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From: Fidell, Eugene [REDACTED]

Sent: Tuesday, November 26, 2013 11:12 PM

To: Green, Kyle W LTCOL USAF OSD OGC (US)

Cc: Ham, Patricia A COL USARMY OSD OGC (US); Saunders, Terri A CIV OSD OGC (US); Doser Pascual, Ranae L MAJ USAF OSD OGC (US); Nelson, Douglas M CIV (US); Gordon, Joanne Katherine CIV (US); Fried, Maria A CIV OSD OGC (US)

Subject: Perspective on MJIA Legislation

Dear Kyle,

Thank you for your email.

Echoing a point he made in an opinion article for the October 27, 2013 San Antonio Express News (p. F6, cols. 3-4), a November 2013 White Paper by Prof. Schlueter on proposed UCMJ amendments states (p. 4):

". . . Recently, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia overturned the conviction of a man named General Markač, a commander of a Special Police unit during the Croatian War of Independence in the 1990's. The appellate court noted that although General Markač had some control over his subordinate commanders, his authority to discipline them for their misdeeds was not within his power because any crimes committed by members of his command fell under the jurisdiction of civilian prosecutors. Thus, the court said, he could not be held liable for crimes committed by his subordinates. . . ."

This is not an accurate summary of the Appeals Chamber's reasoning in its November 16, 2012 decision in Markač. Please refer to paragraphs 148-57 of that decision. The Appeals Chamber's refusal to convict Markač on a theory of superior responsibility as an alternate form of liability was based, in the first instance, on the fact (para. 148) that "the Trial Chamber was unclear about the parameters of Markač's power to discipline Special Police members, noting that he could make requests and referrals, but that 'crimes committed by members of the Special Police fell under the jurisdiction of State Prosecutors.'" (Footnote omitted.) In other words, the lower court did not properly develop the scope of his power.

The Appeals Chamber added:

150. As set out above, the Trial Chamber did not make explicit findings sufficient, on their face, to enter convictions against Markač based on the two alternate modes of liability deemed relevant by the Appeals Chamber. In the absence of such findings, and considering the circumstances of this case, including the full context of the arguments presented by the parties at trial and on appeal, the Appeals Chamber, Judge Agius dissenting, declines to analyse the Trial Chamber's remaining findings and evidence on the record in order to determine whether Markač's actions were sufficient to satisfy the elements of alternate modes of liability. To undertake such an investigation in this case would require the Appeals Chamber to engage in excessive fact finding and weighing of evidence and, in so doing, would risk substantially compromising Markač's fair trial rights.

151. More specifically, the Appeals Chamber recalls that JCE [joint criminal enterprise] and unlawful artillery attacks have been the central issues in the parties' arguments since the beginning of this case. The Prosecution's Pre-Trial and Final Trial Briefs consistently focus on the existence of unlawful attacks

and a JCE. On appeal, the Prosecution devoted a single footnote to alternate modes of liability in each of its response briefs and referred to the matter only briefly during oral arguments. (Footnote omitted.)

It is not surprising that the Appeal Chamber would decline to adjudge a conviction on a theory to which the prosecution devoted only one footnote and the briefest of references at oral argument.

The decision cautioned in para. 153 that "any attempt by the Appeals Chamber to derive inferences required for convictions under alternate modes of liability would require disentangling the Trial Chamber's findings from its erroneous reliance on unlawful artillery attacks, assessing the persuasiveness of this evidence, and then determining whether Markač's guilt was proved beyond reasonable doubt in relation to the elements of a different mode of liability. Such a broad-based approach to factual findings on appeal risks transforming the appeals process into a second trial."

The next paragraph stated:

154. The Appeals Chamber observes that in the context of this case, drawing the inferences needed to enter convictions based on alternate modes of liability would also substantially undermine Markač's fair trial rights, as he would not be afforded the opportunity to challenge evidence relied on by the Appeals Chamber to enter additional convictions. The Appeals Chamber notes that Markač was provided the opportunity to discuss whether the Trial Chamber's findings implicate alternate forms of liability. However the scope of this additional briefing did not extend to challenging evidence presented to the Trial Chamber. Even if the Appeals Chamber had exceptionally authorised Markač to challenge evidence not related to his convictions, the very large scale of potentially relevant evidence on the record would render any submissions by Markač voluminous and speculative. In addition, Markač would almost certainly have been left uncertain about the scope of the case against him on appeal. (Footnotes omitted.)

In other words, the Appeals Chamber deemed it fundamentally unfair to convict on an alternate theory of liability given the way the case had unfolded.

A later paragraph elaborated on why it could not approve a conviction on an alternate theory:

156. The Appeals Chamber recalls again that the Trial Chamber found that Markač incurred criminal liability on the basis of two sets of actions: i) unlawful artillery attacks on Gračac; and ii) the Failure to Act. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, has now reversed the Trial Chamber's conclusion that artillery attacks on Gračac were unlawful; found that Markač's Failure to Act does not, in itself, satisfy the elements of aiding and abetting or superior responsibility; determined that it is inappropriate, in the circumstances of this case, to make additional inferences from the findings of the Trial Chamber and evidence on the record; and concluded that Markač cannot be held liable for deportation. In this context, the Appeals Chamber, Judge Agius dissenting, can identify no remaining Trial Chamber findings that would allow a conviction pursuant to an alternate mode of liability for the crimes Markač was convicted of: deportation, persecution, murder, and inhumane acts as crimes against humanity, and plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war. (Footnote omitted.)

In other words, the Appeals Chamber declined to act as a trial court itself by filling in gaps in the evidentiary record or the Trial Chamber's findings.

Paragraph 157 stated in pertinent part: "Accordingly, the Appeals Chamber, Judge Agius dissenting, will not enter convictions against Markač on the basis of alternate modes of liability."

In light of the actual rationale of the Appeal Chamber's decision, therefore, Prof. Schlueter's reliance on Markač for the proposition that "[t]he same result could occur under the proposed amendments, where someone outside the chain of command is making a binding decision to prosecute or not prosecute crimes occurring within the commander's command" is misplaced.

I respectfully disagree with other assertions in Prof. Schlueter's paper (to include his dismissal of foreign legal developments), but I especially wanted to flag this one because of the obscurity of the matter and my concern that the Panel might not otherwise be in a position to probe it to the extent needed to obtain a proper understanding of the Appeals Chamber's rationale.

Very respectfully,

Gene Fidell

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From: Green, Kyle W LTCOL USAF OSD OGC (US) [REDACTED]  
Sent: Thursday, November 21, 2013 2:42 PM  
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Subject: Perspective on MJIA Legislation

Professors,

Many of you are likely familiar with the Response Systems Panel - the congressionally mandated review committee tasked under Section 576 of the FY13 NDAA to evaluate DoD's sexual assault crimes response systems. I am the staff branch chief for the Role of the Commander Subcommittee, which is one of three subcommittees created by the Secretary of Defense to assist the Panel in its statutory charter.

The RoC Subcommittee's Terms of Reference require its members to assess legislation that affects the role of the commander under the UCMJ. The Military Justice Improvement Act, first introduced by Senator Kirsten Gillibrand in May, is under consideration. RSP previously received information from the Service TJAGs and others on technical and resourcing considerations for a draft version of the MJIA. A revised version of the MJIA (attached) was introduced yesterday as an amendment to the FY14 NDAA, and members of the Role of the Commander Subcommittee have requested perspectives on the revised amendment.

Would you be willing to provide written views for consideration? We are primarily seeking technical and resourcing assessments of the amendment, although philosophical perspectives are also central to the discussion. Since congressional consideration of the NDAA and the MJIA amendment is now underway, the Subcommittee plans to meet next week to consider any views received.

Thank you for your consideration, and please contact me with your inputs or questions. If you would like to review the work of the RSP and its subcommittees, our website is <http://responsesystemspanel.whs.mil/>.

Respectfully,  
Lt Col Kyle Green

KYLE W. GREEN, Lt Col, USAF  
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