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# Is There a Crisis in Military Appellate Justice?\*

Eugene R. Fidell\*\*

It is a pleasure to be with you today, not only because Dean Logan is an old friend and former law firm colleague, but also because I have fond memories of Rhode Island, the state where my father spent part of his childhood. Some 36 years ago I was a student at the Naval Justice School, a few miles away in Newport, and I have never forgotten the pleasant time I spent there, early in my career.

## I.

Is there a crisis in Appellate Military Justice? At first glance the question seems an odd one. After all, don't things seem to be going pretty well on the appellate side of the military justice system? The highest court of the jurisdiction – The United States Court of Appeals for the Armed Forces – is turning out careful, scholarly opinions that are easily on par with the work of the geographical circuits. Moreover, there has been a minimum of friendly fire among the judges; collegiality seems to be the order of the day. Thus, the court has increasingly spoken with one voice or at least by a lopsided majority. This means the danger of doctrinal fragility is small. This historic courthouse on E Street is in wonderful shape. There have been no recent reversals by the Su-

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\* Remarks of Eugene R. Fidell during the Military Justice Symposium at Roger Williams University Ralph R. Papitto School of Law, Bristol, Rhode Island, March 31, 2006. Opinions expressed in these remarks are personal to the author and do not necessarily represent the views of the National Institute of Military Justice.

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preme Court. Nor have there been any unanticipated departures from the court. The court, as well as the service courts of criminal appeals, are untouched by scandal. So, all in all, things look pretty good.

## II.

A closer look, however, presents a less rosy picture. Let me give some examples.

Despite the current high level of interest in all things military (including military justice and its cousin, military commissions), the Court of Appeals continues to be an unknown institution, not only to the American public and other federal courts, but even to Congress.

That the court is not on the public's screen is hardly a surprise, but that it is not on the screen of the other federal courts, after nearly 60 years of existence, is. A glance at *Shepard's Military Justice Citations* shows that the court's opinions – scholarly though they often are, and dealing as they frequently do, with issues that could arise in any criminal justice system – are still only infrequently cited outside the military appellate courts.<sup>1</sup> This is nothing new,<sup>2</sup> but the fact that it persists after so many years remains disturbing. The military itself may be a “specialized society separate from civilian society,”<sup>3</sup> but that is not inevitably true of military appellate jurisprudence. I do not believe this is healthy or in the long-term interests of the system or the country.

Recently we were subjected to a remarkable indication of congressional disdain for the military appellate system. As you know, Congress recently passed two important pieces of legislation concerning detainees. One – the McCain Amendment – forbade the use of cruel, inhuman or degrading treatment of Department of Defense detainees. The other – the Graham-Levin Amendment –

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1. It happens from time to time. See e.g., *United States v. Platte*, 401 F.3d 1176, 1181-83 (10th Cir. 2005); *People v. Williams*, 20 A.D.3d 72, 77, 795 N.Y.S.2d 561, 566 (N.Y. App. Div. 2005); *Anderson v. State*, 385 Md. 123, 136, 867 A.2d 1040, 1047 (Md. 2005), all noted in *Shepard's Military Justice Citations* (Jan. 2006 Cum. Supp.).

2. See generally Eugene R. Fidell, “If a Tree Falls in the Forest. . .”: *Publication and Digesting Policies and the Potential Contribution of Military Courts to American Law*, 32 JAG J. 1 (1982).

3. E.g., *Parker v. Levy*, 417 U.S. 733, 743 (1974).

effectively zeroed out Guantanamo detainees' access to the district courts for writs of habeas corpus.<sup>4</sup> Congress conferred on the United States Court of Appeals for the District of Columbia Circuit judicial review authority over the military commissions and Combatant Status Review Tribunals. This was achieved without any hearings and on a needlessly expedited basis. So far as known, no consideration was given to conferring that appellate authority on the Court of Appeals for the Armed Forces, where – at least as to the military commissions – one would have expected it to reside, since the military commissions are criminal proceedings conducted by military lawyers and ordinarily guided by the rules applicable to general courts-martial.<sup>5</sup>

What is more, given the fact that the detainees and others argue that they are entitled to the trial and appellate rights afforded to POWs because of the government's failure to conduct competent tribunals under Article 5 of the Third Geneva Convention, affording them, under Article 102, appellate review in the same court that reviews our internal disciplinary cases – i.e., courts-martial – would have been a way of honoring at least the spirit of the Geneva Convention.

Whatever other fault can be found with the DTA, Congress's failure to confer this jurisdiction on the Court of Appeals for the Armed Forces hardly reflects a recognition of the court and its strengths. Considering the fact that the principal author of the Graham Amendment is an experienced military lawyer (indeed, one who has cited his own expertise in this regard), the choice is particularly incomprehensible – unless it is simply a reflection of the congressional satisfaction with the seeming direction of the District of Columbia Circuit based on its earlier decision in *Hamdan*.<sup>6</sup>

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4. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, tit. XIV, 119 Stat. 3473 (2006) (“DTA”); Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influence Act, tit X, §§ 1001 et seq. 119 Stat. 2739 (2005) (DTA).

5. MCM preamble ¶ 2(b)(2) (2005 ed.); see generally Eugene R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, *Military Commission Law*, ARMY LAWYER 47, 48-49 (Dec. 2005).

6. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2004); 126 S. Ct. 2749 (2006). The Supreme Court heard argument in *Hamdan* (No. 05-184) on March 28, 2006.

Certainly we can rule out one other possible explanation: that the Court of Appeals for the Armed Forces is too burdened by its present caseload to permit any additions. Mindful of the fact that a good deal of the court's energy is expended on screening petitions for grant of review in the largest (discretionary) part of its charter, the fact remains that it hands down a modest number of full opinions. Roughly speaking, since the 2004 term, the court has issued about one decision per judge per month. To the extent that it continues to entertain petitions that do not cite any error, moreover, it has only itself to blame for the size of its petition docket. While relief is occasionally granted even though the petitioner has failed to cite any errors in seeking discretionary relief (which is supposed to be for good cause shown),<sup>7</sup> this remains very rare.<sup>8</sup>

There have been other troublesome areas in the appellate military justice system in recent years. For example, at least one service court designates a single panel member to read the record of trial.<sup>9</sup> Considering the unique powers of those courts to set aside findings of guilt and reduce sentences,<sup>10</sup> the "reader judge" approach is disturbing. Equally disturbing is the fact that the court permitted two-judge service court panels to decide cases, even where there was no cogent reason for not filling out the bob-tailed panel.<sup>11</sup>

On a brighter note, the Court of Appeals correctly set aside many cases in which the service court seemed to have been on automatic pilot, simply lifting much of the issued opinion – by means of a few keystrokes – from government briefs.<sup>12</sup> With luck, at least that practice – which has already calculated to foster con-

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7. Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2000).

8. For a recent example see *United States v. Politte*, 62 M.J. 24 (C.A.A.F. Mar. 21, 2006) (3-2 decision).

9. *E.g.*, *United States v. Nelson*, 52 M.J. 516 (N.M.C.C.A. 1999); *United States v. Gibson*, 50 M.J. 575, 577 & n.1 (N.M.C.C.A. 1999); *United States v. Kolly*, 48 M.J. 795, 796 (N.M.C.C.A. 1998).

10. Art. 66(c), UCMJ, 10 U.S.C. §866(c) (2000) (C.C.A. "may affirm only such findings of guilt and the sentence or such part or amount of the sentence, as it finds correct in law and in fact and determines, on the basis of the entire record, should be approved"); see *United States v. Cole*, 31 M.J. 270, 272 (1990); *United States v. Parker*, 36 M.J. 269, 271 (1993).

11. *United States v. Lee*, 54 M.J. 285, 286-88 (2000).

12. *E.g.*, *United States v. Jenkins*, 60 M.J. 27, 29-30 (2004).

fidence in the administration of appellate military justice – has been forbidden. That it occurred in the first place, however, is disquieting.

### III.

Of all the problems currently vexing the system, the gravest, in my opinion, is that of delay. So far, the Court of Appeals has been unable to find a way to remedy this. Indeed, at times, the court itself seems to take far longer to decide matters that it ought.<sup>13</sup> But the real problem lies with the court of criminal appeals – mostly, but not exclusively, the United State Navy-Marine Corps Court of Criminal Appeals.

Cases at the Navy Court have frequently seemed to fall into an appellate black hole. The Court of Appeals has entertained a number of extraordinary writs as a result, and has even set aside the odd case where a particularized showing of prejudice could be made.<sup>14</sup> The court has demanded explanations,<sup>15</sup> but when the Navy responded that it felt the appellate division was properly staffed, the matter seemed to lose some of its urgency. At this writing, the Navy has made headway, but the problem of inordinate delay remains serious<sup>16</sup> and it is premature to conclude that a lasting solution has been found.

Members of the service have a right to expect better. They have a right to speedy review on appeal.<sup>17</sup> They have a right to

13. I can think of a case in which a petition for review was filed before the deadline, timely supplemented in August 2005, and briefing at the supplement (equivalent to certiorari) state was completed soon after. Seven months later, the court still has not decided whether good cause has been shown so as to warrant plenary briefing and argument.

14. *E.g.*, *United States v. Jones*, 61 M.J. 80, 83-86 (2005) (4-1 decision) (disapproving bad-conduct discharge).

15. *Diaz v. Judge Advocate Gen. of the Navy*, 59 M.J. 34, 40 (2003); *see also Diaz v. Judge Advocate Gen. of the Navy*, 59 M.J. 171 (2003) (mem.).

16. As of October 2005, for example, the Navy-Marine Corps Appellate Defense Division had 11 cases with 7-12 enlargements, 2 with 13-18 enlargements and 3 with over 19 enlargements. The numbers a year earlier were much higher in each category. Interestingly, the defense has no monopoly on issues of delay. Timeliness can be a headache for the government as well. *E.g.*, *United States v. Buber*, 61 M.J. 72 (2005) (mem.) (4-1 decision) (denying motion for extension of time to file certificate of review); *United States v. Harding*, 61 M.J. 477 (2005) (certificate for review); *United States v. Harding*, 62 M.J. 381 (specified issues).

17. *E.g.*, *Toohey v. United States*, 60 M.J. 100, 100-102 (2004) (per cu-

review at a time that can do them some good – not long after they have completed their sentence to confinement, as happens all too often under the current arrangements.

There are not that many measures available to address this problem.

One is to affect a sea change on the simple matter of enlargements of time. It is certainly true that everyone involved with military appeals has grown used to the liberal availability of enlargements. This culture needs to change. I believe it can. I recently met with the President and Deputy President of the Israeli Court of Military Appeals in Tel Aviv. Israel military practice requires that the accused's brief be filed within fifteen days, and the government's response within the same period – both subject to enlargement based on a showing of need. I am sure there is some flexibility in those deadlines, but I came away with the sense that appeals move along much more quickly than here.

Another remedy would be to overturn convictions or grant sentencing relief as a sanction. Certainly there are times when this relief can and should be granted, even without a particularized showing of prejudice. On the other hand, how likely is it that such relief will be granted in the most serious cases, such as those involving crimes of violence? The Court of Appeals has before it several cases of extreme delay. We should have a clearer sense of its approach in the next several months.

Another remedy would be for the Court of Appeals to prescribe a rigid deadline for final action by the service courts, after which the case would be deemed affirmed and hence ripe for review by the Court of Appeals. But even if one could identify a one-size-fits-all deadline,<sup>18</sup> cutting the courts of criminal appeals out of the process can work a serious injustice on the accused, since those courts have unique power over findings and sentences – a power not shared by the Court of Appeals. (Unlike the Supreme Court, which can grant certiorari prior to judgment in the courts

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riam) (4-1 decision); *Diaz*, 59 M.J. at 37.

18. When it became apparent that the boards for correction of military and naval records were taking inordinate amounts of time to decide cases, Congress imposed timeliness standards, but did not enact a rule arbitrarily granting relief when the standards were not met. See 10 U.S.C. § 1557 (2000); see also 14 U.S.C. § 425 (2000).

of appeals,<sup>19</sup> the Court of Appeals cannot entertain a petition for grant of review before the service court has decided a case,<sup>20</sup> although it does have extraordinary writ powers.)<sup>21</sup>

Yet another approach would be frankly procrustean. This would entail cutting back on the work of the service courts by abolishing mandatory review and shifting to a right of appeal. This would cut back on appellate delay by the simple expedient of cutting back on the sheer number of cases.

There is a conversation to be had as to whether the military appellate layer cake is too complicated, and whether the service courts should be abolished. This would also be a radical change, but it is one worth discussing – provided that at the end of the day the accused in any court-martial gets a chance to make his or her case on direct appeal to some court of law.

In 2003, the Navy briefly floated a proposal that would have eliminated automatic appellate review in guilty plea general and special courts-martial, substituting a right to appeal whenever a finding of guilt was based, even in part, on a not guilty plea. In cases not involving death sentences, punitive discharges, or confinement in excess of one year, the accused would be entitled to petition for discretionary review by the court of criminal appeals. The Army and Air Force did not support the idea and it never emerged from the Joint Service Committee on Military Justice, which proposes changes to the *Manual for Courts-Martial* and UCMJ.<sup>22</sup>

The next year, Jeffery D. Lippert, an Army judge advocate, proposed eliminating automatic appellate review for all special courts-martial, including those in which the sentence includes a bad-conduct discharge.<sup>23</sup> One of his contentions was that “reviewing special courts-martial cases under Art. 69 [i.e., administrative review in the Office of the Judge Advocate General] saves signifi-

19. 28 U.S.C. § 2101(e); SUP. CT. R. 11.

20. Art. 67, UCMJ, 10 U.S.C. §867 (2000), *e.g.*, United States v. McLaughlin, 46 M.J. 159 (1996) (mem.); *see also* EUGENE R. FIDELL, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 17 (11th ed. 2003).

21. 28 U.S.C. § 1651(a) (2000); C.A.A.F.R. 4(b).

22. I am indebted to Rear Admiral James E. McPherson, Judge Advocate General of the Navy, for information concerning this proposal.

23. Jeffery D. Lippert, *Automatic Appeal Under UCMJ Article 66: Time for a Change*, 182 MIL. L. REV. 1, 3 (2004).

cant post-trial resources because such review does not require the preparation of verbatim records of trial.”<sup>24</sup> He also argued that courts-martial “are only infrequently set aside on appeal.”<sup>25</sup>

Major Lippert’s proposal also rested on the notion that several states have put in place procedures for expediting criminal cases on appeal by screening them before a full record of trial is prepared.<sup>26</sup> It turns out, however, that only a handful of states do so, and, as he notes, the First Circuit found due process flaw in one of those states’ procedure because the appellate court ruled on requests for leave to appeal without an adequate record.<sup>27</sup>

Whatever is done to address the problem of delay on appeal, we should not throw out the baby with the bathwater. Every court-martial ought to be subject to direct appellate review; the UCMJ could usefully be amended to provide for the appeals as of right to the Court of Appeals across-the-board. The court can manage its caseload by ruling summarily on many cases. Dispensing with the petition states would save time and effort all around. It would also afford GIs the same right to petition for discretionary review by the Supreme Court as other criminal defendants enjoy. The current discrepancy<sup>28</sup> is indefensible.

#### IV.

I would like to propose two other approaches to the problem of appellate delay. One would require a major rethinking of the appellate structure; the other is much more easily done, and requires no legislation at all.

The more radical change would be to abandon the concept that appellate representation should be done by attorneys other than those who defended at trial. For many years, the appellate defense function has been centralized, in accordance with Article

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24. *Id.* at 4 & n.13; *see also id.* at 28-31.

25. *Id.* at 4 & n.10; *see also id.* at 17 & n.101

26. *Id.* at 34.

27. *Bundy v. Wilson*, 815 F.2d 125, 135 (1st Cir. 1987).

28. *See* Art. 67a(a), UCMJ, 10 U.S.C. § 867a(a) (2000) (denial of petition for grant of review is not reviewable on writ of certiorari); *compare* 28 U.S.C. § 1259 (3) (2000), *with* 28 U.S.C. § 1254(1) (2000). H.R. 1364, 109th Cong. (2005) (would amend § 1259 to permit petitions for certiorari where the Court of Appeals denied an extraordinary writ, but does not correct the second sentence of Article 67a(a), which blocks direct Supreme Court review in far more cases).

70 of the UCMJ.<sup>29</sup> This made eminent good sense when the military establishment was much larger and even more widely dispersed than it now is – or when communications with the field were subject to lengthy delays. Today, despite the current high tempo of operations and the deployment of troops in distant places, the fact is that the force has been downsized, permanent bases in places such as Germany, Britain, Japan and the Philippines have been reduced or eliminated, and communications between the field and Washington are far better due, among other things, to the Internet.

In addition, it must be recognized that there is a potentially serious disadvantage to the accused whenever a new lawyer steps in on appeal. Looking to trial defense counsel for the provision of appellate representation has much to recommend it. Nothing will be lost in translation, and the accused will at least have had the benefit of personal, face-to-face, contact with the judge advocate responsible for the appeal.

It may be objected that trial defense counsel may not be as familiar with the current state of appellate doctrine as are the specialist appellate defense assigned to the appellate divisions under the current arrangements. But all judge advocates go through the same training, and all have real-time internet access to the decision of the Court of Appeals and service courts of criminal appeals. If counsel in the field are not current on the law, they should not be defending anyone at trial.

Similarly, it may be objected that having separate appellate defense counsel is critical because issues of ineffective assistance of counsel (“IAC”) may be buried if appeals are handled by trial defense counsel. This is not a compelling argument. After all, questions of ineffective assistance of counsel can and do arise on appeal. We thus would need an infinite regress of counsel to deal with IAC claims. The real difficulty, it seems to me, is that the appellate military justice system relies on the direct appellate review process to address IAC claims, rather than having them addressed on collateral attack, as the civilian federal courts and the state courts do. The Cox Commission recognized that something had to be done on this subject;<sup>30</sup> to date, nothing has been done.

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29. 10 U.S.C. §870 (2000).

30. Walter T. Cox III et al., Report of the Commission on the 50th Anni-

Finally, the notion that relying on trial defense counsel to handle appeals is unworkable disregards the practical realities. Counsel in the field already have to be alert to the appellate process in three ways (aside from preserving issues): they must be ready to deal with government appeals under Article 62;<sup>31</sup> they must be ready to file extraordinary writs, with or without the assistance of the appellate counsel in Washington; and they must be ready to draft Article 38(c)(1)<sup>32</sup> briefs setting forth issues for further review.

Nor would reliance on trial defense counsel impose an enormous or unwarranted expense on the taxpayers. The service courts schedule very few cases for oral argument; the vast majority are decided on the briefs. Similarly, the lion's share of the work of the Court of Appeals is conducted on paper. Only a few dozen oral arguments are conducted each Term, and some of those are handled in large measure by civilian defense counsel at no expense to the government. It is not an unreasonable expense to fund travel for trial defense counsel in the remaining cases in which the service courts or Court of Appeal hear argument. That expense would be more than offset by the savings achieved by reducing the services' appellate divisions.

The other reform I would offer for discussion is drawing on the civilian members of the bars of the Court of Appeals and service courts to accept appointment to represent service members on appeal. Membership in these courts' should entail more than getting an impressive certificate on the wall. I see no reason the military appellate courts could not direct their Clerks to develop and maintain a list of those attorneys who are willing to accept appointment. This would entail no expense to the government but would give military accused and the appellate military courts the benefit of a truly fresh, outside look at the cases. The National Institute of Military Justice suggested this in a recent case,<sup>33</sup> to no avail. If the problem of delay has not abated – and indeed, even if it has – the idea should be seriously considered.

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versary of the Uniform Code of Military Justice 9 (2001).

31. 10 U.S.C. § 862 (2000).

32. 10 U.S.C. § 838 (c)(1) (2000).

33. See Memorandum of National Institute of Military Justice as *Amicus Curiae*, *Diaz*, *supra* note 15.

I'd like to offer two other thoughts concerning the Court of Appeals and the military legal profession. Both points have to do with inexorable change.

When judges or justices have sat together for a substantial time – as was true, for example, of the Supreme Court until the most recent vacancies occurred – the court itself, as well as the bar, will have developed a more or less settled expectation of how things work. Political scientists call this a “natural court.”<sup>34</sup> Any time the membership of a court changes, a new “natural court” arises. Six months from today the current “natural” Court of Appeals for the Armed Forces will end. Chief Judge Gierke and Judge Crawford will both depart.<sup>35</sup> Two new judges will take their places at or soon after the expiration of their terms of office. Two judges constitute a big chunk of a five-judge bench; two votes are all that is required for a grant of review.<sup>36</sup> The new judges – whose identities of course are unknown at this time – will likely have a major impact on military jurisprudence during this exciting time. Presumably they will bring to the Court – and the system over which the Court presides – new perspectives. Those who are concerned about the administration of justice within the Armed Forces will be hoping the new judges continue the Court's current high standards as well as a willingness to ask, with the Chief Judge Gierke, whether it is “time for a comprehensive re-evaluation of the military justice system,”<sup>37</sup> and to consider new solutions to old problems.

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34. See Linda Greenhouse, *Under the Microscope Longer than Most*, N.Y. TIMES, July 10, 2005, at 3; see also LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 371 (3d ed. 2003) (listing “natural” Supreme Courts since 1789).

35. That two vacancies are occurring at one time is contrary to the intent of legislation Congress enacted in 1989, which sought to ensure staggered terms when two new judgeships were created. Pub. L. No. 101-189, § 1301 (d)(2), 103 Stat. 1575 (1989). The fortuities of the appointment process led to one judge receiving a shorter term than another, a discrepancy that Congress remedied in 1996. Pub. L. No. 104-201, § 1068 (c)(1), 110 Stat. 2655 (1996). In retrospect, it was unrealistic to hope for staggered terms, since death and resignation could easily upset such an arrangement in any event. The 1996 legislation sacrificed the illusory benefits of staggered terms for greater stability on the Court and fairness to the judges.

36. FIDELL, *supra* note 20, at 42.

37. H.F. “Sparky” Gierke, C.J., C.A.A.F., Address to the ABA Mid-Year Meeting Chicago, Embracing Change—Looking Back and Moving Forward 27 (Feb. 10, 2006).

Finally, it is important that a new generation of leaders arise in the military legal field to receive the baton from those of us in my generation who have concerned ourselves with these important issues. As fewer and fewer law teacher and practitioners have military service as part of their life experience, it will be increasingly challenging to maintain the level of knowledgeable civilian interest in military justice that I believe is critical in a democratic society. For this reason, I am particularly delighted that, under Dean Logan's leadership, the Law School has sponsored this important and timely symposium.