counsel at several different posts, I was often troubled at the variances in sentences and the panel. I do not believe a military panel represents a true "cross section" of the soldiers - only the more senior soldiers. Younger enlisted have no realistic chance. What troubled me is demonstrated in these two cases (names and substantial facts withheld to prevent interference with your position):

-a First Sergeant, with 22 years, who was having intercourse with one of his soldier's wife (also participating in parties with his soldiers that led to orgies and heavy drinking). The 1SG would send this young Specialist off on a funeral detail whenever he "got in the mood" and would then go see the wife (who was unsure of how to stop him). The evidence was overwhelming (confession, several witnesses, no alibi), but the 1SG wanted his trial. A panel found him guilty and reduced him to E-4. Nothing else. I was a defense counsel (not his) at this field office, and was amazed at the sentence.

-in contrast, a 19 yr old E-3 (PFC) is telling a friend of his how he hates
his command and that it is so frustrating that it could make him kill someone. He tells his friend that he is so upset he could kill him (his friend) and not care. Directly from that conversation they go eat dinner together and play video games together. In a judge alone case arguing that it was a conditional threat, the judge found him guilty and sentenced him to a BCD and 3 months confinement.

While I agree that a soldier who has served a significant amount of time is
an important consideration for mitigation and extenuation (and rightfully considered), the younger soldiers are getting hammered without a blink of an eye. It is the unwritten rule of thumb in the military on how trials usually result, but after we would advise clients of what he was up against as far as evidence (and who the panel consisted of or judge was) - they wanted to plead with the best deal possible. I had many clients that I knew in my heart were probably innocent (but did not know for an absolute fact - after advising the client that before he told me his side of the story - this was the government's version and the odds for prevailing), but pled anyway to get a better deal. Through innuendo, I had a feeling what really happened. This has been a continuing favorite practical exercise at Trial Defense Service conferences in which it is always unanimous that the counsel never asks for the accused's version until we advise them about perjury and the proposed deal (if it would be in the best interest of the client in light of the possible sentence - not the maximum, but what the judge/panel would probably give versus the "deal")

I wanted to fight these cases with all of my heart if I could confirm my suspicions, but it was the clients decision to plead or not plead (and after

I explained my obligation not to put on perjured testimony they would say whatever was necessary to make it through my interviews of them and the court's Care inquiry - and not tell me what I suspected really happened). It always presented the ethical quandary of did I have a duty to investigate to see if my client was lying to me to take the deal (which would be in his best interests overall) or risk a lengthy sentence by rolling the dice and not "accepting responsibility."

In the civilian sector, if a juror has the same relationships with people involved with the case (commanders know other commanders who approve of the case) - they are kicked for cause. The conflict is inherent.

I thank you for your time and your service to our Armed Forces, and please do not hesitate in contacting me if I can be of any assistance.

Very Respectively,
Robert Don Gifford
Assistant District Attorney
Tulsa, Oklahoma
Captain, Judge Advocate (USAR)
Senior Defense Counsel, 22nd LSO (Team 7)
(918)596-4862

Subject: UCMJ
Date: Mon, 12 Feb 2001 21:02:12 -0500
From: "Mr Paul Robertson" <nmfarm@home.com>
To: <JudgeCox@earthlink.net>

Sir, I was an inmate confined at the United States Disciplinary Barracks. I did commit crimes and did deserve to be punished. I was a Police Officer at one. So I have a good understanding of the UCMJ. The system is unfair in many ways, I am going to send you a file here in the next few days. I hope you read it and give it some attention.

Thank you,
Mr. Paul M Robertson

Subject: COMMISSION ON UCMJ
Date: Mon, 12 Feb 2001 08:31:56 -0500
From: Saunders Capt Kevin T <SaundersKT@newriver.usmc.mil>
To: "'judgecox@earthlink.net'" <judgecox@earthlink.net>

SIR--

THANK YOU FOR THE OPPORTUNITY TO ADD MY "TWO CENTS."

FIRST I WOULD LIKE TO ADDRESS ART 32S. ALL OF THE 32S SHOULD BE VERBATIM. I BELIEVE THE POINT OF A 32 IS BOTH TO SEE IF ANY EVIDENCE EXISTS TO GO TO A GCM AND TO BE USED AS A TYPE OF DEPOSITION. A VERBATIM TRANSCRIPT HELPS AT A COURT-MARTIAL. I REALIZE IT WILL PUT ADDED STRAIN ON A SMALL COURT REPORTER MOS BUT THE BENEFIT OUTWEIGHS THE BAD. ADDITIONALLY, IF THE IO FINDS NO PROBABLE CAUSE THE GOVERNMENT SHOULD BE DISALLOWED TO GO FORWARD OR LIMITED TO A LOWER COURT-MARTIAL. OTHERWISE, WHAT IS THE POINT? AS A DC, IT IS HARD ENOUGH TO GET A RECOMMENDATION OF NO PROBABLE CAUSE, BUT THEN WHEN THERE IS NO EVIDENCE WHATSOEVER, THE GOVERNMENT STILL GOES FORWARD! THIS IS A WASTE...AND THE MILITARY SHOULD NOT TOLERATE IT.

SECONDLY, AN ACCUSED SHOULD BE ALLOWED TO CHOSE MJ ALONE AT SENTENCING DESPITE HAVING A MEMBERS DURING FINDINGS.

LASTLY, JAG OFFICERS SHOULD NOT BE ALLOWED TO BE DC BEFORE TC. I SPEAK THIS WITH CONVICTION AND FROM EXPERIENCE. I FEEL I DID AN EXCELLENT JOB THE PAST YEAR BUT BELIEVE I WOULD HAVE DONE BETTER WITH TC EXPERIENCE. AN ACCUSED'S RIGHTS ARE SO IMPORTANT THAT HE/SHE RATES THE BEST COUNSEL. AFTER A TERM IN MILITARY JUSTICE, THE JAG WILL BE BETTER PREPARED AS A DC.

THANK YOU VERY MUCH FOR YOUR TIME AND GOOD LUCK IN YOUR VERY IMPORTANT TASK. I PRAY YOU ARE GIVEN THE WISDOM OF SOLOMON.

RESPECTFULLY,

K.T. SAUNDERS
DEFENSE COUNSEL
MCAS NEW RIVER
910-450-6160, 6169

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Subject: Proposed UCMJ Changes
Date: Thu, 15 Feb 2001 17:25:08 -0000
From: "Vanacker, Greg" <greg.vanacker@orport.ang.af.mil>
To: "'Judgecox@earthlink.net'" <Judgecox@earthlink.net>

Judge Cox,
This letter is in response to a proposal presented in a FedWeek paragraph. I can't disagree that the UCMJ is probably in need of updating, but I do not agree with the idea of de-criminalizing adultery. Even if the decision is made that adultery is no longer considered a crimnal offense, there should be very clear guidance for the people in key leadership and management positions to follow in the event one of their employees "crosses the line". Most folks probably don't think about it much until it comes along and changes their life forever. Without going into great detail, here is what happened to me.
In 1989 I was TDY going to school for training related to our conversion to the F-15 aircraft. Married with 2 young children. While I was at school, my wife started dating someone. That is probably fairly commonplace anymore, but the man she dated and became romantically involved with was my best friend as well my immediate (technician)supervisor. Although he wasn't my military supervisor, I had to work with him regularly on military issues similar to our offices. His office and my office were side by side at the time. Of course I was stunned when the whole affair was finally revealed about 2 years after it started. Here is where I really screwed up. I put my faith in leadership and the system to do the right thing and this is what they did. NOTHING! I got plenty of lip service with statements such as "we're looking into our options" or "we're not sure how this should be handled due to the complexity of military vs. technician issues. Eventually the months turned into years and nothing changed. I finally started doing my own research and in a couple of days was able to determine that he should have been terminated from his technician position just for starters. On the military side it is up to the the commander to decide his fate and administer disciplinary action. Again nothing was done. Instead the man kept his job and position. He was promoted militarily. Plus it took almost 3 years before anyone had the sense to at least move his office away from mine. Eventually he was assigned as our swing shift supervisor (another pay increase) and retired in November 1999.
Today things are different. A similar situation occurred about 18 months ago in a different area of maintenance but this guy wasn't so lucky. He was terminated immediately.
Adultery may be an everyday event, but that doesn't make it right anymore than armed robbery should be decriminalized just because it happens everyday.
I hope that you will consider my words and share them with others involved in the UCMJ revision. I would like to be in attendance when this issue is discussed, but I'm sure that it would be a lengthy process. If there is anything I can do to help further, please call or write. Thank you for your time and consideration.

Sincerely,
Gregory M. VanAcker

Gregory M. VanAcker,Smsgt
142 FW Weapons Element NCOIC
Oregon ANG, Portland, Or.
DSN 638-5156
greg.vanacker@orport.ang.af.mil

Subject: FW: 1 Aug Staff Meeting
Date: Tue, 13 Feb 2001 18:12:55 -0800
From: "Major Wahonick" <wahonickdo@miramar.usmc.mil>
To: <judgecox@earthlink.net>
CC: "LtLol McGoffin (E-mail)" <michael.mcgoffin@lackland.af.mil>,
"Turley CDR/CO" <Turley@Brig.Miramar.com>,
"Miller Mr" <Miller@Brig.Miramar.com>

Your Honor,

I am responding to your call for comment in preparation for your impending Cox Commission review of the UCMJ. I saw the news item in the 1 Jan issue of The Military Press, a small current events newspaper distributed around town in San Diego.

While I'm certainly not a legal scholar, I am an Air Force Security Forces officer and have some civilian law enforcement experience. I've formed some opinions on the subject of military justice which I hope you'll consider. Currently, I'm the Air Force Detachment Commander and Operations Officer at Naval Consolidated Brig Miramar, so I offer a view from two sides of the military justice system-enforcement and corrections. I also sit on a Review Board which forwards parole, clemency and return-to-duty recommendations through our CO to all three service Secretaries' personnel councils.

First of all, I hope you won't make sweeping changes to the UCMJ. Please fine-tune it and validate the command influences already built into the system. Overall, military justice is extremely effective and widely respected. If I were an innocent party accused of a crime, I'd much rather have my case adjudicated in the military justice system than take a chance in any civilian court. My odds of being wrongly convicted are much less. That indicates credibility that might be lost if fundamental changes are made to make the military system completely mirror civilian courts.

In response to the five topics mentioned in the article, my personal opinions follow. Please be aware these are certainly not collective positions by the Air Force, Navy or NAVCONBRIG Miramar:

1. Adultery should continue to be listed as a crime because the mere existence of the offense on the books is a deterrent and helpful to the maintenance of good order and discipline in the military. Actual prosecution should be limited to flagrant cases where other charges are involved. Sodomy, on the other hand, should definitely be dropped, or the definition changed and made more specific. The fact is lots of people engage in oral sex who are otherwise not criminals. Sodomy, as it's defined now, is unenforceable and therefore unnecessarily weakens the UCMJ.

2. The defense of good military character should be dropped. Those considerations are for the sentencing phase of the process.

3. Military sentences should not be the same as Federal court sentences, but military sentences should be more standardized across services, ranks, and geography. Example: Typically, the going rate for a Sailor stationed in the Pacific Fleet who is convicted of indecent acts is a 5 year sentence. A Sailor convicted on the East coast of the same crime will most likely get a 15 year or longer sentence. Inconsistencies prevail. Marines are notoriously hard when sentencing NCO's. The joke during discussions at the Review Board is that a Marine prisoner got 5 years for selling drugs and 5

more for being a Sergeant. I am not an advocate of determinate or fixed sentences. The parole carrot is essential to maintaining order in our military prisons. I am for stricter guidelines to be imposed on our judges to promote consistency, and therefore justice. I also recommend some language to prevent JAG's and judges from manipulating sentences just to get an offender incarcerated at a facility of choice. I've seen several 5 year sentences for very serious offenses, motivated no doubt, by the command's desire to imprison the member in a level 2 facility (such as ours, ideally close to home) rather than at the U.S. Disciplinary Barracks. That type of manipulation is wrong and also unjust. Please don't tie our judges' hands, we pay them to use their judgment because every case is different. Just standardize the sentences better with tighter ranges.

4. I don't believe the role of commanders in the military justice process should be downplayed with one administrative exception. The actions of the Convening Authority after the courts martial trial should be strictly limited. Preferential CA clemencies undermine the system. Such clemency should be limited to a percentage of the original sentence/fine, maybe 25%. Also, time limits must be placed on the CA's to act. A ridiculous amount of time and effort is spent by legal offices and confinement facilities reminding these flag officers that they need to review a case. Far too often, prisoners will serve their sentences and be released before the CA takes action. Navy and Marine CA's tend to be the worst, sometimes taking up to 2 years to act on sentences. That is unfair to the prisoner and compounds the administrative burden for the services regarding release, discharge, appellate leave, etc. I recommend a three month time limit after the trial. If the CA can't act prior to three months, he/she loses any opportunity to change it and the sentence stands. That makes it easier for the CA's, who will no longer necessarily have to review cases they're obviously not interested in. That portion of the process doesn't exist in civilian courts, anyway.

5. Military jurisdiction is right on the money and should not be changed. The first time a crime is committed on a space station, or on the shuttle while enroute, we'll know that is absolutely true. The beauty of the system is the lack of geographic boundaries. I think that when an otherwise well established and reliable civilian court in any country wants jurisdiction over an offense committed by a service member off-base, we should defer to that court. However, we should always hang onto our own jurisdiction, should that court decline the case.

Here are my thoughts on other military justice subjects of non-judicial punishment (NJP) return-to-duty (RTD) and correctional custody (CC). I write as a commander and 23 year career service member, but once again these thoughts are my own:

Air Force and Army doctrine separating confinement from NJP is good. The Navy mixes
it up regularly. Bread & water is based on very questionable Constitutional grounds, more on 215 years of Naval tradition- a lot of which is no longer applicable. The two (confinement and NJP) do not mix well. Also, the American Correctional Association (ACA) industry standard prohibits food restriction during incarceration. Recommend immediate elimination of Bread and Water as an NJP option.

CC is a waste of time and effort. It only prolongs the inevitable, keeping the same 10% of rotten apples around that take up 90% of a commander's time.

I understand the attraction to those programs during this lean recruiting period. However, after considerable effort and some standard lowering, we (the AF) met our goal this year. Most of this personnel business is dictated by demographics. There is a second baby boom only 7 or 8 years away and this economy will not be perpetually great. As a commander, instead of CC, I'd much rather have an efficient OTH discharge process without the unwritten 2 Article 15 requirement, etc. to get that 10% who might go to CC off of my books. So what if there is no immediate fill. If this troop is in CC (or incarcerated in a RTD program), he/she's not doing anything to accomplish my mission anyway. If I have a troop who's in enough trouble that I would send him/her to CC, but I truly believe the kid will turn around (and they're precious few), I'm going to make him/her the ward of my most effective NCO (dare I say mentor), until the kid comes around, or the NCO loses patience/interest and advises me to get rid of him/her. CC is a cop-out, making another activity do your training dirty work. I have little confidence in retraining. A very well-organized, equipped, staffed and run operation at Basic Training obviously didn't have the required effect on this young person during 6,8, or 12 weeks of the most carefully choreographed training on earth. I think we're kidding ouselves to think that temporary duty amature instructors can accomplish more in 30 days of CC, no matter how cool their program looks. Further, CC is a form of incarceration without a trial. From that point of view, it does allow way too much command influence. It is also a potentially dangerous type of organized hazing. I recommend eliminating CC as an NJP option DoD-wide

RTD- taking some good-hearted felon back on active duty is ludicrous. His/her commander made that call already by preferring charges to a general courts-martial in the first place. All services except the Air Force have abandoned their RTD programs except on paper. An IG audit this summer determined the Air Force program is expensive and mostly ineffective, yet we continue to waste resources manning the program at NAVCONBRIG Charleston. Recommend elimination of RTD as an option for all services.

>From a corrections viewpoint, the other direction I think we should consider taking is directing judges and CA's to quit automatically sentencing drug users to confinement. If they're incorrigible, discharge them. I'm for rehabilitation if we're so short-handed that we're willing to send thieves, deserters and other non-performers to CC and RTD. We'll probably get a better productivity return after treatment of drug offenders. In many/most cases, we got better performance from them before they got in trouble. Think of the urinalysis surprises we've seen over the years with our best troops popping positive. If we don't divert drug offenders (not dealers) somewhere else other than our confinement facilities, our military corrections system will be overtaxed to to point of failure in a very few years, with cases of overcrowding, inhumane treatment, riots, etc., just like the worst state systems are now.

We also need to instruct AFOSI, NCAS, and CID to quit piling on distribution charges to simple party drug users. The tactic of soliciting a user to obtain drugs for the agent with no plan to pursue pushers higher in the drug hierarchy smacks of entrapment, especially when no money changes hands. Recommend a careful review of the language describing elements of distribution charges.

For all of these programs, keeping non-productives around in the service is more than non-productive, it's counterproductive, costing commanders, first shirts, and supervisors time that they could be spending encouraging and

improving the lives of their other 90-plus% of good troops. I understand the drawback to discharging criminals and other problematic people is that we want some return on our training dollar investment. Maybe we can insert some binding clauses in future enlistment contracts that quantify the cost of training and give the gov't authority to collect by pay garnishment or income tax refund withholding after discharge before the end of the agreed enlistment.

Sir, thanks for reading this and the opportunity to make some input to your Commission and their important work. Sorry for being so verbose. I hope this helps.

V/R

Maj Don Wahonick

Subject: Re: 50th Anniversary of UCMJ Commission
Date: Wed, 7 Feb 2001 07:04:36 -0800 (PST)
From: "have shovel.." <aholeiwilldigg@yahoo.com>
To: Vicki Cox <judgecox@earthlink.net>

Dear Judge Cox,

Thank you for responding to my e-mail. It is real sorry that only 250 plus responded to your request in the Navy Times. I guess that there are only a hand full of us that really care what happens with our history, and tradition. I just recently returned from a leadership training unit and now I have even a greater respect for our laws and heritage. We also learned that when something needs to get done, someone says it and bang, it happens, and that change is something people don't really like, and also it normally takes 2-5 years to implement. I really appreciate that you will be reading or putting my comments into account for the 50th anniversary commissioning. I again thank you and your team for considering the low men on the totem pole! Have a good day and good luck!

Sincerely,
ABH2 (AW) Luke Willdigg, USN

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Subject: Topics for 50th Anniversary of the UCMJ Commission
Date: Fri, 23 Feb 2001 14:41:16 -0500
From: "Sally Allman" <sally_allman@nvlsp.org>
Organization: NVLSP
To: <judgecox@earthlink.net>
CC: "David" <david_addlestone@nvlsp.org>

This e-mail is from David Addlestone

I hope that the Commission will deal with the subject of less than fully honorable administrative discharges. While mentioned only in passing in Article 74(b), the UCMJ is otherwise silent on these stigmatizing discharges, which have from time to time been used by commanders to circumvent the UCMJ.

On several occasions current and former members of the Court of Appeals for the Armed Forces have addressed this problem, e.g. see Everett, "Military Administrative Discharges" - The Pendulum Swings, Duke L.J. (1966) and Effron, "Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates," 9 Harv. C.R. - C.L.L. Rev 227 (1974); see also Ervin [Senator Sam] "Military Administrative Discharges: Due Process in the Doldrums, 10 San Diego L. Rev. 9 (1973). (See also references to testimony of other USCMA Judges before Congress cited in these articles.)

While there has been clear improvement in the "paper process" in the past five decades, the percentage of less than fully honorable administrative discharges issued by the services each year remains at a relatively constant rate, raising many of the same questions raised by the above-cited eminent commentators.

Subject: "UNIVERAL" CODE OF CONDUCT...
Date: Wed, 28 Feb 2001 01:41:30 EST
From: EACyr@aol.com
To: judgecox@earthlink.net

iT WAS DRAFTED 50 YEARS AGO, DURING THE MCCARTHY ERA OF WITCHHUNTS AND HYSTERIA. LET US NOW BRING OUR COUNTRY INTO THE 3RD MILLENIUM, EQUAL TO THE EUROPEAN UNION.
LET US NOT CRIMINALIZE NORMAL, SEXUAL ACTIVITY BETWEEN ADULTS.
LET'S STOP IMPRISONING AMERICAN CIVILIANS AND MILITARY PERSONELL.
OUR COUNTRY IS VIOLATING HUMAN RIGHTS.
THE ONLY COUNTRIES WHO AGREE WITH THIS ARE THOSE THAT ARE RELIGIOUSLY CONTROLLED, LIKE IRAN, IRAQ, SOMALIA-WHICH IS SET EXECUTE A PAIR OF LESBIANS...

Subject: gay military
Date: Tue, 27 Feb 2001 10:51:12 -0800
From: "Augustine, Marjorie" <marjorie.augustine@attws.com>
To: "'judgecox@earthlink.net'" <judgecox@earthlink.net>

Judge,

As long as there is not a mis-use of sexual power, the military should not regulate "consensual sodomy". I'm obviously not a gay male, but I think what people do in private is thier own business if it's not imposing on me. Who do we think we are as a society to tell people what they can do in thier beds? Please think about this before going further.

Let's let our military be a realistic cross section of America which includes gays and lesbians, retirees and currently enlisted people should not have to be worried about being discharged because of being gay. I have no problem thinking that anyone who wants to defend my freedom can do so, I don't want to serve in the military, and I have respect for those who do, more so for the ones who know that they aren't valued even though they would willingly die to defend me.

Marjorie Augustine
Pittsburgh PA

Subject: equal justice
Date: Tue, 27 Feb 2001 11:07:14 -0800 (PST)
From: "Kris C." <devachanus@yahoo.com>
To: judgecox@earthlink.net

Mr. Cox, I would ask your committee to consider eliminating its prejudice and hatred toward gay persons in the military.
Would the committee also consider eliminating certain crimes against military gay persons- Consensual sex between two gay adults should not be criminalized. This would also include prosecution and loss of benefits of the military retirees who "come out".

I believe it's time we come out of the dark ages- even in the military.

Thank you for your time,
Kris C.

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Subject: Fwd: Cox Commission Comments re. ART 32, UCMJ
Date: 2 Mar 2001 18:02:35 -0800
From: Gene Barry <nimj@justice.com>
To: judgecox@earthlink.net

------- Start of forwarded message ------- Subject: Cox Commission Comments re. ART 32, UCMJ To: nimj@justice.com From: FSH91st@aol.com Date: Fri, 23 Feb 2001 12:04:47 EST Cc: pmueller90@hotmail.com At what level in the USAF chain of command did accountability cease to exist in the USAF Article 32, UCMJ, United States vs. Tech. Sgt. Thomas P. Mueller, as reported 27 February 1996 in the UCMJ Investigating Officer's Report?

Specifically, the flight control rods of a Spangdahlem F-15C were mistakenly crossed on 17 May 1995 which led to a fatal takeoff of the accident aircraft, SN 79-0068, on it's first post-maintenance flight on 30 May 1995. The case involved a complex chronological sequence of events dating back to the early 1970s when the F-15 flight control system was finalized and placed into production. High Accident Potential (HAP) reports had identified the potential for this particular maintenance error in 1986 at Luke AFB and 1991 at Elmendorf; sadly, post-HAP (2 reports) USAF "fixes" obviously did not prevent the recurrence of this particular maintenance error until after the 30 May 1995 accident that killed Maj. Donald Lowry. Color coding of the two pertinent control rods and changes in pertinent Technical Orders and maintenence guides subsequent to the HAPs did NOT prevent recurrence of this mistake.

Attached are two MS Publisher documents (TimeLine.pub and Overlay1.pub) which detail the complex scenario leading up to the 30 May 1995 accident. The TimeLine is a causal map and the Overlay1 identifies both UCMJ and Accident Investigation Board references.

Bottom Line: 1. Art 32 UCMJ Investigations against Tech. Sgt. Mueller and Tech. Sgt. Campbell

2. Letters of Reprimand against at least three other enlisted personnel (Master Sgt. Schwennecker, SrA Pfender, SrA Shawkey)

3. No prosecutions or investigations above Squadron level or NCO level

4. Specifically, the ineffective actions by Headquarters USAF, Air Force Safety Agency, and F-15 SPO/WRAFB following the two HAP reports were ignored and, in effect, deemed irrelevant by the Accident Investigation Board in the causation of this accident-waiting-to-happen.

5. See Synopsis, Overlay1, which is my interpretation of this tragic accident scenario.

Frank B. Osteen, Col USAF MC Ret
(864) 292-3969, FSH91st@aol.com

------- End of forwarded message -------

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                  Name: TimeLine.ZIP
TimeLine.ZIP      Type: Zip Compressed Data (application/x-zip-compressed)
            Encoding: base64
```

Subject: Revise UCMJ
Date: Tue, 27 Feb 2001 12:52:45 -0600
From: "Jody L. Grenga" <grenga@swbell.net>
To: judgecox@earthlink.net

RE: 50-Year Review, UCMJ

Dear Judge Cox,

During your 50-year review, please amend the UCMJ to de-criminalize personal, private conduct between adults who consent mutually from this behavior. As long as fraternization issues and positions of power are not at issue, personal and private conduct such as homosexuality should be considered personal and private conduct between consenting adults and should be removed as a crime from the UCMJ. The U.S. military is one of the few military systems in the First World which criminalizes consenting conduct, and it is time to change this flaw in the UCMJ.

Thank you,

JODY GRENGA
AUSTIN TX

Subject: UCMJ
Date: Thu, 1 Mar 2001 18:09:25 -0800
From: JENNIFER M HOGAN <jenkier@juno.com>
To: judgecox@earthlink.net

To The Honarable Judge WalterT. Cox III,

Dear Sir,

My name is Jennifer Hogan. I am writing on behalf of my boyfriend Charles Evans.
My opinion is just that only my opinion, so I wont state that on this letter, what I would like to offer you instead is the facts instead and let you determine what needs to be accomplished.
Charles is currently serving a 12 year sentence, at Fort Leavenworth. he is convicted of rape, he did not commit rape. It was consented to. If it was rape I dont believe theaccuser would have got into the front seat of his car, put her seat belt on and been driven on to Camp Pendleton, by him, past gaurds, etc. his trial was very unfair there were no black members on the jury, he is black. The accusers were found by me sitting in the base burger king booth, by me during the trial,eating lunch, and laughing it up having a real good time till they saw me, then they straightened up.I told the court, nothing was done about this, yet there was a rule they were not to be talking together. This is kind of odd to me.The girl admitted she lied to various people before as well as during the trial, yet the trial was still allowed to continue.so I guess it is ok to sit in a courtroom and lie, and get away with it. I am very angered by the things I witnessed during that trial.
A few years prior to this I had been " date raped" by my boyfriend who was in the military.
It upset me, but I did not say anything, for fear that the military would choose to believe their men over me. That they would stand behind their men, now I see that is not the case at all. Thy did not investigate anything Charles had to say, they felt the accuser was being truthful. It didnt matter one bit what he had to say, as far as they were concerned he was lying, and she was telling the truth. When she was the one who admitted in court that she lied, while on the witness stand. His confession was coerced by ncis agent kenneth proffitt.
They brought Charles off a 12 hour non sleeping post, and interrogated him, he had no food, no water, he was so exhausted he fell asleep on the floor in NCIS office.Now this female is allowed to go on with her life. While Charles sits in Fort Leavenworth for 12 years of his life, he cannot see his son.
Also, to show how command influnce plays apart in these trials: The 12 hour non sleeping post, was brought up during trial, the log book that was requested by the defense during trial, came up "missing". It just so happens the on log book in particular, that they needed, Is "missing". There is so much more to this case, but it would take so much time . Just keep it in your mind she admitted she lied on the witness stand, yet he was still convicted....that should tell you something is wrong. I know that deep down in my heart that change will come to the UCMJ. It is past time. Mabye this will help future military men and women, if it doesnt help those it has already affected. Thank You very much for your time.

Jennifer Hogan
1727 Ulster Dr. Alexandria Louisiana 71303
on behalf of Charles Evans

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Subject: UCMJ Revisions - Jurisdiction over reservists
Date: Sun, 25 Feb 2001 21:43:27 EST
From: LANSINGJAG@aol.com
To: judgecox@earthlink.net
CC: t.patrick.hannon@ssa.gov

February 25, 2001
1260 Starboard Drive
Okemos, Michigan 48864
lansingjag@aol.com

To: Honorable Walter T. Cox III
judgecox@earthlink.net

Subj: UCMJ REVISIONS - JURISDICTION OVER RESERVISTS

Dear Judge Cox:

I understand you will head the Cox Commission convening at GWU this spring and are soliciting ideas for UCMJ improvements. I have been a judge advocate for 15 years, roughly 10 of those as an appellate counsel in the military justice system, and am presently a naval reserve commander. Strictly in my personal capacity, I offer the following for your consideration.

I see a problem emerging. The end of the Cold War forced our military forces to become increasingly dependent upon reserve support as defense budgets shrank and military missions expanded. Despite the rhetoric of the new administration, this historic trend will continue as reserve forces provide a cheaper, if sometimes degraded, alternative for national defense. In some cases, use of reserve forces is sufficient, or even preferred, but the UCMJ has failed to keep up with this new political reality.

Fifteen years ago, the Supreme Court resolved a recurring jurisdictional nightmare by throwing out the old US v Callihan service connection test in favor of a bright line rule for active duty members in US v Solario. The Court ruled if you were on active duty when the offense was committed, you were subject to military prosecution.

This rule applies to reservists on active duty, but not to reservists performing normal weekend drills or extended weekend duty. Thus, a reservist who gets angry at his commanding officer on Saturday's drill and murders him Saturday night is not subject to military jurisdiction. A seaman dismissed from drill at 1630, walking in his uniform with other members of his unit to his car in the on base parking lot, may, at 1631, lawfully tell a superior commissioned officer to go f*** himself and escape prosecution. More commonly, a reserve officer dating an enlisted member "off duty" may avoid prosecution by not being unduly familiar while "on duty." If military jurisdiction attaches only during the drill weekend, how may the government prove the continuing nature of their unduly familiar relationship? Must they have sex on the drill deck, in uniform, between 0730 and 1630?

A better rule is to consider all those who raise their hands and take the oath of office as subject to military jurisdiction during the tenure of their contracts or commissions. As in Solario, this approach would rid the services of senseless defenses, strengthen the concept of a one-force military, reinforce good order and discipline, and break down the increasingly archaic distinctions between active and reserve forces. I am

keenly aware reservists are citizen-soldiers and the balance struck between the Bill of Rights and the vicissitudes of military necessity is tenuous, but reservists in the all-volunteer forces also realize they submit to unique obligations and restrictions when they undertake the duty and responsibility of serving their country. Being subject to military jurisdiction all day, every day, is part of the job.

Very Respectfully,

Paul Jones

Subject: Comments on UCMJ Topics
Date: Sun, 25 Feb 2001 11:26:26 -0700
From: Law James Capt 366 WG/PA <james.law@mountainhome.af.mil>
To: judgecox@earthlink.net

Dear Judge Cox,

Below you will find my comments on several topics as part of the public comment period for the 50th Anniversary of the UCMJ:

Section I, Letter C: Yes, jurisdiction should be restricted to service-connected offenses only in peacetime.

Section III, Letter B, Number 2: All Article 32 proceedings should be recorded and a partial or complete verbatim transcript should be prepared at the request of either the government or the defense.

Section IV, Letter E: Congress should repeal Article 88 prohibiting officers from uttering contemptuous words regarding certain public officials.

Section IV, Letter K: Consensual sodomy between adults should be decriminalized.

Section IV, Letter L: Adultery should be eliminated as an offense unless it is clearly affecting good order and discipline.

Thanks for the opportunity to comment.

Regards

James Law
Capt James Law
366th Wing Public Affairs
Mountain Home AFB, ID
(208) 828-6800

Subject: Recommended changes for UCMJ
Date: Wed, 28 Feb 2001 00:07:00 EST
From: Catblene@cs.com
To: judgecox@earthlink.net
CC: Catblene@cs.com

27/02/200he

Dear Judge Cox:
The following are suggestions in response to your inquiry as to changes for UCMJ:

1. The practice of probation should be used for first time offenders, especially for continued service and proven record. Tice is enlisting first or second time arrestees, whereas, they keep the members they've court-martialed who are already trained.currently

2. Sentencing guidelines should be used in accordance with the federal guidelines.
3. Article 32 officer's findings should be followed.

4. Article 134 should be repealed.

5. Adultery and Sodomy should not be UCMJ offenses.

6. Military members should be allowed to utilize the federal court systems.

7. Allow the higher courts the power to set aside convictions and over rule the lower court's decisions without constantly remanding cases back to the lower courts.

8. Reestablish mandatory time guidelines for post trail and appellate review.

9. The staff judge advocate is usually a COL or a LTC, it should be a CPT considering the SJA usually does nothing towards providing serious advice to the CA. He also does not review the Record of Trial and doesn't really inform the CA of any Constitutional matters. A CPT could perform this job better.

10. Military members should not have to exhaust their remedies in the military system prior to going to the Federal courts.

11. Military members should not be utilized as training aids to enhance an officer's career.

12. During the court-martial, the accused should be provided with atleast an attorney with experiences such as a Major or above. CPT's should be paralegal for a minimum of atleast one year prior to holding their own case.

13. Remove the CA from the process (except for the clemency matters), which removes command influence(s).

Thank you in advance for your time in considering these suggestions.
Sincerely,

Jeffrey G. Nicholls

(submitted by the sister of Jeffrey G. Nicholls-Charlene F. Kerns)

Subject: Comments on upcoming UCMJ Commission
Date: Wed, 28 Feb 2001 21:05:14 -0800
From: "Oderus" <oderus99@hotmail.com>
To: <judgecox@earthlink.net>

Dear Sir,

I am a Special Agent with the U.S Army Criminal Investigation Command. I have 8 year sexperience as a Military Policeman and 7 years experience with the CID. The following are more comments I have on the UCMJ and changes it may need:

C. II::

A. Civilians should be subject to the UCMJ when they are deployed with forces to a wartime environment or in many of the operations other than war. While deployed to Bosnia, the civilians deployed with the forces fell under, technically, Bosnia law and no one would prosecute them. The only recourse was to remove them from the environment, letting them get away with crimes unscathed in any way.

C. Military members stationed within CONUS should be prosecuted under the respective state laws OR the military law enforcement personnel should have arrest powers outside the installations to keep a uniform system in place. I have seen military members not get prosecuted because the state and the government both thought the other was going to prosecute. On the other hand, civilians on the installation have gotten away with crimes, they may get fired, but the local law enforcement think the Assistant US Attorneys will prosecute any offense, when my experience is they only prosecute heinous crimes or high dollar value crimes.

As far as military law enforcement, all services have different standards to prosecute and they should be standard across the board. A good suggestion is to instill a Defense Law Enforcement Command along the lines of the Defense Criminal Investigation Services (DCIS) and assign civilian law enforcement, with a Defense background, to all services. I, being Army could get assigned to a Marine base this time and then a Air Force Base, the training is the same and the agency is the same so uniformity in standards in investigations is the same. Since I would be civilian, I could arrest anyone and they would get prosecuted in the local court systems. While deployed they would all get prosecuted under the UCMJ.

III:

A. 1. The panel members in courtsmartials should be randomly selected, there is not a "jury of peers" in the current system, every panel I have seen is senior enlisted or officers, no matter what rank the defendant is. This is not really fair for the defendant.

2. A Courts Martial Command would work well. The current system where the SJA office falls under the local command does not really offer the defendant a fair chance if they are not in the good graces of the local command.

3. Pre-trial agreements should be offered.

4. Budgetting for courtsmartials should be centralized. I have seen to often where the actual courts-martials budget is depleted with several

months left in the Fiscal year. While no one will admit it, this has an effect on who is courtsmartialed during the time of low budgets.

B. 1. A preliminary hearing should be conducted in lieu of a Artical 32 hearing., The Art 32 hearings often take too long and they help to deplete the courts-martial budgets. A preliminary hearing like in the civilian courts is much quicker and allows the investigators more time to investigate. Currently subpoenas can not be issued until after charges are preferred, which happens after the investiogator closes the case. Under the UCMJ system, subpoenas and search and arrest warrants are very difficult to obtain when tbey can be most used, prior to charges being preferred.

D. 5. The local prosecutors in the state should be the trial counsel and military trial counsels should be used overseas only.

9. A centralized Trial Defense Service should be institued just like the investigators should be centralized to maintain uniformity among the services.

IV:

B. There should be more stringent offense for rapes by a stranger. 95% of the rapes investigated are not rapes in the classic sense as people imagine it with a stranger attacking a person and forcing their will. Most are "date rapes" and should be treated as such, especially with alcohol/drug involvement with all involved.

E. No, Congress should repeal any restrictions currently in place. Freedom of speech is a right and it should be for everyone.

F and H. If the military courts were prosecuted in the civilian sector, this would not be an issue. For overseas, there should be a contempt law/child abuse and neglect laws for civilians as well as military.

V:

D. There should be sentencing guidelines. there is no uniformity in sentencing as it presently stands.

VI:

A. Good military character should NOT be a factor in military courts. Currently at my installation we have a E-7 male who picked up a E-4 male, took him home and sodomized him while the E-4 was passed out drunk. The E-7 denied the allegation at the Art 32 hearing but admitted it for a pre-trial agreement. The E-7 was reduced to E-4 and allowed to stay in the service. At asubsequent courts-martial for perjury, the now E-4 was reduced to E-1 and sentenced to 90 days in jail. THe now E-1 will return to the installation, finish his time and retire as a E-7 under the "high 3", all because his unit feels he had good military character. A rape is a rape and in civilian court he would be incarcerated and possibly have to register as a sex offender.

B.. Yes, a exculpatory defense polygraph should be allowed in court proceedings.

Thank you for your time.

Jeffrey WELLS

Subject: Reform of the UCMJ
Date: Thu, 22 Feb 2001 19:38:56 -0600
From: "porche115" <porche115@email.msn.com>
To: <JudgeCox@earthlink.net>

Your Honorable Judge Cox,

I am writing about my concerns with our current UCMJ laws, and the illegal way they are used against our soldiers. The UCMJ in my opinion should be removed from the hands of the military, to prevent, any undue illegal command influence. It is a totalitarian system.

My son, Brian Adams, served our country with deep pride and dignity, he was grateful and honored to do so. If allowed the chance to serve again, he would do so, providing he could trust the UCMJ laws was changed, to where truth and evidence, meant conviction or innocence. Trouble found him in Oct. 1999. A female soldier said he raped her. This accusation occurred off base, in the same room as a married couple, and became a civilian matter.

The victim decided she would report the incident, but first, she wanted to get her nails done. Civilian police arrested him on her word alone. However, after taking sworn testimony from him and his witnesses, he was released. The victim was sent to the hospital so they could collect evidence. They did a rape kit and took her clothes to test for DNA. Nothing was found in the kit, her body, or her clothes. the case was thrown out of civilian court, as it should have been.

Civilian justice prevailed, there was no illegal command influence involved, to obtain illegal evidence. When the military is allowed to prosecute a case that has been thrown out of civilian court, because of no evidence it should end there. From that point on, only illegal evidence can be obtained.

The commander at Ft. Drum, NY. wanted this case tried and Brian was prosecuted. The Commander aggressively and viciously pursued the matter, (not my words, words of two different attorneys who looked at his ROT) Needless to say, he trusted and believed in the UCMJ to go by truth and evidence as civilian court had done. He signed his rights away to speak without and attorney present, to CID. The mistake of his life. CID intimidated, and harassed him for over 4 hours. He repeatedly told them he wanted to end the interview, they viscously continued to hammer away until they broke his will, and he wrote and signed the confession. This is the only evidence in a rape case.

Isn't it about time CID is made accountable to someone, when they break the constitutional rights of our soldiers? Sir, on a coerced confession he will be a sex offender the rest of his life. A case that should have never be tried to begin with.

Clemency powers must be removed from the convening authority. My son was suppose to have a hearing early Nov. 2000. It seems the Commander is too busy prosecuting, to hold clemency hearings, enjoying the powers he has over our soldiers lives.

We have heard from other soldiers that the Military Court of Appeals seldom, if ever, makes signicifiant changes in convictions or view the circumstances

surrounding the case. When was the last time the military said "we might have made a mistake in judgment?"

Thank you for, your interest in our opinion of the way the UCMJ is allowed to operate, and some of the changes that need to be made.

Sincerely,
Ruby Porche
http://www.militaryinjustice.org
"They fight for our rights and freedom. Who will fight for theirs?"

Subject: Input
Date: Thu, 1 Mar 2001 15:37:17 -0800
From: "Salvin, Richard CID" <richard.salvin@irwin.army.mil>
To: "'Judge W. Cox'" <judgecox@earthlink.net>

Judge Walter Cox,

> I was advised that you are heading a commission looking to make
> suggestions to congress regarding the UCMJ, and that you are looking for
> input from the field.
>
> I am writing to you as a military criminal investigator for the US Army.
> I am stationed in California and currently work General Crimes on an
> installation that shares concurrent jurisdiction with the county of San
> Bernardino, CA.
>
> I would like to offer a couple comments:
>
> I find that all too often offenses must be assimilated during the conduct
> of investigations. For instance, there is no UCMJ article for child
> abuse, and there are other violations that can only be charged through 18
> USC. Assimilation works, however, as technology changes, and how society
> looks at certain types of crimes changes, so to should the UCMJ. That's
> probably why your doing what your doing. Take consensual sodomy, for
> instance. This may need to be changed in light of how society now looks
> at it. In general, UCMJ offenses should be in line with the current
> civilian laws.
>
> As an investigator I do not have the realistic ability to subpoena records
> or testimony until charges have been preferred. Usually that is a long
> time after our investigation has been closed. Local law enforcement and
> prosecutors seem to do a better job, in part, because they make a decision
> to file charges within days of the reported incident.
>
> Pre-trial confinement in the military is broken. When a soldier under
> investigation goes AWOL, comes back, and goes AWOL again, then something
> is very wrong. If one soldier rapes, or attempts to rape another soldier,
> is it only appropriate to issue a "No-Contact" order until charges are
> preferred or the case goes to courts martial. The victim should not be
> forced to relive the event every time she has a chance encounter in a
> motorpool or dining facility.
>
> The SJA (trial and defense counsel) should be within a stovepipe command,
> free from the influence of the local command. Too much politics as it
> stands.
>
> This might be outside of the scope of your inquiry, but I want to address
> an issue that is close to home. When I look at my counterparts around the
> Major Criminal Investigative Organizations (OSI, DCIS, NIS) I see that
> they have, for the most part, gone the route of hiring only civilian
> criminal investigators. Even US Army CID has hired civilian fraud agents.
> Army CID staff, who are made up of MP officers that are in command
> positions for 2-3 years, have decided to not follow the MCIOs. I think
> that the other MCIOs have the right idea. This organization would do much
> better if we followed their lead. Investigators would be truly free from
> command influences, and restructuring in a similar manner to the MCIOs
> would preclude violations of the Posse Comitatus Act. Current military

> CID agents do not have arrest authority over civilians, a problem that
> only exists for military (Army) investigators.
>
> Respectfully,
>
> Richard Salvin
> Richard Salvin, Special Agent, Fort Irwin Resident Agency (CID)
> Direct: 760-380-5886, DSN 470-4967, Fax: 4968
>

Subject: NIMJ
Date: Fri, 2 Mar 2001 09:12:14 EST
From: RLSchwoebel@cs.com
To: judgecox@earthlink.net

12010 Dusty Rose NE
Albuquerque, NM 87122
March 2, 2001

Judge Cox,

I propose to bring before you an issue that I believe merits attention by the Commission. I do not see this particular topic on the agenda published on the web site.

The issue that I would ask you to consider deals with the absence of military law and process associated with cases in which deceased service people are accused of crimes by their service. My experience with this issue stems from an investigation that I organized and conducted while I was Director of Components at Sandia National Laboratories from 1989 to 1991. At the request of the Senate Armed Services Committee, Sandia conducted an independent investigation of the cause of a tragic explosion aboard the battleship USS Iowa that resulted in the death of forty-seven crewmen.

As you may recall, the explosion occurred on April 19, 1989, while the Iowa was participating in a fleet exercise. An open breech explosion took place in Turret II that killed all the men in the turret. The Navy conducted an investigation that concluded that: 1) the explosion could not have been an accident; 2) since an accident was not possible, the explosion must have been the result of a deliberate act by a member of the crew, and; 3) the Navy identified a crewmember who "most probably" committed this act.

Both the Senate Armed Services Committee and joint committees of the House called the Navy to testify about their findings. Concerns with the Navy investigation led to a request from SASC that Sandia conduct an independent investigation.

The independent investigation was documented in GAO reports and also in a book published in 1999 by the Naval Institute Press, "Explosion Aboard the Iowa", authored by myself.

A continuing personal concern has been that no formal process took place following the accusation by the Navy that a particular crewman had intentionally caused this tragedy. No advocate was appointed, no defense was prepared and no cross examination of accusers took place. Furthermore, defaming and unauthenticated information about the accused unrelated to the accusation was released by the Navy through unidentified sources during their investigation.

I would like to visit with you about this case, discuss details and process changes that I would propose, and reasons why I believe it is important to address this issue.

Sincerely,

Dr. Richard L. Schwoebel
Retired Director, Surety Assessment Center
Sandia National Laboratories
Albuquerque, NM
phone/fax 505 858 1240

Subject: Article 125, UCMJ
Date: Fri, 23 Feb 2001 10:47:53 EST
From: Timber5435@aol.com
To: judgecox@earthlink.net
CC: Cliff4Vets@aol.com

Dear Sir; I am a Gay Retired Army Veteran. I would like to see the removal from the UCMJ of Article 125, regarding sodomy. It has never been fairly applied, especially to "straights". There should be articles which protect all servicemembers from all forms of unwanted sexual advances, and harrassment of all sorts. Thank you.

Sincerely,

Leo Dorrington
MSG, US Army Retired
PO Box 1667, Boston, MA 02105-1667
Email timber5435@aol.com

Subject: Fwd: Cox Commission
Date: Thu, 01 Mar 2001 16:29:59 -0000
From: "David Woodbury" <ryanw32@hotmail.com>
To: judgecox@earthlink.net
CC: ryanw32@hotmail.com

I sent this to the wrong email initially, then couldn't find the Army Times at the library again, with your correct email. I just searched for cox commission online and apparently found your email address just in time to be heard. I suppose this issue will now fall under your item #17: evolving standards of privacy/sexuality.

>From: "David Woodbury" <ryanw32@hotmail.com>
>To: cox@earthlink.net
>CC: ryanw32@hotmail.com
>Subject: Cox Commission
>Date: Fri, 29 Dec 2000 18:31:42 -0000
>
>Hello, sir. This is SSG David Woodbury sending to you from the Camp Doha
>library, in Kuwait. I just got done reading the article in the 18 December
>Army Times that mentioned the commission you are leading to review certain
>regulations of the UCMJ. The commission is to review "whether adultery
>should be considered a crime." This is outrageous! What kind of a stab in
>the back would that be! Families everywhere will feel the pain. I know that
>they already do, but how can we increase the insult by calling it anything
>less than it is? Betryal. Is that fine, ok, no problem? And the loosening
>of standards, we can be assured, will lead to an increase in the activity.
>How can the words "American military justice" now be associated with
>"legalized adultery." Is that the statement we need to make? When too many
>people want to trample someone's rights, we just say "okay, it's not
>illegal anymore." Our government was founded on values and our oath of
>service is to uphold those values, as embodied in the Constitution--it is
>not to serve the will of any tyrant, be that tyrant an individual or a
>majority. If this change is made, we heap the dishonor on the victims,
>preserving the offenders. We say to them, "Disloyalty is no big deal. Suck
>it up and drive on." We may as well state it plain and clear (and yet I
>hope it never comes to this) that there should be no dishonor nor any
>punishment for the violation of any oath--be it to God or State. That would
>be to say, that people must be free, no matter what the cost to everyone
>else! Down with the family! To make adultery less than a crime would, at
>the very least, make a pure mockery of one of the essential Army Values:
>Loyalty. May as well replace it with "Betrayal and the Undermining of
>Authority, Good Conduct, and Discipline." The courts are there to preserve
>justice, not to cater to those with a weak moral back-bone. If you want to
>preserve Army honor, discipline, and morale, hold every offender to the
>fire--the message just might get across. As long as we are vigilant to
>prosecute offenses, and make no allowances for rank, Army honor will be
>preserved. Thank you for your consideration.

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Subject: UCMJ Changes...
Date: Tue, 6 Mar 2001 14:29:21 -0700
From: Bertha Carlos E Dr USAFA/DFPY <Carlos.Bertha@usafa.af.mil>
To: "'judgecox@earthlink.net'" <judgecox@earthlink.net>

Dear Judge Cox:

I am Carlos Bertha, an Assitant Professor of Philosophy at the US Air Force Academy. My areas of concentration include Military Ethics, and have a particular interest in legal theory. I am also a captain in the Army Reserves (currently inprocessing with USSPACECOM), so the UCMJ is certainly not new or foreign to me (in fact, as a matter of academic preparation, I believe I am more intimately acquainted with the Manual for Courts-Martial than your average military officer).

I would be very interested in participating in the discussion that shapes any possible/forthcoming changes to the UCMJ. My schedule is quite flexible, particularly in the summer, and I could probably make a case for the department having an interest in letting me participate in a venture of this nature (to the point, perhaps, of allowing me to be TDY for short periods of time). Anyway, I am getting WAY ahead of myself. Let me just offer my services, interest and military ethics background and leave it at that. If there is any way I can be a part of this venture, I would love the opportunity. Feel free to look at my vitae and military bio for additional information (see link below).

Best regards,

Carlos E. Bertha, Ph.D.
Assistant Professor
Department of Philosophy
United States Air Force Academy
http://www.usafa.af.mil/dfpfa/CVs/Bertha/
(719) 333-8655

Subject: FW: Schedule for March 13 hearing
Date: Wed, 7 Mar 2001 09:15:15 -0600
From: <HolianLT@mfr.usmc.mil>
To: judgecox@earthlink.net

Sir,

Why are no senior Judge Advocates involved in this process? Why is there no representation from the Joint Chief of Staffs? I may not know all of the facts, can I be informed.

Semper Fidelis,
Capt Holian

Subject: Article 125
Date: Tue, 6 Mar 2001 15:20:16 -0500 (EST)
From: kimball@altavista.net
To: JudgeCox@EarthLink.net
CC: Cliff4vets@aol.com

I have been helping veterans upgrade their military discharges since 1977. Following are a couple of my encounters with Article 125.

Very respectfully,
Dick Kimball

cc: Cliff Arnesen, GLB Veterans of New Eng.
==========
Two True Article 125 Stories

About 1957
Roger was a buck sergeant working on staff for the ROTC Program at MIT. Most weekends he returns home to rural Maine. He discovers that a sailor from the Navy shipyard in South Boston also is driving to that area of Maine and they arrange to carpool and save on gas.

The sailor is apprehended and investigated for being homosexual. The authorities investigate Roger for possible homosexuality. Roger is called into the Army investigator's office. The proposition put to Roger is a simple one: either he can admit to being a homosexual and be thrown out of the Army with an Undesirable Discharge, or the Army will investigate him by sending agents to his home town to ask people who know him if they have observed anything about Roger that would lead them to suspect that he is a homosexual.

Faced with having his reputation in his home town destroyed, Roger signed the admission to being a homosexual and accepted the discharge. Roger, however, was not actually a homosexual.

About 1989
Paul was a First Lieutenant at an Air Force Base in England. He was the officer in charge of a number of buildings including the gym and a combined Officers and Enlisted Club. Paul was also the beneficiary of a recent inheritance and owned two cars, one of which was a Cadillac.

Paul had occasion to ban one enlisted man from the club over a couple of incidents of loutish behavior and foul language. The enlisted man openly made threats of revenge against Paul. A few months later, the enlisted man accused Paul of being homosexual. The enlisted man's best friend backed-up this accusation.

This accusation was accepted and acted upon. Paul demanded and got a court-martial. During the formal investigation of charges, a former enlisted man who had been given a Bad Conduct Discharge by a court-martial for several offenses, including perjury, offered to testify against Paul. This offer was accepted and he was twice flown from the United States to England for this at government expense.

Paul was tried by a General Court Martial for committing a homosexual act with one of the accusers and taking an indecent nude photograph of the other one. The accusers were permitted to change their testimony on critical facts such as the

location where the homosexual act had taken place and the date. They had placed Paul's home in the wrong town and selected a date when he was away for a week.

In spite of glaring inconsistencies between the original accusations and the testimony of the accusers, in spite of the fact that the photograph was never introduced into evidence, in spite of the obvious motives of all three prosecution witnesses to testify falsely, Paul was convicted. He was sentenced to a year in prison and dismissal (the equivalent for an officer of a Dishonorable Discharge). The conviction was upheld through two military appeals. There are military appellate judges who never, throughout their entire careers, overturn a single conviction.

Paul was and is a heterosexual. The accusations against him were false. He had even dated a woman officer who was one of the prosecution team on this case. Paul is now a "graduate" of the U.S. Disciplinary Barracks at Fort Leavenworth, KS.

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Subject: Entrapment in Military Cases
Date: Tue, 6 Mar 2001 15:40:08 -0500 (EST)
From: kimball@altavista.net
To: JudgeCox@EarthLink.net

My name is Richard Kimball. In my volunteer work at the VA, I help veterans upgrade bad military discharges. The facts of one case, dating from the 1990's absolutely grate on me:

The Making of a Military Dope Dealer

Prologue:
Private First Class S was a member of a tank company that had been on training maneuvers with the Bradley Fighting Vehicle in the boondocks for some two months. Many of the men smoked marijuana out of sheer boredom, PFC S among them. Immediately upon the unit returning to Fort Stewart, a random urinalysis (drug screen) was ordered. PFC S was in a panic. Marijuana use is detectable for several weeks after the last use.

At this time several enlisted men observed that senior NCO's who used marijuana never seemed to get caught by urinalysis. The rumor started around that there was a way to beat the urinalysis. By the time the rumor got to PFC S, it indicated that the secret was to take the broad spectrum antibiotic tetracycline. This is nonsense, but PFC S didn't know that.

PFC S contacted a military medic he had known previously, Specialist Fourth Class M. Unbeknownst to Private S, Sp4 M had been apprehended for some sort of hanky panky of his own and was at the time working as an informant for the Army's Criminal Investigations Division (CID) in the hope of reducing his sentence. The unlucky PFC S asked Sp4 M for some tetracycline.

The Sting:
Sp4 M informed PFC S that, while he personally did not have access to tetracycline, he could put PFC S in contact with someone who could help him. Boys and girls, can you say, "Narc?"

The female agent from the Army CID who pretended to be a military hospital pharmacist insisted that she would only "trade" the tetracycline for marijuana; she wouldn't sell it to him for cash. PFC S, whose wife was just about to deliver their first baby, was desperate.
PFC S was terrified of the possibility of being a marijuana distributor, but he was even more reluctant to be incarcerated in the stockade, instead of with his wife, at the birth of their first child. He argued with the CID agent that he didn't have any marijuana, and that he wasn't a dealer. She insisted that the only way she would get him any tetracycline was if he got her some marijuana. Finally, she gave him $5 to get her a "nickel bag" of marijuana. He took her money, went into town, and bought a tiny bag of marijuana from a civilian dealer. At his subsequent court martial, this turned out to be 0.04 gram, not quite 1½ thousandths of an ounce.

The Kill
The CID agent was, of course, not satisfied with this. The initial transaction was, in all likelihood, just a means to gain PFC S's confidence. The agent then gave PFC S $50 to buy her more marijuana. PFC S repeated the earlier process and was able to buy her a 6 gram bag (just over 1/5 of an ounce).

PFC S was so terrified, by this point, that he arranged to rendezvous with the agent in a remote parking lot on the base at a late hour. After he gave the agent her change (since he kept no profit for himself) he insisted that she go to his car herself and retrieve the marijuana from its hiding place there. Of course, a second agent was hidden nearby photographing this whole transaction with a telephoto night vision camera.
PFC S failed his urinalysis and was reduced two pay grades, to the lowest possible rank, that of a new recruit.

Then former PFC, now Private, S was ordered to stand trial before a General Court Martial for "selling" marijuana to the undercover CID agent. For the good of his family, Private S offered to become an informer and to help apprehend an actual dealer on Fort Stewart. Private S was actually able to cause the apprehension of Private A, who had really been dealing in marijuana on the base, but even this turned out to work against him.

The CID agents to whom Private S was reporting left messages for him with his unit identifying themselves as being with the CID. If this were done innocently, it would be such an unbelievably naïve mistake that it may be assumed to have been deliberate and malicious. The outcome of this action was that Private S was alienated from his former friends in his unit and prompted his immediate superior, Sergeant D, to tell Private S in no uncertain terms that the sergeant intended to, "screw [S] for being a snitch." Many other former friends and supporters also turned against Private S when they learned that he was an informer.

The Trial:
The case of Private S was assigned to Military Judge A, who was known to hand out particularly harsh sentences, to be especially severe with drug offenders, and even more so with drug dealers.

Major W was assigned to defend Private S. Major W's offer of a "Chapter 10 Discharge" Under Conditions Other Than Honorable "for the Good of the Service," the military version of a plea bargain was turned down by the prosecution.

In 1984, the Reagan Administration had revised the Manual for Courts Martial, making drug cases much easier to prosecute , and consequently, much more difficult to defend. These revisions also made the punishments for drug offenses much harsher. The facts that Private S: did not keep an inventory of marijuana on hand, did not make the slightest offer to sell the agent any marijuana, had been visibly reluctant to buy the marijuana on the agent's behalf, and had made absolutely no profit on the transactions would not (and did not) save him from conviction.

One gets the impression that Major W had pretty much given up on this case. Since Major W may have seen numerous similar cases, he may have accurately determined that the case of Private S was hopeless from the outset. At any rate, Major W decided to plead Private S guilty in exchange for a predetermined sentence. Private S wanted to fight the charge, but relented when Major W threatened that Private S might face a maximum sentence of 30 years in Leavenworth . Major W did not even bother to identify favorable character witnesses (although Private S did get some for himself), but this may also have been a rational response to feeling that the case of Private S was hopeless.

Because of the guilty plea, the verdict was a foregone conclusion. Immediately upon accepting Private S's guilty plea, Judge A convened a sentencing hearing.

Private S believed that he was pleading guilty in exchange for a sentence of three months imprisonment , but that was not to be the case.

Sergeant D made good on his threat (above), testifying that Private S was generally worthless, could not be trusted, and required constant supervision. The testimony of other superiors above Private S was similar, although less harsh. All Private S got for acting as an informant and obtaining evidence against an actual drug dealer was a lukewarm letter from the CID indicating to the court that he had been "helpful." Private S's cooperation with the CID did him vastly more harm than good.

Judge A sentenced Private S to, "one year plus one day" of imprisonment and a Bad Conduct Discharge. However, since Private S had just been reduced to the lowest possible pay grade and was the sole support of his wife and baby, he was not sentenced to any loss of pay. Private S was transferred to Leavenworth.

Please recall that the entire offense consisted of transferring less than ¼ ounce of marijuana without making any profit on it and at the request of the agent. Also recall that the only offense that S actually intended to commit was the purchase of some antibiotic without a prescription.

Private A, the real marijuana dealer that Private S identified and helped apprehend, was sentenced to a fine of $600, plus 45 days of extra duty and 45 days of being restricted to Fort Stewart, with the restriction as a suspended sentence. Private A was honorably discharged. The official reason for Private A's relatively lenient sentence was that the main witness against him was not available; since this witness was Private S himself, that was simply not the case. Private S had not yet even been transferred to Leavenworth.

About the only bright spot in all of this for Private S is that his wife was still waiting for him when he was released from prison with his Bad Conduct Discharge. Although he is now a federal felon, the former Private S is rebuilding his life and remains happily married.

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