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## Symposium ("Challenges and Changes to Military from the War on Terror": Introduction

Jon W. Shelburne

*Roger Williams University School of Law*

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# Symposium

## Introduction

Jon W. Shelburne\*

In May of 2006, the Court of Appeals of the Armed Forces (CAAF) issued the *Moreno* opinion<sup>1</sup> in which the court found the appellant was subjected to an unreasonably lengthy delay for no constitutionally justifiable reason, and suffered prejudice as a result of his oppressive incarceration. The court held that as a result of the unreasonable delay, *Moreno* was denied due process under the fifth amendment of the U.S. Constitution and the right to speedy appeal. *Moreno* sent shockwaves through the military justice system resulting in the respective Services developing more stringent guidelines for processing cases. The Navy and Marine Corps took particular notice because the opinion singled out their courts as the worst offenders when it comes to delay in post-trial processing.

Almost two months prior to the release of the *Moreno* decision, Roger Williams hosted a symposium on 31 March of 2006 titled “Challenges and Changes to Military from the War on Terror” at the School of Law in Bristol, Rhode Island. At that symposium, Eugene Fidell delivered an extremely insightful keynote address raising questions about the current practices of the military appellate courts and essentially predicted the CAAF opinion in *Moreno*. In his comments, Mr. Fidell was particularly critical of the significant and not unusual delays of the courts’

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\* Visiting Assistant Professor of Law, Roger Williams University School of Law.

1. *United States v. Moreno*, 63 MJ 129 (2006)

handling of cases. He made a number of insightful recommendations and predicted changes necessary to restoring credibility to the military appellate process. We are delighted to be able to share Mr. Fidell's comments and opinions in this issue of the law review.

This issue of the Roger Williams University Law Review contains several other interesting articles covering a broad range of topics which attempt to tackle current issues in military law. From military commissions to handling secret evidence to simple challenges facing service members who want to leave active duty after fulfilling their contracts, the articles contained in this issue identify problems military lawyers are facing on a daily basis and provide wide ranging solutions to assist military attorneys and the current and future administrations in dealing with these complex and difficult issues.

The authors who are featured in this edition are representative of the fine scholars and practitioners who work in the area of military law. Eugene Fidell practices in a law firm in Washington, D.C. and has become one of the most noted experts in the area of military law. Frank Williams, the Chief Justice of the Rhode Island Supreme Court, writes for this edition as one of only four individuals given special commissions in order to serve as officers charged with providing appellate review to the military commissions currently being tried at Guantanamo Bay. Victor Hanson and Lawrence Friedman provide a unique combination of service in the military and years of academic excellence at New England School of Law. Major Robert Bracknell served in the Marine Corps a number of years before deciding to pursue his law degree. He writes from the perspective of one who still leads Marines, has studied at Harvard and serves as a judge advocate in the Marine Corps. Our very own Peter Margulies has written and published extensively on a range of topics in international law and has established himself as a preeminent scholar in the area of the legal response to terrorism since 9/11. He has been a professor at Roger Williams for almost 7 years and has been teaching and writing for almost 20 years. His co-author, Laura Corbin, still serves in the Army Reserve while completing her degree at Roger Williams and provides insight into the inner workings of an army that has been consistently deployed for the past five years. Sharing her active duty experience is a fellow Army officer,

Captain Cameron Elizabeth Hernandez who tackles an interesting and yet often overlooked area of concern for active duty and reserve members of our military who merely want to go home after fulfilling their contracts to the U.S. military. Michael Newton is a law professor at Vanderbilt and has been widely published in military and international law. A West Point graduate and former Judge Advocate, Professor Newton has deployed with forces in Kosovo and elsewhere giving him a unique perspective on the legal response to Counter Insurgency.

When the students on the law review editorial board approached me last May and asked whether we could create a meaningful edition covering topics in military law, I was eager to help them seek out articles from those who practice or write in this interesting and dynamic area of the law. As the articles in this edition demonstrate, the military practice of law covers a wide range of topics that cross over into many other areas of the law. Global, international, national, regional, and even individual issues are raised by the authors of the articles contained within the covers of this publication. Wide-ranging solutions to security threats created by the global market and practical solutions to prosecuting acts of terror while reducing the possibility of allegations of torture are representative of the issues raised here.

As I reviewed the assembled articles and thought about the best way to open this edition of the law review, I was reminded of my first duty station in Okinawa. My family was young and we had a limited budget due to college loans (pale in comparison with the debt our current graduates are facing). So we eagerly looked forward to the Sunday brunch at the Officer's Club. There were so many choices, the fruit was always fresh, and perhaps best of all, my boys ate for free. This issue of the law review is like that in so many ways. There are choices and things of interest for every reader, the topics raised are fresh and current, and the solutions offered are free for the taking to anyone who will listen.

As young Captains serving in Okinawa in the early '90s, my colleagues and I had no idea how 9/11 would change the practice of law within the military. We were handling "Don't Ask, Don't Tell" policy changes and trying to foster an attitude of greater respect for the broader range of due process protections emerging with each change to the UCMJ – but there was no way we could have predicted how the President would choose to use the military

to implement the Tribunals or to guard detainees or to prosecute the war on terror. With each new day, with each new month, with each passing year, our military lawyers and those who choose to practice in the area of military law are asked to develop and carry out wide-ranging changes in policy and the law that go far beyond the days of tweaking social policies. While the UCMJ largely remains the same, other areas of military law have been stretched. To a greater degree than ever before, judge advocates are being asked to step into operational roles and provide advice side by side with the forces carrying out the orders and missions of the day in a combat environment.

The prosecution of Captain Randy Stone, a judge advocate, and Lieutenant Colonel Jeffrey Chessani, Captain Stone's battalion Commander, for their roles in alleged killing of civilians in Haditha highlight the new and changing face of the alleged wrong-doer in this new age. The young judge advocate who deploys with a combat unit finds him or herself facing new challenges to provide the commander with timely, relevant and accurate advice within the dynamic and ever changing battle space. That advice is then frequently subject to second guessing and arm-chair review from the comfortable confines of the Pentagon or briefing rooms in Congress. The threat of prosecution for inaccurate or untimely advice raises the question whether we have unrealistic expectations about the roles our lawyers should be playing in the modern military. Are we creating an environment in which the commander will be afraid to move without first seeking written advice from the judge advocate? Will the judge advocate or civilian counsel charged with providing advice to a military commander hesitate to provide such advice without first seeking guidance from higher authority within the chain of command or civil service bureaucracy? Will the hesitation on the part of the military lawyer or commander result in a paralysis that can only be measured with lives and limbs? While these questions are not answered directly in the articles selected for this issue, the questions certainly highlight the need for vigorous debate about the current state of military law. The questions reflect a pressing need for those who practice in this area to remain focused on enhancing and improving the laws we as military lawyers are charged with enforcing. And perhaps most importantly, the questions posed call us to a higher duty to

educate our lawyers, commanders and the public at large in this ever changing area of the law.

Our hope is that this issue will help foster new debate in the area of military law. The Commandant of the Marine Corps recently released his guidance on the reading program for all Marines.<sup>2</sup> This program encourages all Marines of all ranks to continue to read books that provide historical and common frames of reference for our small unit leaders. The program encourages Marines to educate themselves, challenge themselves, and test themselves with knowledge from our past to help with the current decisions we must make on a rapidly changing battlefield. This issue of the law review seeks to promote many of those same goals. The only way this generation of lawyers can hope to rise to the challenges being faced every day is to continue to educate ourselves about the problems we face, to debate the policy and law we are charged with enforcing, and to seek refinement in areas where the law is flawed or in need of change. It is our hope that this issue will assist practitioners and scholars in military law to meet those challenges.

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2. Commandant's All Marine (ALMAR) message 030/2007 dated June 5, 2007.