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Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Courts (2002)

Major Timothy C. MacDonnell

A Majority of One: A Summary and Analysis of An Oral History of Colonel Denise K. Vowell (Retired), United States Army, 1973-2006

Colonel George R. Smawley

Lore of the Corps

***The Army Lawyer:* A History**

In Honor of Chuck Strong

Technical Editor, *The Army Lawyer* and *The Military Law Review*, 1995-2015

CLE NEWS

CURRENT MATERIALS OF INTEREST

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Lore of the Corps

The Army Lawyer: A History

Fred L. Borch
Regimental Historian & Archivist

When The Judge Advocate General's School (TJAGSA) opened in Charlottesville in 1951, and the first Advanced Class (today's Graduate Class) arrived later that year, it was only natural that the faculty would look for ways to enhance legal research and writing. As a result, the *Military Law Review* began publishing in 1958 and, for more than fifty-five years now, that legal periodical has contained in-depth, comprehensive, analytical articles akin to those published in other law school journals in the United States.

The Army Lawyer, which began publishing in August 1971, originated for very different reasons and, with this 500th issue, it is now appropriate to examine its history and its impact on our Corps. This *Lore of the Corps* looks first at the origins of *The Army Lawyer*. It then looks the evolution of the monthly periodical from the 1970s to the present, and identifies some of the men and women who have edited, formatted and produced it through the years. Finally, this article offers some thoughts on the future of *The Army Lawyer*.

The first issue of *The Army Lawyer* announced why it was being created as "a monthly publication" of TJAGSA:

> Its purpose is to provide practical, how-to-do-it information to Army lawyers. Thus, *The Army Lawyer* will fill the gap between the *Judge Advocate Legal Service*[1] and the *Military Law Review*, and at the same time consolidate other publications in a single, convenient source. *The Army Lawyer* replaces, in part, the Procurement Legal Service, the *Legal Assistance Bulletin*, the *PP&TO Newsletter*, the *Claims Administrative Newsletters*, and the non-case materials of JALS, except those of interest to reservists and those which must have immediate distribution to the field.[2]

In short, *The Army Lawyer* was going to be practical and informative, and it was going to consolidate the many existing newsletters produced throughout the Corps so that judge advocates would need look only at one source for the latest best legal practices. In fact, this first issue announced that future issues would contain "comments on recent developments in the law and provide a forum for short articles from the field." It would also "carry items of current general interest to Army lawyers."[3]

But there was more to *The Army Lawyer*'s origins than what appeared in the printed text of Volume 1, Number 1. As Colonel (Retired) John Jay Douglass remembers, there were a number of other important reasons to create a monthly legal periodical—the chief one being that no one in the Corps really knew what TJAGSA had to offer in the way of education and training. This was particularly true for the many hundreds of Reservists in the Corps who, as Douglass puts it, "really had no contact with the active duty guys."[4]

Colonel John Jay Douglass, who served as Commandant, The Judge Advocate General's School, from 1970 to 1974, played a major role in the creation of The Army Lawyer.

Why would Douglass be concerned with the Reserve legal community? The answer was simple. The year before he assumed duties as Commandant in 1970, The Judge Advocate General's Office (or "JAGO" as it was called in everyday conversation) "had transferred all the JAG Reservist responsibilities to the School." This meant that it was now COL Douglass' responsibility to keep in contact with Reserve judge advocates and he saw that publishing a monthly journal that was distributed to them

[1] Published between March 1959 and November 1975, the *Judge Advocate Legal Service* (JALS) was initially published on a *weekly* basis provide field Judge Advocates with the latest appellate decisions from the Court of Military Appeals (the forerunner of the Court of Appeals of the Armed Forces) and the Comptroller General. In the 1960s, JALS expanded its content to contain other information of interest to Army lawyers, including information on claims, procurement, international law and military affairs. After the creation of *The Army Lawyer*, however, JALS limited its content to military criminal law. It ceased publication in 1975.

[2] ARMY. LAW., Aug. 1971, at 1. Page 1 of the first edition of *The Army Lawyer* is inserted at the end of this article.

[3] *Id.*

[4] Telephone interview, author with Colonel (Retired) John J. Douglass (8 Dec. 2014) (on file with author).

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by mail would be a way to accomplish this goal. In the 1970s, virtually all wide-spread communication in the Army was by written letter or other printed publication—delivered by the U.S. post office—so this concept makes sense.

While Douglass says that this desire to have contact with the Reserve judge advocate community was a major impetus behind the creation of *The Army Lawyer*, he also identifies a second important reason: active component judge advocates really did not understand what TJAGSA did, or what it offered in the way of legal education and training, and this ignorance meant the School was both underutilized and underappreciated.

This state of affairs existed because while every lawyer who entered the Corps was required to attend the Judge Advocate Officer Basic Course, there was no requirement to attend the Advanced Course—or any other instruction being offered in the way of shorter courses. Additionally, since more than a few successful senior officers—including Major Generals George S. Prugh and Harold E. Parker, then serving as The Judge Advocate General and The Assistant Judge Advocate General, respectively—had never attended either the Basic or Advanced Courses, Douglass discovered that there was considerable resistance to coming to TJAGSA for a year of graduate legal education from senior captains and majors who intended to make the Corps a career. As they reasoned, why should a young officer uproot his family for a year at TJAGSA if that was not necessary to reach flag rank. But, thought Douglass, a monthly publication would showcase the short course offerings at TJAGSA and, as uniformed attorneys came to Charlottesville for a week (for example) of procurement law instruction, might encourage these Army lawyers to attend the Advanced Course when offered the opportunity.

Colonel Douglass' goal—which he said repeatedly to all within earshot—was to make TJAGSA "The Home of the Army Lawyer." Every judge advocate, in his view, must believe that he must come to Charlottesville to be successful in the Corps. Consequently, when it came time to select a name for the new monthly publication, it was logical for it to be christened *The Army Lawyer*.

When the first issue was published in August 1971, it contained reports on the new "Pilot Legal Assistance Program" in New Jersey (where Judge Advocates, with the approval of the New Jersey State Bar Association, provided in-court representation in civil matters for soldiers in the grades of E-4 and below) and from the Army Trial Judiciary (court-martial statistics, and recurring errors and irregularities). There was an article from the Army Claims Service titled "Suggestions for a Successful Recovery Program" and from the Litigation Division on various pending cases and decisions of interest. The School's Procurement Law Division (today's Contract and Fiscal Law Division) discussed recent decisions from the Court of Claims and Board of Contract Appeals. On a truly practical level, the Legal Assistance Division at the Office of The Judge Advocate General (OTJAG) offered tips on "telephone etiquette" that should be observed by those answering calls coming to a legal assistance office in the field. Helpful advice included refraining from telling the caller that the judge advocate with whom he wished to speak was "out playing golf" or had "left early." Finally, there was a brief article written by a civilian attorney at Third U.S. Army, Fort McPherson, Georgia. It focused on the legal issues arising in a court-martial of a Marine Corps Reservist who willfully disobeyed the order of his superior commissioned officer to get a haircut and who rejected Article 15 punishment in favor of trial by court-martial.

This inaugural issue of *The Army Lawyer* finished with sections called "Personnel Actions," "Books of Interest to Lawyers," and "Military Affairs Opinions." The first, provided by the Personnel, Plans and Training Office, OTJAG, was almost certainly the first section read by those who received the new publication because it contained the names of those officers and warrant officers who were retiring from active duty or being promoted. It also contained a list of all upcoming assignments of colonels, lieutenant colonels, majors, captains, lieutenants, and warrant officers. As for the second section, this listed books of professional interest to lawyer, such as Anthony Lewis' *Gideon's Trumpet* (about the celebrated *Gideon v. Wainwright* decision) and Catherine Bowen's *Yankee from Olympus* (about Supreme Court Justice Oliver W. Holmes). Finally, the last section contained opinions from OTJAG's Military Affairs Division (today's Administrative Law Division). With a view toward practicality, these opinions were printed in *The Army Lawyer* in a 3-inch-by-5-inch format, so that a reader could "clip" and paste them on 3 x 5 cards and so build a card reference library. The opinions covered civilian pursuits by retired officers, the privileges enjoyed by

children of remarried and divorced Army widows, whether "bowling score sheets" could be accepted as gifts by a military bowling lane located on a military reservation, and whether military personnel could carry concealed weapons while off-duty.

By the time it was in its second year of publication, *The Army Lawyer* had expanded to include new features in addition to articles, reports and practical legal information. The Personnel Section began listing the names of all judge advocates receiving military awards, information on volunteering for overseas assignments, policies on attending civil schools at Government expense, and job openings for "DA Civilian Attorney Positions."[5] There was a new section called "JAG School Notes" which provided information on staff and faculty at TJAGSA and even solicited readers to contribute to a newly formed "beer mug collection to be displayed in the [TJAGSA] Open Mess."[6] Finally, a section called "Bar Notes" announced upcoming American Bar Association, Federal Bar Association, and Judge Advocate Association news items.[7]

Starting in November 1971, *The Army Lawyer* began publishing the schedule of courses offered at TJAGSA, along with "scopenotes" for these offering—thereby fulfilling COL Douglass' goal of letting Judge Advocates in the field know what was available in the way of legal education. Courses listed included the 62d Basic Course, 20th Advanced Course, 2d Staff Judge Advocate Course, 1st Legal Assistance Course and 5th Law of Federal Employment Course.[8] *The Army Lawyer* continued to list available courses in the 1980s, 1990s, and 2000s; today readers interested in Continuing Legal Education (CLE) offerings are directed to the "Legal Center and School" website for a schedule of courses.

In the early 1980s, the content of *The Army Lawyer* began evolving toward what might be called a "mini-law review" in that information on personnel (promotions, reassignments, school selection, and awards) and other similar non-legal news items were no longer carried. The last PP&TO section, for example, appeared in February 1982. Apparently this occurred because the Army Publications and Printing Command changed its policy on what could be published in a Department of the Army Pamphlet (DA Pam) and informed TJAGSA that non-legal items were no longer permissible. Since *The Army Lawyer* had become a DA Pam in March 1973, it had to follow this new guidance—which meant the end of information on promotions, awards, reassignments and similar items.[9] This prohibition, however, does not seemed to have prevented the occasional insert of information from PP&TO; the January 1994 *The Army Lawyer* contained an announcement on the importance of official photographs for promotions and information on filing "commendatory matters" in the Official Military Personnel File.[10]

From the 1990s to the present, *The Army Lawyer*'s content has been relatively stable, with a number of notable exceptions. First, beginning in the 1990s, the editors began devoting entire issues to one topic. As a result, there were special issues devoted to contract and fiscal law[11] and criminal law,[12] usually on an annual basis. *The Army Lawyer* also began publishing "TJAGSA Practice Notes" in which faculty members from all the teaching departments provided short articles on current developments in the law. In November 1997, for example, 'practice notes' included information on the application of the Major Fraud Act to government contracts and the Taxpayer Relief Act of 1997.[13] The following month contained 'practice notes' on the Child Support Recovery Act and the Uniformed Services Employment and Reemployment Rights Act.[14]

Second, starting with the October 2004 issue, the editors began publishing book reviews. Written mostly by Graduate Course students as part of their writing curriculum, these now appear in virtually every issue.

Third, at the suggestion of then Captain Ronald P. "Ron" Alcala, who was editing *The Army Lawyer* in 2010, a monthly history feature called the "Lore of the Corps" began appearing as the lead article. Two to four pages in length, and covering a variety of topics (courts-martial, personalities, war crimes and general history), these have been a regular monthly feature for nearly five years. Alcala's other adopted suggestion was a newly designed blue-and-gold colored cover for *The Army Lawyer*, featuring the Regimental crest. The new cover first appeared in December 2010.

From its inception in 1972 until the present, a number of judge advocates have served as editors of *The Army*

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[5] ARMY LAW., Sept. 1972, at 30.

[6] *Id*. at 27.

[7] ARMY LAW., OCT. 1972, at 26.

[8] ARMY LAW., Nov. 1971, at 24–25.

[9] As a result, this information was not officially available, although individual members of the Corps routinely prepared unofficial assignment lists through the years. Additionally, *The Regimental Reporter*, the newsletter of the TJAGSA Alumni Association, usually published lists of assignments when these became known. Not until the Corps created an electronic newsletter called the *Quill and Sword* did assignment lists once again become officially available.

[10] *Personnel, Plans and Training Office Notes*, ARMY LAW., Jan. 1994, at 44.

[11] *E.g., Contract Law Developments of 1996—The Year in Review*, Army Law., Jan. 1997; *Contract and Fiscal Law Developments of 2006—The Year in Review*, Army Law., Jan. 2007.

[12] *E.g., 50th Anniversary of the UCMJ Series*, ARMY LAW., July 2000; *Military Justice Symposium I*, ARMY LAW., May 2004, *Military Justice Symposium II*, ARMY LAW., July 2004.

[13] *TJAGSA Practice Notes*, Army Law., Nov. 1997, at 31–44.

[14] *TJAGSA Practice Notes*, Army Law., Dec. 1997, at 26–34.

Lawyer. The first to serve were Captains (CPT) Stephen L. Buescher (editor) and Donald N. Zillman (articles editor). They were followed by the following *primary* editors:[15] CPT Paul F. Hill (October 1973 through November 1975); CPT Charles P. Goforth, Jr. (December 1975 through August 1978), Major (MAJ) Percival D. Park (September 1978); CPT Frank G. Brunson, Jr. (October 1978 through September 1980); CPT Connie S. Faulkner (October 1980 through May 1982); CPT Stephen J. Kaczynski (June 1982 through August 1983); CPT Debra L. Boudreau (September 1983 through July 1985); CPT David R. Getz (August 1985 through March 1988); MAJ Thomas J. Feeney (April 1988 through June 1988); CPT Matthew E. Winter (July 1988 through August 1990); CPT Daniel P. Shaver (September 1990 through May 1993); CPT John B. Jones, Jr. (June 1993 through August 1995); CPT John B. Wells (September 1995 through August 1996); CPT Albert R. Veldhuyzen (September 1996 through June 1998); CPT Scott B. Murray (July 1998); CPT Mary J. Bradley (August 1998 through September 1998); CPT Kenneth D. Chason (October 1998 through June 1999); CPT Mary J. Bradley (July 1999 through August 1999); CPT Drew A. Swank (September 1999 through July 2000); CPT Todd S. Milliard (August 2000 through November 2000); CPT Gary P. Corn (December 2000 through July 2001); Todd S. Milliard (August 2001 through October 2001); CPT Erik L. Christiansen (November 2001 through August 2002); CPT Joshua B. Stanton (October 2002 through August 2003); CPT Heather B. Fagan (September 2003 through May 2004); CPT Anita J. Fitch (June 2004 through February 2007); CPT Alison M. Tulud (March 2007 through August 2009); CPT Ronald T. P. Alcala (September 2009 through November 2010); CPT Madeline Yanford (later Gorini) (December 2010 through May 2011); CPT Joseph D. Wilkinson II (June 2011 through May 2012); CPT Takashi Kagawa (June 2012 through June 2013); CPT Marcia Reyes Steward (July 2013 through August 2014); and CPT Michelle E. Borgnino (September 2014 to present).

Of all these editors, two deserve additional mention: MAJ Matthew E. "Matt" Winter and CPT John B. Jones, Jr. This is because both received "Army Editor of the Year" honors for their work on *The Army Lawyer*. In a Pentagon ceremony on 15 November 1990, Secretary of the Army Michael P. W. Stone presented Winter with his award. The citation for the award noted that MAJ Winter made *The Army Lawyer* "easier to read, understand and use." Secretary Stone also noted that Winter's initiatives while editor had "broadened the scope of legal subjects covered . . . encouraged submission of articles . . . eliminated printing errors, and substantially cut the production cycle" of the monthly periodical.[16]

Four years later, on 10 November 1994, Secretary of the Army Togo D. West, Jr., himself a former member of the Corps, presented Captain John B. Jones, Jr. with the award. According to the citation for Jones' award, he had prepared "approximately 3750 pages of manuscript for twelve issues" and "moved up the production cycle thirty days to ensure that *The Army Lawyer* was published and distributed by its cover date."[17]

While these editors had overall responsibility for producing the monthly periodical, they could not have accomplished their work without the support of administrative assistants. Initially, Mrs. Helena Daidone and Miss Dorothy "Dottie" Gross, both long-time civilian employees at TJAGSA, provided administrative support to *The Army Lawyer* editors. Miss Gross left the position for another job in TJAGSA after a short period, but Mrs. Daidone continued to support *The Army Lawyer'*s editors through the August 1979 issue.

A new Administrative Assistant, Ms. Eva F. Skinner, came on board in November 1979. She had been an employee in TJAGSA's Academic Department (today's Office of the Dean) since August 1973 but transferred to the Developments, Doctrine and Literature Department (or "DDL" as it was known colloquially) to become an "Editorial Assistant." Since DDL oversaw the production both *The Army Lawyer* and *The Military Law Review*, Skinner began supporting the editors of both publications. When she retired in January 1995, Ms. Skinner had "trained fifteen different editors and coordinated the production of . . . 200 issues of *The Army Lawyer*."[18]

Charles J. "Chuck" Strong replaced Skinner as "Editorial Assistant" in November 1995. His recent retirement as "Technical Editor"[19] in January 2015 means that *The Army Lawyer* will be without administrative support for the near future.

When one compares today's *The Army Lawyer* to the inaugural issue, it is clear that the content of the

[15] This Lore of the Corps lists only *primary* editors as, on occasion, the masthead of *The Army Lawyer* lists "assistant editors." For example, CPT Jennifer Crawford is listed as an assistant editor for the November 2004 through May 2005 issues; CPT Colette E. Kitchel is listed as an assistant editor for the July 2005 through March 2007 issues. The March 2007 issue shows CPT Alison M. Tulud as the editor, with now MAJ Anita J. Fitch and CPT Colette E. Kitchel as assistant editors. Similarly, the August 2009 *The Army Lawyer* shows MAJ Tulud as editor with MAJ Ann B. Ching and CPT Ronald T. P. Alcala as assistant editors.

[16] *Major Winter Selected Army Editor of the Year*, THE REGIMENTAL REPORTER, Spring 1991, at 4.

[17] *Captain Jones Selected Army Editor of the Year*, THE REGIMENTAL REPORTER, Spring 1995, at 8.

[18] *Eva Skinner Retires After Lifetime of Service*, THE REGIMENTAL REPORTER, Spring 1995, at 10.

[19] The position was upgraded and renamed "Technical Editor" in January 2000, chiefly because the job had expanded to require the incumbent to use new electronic software in formatting both *The Army Lawyer* and the *Military Law Review* for publication. Additionally, the Technical Editor now was required to ensure that all legal citations followed the uniform system contained in Harvard Law School's *The Bluebook: A Uniform System of Citation*.

periodical has changed considerably. Certainly the original intent to have a practical, how-to-do-it periodical that would also trumpet TJAGSA's educational offerings in Charlottesville has given way to a more scholarly journal.

One sometimes hears the complaint that *The Army Lawyer* is just a smaller version of *The Military Law Review*. When one considers, however, that the former contains a much greater variety of articles than the latter, and that many of the authors writing for *The Army Lawyer* are seeking to provide helpful guidance to the practitioner in the field, this is not a criticism that should be taken too seriously.

As for the future? There seems little doubt that *The Army Lawyer* will continue to be published on a monthly basis, although the number of print copies will certainly decrease over time as the Army—and the Corps—moves increasingly to electronic only publishing. In fact, the on-line version of *The Army Lawyer* (posted on www.jagcnet.army.mil) already appears weeks before the print version is available. But, as long as *The Army Lawyer* is offered by the Government Printing Office as an "individual paid subscription"—currently priced at $50 per year—it would seem likely that a print version will remain in existence.

The Army Lawyer, like its sister, the *Military Law Review*, is part of the Army JAG Corps' "brand." When readers see it, they have no doubt that it is connected to lawyering in the Army and to legal education at the only American Bar Association accredited military law school in the world.

Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts

Major Timothy C. MacDonnell

This article was originally published in the March 2002 edition of The Army Lawyer. *Since that time it has been cited more frequently than any other appearing in this publication written by a judge advocate. Lieutenant Colonel (Retired) MacDonnell joined the Army in 1987 as an Air Defense Artillery Officer. He was accepted in to the Funded Legal Education Program and attended law school at Suffolk University Law School, graduating in 1999. After serving for fourteen years as a judge advocate he retired from the Army and joined the faculty at Washington and Lee University School of Law where he is now an Associate Clinical Professor of Law and the Director of the Advanced Administrative Litigation Clinic.*

On 13 November 2001, President George W. Bush signed Military Order 222, authorizing the trial of non-U.S. citizens for war crimes by military commission.[1] Since the signing of that order, a contentious debate has raged over the possible use of military commissions to try suspected terrorists. As part of that debate, the media has used various terms to describe the proposed military commissions. They have called them "Secret Military Trials,"[2] "Military Tribunals,"[3] and "U.S. Military Court[s]."[4] A Cable News Network internet story described military commissions as "essentially a courts-martial, or a military trial, during a time of war."[5] This quotation illustrates the underlying misperception that military commissions and courts-martial are the same.[6] They are not.

In fact, substantial differences exist between military commissions and courts-martial. Although both courts have existed since the beginning of the United States, they have existed for different purposes, based on different sources of constitutional authority, and with different jurisdictional boundaries. These differences can affect who may order a trial, who may be tried, what types of cases the court can hear, and the pretrial, trial, and appellate procedures applied in a particular case.

This article examines two of the major distinctions between military commissions and courts-martial: the constitutional authority to create each court and their respective jurisdictional limitations. Due to the complicated constitutional and jurisdictional issues presented by military commissions, as compared to the relatively straightforward courts-martial, this article is devoted primarily to discussing this generally misunderstood court.

Section I: Constitutional Authority for Courts-Martial and Military Commissions

Most illustrative of the distinction between military commissions and courts-martial is the constitutional authority for the creation of these two courts. The Supreme Court has held, "Congress and the President, like the courts, possess no power not derived from the Constitution."[7] Thus, no branch of the government may convene a court without some source of authority from the Constitution. This section identifies and contrasts the constitutional authority for the creation of military commissions and courts-martial, and discusses the significance of these differences.

Courts-Martial

The Constitution vests Congress with the authority to create courts-martial and establish rules for their operation. This power is derived from Article I, section 8, clause 14 of the Constitution, which states: "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces."[8] Congress first exercised its authority under Article I, section 8, in 1789, when it expressly recognized the then existing Articles of War and made them applicable to the Army.[9] In 1950,

[1] Military Order 222, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

[2] Neil King, Jr., *Bush's Plan to Use Tribunal Will Hurt U.S. in Human-Rights Arena, Some Say*, WALL ST. J., Nov. 27, 2001, at A-2.

[3] Mona Charen, *Presidential Power and Military Tribunals*, WASH. TIMES, Nov. 26, 2001, at A-17.

[4] Dennis Byrne, *Can They Get a Fair Trial?; Sweet Justice in a U.S. Military Court*, CHI. TRIB., Nov. 19, 2001, at 23.

[5] Kevin Drew, *Tribunals Break Sharply from Civilian Courts*, CNN.com/LAWCENTER (Dec. 7, 2001), *at* http://www.cnn.com/2001/LAW/12/06/inv.tribu-nals.explainer/index.html.

[6] *See generally* William Glaberson, *A Nation Challenged: The Law; Tribunal v. Courts-Martial: Matter of Perception*, N.Y. TIMES, Dec. 2, 2001, at B-6 (describing the misperception and the reaction of former military attorneys to the misperception).

[7] *Ex parte* Quirin, 317 U.S. 1, 25 (1942).

[8] U.S. CONST. art. I, § 8.

[9] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 23 (2d ed., 1920 reprint).

Congress dramatically revised the Articles of War, creating the Uniform Code of Military Justice (UCMJ).[10] Through the UCMJ, Congress established courts;[11] defined their jurisdiction;[12] identified crimes;[13] delegated authority to create pre-trial, trial, and post-trial procedures;[14] and created an appellate system.[15]

Military Commissions

Although the constitutional authority for courts-martial is easy to identify, the power to establish military commissions is not. Military commissions are a recognized method of trying those who violate the law of war,[16] but the power to create them lies at a constitutional crossroad. Both Congress and the President have authority in this area.[17] Congress's authority lies in Article I, section 8, clauses 1, 10, 11, 14, and 18.[18] Particularly given Congress's authority "to define and punish Piracies and Felonies committed on the high seas, and Offense against the Law of Nations,"[19] there is little question that Congress could, under appropriate circumstances, establish a military commission.

Presidential Authority

The more controversial question concerns the President's authority to establish military commissions based upon his Article II powers. The President's authority regarding commissions is derived from Article II, section 2, clause 1, of the Constitution, which states, "The President shall be Commander in Chief of the Army and Navy of the United States."[20] The President's power to appoint a military commission without an express grant of that authority from Congress is inherent to his role as the Commander in Chief of the armed forces. This argument has support from the UCMJ, international law, and Supreme Court precedent.

Statutory Authority

While the UCMJ discusses military commissions,[21] it does not specifically grant the President the authority to create military commissions.[22] Instead, Articles 18 and 21, when taken together, recognize the jurisdiction of military commissions to try violations of the law of war, and articulate Congress's intent that the UCMJ not preempt that jurisdiction. Article 18 grants courts-martial the authority to try anyone suspected of committing war crimes, including civilians. It states: "[g]eneral courts-martial . . . have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[23] Article 21 expresses Congress's intent not to interfere with the existing jurisdiction of military commissions over war crimes:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.[24]

If the UCMJ and other statutes do not vest the President with the authority to create military commissions, that authority, if it exists, must be inherent to the President as Commander in Chief of the military.

Critical to this position is the concurrent jurisdiction language of Article 21. Given the significance of this Article, it bears further discussion. Article 21 was enacted in 1950 as part of the original UCMJ, and was derived verbatim from Article of War 15.[25] Perhaps because Article 21 was a wholesale adoption of Article of War 15, there was little discussion of it in the legislative history of the UCMJ.[26] Thus, to understand the intent of Article 21, it is necessary to

[10] 10 U.S.C. §§ 801–946 (2000). The UCMJ is a comprehensive collection of statutes that are the skeleton and much of the flesh of today's military justice system.

[11] UCMJ art. 16 (2000).

[12] *Id*. arts. 2–3, 17–21.

[13] *Id*. arts. 77–134.

[14] *Id*. art. 36.

[15] *Id*. arts. 59–76.

[16] WINTHROP, *supra* note 9, at 831; *see In re* Yamashita, 327 U.S. 1, 10 (1946); *Ex parte* Quirin, 317 U.S. 1, 27 (1942).

[17] *Quirin*, 317 U.S. at 26.

[18] U.S. CONST. art. I, § 8, cls. 1, 10–11, 14, 18.

[19] *Id*. art. I, § 8, cl. 10.

[20] *Id*. art. II, § 2, cl. 1.

[21] *See* UCMJ arts. 18, 21, 28, 36–37, 47–50, 58 (arguably), 104, 106 (2000).

[22] *See id*.

[23] *Id*. art. 18.

[24] *Id*. art. 21.

[25] H.R. DOC. NO. 81-491, at 17 (1949); S. REP. NO. 81-486, at 13 (1949).

[26] The House and Senate hearings discussed military commissions, however, the discussion focused on little more than defining the meaning of the term "military commission." The House and Senate reports mention commissions, but only indicate that military commissions have been recognized by the Supreme Court and that Article 21 is derived from Article of War 15.

examine the legislative history of Article of War 15.

Article of War 15 came into existence as part of the 1916 revisions to the Articles of War.[27] The chief proponent of Article 15 was Major General Enoch H. Crowder, the Judge Advocate General of the U.S. Army between 1911–1923.[28] General Crowder testified before the House of Representatives and the Senate on the necessity of Article 15. General Crowder described the military commission as a "common law of war" court.[29] He pointed out that the "constitution, composition, and jurisdiction of these courts have never been regulated by statute,"[30] but "its jurisdiction as a war court has been upheld by the Supreme Court of the United States."[31] General Crowder argued that Article 15 was necessary to make clear that expansion of courts-martial jurisdiction did not preempt the jurisdiction of military commissions.[32] General Crowder concluded his testimony before the Senate by stating that Article 15 would ensure that military commissions would "continue to be governed as heretofore by the laws of war rather than statute."[33]

General Crowder's testimony before Congress supports the argument that Article of War 15, and thus Article 21 of the UCMJ, is a recognition of the jurisdiction of military commissions to try alleged violations of the laws of war. By recognizing the jurisdiction of military commissions without an express statutory grant of authority, Congress has effectively acknowledged the constitutional authority of the President to convene commissions.

Customary International Law

Although customary international law cannot bestow upon the President any authority he does not already possess through the Constitution, it can help to explain what powers are generally considered inherent to military command. International law recognizes the authority of a nation, and in particular, military commanders, to try war criminals by military commission.[34] Military courts have been used to try violators of the laws of war from medieval times,[35] including the American Revolutionary War,[36] the Mexican American War,[37] the Civil War,[38] and World War II.[39] Besides the United States, Great Britain,[40] Germany,[41] France,[42] Italy,[43] the Soviet Union,[44] Australia, the Philippines,[45] and China have all used military commissions to try individuals accused of war crimes.[46]

During the twentieth century, when the international community joined together to try war criminals, it relied upon the jurisdictional authority of military courts as the platform for its trials. After World War I, the allies demanded that Germans suspected of committing war crimes be turned over for trial before a military court.[47] After World War II, over ten nations took part in the International Military Tribunals in the Far East.[48] The Tribunals in the Far East were provided for in the Potsdam Declaration and convened by order of General Douglas McArthur, the Supreme Commander of Allied Powers.[49] The international war crimes trials at Nuremberg were military tribunals. Although France, Great Britain, the United States, and the Soviet Union agreed upon the trials in the London Agreement of 8 August 1945, military officers signed the orders that actually established the International Military

[27] *Revision of the Articles of War, Hearing on H.R. 23,628 Before the House Comm. on Military Affairs*, 62d Cong. 35 (May 21, 1912) (statement of Brigadier General Enoch H. Crowder, Judge Advocate General, U.S. Army) [hereinafter Crowder Testimony]; REVISION OF THE ARTICLES OF WAR, S. REP. NO. 63-229, at 53 (1914)

[28] JONATHAN LURIE, ARMING MILITARY JUSTICE 47 (1992).

[29] *Id.* at 35.

[30] *Id.*

[31] REVISION OF THE ARTICLES OF WAR, *supra* note 27, at 53.

[32] *Id*. General Crowder argued that Article 15 was necessary because proposed changes to the Articles of War would give jurisdiction to courts-martial to try "per- sons subject to military law." *Id*. If courts-martial jurisdiction was expanded to included "persons subject to military law," then courts-martial, in addition to military commissions, would have jurisdiction over those who violate the laws of war. General Crowder urged that without Article 15, the question would arise whether Congress had ousted the jurisdiction of military commissions. *Id*.

[33] *Id*. at 35.

[34] Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 832 (1948).

[35] Harold Wayne Elliott, Trial and Punishment of War Criminals 46 (1998) (unpublished S.J.D. dissertation, University of Virginia) (on file with author).

[36] Green, *supra* note 34, at 832.

[37] WINTHROP, *supra* note 9, at 832.

[38] *Id*. at 833.

[39] *Ex parte* Quirin, 317 U.S. 1 (1942).

[40] WINTHROP, *supra* note 9, at 831 n.64; HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 105 (1993).

[41] LEVIE, *supra* note 40, at 20.

[42] *Id*. at 19.

[43] *Id*. at 119.

[44] *Id*. at 127.

[45] *Id*. at 176.

[46] *Id*. at 177.

[47] *Id*. at 26–27. Although the Germans were never turned over, the fact that the Allies intended to try the Germans before a military court supports the position that international law recognizes the jurisdiction of military courts to try war criminals. *Id*.

[48] United States and Ten Other Nations v. Araki and Twenty-Seven Other Defendants, Transcripts of the International Japanese War Crimes Trials, vol. I, at 1 (1946) (on file with the U.S. Army Judge Advocate General's School, Charlottesville, Virginia).

[49] *Id*. at 105–06, 123.

Tribunal,[50] and the trials were before military courts.[51]

Under customary international law, the right of a military commander to establish and use military commissions to try suspected war criminals is inherent to his authority as a commander. By making the President the commander of the U.S. military forces, the Constitution vests the President with that authority generally associated with command, including the authority to create military commissions.

Supreme Court Precedent

The Supreme Court confirmed the President's inherent authority to establish military commissions. The Court discussed this authority in three landmark cases. In *Ex parte Quirin*[52] and *In re Yamashita*,[53] the Court acknowledged that both the President and Congress have authority regarding military commissions, but neither case defines the President's authority to establish military commissions in the absence of an express grant from Congress.[54] The Court took this further step in *Madsen v. Kinsella*,[55] concluding that absent congressional action to the contrary, the President has the authority as Commander in Chief to create military commissions.[56]

Perhaps the most well-known case regarding military commissions, *Ex parte Quirin* involved the trial of eight German soldiers who had infiltrated the United States in 1942 with the intent to sabotage war facilities.[57] After being captured, the soldiers were tried before a military commission in accordance with an order from President Franklin D. Roosevelt. The government charged the saboteurs with violating the law of war; Article of War 81, relieving intelligence to the enemy; and Article of War 82, spying. The saboteurs were also charged with conspiracy to violate Articles 81 and 82.[58] The petitioners filed a writ of habeas corpus in federal court, and the Supreme Court heard the writ on an expedited review. The proceedings before the military commission were suspended pending the Supreme Court's ruling.[59]

The petitioners in *Quirin* claimed that the President's order appointing a military commission was without constitutional or statutory authority. The Court disagreed, principally on statutory grounds. Although the Court discussed the President's constitutional authority regarding military commissions, it stated that "[i]t is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions."[60] Pointing to several Articles of War, the Court ruled that Congress had authorized military commissions by recognizing their jurisdiction and authorizing the President to establish rules for their conduct.[61]

Although the *Quirin* Court did not resolve to what extent the President had the authority to appoint military commissions, it set the stage for the case that eventually would. In *Quirin*, the Court discussed the President's constitutional role in the creation of military commissions. The Court pointed out that "the Constitution . . . invests the President, as Commander in Chief, with the power to wage war which Congress has declared."[62] It also observed, "An important incident to the conduct of war is the adoption of measures by the military commander . . . to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."[63] Thus, when the President is executing a military action specifically authorized by Congress, he is permitted to create military commissions incident to the execution of that military operation.[64]

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[50] I Trials of War Criminals Before the Nurenberg Military Tribunals Under Control Council Law No. 10, 1946–1949; Trials of War Criminals Before the Nurenberg Military Tribunal, vol. 1, The Medical Case, XVI (1949); Military Government—Germany, United States Zone, Ordinance No. 7, Feb. 17, 1947.

[51] JOHN A. APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL LAW 12 (1954).

[52] 317 U.S. 1 (1942).

[53] 327 U.S. 1 (1946).

[54] *Quirin*, 317 U.S. at 29; *Yamashita*, 327 U.S. at 10.

[55] 343 U.S. 72 (1952).

[56] *Id*. at 348.

[57] *Quirin*, 317 U.S. at 21.

[58] *Id*. at 23.

[59] *Id*. at 20.

[60] *Id*. at 29.

[61] *Id*. at 26.

[62] *Id*.

[63] *Id*. at 28.

[64] *Id*. The *Quirin* Court stated:

> By his [the President's] Order creating the present commission he has undertaken to exercise the authority conferred upon him by Congress and also such authority as the Constitution itself give the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

Id. Some may argue that the President's authority in *Quirin* to create a military commission was critically linked to Congress's declaration of war. The Court gave no indications, however, that Congress's declaration of war carried with it any greater significance than an authorization to conduct a military action that was something less than war. This issue is discussed at

The Court's conclusions and reasoning in *Quirin* regarding the President's authority to appoint military commissions were echoed in *In re Yamashita*.[65] *Yamashita* involved the prosecution of General Tomoyuki Yamashita, the Commanding General of the Imperial Japanese Army in the Philippines. General Yamashita was tried and convicted by military commission for violations of the law of war in connection with his command of the Fourteenth Japanese Army Group.[66]

One of General Yamashita's allegations of error was that the commission that tried him was not lawful.[67] In answering this question, the Court reiterated its position in *Quirin* that Congress, through Article 15, had recognized the authority of military commanders to try violations of the law of war at a military commission.[68]

Based on this premise, the only question left to the Court regarding the lawfulness of the commission was whether it had been properly convened. The Court found that the President had directed General Yamashita be tried by military commission and the commission itself was convened by order of General Wilhelm D. Styer.[69] General Styer was Commanding General of the U.S. Army Forces in the Western Pacific, which included the Philippines. The Philippines was the location where the petitioner had committed his offenses, surrendered, was detained pending trial, and where the military commission was conducted.[70] Based on these facts, the Court concluded, "[I]t . . . appears that the order creating the commission for the trial of [the] petitioner was authorized by military command, and was in complete conformity to the Act of Congress sanctioning the creation of such tribunals.[71] Thus, the Court found it unnecessary to discuss the President's authority regarding military commissions in any greater detail then it had in *Quirin*.

Seven years after *Yamashita*, the Supreme Court decided *Madsen v. Kinsella*,[72] and resolved the question of the President's inherent authority to create military commission. The *Madsen* case came to the Supreme Court through a petition for a writ of habeas corpus submitted by Mrs. Yvette J. Madsen. In 1950, a military commission convicted Mrs. Madsen, a native born U.S. citizen, of murdering her husband, a lieutenant in the U.S. Air Force, in their military quarters in Frankfurt, Germany. Mrs. Madsen was tried before a military commission in the American Zone of Occupied Germany.[73]

Madsen made a number of jurisdictional attacks on the military commission that convicted her. Among the errors alleged were that: (1) Madsen should have been tried by a courts-martial rather than a military commission, (2) the commission lacked jurisdiction over the offenses for which Madsen was tried, and (3) the commission itself was unconstitutional.[74] The Court rejected each of these claims, stating, "[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander in Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions."[75] The Court emphasized that Congress had made no attempt to limit the President's power regarding commissions. Rather than attempting to limit the President's authority to appoint military commissions, Congress recognized and sanctioned this authority in Article of War 15.[76]

In *Madsen* the Supreme Court clarified an issue that hung conspicuously unanswered in *Quirin* and *Yamashita*. Both *Quirin* and *Yamashita* emphasized that Congress and the President had authority in the area of military commissions, but the Court did not articulate the extent of the President's authority.[77] In *Madsen*, the Court resolved the issue, concluding that, absent congressional action to the contrary, the power to create military commissions is inherent in the President as Commander in Chief.

The shared power to create military commissions is unusual in a government predicated on the necessity of a separation of powers; it lies in what Justice Jackson called "a zone of twilight in which [the President] and Congress may have concurrent authority."[78] Although this authority appears to be concurrent, it is not equal. The President's authority to establish military commissions is subject to

length by Professor Curtis A. Bradley and Jack L. Goldsmith in an upcoming article entitled *The Constitutional Validity of Military Commissions*, 5 Green Bag 2d 249 (2002). Bradley and Goldsmith point out in that article: "A congressional declaration of war is not necessary in order for the President to exercise his independent or statutorily-delegated war powers." *Id*.

[65] 327 U.S. 1 (1946).

[66] *Id*. at 5.

[67] *Id*. at 6.

[68] *Id*. at 7.

[69] *Id*. at 11.

[70] *Id*. at 10.

[71] *Id*. at 11.

[72] 343 U.S. 341 (1952).

[73] *Id*. at 343.

[74] *Id*. at 342.

[75] *Id*. at 348.

[76] *Id*. at 354.

[77] *Ex parte* Quirin, 317 U.S. 1, 26 (1942); *In re* Yamashita, 327 U.S. 1, 7 (1946).

[78] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

Congress's power to limit that authority."[79] This hierarchy of power is logical given that the Constitution expressly grants Congress the authority to create military commissions,[80] while the President's authority must be implied from his role as Commander in Chief of the armed forces.[81]

This brief examination of constitutional authority for the creation of courts-martial and military commissions demonstrates that these two types of courts are fundamentally different. The authority to create courts-martial jurisdiction rests with Congress alone. The Constitution vests in Congress alone the authority to create rules and regulations for the governance of the armed forces. In contrast, the authority to create military commissions is vested in both Congress and the President. Based on the UCMJ's legislative history, international law, and Supreme Court precedent, this shared authority arises from military commissions' function as a tool for the execution of war.

Section II: Jurisdiction of Courts-Martial and Military Commissions

In addition to a distinctly different source of constitutional authority, the respective jurisdictions of military commissions and courts-martial are also different. Jurisdiction is a fundamental issue in every case. No criminal trial may proceed unless the court conducting the trial has jurisdiction over the person being tried and the subject matter in issue.[82] The fact that the jurisdiction of courts-martial overlaps with military commissions in some areas may contribute to the misconception that courts-martial and military commissions are one in the same. To remove any confusion and to highlight the differences between the two courts, this section will discuss and describe the jurisdiction of courts-martial and military commissions.

Courts-Martial

The UCMJ establishes personal jurisdiction for courts-martial at Articles 5 and 17. Article 17 states that "[e]ach armed force has courts-martial jurisdiction over all persons subject to this chapter,"[83] and Article 5 states that this jurisdiction "applies to all places."[84] This general grant of jurisdiction can be exercised at three levels of courts-martial: general, special, or summary. Articles 18, 19, and 20 define the jurisdictional limitations of these courts. The main distinction between these courts is the maximum punishment each is authorized to impose.[85] The UCMJ authorizes general courts-martial to impose "any punishment not forbidden by [the Code], including the penalty of death,"[86] while special and summary courts martial punishments are considerably more limited.[87]

The phrase "persons subject to this chapter" appears in Articles 17 through 20, and describes the individuals over whom courts-martial jurisdiction may be exercised. Article 2 of the UCMJ defines this phrase as including individuals in the military on active duty,[88] members of the National Guard and Reserves in certain circumstances,[89] enemy prisoners while in custody,[90] retired service members,[91] and individuals accompanying a military force in times of war.[92]

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[79] *Madsen*, 343 U.S. at 348.

[80] U.S. CONST. art. I, § 8.

[81] Congress has exercised its authority regarding defining and punishing violations of the law of nations by, among other actions, authorizing the trial of violations of the law of war at courts-martial or military commission. By expressly recognizing the jurisdiction of military commissions in Article 21, UCMJ, and authorizing the President to prescribe rules for their conduct in Article 36, UCMJ, Congress has provided express authorization for the commissions. As noted by Justice Jackson in *Youngstown Sheet*: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 U.S. at 635.

[82] *See, e.g.*, United States v. Baucum, 80 F.3d 539, 540 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 879 (1996); United States v. Verdugo-Urquidez, 939 F.2d 1341, 1344 (9th Cir. 1999), *vacated on other grounds*, 508 U.S. 1201 (1992).

[83] UCMJ art. 17 (2000).

[84] *Id*. art. 5.

[85] *Id*. arts. 18–20. In addition to distinctions in the maximum punishment each court is authorized to impose, there are due process and composition differences as well. As the maximum punishment a soldier is exposed to decreases so does the process due. For example, all contested general courts-martial must go through an Article 32 investigation before being brought to trial, while special and summary courts-martial do not. *Id*. art. 32. The minimum number of panel members necessary to create a quorum at a general court-martial is five, at a special it is three, while summary courts-martial are presided over by one officer. *Id*. art. 16.

[86] *Id*. art 18.

[87] *Id*. arts. 18–20. According to UCMJ article 19, special courts-martial may impose no punishment greater than a bad conduct discharge, one year in confinement, hard labor without confinement for three months, and two-thirds forfeiture of pay for one year. *Id*. art. 19. This jurisdiction has been further limited by the President, as authorized by Congress, in Rule for Courts-Martial (R.C.M.) 201(f)(2)(B)(i). MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(B)(i) (2000) [hereinafter MCM]. Summary court-martial jurisdiction is discussed in UCMJ Article 20. The maximum punishment at a summary court-martial is confinement for one month, hard labor without confinement for forty-five days, restriction for two months, and forfeiture of two-thirds pay for one month. UCMJ art. 20. Neither a special nor a summary courts-martial may impose the death penalty, dismissal, or a dishonorable discharge. *Id*. arts. 19–20.

[88] *Id*. arts. 2(a)(1)–(2).

[89] *Id*. arts. 2(a)(3), (5)–(6).

[90] *Id*. art. 2(a)(9).

[91] *Id*. art. 2(a)(4).

[92] *Id*. arts. 2(a)(10)–(11). Article 2 also defines "persons subject to this chapter" as including "persons in custody of the armed forces serving a sentence imposed by a courts-martial" and people occupying an area which

In addition to individuals described in Article 2, general courts-martial have personal jurisdiction over those accused of violating the laws of war. Article 18 provides that "[g]eneral courts-martial . . .have jurisdiction to try any persons who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[93]

Besides describing the three levels of courts-martial, Articles 18, 19, and 20, also describe the subject-matter jurisdiction of those courts. Each court has jurisdiction to try "any offense made punishable by this chapter."[94] Articles 77 through 134 describe the offenses that are made punishable by the UCMJ. General courts-martial also have the added subject-matter jurisdiction over any violation of the laws of war that could be tried at a military commission.[95]

Military Commissions

Because court-martial jurisdiction is established by statute, it is a relatively simple task to read the statute and understand who can be tried for what crimes by courts-martial. This task is more complex with military commissions. To determine the jurisdiction of military commissions, three zones of jurisdiction must be considered: customary international law, international treaties, and the Constitution. These three zones of jurisdiction must be considered and laid over one another to determine the jurisdiction of military commissions.

Jurisdictional Limitations Imposed by Custom and History

Military commissions have been used throughout American and international history. These courts have not always been called military commissions; before the term military commission came into use they were called courts-martial, courts of inquiry, or special courts-martial.[96] From the historical use of these commissions, customary international law regarding their jurisdiction can be discerned. The jurisdictional boundaries of these tribunals have evolved and been refined, arguably to accommodate the changing nature of warfare. This evolution and refinement is illustrated particularly well in U.S. history.

As explained by General Crowder in his testimony before Congress, and by the Supreme Court in *Ex parte Quirin*, *In re Yamashita*, and *Madsen*, U.S. military commissions have drawn their jurisdiction to try cases from customary international law.[97] (General Crowder and the Supreme Court often used the term "international common law" when referring to what is more commonly referred to as "customary international law.") Therefore, a historical examination of the evolution and refinement of American military commissions reflects the evolving nature of customary international law.

The United States has used military commissions since before the ratification of the Constitution[98] and as late as 1950 in occupied Germany.[99] Customary international law, Supreme Court precedent, and U.S. history indicate that three distinct types of military commissions have been used: martial law courts, military government courts, and war courts.[100] Each type of military commission has unique jurisdictional characteristics. Martial law courts refer to courts established by a military commander whose forces have occupied a particular area within the United States and displaced the civil government. Military government courts are the same as martial law courts, except they are established either outside of the United States or in areas within the United States in a state of rebellion. Finally, war courts are established by military commanders strictly for the purpose of trying violations of the laws of war.[101]

American Commissions in Their Infancy

One of the first and most famous military commissions in the United States, the trial of Major John André, was a war court. André, the Adjutant General to the British Army in North America, was captured after meeting with Major General Benedict Arnold in September 1780.[102] At the meeting, General Arnold gave André copies of the defense plans for the military post at West Point.[103] André still possessed the plans at the time of his capture. General George Washington ordered Major André tried for the

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the United States has leased, reserved, or otherwise acquired which is outside the United States, the Canal Zone, Puerto Rico, Guam, and the Virgin Islands. *Id*. art. 2.

[93] *Id.* art. 18.

[94] *Id.* arts. 18–20.

[95] *Id.* art. 18.

[96] WINTHROP, *supra* note 9, at 831–32; WINTHROP SERGENT, THE LIFE OF MAJOR ANDRE 347 (1871).

[97] Madsen v. Kinsella, 343 U.S. 341, 346 (1952); *In re* Yamashita, 327 U.S. 1, 20 (1946); *Ex parte* Quirin, 317 U.S. 1, 30 (1942); Crowder Testimony, *supra* note 27.

[98] WINTHROP, *supra* note 9, at 831–32.

[99] *See, e.g*., *Madsen*, 343 U.S. at 341.

[100] *See* MCM, *supra* note 87, pt. I, ¶ 2. Part I, paragraph 2 of the *MCM* describes military jurisdiction. The *MCM* lists four distinct areas within military jurisdiction: military law, martial law, military government, and the law of war. *Id*.

[101] *Id*.

[102] SERGENT, *supra* note 96, at 347.

[103] ROBERT HATCH, MAJOR JOHN ANDRE 243–48 (1986).

offense of spying. A military commission found André guilty and sentenced him to death.[104]

Although the trial of Major André was controversial, this was not due to jurisdictional issues. The jurisdiction to try enemy soldiers for war crimes at a military commission was well established by 1780. Indeed it would be difficult for the British to claim that the trial ordered by General Washington lacked jurisdiction, given Britain's use of a less formal proceeding to find Nathan Hale guilty and execute him four years earlier for the same offense.[105]

A more controversial use of a military commission occurred when General Andrew Jackson ordered the trial of a non-military U.S. citizen at one of the first martial law courts in the United States. In December of 1814, prior to the Battle of New Orleans, General Jackson declared a state of martial law in the city of New Orleans.[106] Jackson prepared the city for a siege, and to that end, he established curfews and pass policies.[107] Individuals found in violation of Jackson's curfew or pass policy faced arrest. Jackson also ordered military personnel to enter private homes to commandeer entrenching tools or other supplies he deemed necessary to the war effort.[108] After winning the Battle of New Orleans, General Jackson maintained the city in a state of martial law, despite the retreat of the British forces.[109]

Jackson's actions drew widespread criticism throughout New Orleans. One of Jackson's critics was Louis Louaillier, a member of the Louisiana Legislature. Louaillier wrote an editorial in a local newspaper declaring that the continued state of martial law was inappropriate and unnecessary.[110] Jackson ordered that Louaillier be arrested and tried by military commission for a number of offenses, including espionage and inciting mutiny.

An attorney who witnessed Louaillier's arrest filed a petition for a writ of habeas corpus on behalf of Louaillier in federal court. Louaillier's attorney claimed the military court had no jurisdiction over his client since Louaillier was a civilian. Federal judge Dominick A. Hall granted the writ, and ordered Louaillier be presented to his court the next day. Jackson, who was an attorney by trade, refused to honor the court order, and had Hall arrested on a charge of aiding and abetting and exciting mutiny.[111] A military commission tried Louaillier, but he was not found guilty of any charge. The commission determined it did not have jurisdiction to try Louaillier for six of the seven charges in the case. As to the seventh charge—espionage—the commission found Louaillier not guilty. Jackson refused, however, to accept the findings of the commission, and placed Louaillier back into confinement.[112]

Shortly after the military commission acquitted Louaillier, news that Britain and the United States had signed a peace treaty finally reached New Orleans. Upon receiving notice of the peace agreement, General Jackson lifted the state of martial law. Jackson also ordered the release of Louaillier and all the other individuals whom he had ordered arrested based on violations of martial law.[113]

Judge Hall wasted little time in issuing an order for Jackson to show cause why he should not be held in contempt of Judge Hall's earlier order to release Louaillier. General Jackson made a number of responses to the court's show cause order, but they were all rejected. The court found Jackson in contempt and ordered him to pay a $1000 fine as punishment. Judge Hall effectively summarized the case of *United States v. Jackson* by stating: "The only question was whether the Law should bend to the General, or the General to the Law."[114]

The declaration of martial law in New Orleans and the trial of Louis Louaillier, along with the subsequent contempt proceedings against Jackson in federal court, are historically valuable for two reasons. First, Jackson's use of martial law and a military court to try Louaillier provides one of the first examples of a martial law court being used in the United States to try a non-military U.S. citizen. Second, the trial of Louis Louaillier illustrates one of the most fundamental jurisdictional issues in the area of military commissions in the United States: when may a military commission be used against a U.S. civilian? This question, raised by the events of 1815, arose again in 1866, 1946, and in 1952 with varying results.[115]

The trials of Major André and Louis Louaillier are examples of American military commissions in their

[104] SERGENT, *supra* note 96, at 347. The convening order from Washington tasked the court to examine whether "[h]e came within our lines in the night on an interview with Major General Arnold, and in assumed character; and was taken within our lines, in a disguised habit, with a feigned name, and with the enclosed papers concealed upon him." *Id.*

[105] HATCH, *supra* note 103, at 68–69.

[106] LURIE, *supra* note 28, at 12.

[107] MARQUIS JAMES, ANDREW JACKSON: THE BORDER CAPTAIN 226 (1933).

[108] *Id*. at 244.

[109] *Id*. at 275.

[110] *Id*. at 282.

[111] LURIE, *supra* note 28, at 12.

[112] JAMES, *supra* note 107, at 283.

[113] *Id*.

[114] *Id*. at 286.

[115] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); Duncan v. Kahanamoku, 327 U.S. 304 (1946); Madsen v. Kinsella, 343 U.S. 341 (1952).

infancy. They demonstrate that as early as 1780 and 1815, the United States had employed military commissions as both war courts and martial law courts. Although these early cases establish the United States had used military commissions in the Revolutionary War and the War of 1812,[116] it was not until the Mexican-American War and the Civil War that the United States employed military commissions on a large scale.[117] It was also during these larger conflicts that the distinction between military government courts, martial law courts, and war courts achieved greater clarity.

Mexican-American War

During the Mexican-American War in 1847, the U.S. Army occupied large sections of Mexico. General Winfield Scott, the commander of those occupied areas, declared a state of martial law and suspended the authority of the civil government. Individuals who committed crimes in those occupied areas could be brought to one of two kinds of military courts: a military commission or a council of war. In 1847, these two military courts were generally alike, except for their names and the type of cases they heard. Military commissions were essentially military government courts. They were used to try individuals for crimes that would normally be brought before a civilian criminal court during peacetime. Councils of war were war courts. They were used to try violations of the law of war.[118]

During the Mexican American War the jurisdictional limitations of military commissions began to crystallize.[119] Both military government courts and war courts faced territorial and temporal limitations to their subject-matter jurisdiction. Offenses tried before a commission must have been committed: (1) in a theater of war, (2) within the territory controlled by the commander ordering the trial, and (3) during a time of war.[120] Additionally, the trial itself had to be conducted within a theater of war.[121] These jurisdictional limitations are arguably still in place today, but the meaning of the term "theater of war" has evolved.

Civil War

The Civil War and the subsequent four years entail the most extensive use of military commissions in U.S. history. The government conducted over 4000 military commissions during the war[122] and 1435 more between 1865 and 1869.[123] These commissions, used in the North and the South, tried both military personnel and civilians. The charges they heard ranged from crimes against the laws of war, to acts in violation of President Lincoln's 24 September 1862 proclamation, to crimes usually cognizable by civil criminal courts.[124] Functioning as war courts, martial law courts, and military government courts, respectively, each type of military court was called a military commission.[125]

One of the most controversial uses of military commissions during the Civil War stemmed from President Lincoln's 24 September 1862 declaration of a state of limited martial law throughout the country.[126] Lincoln's proclamation authorized the use of military commissions to try U.S. civilians in areas that were not in a zone of occupation or under insurrection, and suspended the writ of habeas corpus for anyone confined by military authorities.[127] The use of military commissions in this context was so questionable that at least one military commission declared that it did not have jurisdiction to try U.S. civilians outside of a zone of occupation or insurrection.[128] Others, like noted law of war scholar Francis Lieber, believed the commissions proper, arguing that because the whole country was at war, the whole country was within the theater of war.[129]

Some might argue that the Supreme Court resolved this debate in 1866 when it decided *Ex parte Milligan*.[130] In *Milligan*, the Court ruled that military commissions lacked

[116] WINTHROP, *supra* note 9, at 832.

[117] *Id*. at 832–34.

[118] *Id*. at 832.

[119] *Id*. at 837.

[120] *Id*. at 836–37.

[121] *Id*. at 836.

[122] MARK NEELY, THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 168 (1991).

[123] *Id*. at 176.

[124] *Id*. at 168.

[125] WINTHROP, *supra* note 9, at 832.

[126] The widespread use of military commissions, military arrests, and the suspension of the writ of habeas corpus are some of President Lincoln's most controversial acts during the Civil War.

[127] NEELY, *supra* note 122, at 65. President Lincoln's proclamation ordered that

> during the existing insurrection and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission.

Id.

[128] *Id*. at 144.

[129] *Id*. at 160.

[130] 71 U.S. (4 Wall.) 2 (1866).

the jurisdiction to try U.S. civilians when the civil courts were still in operation. The Court also held that the authority to use military commissions could not arise "from a threatened invasion."[131] Rather, "the necessity must be actual and present" and the jurisdiction was limited to "the locality of actual war."[132] The majority in *Milligan* based this ruling not just on an interpretation of the Constitution, but also on the traditions of England.[133]

Despite the Supreme Court's strongly worded denunciation of military commissions, the scope of the Court's ruling in *Ex parte Milligan* was surprisingly limited. The only jurisdictional limitation placed on military commissions by the Court regarded their use against civilians in areas not under valid martial law or occupation.[134] Thus, the ruling had no effect on the use of commissions in the occupied South or in the case of military personnel.[135] In fact, the United States conducted well over two hundred military commissions after the *Milligan* decision.[136]

Post-Civil War

After the Civil War, it was not until World War II that it was necessary for the United States to resort to the large-scale use of military commissions.[137] Once again, the United States used these commissions as war courts, military government courts, and martial law courts.[138] Customary international law standards for jurisdiction remained in place, but, given the global nature of World War II, the limitation of "the theater of war" lost much of its relevance. This evolution in the jurisdiction of military commissions is best illustrated by *Ex parte Quirin*.

In *Quirin*, the United States tried the petitioners for sabotage, spying, attempting to give intelligence to the enemy, and conspiracy to commit those crimes. The government alleged the saboteurs committed these offenses in Florida, New York, and arguably other states on the east coast of the United States. After being captured, the petitioners were tried by military commission in Washington D.C.[139]

The location of the petitioners' offenses and their trial are both significant because neither appears to be within the theater of war as that term was defined in the Civil War.[140] The Court discussed the petitioners' claim that the military commission had no jurisdiction over them because they had committed no "act of depredation or entered the theatre or zone of active military operations."[141] The Court resolved the petitioners' claim by concluding the petitioners completed their crimes when they passed through U.S. military lines and remained in this country.[142] This answer tacitly agreed with the Attorney General's brief in *Quirin* which argued, "The time may now have come . . .when the exigencies of total and global war must force a recognition that every foot of this country is within the theatre of operations."[143]

From the earliest moments of U.S. history to World War II, the United States has applied customary international law to define the jurisdiction of military commissions. Therefore, the expansion of "the theater of operations" illustrates that American military commission jurisdiction, and thus the jurisdictional limitations imposed by customary international law, have evolved over time with the changing nature of warfare.

Jurisdictional Limitations Imposed by International Treaties

International treaties further restrict the jurisdiction of military commissions. Even if the United States has the authority under customary international law to conduct a military commission, it would be unable to exercise that authority if it had entered into a treaty which precluded the use of commissions. Although the United States is not a signatory to any treaty expressly forbidding the use of military commissions, it has entered into several treaties that affect how or when it can use commissions and the minimum due process necessary at a commission. The most significant of these treaties regarding military commissions are the four 1949 Geneva Conventions, particularly, Geneva Convention III Relative to the Treatment of Prisoners of

[131] *Id.* at 127.

[132] *Id*. at 128; NEELY, *supra* note 122, at 176.

[133] *Milligan*, 71 U.S. at 128.

[134] *Id.*

[135] LURIE, *supra* note 28, at 42.

[136] NEELY, *supra* note 122, at 177.

[137] *Id*. at 182–83.

[138] REPORT OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES: EUROPEAN COMMAND, JUNE 1945 TO JULY 1948, at 52 (1948) [hereinafter JAG WAR CRIMES REPORT].

[139] *Ex parte* Quirin, 317 U.S. 1, 22–23 (1942).

[140] WINTHROP, *supra* note 9, at 832.

[141] *Quirin*, 317 U.S. at 38. Although the Court did address the theater of war issue relating to where the petitioners crimes were committed, it did not address the theater of war issue relating to the location of the commission. *See id*.

[142] *Id.*

[143] *Id.* at 46; Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 75 (1980).

War,[144] and Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.[145]

All four of the 1949 Geneva Conventions were enacted in response to the events of World War II. The international community created the Conventions in an effort to establish universal rules for the protection of the victims of war.[146] The Conventions specifically addressed the treatment of the wounded and sick in the field and at sea,[147] prisoners of war,[148] and civilians.[149] Among the safeguards provided by these Conventions were due process obligations imposed on any nation seeking to prosecute individuals during a time of armed conflict.[150]

With the exception of Common Article 3, all the articles of the four 1949 Geneva Conventions, apply only to "international armed conflicts."[151] Thus, the provisions of Geneva Conventions III and IV regarding the jurisdiction of military commissions are only applicable to the situation where a "difference between two States . . . [leads] to the intervention of members of the armed forces."[152]

Geneva Convention III

Before the 1949 Conventions, several international agreements had laid substantial groundwork regarding the treatment of prisoners of war.[153] Geneva Convention III built upon this foundation. The trial of prisoners of war was one area of particular concern after World War II. The Convention devotes twenty-eight of its 143 articles to the trial and punishment of prisoners. Articles 4, 84, 85, and 102 are particularly relevant to the jurisdiction of military commissions.

Under Geneva Convention III, the term "prisoner of war" does not apply to all those captured by our military during a time of war. Prisoner of war is defined at Article 4 of Geneva Convention III, and includes, among others "members of the armed forces of a party to the conflict;"[154] "members of militias,. . .volunteer corps, . . .and organized resistance movements" who meet certain conditions;[155] and "persons accompanying the force without actually being members thereto."[156] If persons do not meet the definition contained in Article 4 of the Convention, then they are not considered to be a prisoner of war and are not entitled to the protections provided by Geneva Convention III beyond Common Article 3.[157]

For those entitled to prisoner of war status, the Convention recognizes the competency of military courts to try them, with limitations. Article 84 states that "[a] prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offense alleged."[158] Although Article 84 recognizes and even favors the use of military courts to try prisoners of war, Article 102 limits the kind of military court that may be employed. Under Article 102 "a prisoner can be validly sentenced only if the sentence has been pronounced by the same courts according the same procedure as in the case of members of the armed forces of the Detaining Power."[159] Article 85 makes it clear that the limitations established in Article 102

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[144] Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

[145] Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

[146] JEAN DE PREUX ET AL., COMMENTARY, IV GENEVA CONVENTION: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR foreword (Jean S. Pictet ed., 1958). The foreword sections of all of 1949 Geneva Convention commentaries are the same.

[147] Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

[148] Geneva Convention III, *supra* note 144.

[149] Geneva Convention IV, *supra* note 145.

[150] Geneva Convention I, *supra* note 147, art. 3 [hereinafter Common Article 3] (this provision is in all four Conventions, thus referred to as Common Article 3); Geneva Convention III, *supra* note 144, ch. 3; Geneva Convention IV, *supra* note 145, arts. 64–78. These provisions address the trial or punishment of individuals during armed conflict.

[151] Common Article 3, *supra* note 150.

[152] DE PREUX ET AL., *supra* note 146, at 23.

[153] *Id*. at 3–4.

[154] Geneva Convention III, *supra* note 144, art. 4(A)(1).

[155] *Id*. art. 4(A)(2).

[156] *Id*. art. 4(A)(4).

[157] When the status of an individual is in question, the Convention provides a mechanism for resolving the issue. Article 5 provides:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Id. art. 5. Thus, when it is unclear whether an individual meets Article 4's definition of prisoner of war, the detaining power can conduct a tribunal to determine that individual's status.

[158] *Id*. art. 84. Thus, Article 84 "establishes the competence of military courts." DE PREUX ET AL., *supra* note 146, at 412.

[159] Geneva Convention III, *supra* note 144, art. 102.

were intended to apply regardless of when a prisoner of war's crimes were committed. Article 85 states: "[P]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."[160]

Thus, based on Articles 84, 85, and 102, the United States could only use military commissions to try prisoners of war when they are used to try U.S. military personnel. Because the United States does not currently use commissions to try its military personnel, it could not use them to try prisoners of war.

Some may argue the above conclusion is flawed, claiming the United States can use military commissions to try enemy prisoners of war so long as we *could* use them to try our own military. Thus, even if the United States does not customarily try its own service members by military commissions, the simple fact that it has the authority to do so is sufficient to meet the requirements of Articles 84, 85, and 102. This argument fails for two reasons.

First, the language of Article 102 is inconsistent with such an interpretation. Article 102 states: "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of the members of the armed forces of the Detaining Power."[161] Those supporting the argument that we *can* use military commissions to try prisoners of war even when we are not using them to try our own service men and women seek to rewrite Article 102. This new Article 102 would read: "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same court *that could be used to try the armed forces of the Detaining Power*, according to the same procedure *that could be used* in the case of members of the armed forces of the Detaining Power." Nothing in Article 102 or the Commentary to the Article supports such an interpretation.

The second reason such an argument fails is that it would undercut the objectives of Article 85. Article 85 was created, at least in part, to address the situation when members of the armed forces of a nation were not afforded the protections of the 1929 Geneva Convention because their crimes were alleged to have been committed before capture.[162] The Commentary to Article 85 specifically cites to *In re Yamashita* as an example of what the drafters of Article 85 sought to avoid. Those that would argue that Article 85 only requires a nation to try prisoners of war by those courts that it could have used to try its own service members ignore the objectives of Article 85, to include the objective of preventing a repeat of *Yamashita*. In 1946, the United States could have used military commissions to try its own personnel, it simply did not. Accordingly, if General Yamashita were tried today, a military commission could still try him. It seems extremely unlikely that the drafters and signatories of Geneva Convention III intended Article 85 to be so impotent.

The interplay between Articles 84, 85, and 102 are particularly significant for the United States. During World War II, the United States used military commissions to try prisoners of war for violations of the laws of war committed prior to capture.[163] The United States, however, did not use military commissions to try its own soldiers, regardless of when the infractions were alleged to have been committed.[164] This distinction was significant. The Manual for Courts-Martial in effect in 1945 placed restrictions on the use of hearsay evidence and deposed testimony; military commissions were not bound by these restrictions.[165] This fact was highlighted by De Preux in his Commentary on Article 85 and cited to as one of the reasons for Article 85.[166] Thus, based on Articles 84, 85, and 102, it seems that the United States could not exercise military commission jurisdiction today as it did during the Second World War. If the United States wished to take an enemy prisoner of war to a military commission, it could do so only if it used military commissions to try its own soldiers.

Geneva Convention IV

In addition to the new restrictions on military commissions established in Geneva Convention III, Geneva Convention IV also places greater limitations on the use of military commissions in an international armed conflict. While the restrictions placed on the use of military commissions by Geneva Convention III seem to be directed to war courts, the restrictions in Geneva Convention IV go principally to military government courts. This focus is logical given the Convention's objective of protecting civilians in the time of war.

Civilians are perhaps at their most vulnerable when in the hands of an occupying military force. Thus, Geneva Convention IV provides detailed provisions regarding the trial of civilians in occupied territories.[167] The provisions of

[160] *Id*. art. 85.

[161] *Id*. art. 102.

[162] DE PREUX ET AL., *supra* note 146, at 413–16.

[163] JAG WAR CRIMES REPORT, *supra* note 138, at 46–51.

[164] *In re* Yamashita, 327 U.S. 1, 20–21 (1946); Johnson v. Eisentrager, 339 U.S. 763, 790 (1950).

[165] *Yamashita*, 327 U.S. at 20–21.

[166] DE PREUX ET AL., *supra* note 146, at 413.

[167] *See* Geneva Convention IV, *supra* note 145, arts. 64–78.

Geneva Convention IV relevant to the jurisdiction of military commissions are Articles 64, 66, and 70.

Article 64 demonstrates the strong preference to try civilians in an occupied territory before their own courts: "[S]ubject to the latter consideration of justice and to the necessity of ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offenses covered by the said laws."[168] By encouraging the continued use of court systems in operation before occupation, the Convention allows civilians in occupied areas to avoid facing "a lack of understanding or prejudice on the part of a people of foreign mentality, traditions or doctrines."[169]

Although Article 64 demonstrates a preference for maintaining the preexisting courts of an occupied area, this preference is not without restriction. The preexisting courts will not be used: (1) if the court system itself is contrary to Geneva Convention IV or has "been instructed to apply inhumane or discriminatory laws,"[170] or (2) if the preexisting court system cannot administer justice effectively.[171] Thus, except when the preexisting courts of an occupied territory are unwilling or unable to provide justice, those courts should be used to try offenses that were criminal before occupation.

Besides establishing the presumption that the criminal courts in operation before an occupation will continue to administer the civilian criminal justice system, Article 64 also contains provisions that enable an occupying force to create laws necessary for the efficient conduct of the military government and for the protection of the occupying force. The second paragraph of Article 64 states:

> [T]he Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[172]

De Preux characterized the above section as the "legislative powers of the occupant.[173] This legislative power is particularly important with regard to the jurisdiction of military commissions under the Convention.

Although Geneva Convention IV favors trials of civilians in their country's own courts, this is not true of offenses made criminal under the occupying power's legislative authority. Under Article 66 of Geneva Convention IV, "[i]n cases of a breach of the penal provisions promulgated by it in virtue of the second paragraph of Article 64, the occupying power may hand over the accused to its properly constituted, non-political military courts, on condition that said courts sit in the occupied country."[174] Article 66 allows the occupying power the jurisdiction to punish those who violate the legislation created by that power.

The last section of Geneva Convention IV regarding the jurisdiction of military commissions is Article 70, which states: "[P]rotected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war."[175] This Article limits the occupying power's jurisdiction to offenses committed during the time of actual occupation. The one exception to this general rule is for "breaches of the laws and customs of war."[176] This exception is based on the principle of universal jurisdiction, under which an individual who violates the law of war, violates international law.[177] "The punishment of such crimes is therefore as much the duty of a State which becomes the Occupying Power as of the offender's own home country."[178]

The limitations imposed by Articles 64, 66, and 70 of Geneva Convention IV restrict the customary international law jurisdiction of a military commission operating in an occupied territory. In an occupied territory, the United States can only try civilians at a military commission for violations of the rules the United States established after becoming an occupying force, or for violations of the law of war.

The four 1949 Geneva Conventions represent a turning point in the international law of armed conflict. Their provisions touch a wide variety of issues regarding the conduct of war to include the subject of military commissions. The significance of Geneva Conventions III and IV to the jurisdictional boundaries of military

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[168] *Id*. art. 64.

[169] DE PREUX ET AL., *supra* note 146, at 336.

[170] *Id.*

[171] *Id*.

[172] Geneva Convention IV, *supra* note 145, art. 64.

[173] DE PREUX ET AL., *supra* note 146, at 337.

[174] Geneva Convention IV, *supra* note 145, art. 66.

[175] *Id*. art. 70.

[176] *Id*.

[177] DE PREUX ET AL., *supra* note 146, at 350.

[178] *Id*.

commissions is considerable. Both Conventions create limitations on the exercise of military commission jurisdiction, whether that commission is in the form of a military government court or a war court. Depending on the status of the individual the United States is seeking to try, U.S. practices that were arguably permissible during World War II are likely no longer acceptable.

Constitutional Restrictions on the Exercise of Military Commission Jurisdiction

This article has already discussed several landmark Supreme Court decisions regarding military commissions. These cases have been discussed as they related to the constitutional authority to create commissions and the historical evolution of the use of military commissions in the United States. This section revisits these Supreme Court opinions and others that define the jurisdiction of military commissions under the Constitution. This section will examine these opinions as they relate to two critical jurisdictional issues. First, under what circumstances may a military commission exercise jurisdiction over a U.S. civilian? Second, when may a commission try foreign nationals?

Jurisdiction of Commissions Over U.S. Civilians

The trial of U.S. civilians by military commission is perhaps the most controversial issue in any discussion of the jurisdiction of military commissions. When American civilians are subjected to the jurisdiction of U.S. military courts, it strikes a disharmonious chord in the American psyche. The United States was born out of the struggle to throw off the oppression imposed by the British government through its military.[179] The Framers of the Constitution feared the military, some believing that standing armies posed a threat to a free society. Thus, in drafting the Constitution, the Framers strictly subordinated the military to civilian control.[180] Based on this historical and constitutional construction, the Supreme Court has stated that military commissions can be used to try U.S. civilians only under specific extreme circumstance during war.[181]

The Supreme Court has addressed the jurisdiction of military commissions to try U.S. civilians in numerous cases, four of which are particularly relevant. In *Ex Parte Milligan*,[182] *Duncan v. Kahanamoku*,[183] *Madsen v. Kinsella*,[184] and *Ex parte Quirin*,[185] the Supreme Court provides some clear boundaries for the application of military commission jurisdiction over U.S. civilians. These boundaries vary depending on where the commission is held and what type of commission is being conducted. The Court subjects martial law courts to the greater restrictions than military government courts conducted in occupied territories[186] and war courts.

Martial Law Courts

As mentioned above, martial law courts conducted against U.S. civilians face greater restriction on their exercise of jurisdiction than other types of military commissions. These restrictions are discussed and illustrated in *Ex parte Milligan* and *Duncan v. Kahanamoku*.[187] Although some have argued that "the *Milligan* decision had little practical effect,"[188] this criticism is directed principally at the Court's failure to address the use of military commissions in the occupied South, the military detentions authorized by the President, or the President's act of suspending the writ of habeas corpus.[189] For the purposes of establishing jurisdictional boundaries for military commissions, *Milligan* still has relevance.

Members of the U.S. military arrested Lambdin P. Milligan on 5 October 1864 and tried him by military commission on the 21st of that month.[190] Military authorities alleged that Milligan conspired against the government of the United States, afforded aid and comfort to the enemy, incited insurrection, violated the laws of war, and engaged in disloyal practices. The commission found him guilty and sentenced him to death. All of the criminal acts alleged against Milligan were committed in the state of Indiana, and stemmed from his membership in an organization called the Order of American Knights or Sons

[179] BERNARD BAILYN, THE ORIGINS OF THE AMERICAN REVOLUTION 95, 112–19 (1967). 180. *Id*. at 61–63.

[180] *Id.* at 61–63.

[181] *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); Duncan v. Kahanamoku, 327 U.S. 304 (1946). The Supreme Court has never said that a declared state of war was necessary for the use of military commissions. Rather, the extreme circumstances created by warfare may necessitate and justify the use of military commissions.

[182] *Milligan*, 71 U.S. at 2.

[183] *Duncan*, 327 U.S. at 304.

[184] 343 U.S. 341 (1952).

[185] 317 U.S. 1 (1942).

[186] The phrase "occupied territories" is intended to refer to locations outside of the United States and its territories.

[187] 71 U.S. at 126–27; 327 U.S. at 319–23.

[188] NEELY, *supra* note 122, at 176.

[189] *Id*.

[190] *Milligan*, 71 U.S. at 107.

of Liberty.[191] At the time the U.S. military tried Milligan by commission, the civilian courts in Indiana were open and in operation.

The issue that occupied the majority of the Court's opinion was "upon the facts stated [did] . . . the military commission [have] jurisdiction legally to try and sentence . . . Milligan."[192] The Court answered this question with a resounding "No."[193] In arriving at that answer, the Court used what one author called "thunderously quotable language."[194] The majority concluded, "[M]artial rule can never exist where the courts are open."[195] Although "there are occasions when martial rule can be properly applied,"[196] those occasions are limited to when due to "foreign invasion or civil war, the courts are actually closed."[197] The thrust of the majority opinion is that military courts created in a state of martial rule to try civilians are courts of necessity and "as necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power."[198]

Despite claims that the *Milligan* opinion is irrelevant, it is still significant where martial law courts are established within the borders of the United States. The decision creates strict guidelines intended to limit the jurisdiction of martial law courts to the smallest physical area for the briefest period of time. The Court created these limitations based on the recognition that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and in the conflict, one or the other must perish."[199] Eighty years after the *Milligan* decision, the Supreme Court once again visited the question of whether a martial law court had the jurisdiction to try U.S. civilians.

In *Duncan v. Kahanamoku*,[200] the Court reached the same conclusions as in *Milligan*, although for slightly different reasons. Two days after the Japanese attack on Pearl Harbor, Hawaii, President Roosevelt approved the Governor of Hawaii's declaration of martial law in accordance with the Hawaiian Organic Act.[201] After this declaration, the commanding general in that area declared himself the Military Governor and ordered the civil and criminal courts to close. The Military Governor then established military tribunals in the place of the civilian criminal courts.[202] *Duncan* arose out of two prosecutions conducted by these military commissions. The two petitioners were convicted in unrelated cases of embezzlement and assault, respectively. One of the petitioner's trial was conducted over eight months after the Pearl Harbor attack, while the other was tried over two years after that attack.[203]

Although the *Duncan* Court faced very similar issues as those in *Milligan*, there was a significant distinction. In *Milligan*, the President, without any express approval from Congress, declared martial law.[204] In *Duncan*, Congress had passed the Hawaiian Organic Act. This Act granted the Governor of Hawaii the authority, in certain specified emergencies,[205] to declare martial law. This Act also granted the President the authority to approve the governor's decision and thus continue the state of martial law. Therefore, the *Duncan* Court had to address an issue not present in *Milligan*: whether the Organic Act had empowered the military "to supplant all civilian laws and to substitute military for judicial trials."[206] If the Act had not so empowered the military, then the Court could rely on *Milligan* to resolve the granted issue.

In addressing this issue, the Court pointed out that the term martial law was open to a variety of definitions. Because the Organic Act was unclear on its face, and the Act's legislative history was inadequate, the Court stated, "[I]t must look to other sources in order to interpret that term."[207] The other sources the Court considered were those embodied "in the birth, development and growth of our governmental institutions."[208] Based on these other sources the Court concluded Congress "did not wish to exceed the boundaries between military and civilian power."[209] Congress intended instead "to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion [and] was not intended to

[191] *Id.*

[192] *Id*. at 109.

[193] *Id*. at 127.

[194] NEELY, *supra* note 122, at 176.

[195] *Milligan*, 71 U.S. at 127.

[196] *Id*.

[197] *Id*.

[198] *Id*.

[199] *Id*. at 124–25.

[200] 327 U.S. 304 (1946).

[201] *Id*. at 307.

[202] *Id*. at 308.

[203] *Id*. at 310.

[204] NEELY, *supra* note 122, 65, 68.

[205] *Id*. at 308. The governor was authorized to declare martial law in Hawaii when it was necessary "to prevent or suppress lawless violence, invasion, insurrection, or rebellion in the said Territory." *Id*.

[206] *Id*. at 313.

[207] *Id*. at 319.

[208] *Id*.

[209] *Id*. at 324.

authorize the supplanting of courts by military tribunals."[210]

After determining that Congress did not intend to authorize military trials to supplant civilian criminal trials, the Court stated simply: "[W]e hold that both petitioners are now entitled to be released from custody."[211] The majority did not do an additional "*Milligan*" analysis to determine whether martial law was permissible under an argument of necessity. This lack of an examination, however, does not suggest that the standards created in *Milligan* no longer exist. In the Court's statement of the facts at the beginning of the *Duncan* opinion, the Court noted that at the time of both petitioners' convictions the civilian courts were open in some capacity. Additionally, the Court indicated that "at the time the alleged offenses were committed the dangers apprehended by the military were not sufficiently imminent to cause them to require civilian evacuation or even to evacuate the buildings necessary to carry on the business of the courts."[212] Thus, it was unnecessary for the Court to discuss the *Milligan* "open court" test. The Court had already concluded in the accepted facts of the case that the Hawaiian courts were capable of being in operation at the time the petitioners were tried by military commission.

Milligan and *Duncan* stand for the proposition that martial law courts will not be permitted to supplant the jurisdiction of U. S. civilian courts where those civilian courts are capable of operation. Both *Milligan* and *Duncan* point out that the roots of this rule run as deeply as those of the Constitution. These decisions also stand for the proposition that even in the extreme circumstances of war, the subordination of the military to civilian control must, to the greatest extent possible, continue.

Military Government Court

As discussed above, the constitutional restrictions on military commissions are at their zenith when the military seeks to subject U.S. civilians to the jurisdiction of martial law courts within the United States. These constitutional restrictions are at their lowest ebb, however, when U.S. civilians or others are subjected to these same courts outside of the United States. As early as 1853, in *Cross v. Harrison*,[213] the Supreme Court announced its acceptance of the principle that military governments in occupied territories had the right to govern the population of that territory in accordance with "the lawful exercise of a belligerent right over a conquered territory."[214] The Court reiterated this proposition in 1879 in the case of *Dow v. Johnson*,[215] when the Court once again upheld the lawfulness of a military government court in an area outside of the United States.[216]

In *Duncan v. Kahanamoku*,[217] the Court made it clear that one of the authorities given to the military government in an occupied territory is the power to try civilians. The Court distinguished military government courts operating in occupied territories from that of martial law courts operating in the United States, stating: "[W]e are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot or does not function."[218]

The most recent case on this point is *Madsen v. Kinsella*.[219] In *Madsen*, the petitioner was a U.S. civilian convicted of murder by a military government court in occupied Germany.[220] The petitioner claimed she had the right to trial by courts-martial rather than military commission. The Court disagreed. In reaching its conclusion that military commissions in Germany had jurisdiction to try U.S. civilians, the Court stated: "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war."[221] One of these responsibilities is "the President['s] . . . urgent and infinite responsibility . . . of governing any territory occupied by the United States by force of arms."[222]

Law of War Court

The final circumstance to be discussed regarding the jurisdiction of military commissions is the use of a law of war court to try a U.S. civilian. This particular jurisdictional circumstance is thorny and not fully developed. The boundaries of military commission jurisdiction in this context appears to straddle the line between jurisdiction over military personnel, when jurisdiction is not in doubt, and

[210] *Id*.

[211] *Id*. at 324.

[212] *Id*. at 313.

[213] 57 (16 How.) 164 (1853).

[214] *Id*. at 192.

[215] 100 U.S. 158 (1879).

[216] *Id*. at 166.

[217] 327 U.S. 304 (1946).

[218] *Id*. at 314.

[219] 343 U.S. 341 (1952).

[220] *Id*. at 343.

[221] *Id*. at 346.

[222] *Id*. at 348.

jurisdiction over U.S. civilians violating laws heard by civilian courts, when jurisdiction is reluctant.

The Supreme Court addressed this issue, at least in part, in *Ex parte Quirin*.[223] In *Quirin*, the Court qualified the broad language of *Milligan*, concluding that although military commissions in the United States cannot try U.S. civilians, they can try U.S. citizens who engage in belligerent acts.[224]

One of the petitioners in *Quirin*, Haupt, claimed U.S. citizenship.[225] Based on this claim, Haupt asserted that *Milligan* prohibited his trial before a military commission so long as the civilian courts were open.[226] The government opposed Haupt's claim, arguing that through his conduct he had effectively renounced his U.S. citizenship. The Court concluded it did not have to resolve the issue of Haupt's citizenship "because citizenship of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."[227] The Court went on to state: "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."[228] Thus, according to *Quirin*, a U.S. citizen who is an unlawful belligerent exposed himself to the potential penalties associated with that violation of the law of war,[229] including trial by military commission.

These statements represent at least a partial departure from the holding in *Milligan* that military commissions "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[230] Recognizing this departure, the *Quirin* court distinguished *Milligan* by emphasizing that, unlike the petitioners in *Quirin*,[231] the petitioner in *Milligan* was not "a part of or associated with the armed forces of the enemy"[232] and thus "was a non-belligerent, not subject to the laws of war."[233] The *Quirin* Court ruled that *Milligan* was not intended to address the situation present in *Quirin*.[234]

Although the Court supported the use of military commissions to try the petitioners in *Quirin*, it refused to provide a comprehensive definition of when U.S. military commissions sitting in the United States may try its citizens for violations of the laws of war. Instead, the Court concluded it "had no occasion to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war . . . [because] it is enough that petitioners here, upon the conceded facts, were plainly within those boundaries."[235]

The issues at stake when the military takes over the traditional functions of a civilian government within the United States are substantial. According to the Court in *Milligan*, their significance "cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty."[236] In *Milligan* and *Duncan* the Court established standards to protect those principles and to ensure that martial law courts are used only in the most extreme circumstances. The fundamental principles at issue in *Milligan* and *Duncan* are not as present in cases where military commissions are operating in occupied territories or as war courts. Military government courts do not raise the same specter of military domination of civilian government as those same courts operating within the United States. Additionally, military commissions in the form of war courts do not present the same concerns as martial law courts operating in the United States. War courts do not seek to subject the entire civilian populace of a given area to trials by military court.

Jurisdiction Over Foreign Nationals

The jurisdictional basis to try foreign nationals by military commission is, in general, the same as that for trying U.S. citizens. The United States can exercise military commission jurisdiction over foreign nationals through martial law courts, military government courts, or war courts. Foreign nationals can be tried for violations of the laws of war or for violations of crimes normally heard by civilian courts when in an area under U.S. military government. Despite the same general jurisdictional

[223] 317 U.S. 1 (1942).

[224] *Id*. at 37–38.

[225] *Id*. at 20.

[226] *Id*. at 45.

[227] *Id*. at 37.

[228] *Id*.

[229] *Id*. at 37–38.

[230] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121(1866).

[231] *Id*. The petitioners in *Quirin* were charged with "being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform—an offense against the law of war." *Id*. The distinction between the petitioner's status in *Milligan* versus *Quirin* was emphasized by Mr. Patrick Philbin during a panel discussion hosted by the American Bar Association in Washington, D.C., on 16 January 2002.

[232] *Ex parte* Quirin, 317 U.S. 1, 45 (1945).

[233] *Id*. at 46.

[234] *Id*. at 45.

[235] *Id*. at 45–46.

[236] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 118 (1866).

authority to try foreign nationals by military commission as that to try U.S. citizens, there are jurisdictional wrinkles. These wrinkles include the application of international treaties that would not be in issue for the trial of U.S. citizens, and issues related to habeas corpus jurisdiction. *In re Yamashita*[237] and *Johnson v. Eisentrager*[238] address these issues.

In re Yamashita involved the prosecution of General Tomoyuki Yamashita for violations of the laws of war. The charges against General Yamashita alleged, in part, that

> while commander of armed forces of Japan at war with the United States of America and its allies, [he] unlawfully disregarded and failed to discharge his duty as commander to control the operations of the member of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines.[239]

The prosecution submitted a bill of particulars listing 123 war crimes committed by General Yamashita's troops while under his command.[240]

Among General Yamashita's allegations of error was the claim that the military commission that tried him violated Articles 60 and 63 of the 1929 Geneva Convention.[241] Article 60 of the 1929 Geneva Convention required a detaining power that is about to direct "judicial proceedings . . . against a prisoner of war [to] . . . advise the representative of the protecting power thereof as soon as possible, and always before the date set for the opening of the trial."[242] Article 63 requires that a "sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power."[243] The military commission that tried General Yamashita did not notify his country, nor did the commission apply the same rules of evidence and procedure as applied at courts-martial.

The Court examined both allegations of error, and found no violation of the Convention. The Court held that Articles 60 and 63 were not intended to apply to violations of the laws of war that occurred before an individual became a prisoner of war.[244] According to the Supreme Court, Articles 60 and 63 were intended to "apply only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war."[245]

Although the ultimate conclusion of the Supreme Court in *Yamashita* regarding Article 63 is likely moot based on Article 85 of the 1949 Geneva Convention, the Court's application of international law is significant. In the case of foreign nationals, international treaties, such as the 1949 Geneva Conventions, may restrict the jurisdiction of U.S. military commissions or dictate certain minimum due process rights for those proceedings. This could lead to the counterintuitive situation where a U.S. citizen being tried for a war crime would be entitled to less due process than a foreign national tried for the same offenses.

In addition to the jurisdictional wrinkles created by international treaties when trying foreign nationals by military commission, there are habeas corpus issues as well. The habeas corpus issues present are not relevant to the military commission's jurisdiction; instead they go to the jurisdiction of U.S. federal courts. *Johnson v. Eisentrager*[246] discussed these issues at length.

The petitioners in *Eisentrager* were German nationals convicted of war crimes by an U.S. military commission conducted in China.[247] After being convicted, the petitioners were sent to serve their respective sentences in a U.S. Army confinement facility in occupied Germany. The petitioners sought a writ of habeas corpus in the federal district court in Washington D.C. The D.C. court ruled it did not have jurisdiction to hear the case because the petitioners were confined outside of the United States. The Court of Appeals for the D.C. Circuit reversed, concluding that jurisdiction existed to hear a writ of habeas corpus where anyone was deprived of liberty based on the authority of the United States.[248] The Supreme Court disagreed, ruling that under the circumstances, "no right to the writ of habeas corpus appear[ed]."[249]

The Court was cautious to limit its ruling that the petitioners in *Eisentrager* did not have the right to the writ of

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[237] 327 U.S. 1 (1946).

[238] 339 U.S. 763 (1950).

[239] *Id*. at 13–14.

[240] *Id*. at 14.

[241] *Id*. at 20–21.

[242] Geneva Convention Relative to the Prisoners of War, art. 60, July 27, 1929, 47 Stat. 2051, 118 L.N.T.S. 343.

[243] *Id*. art. 63.

[244] *In re* Yamashita, 327 U.S. 1, 22–23 (1946).

[245] *Id*.

[246] 339 U.S. 763 (1950).

[247] *Id*. at 765–66. The petitioners were convicted of passing information to the Japanese after Germany had surrendered. *Id*.

[248] *Id*. at 767.

[249] *Id*. at 781.

habeas corpus. The Court began by noting that the ruling in the case did not apply to citizens, stating: "[W]ith the citizen we are now little concerned, except to set his case as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens."[250] Next, the Court indicated that resident enemy aliens would still have access to the writ, as the petitioners in *Quirin* and *Yamashita* did.[251] This access was based on territorial jurisdiction.[252] The U.S. military confined the petitioners in *Quirin* and *Yamashita* in the United States or its territories, for crimes committed in the United States or its territories.[253] The Court's ruling, therefore, is directed at one very specific class of people, "the nonresident enemy alien . . . who has remained in the service of the enemy."[254]

The Court denied the petitioners access to the writ of habeas corpus in *Eisentrager* because none of the traditional heads of jurisdiction were present. The petitioners were nonresident enemy aliens, whose crimes, trial, and confinement all occurred outside of the United States or its territories.[255] The Court expressed concern that granting nonresident enemy aliens in active hostility with the United States access to the writ might adversely affect future U.S. war efforts. The majority argued, "[I]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."[256]

Eisentrager and *Yamashita* highlight some of the potential jurisdictional wrinkles when the United States seeks to try foreign nationals at U.S. military commissions. These wrinkles seem to counter-balance one another. On the one hand, based on international treaties, foreign nationals may have rights regarding military commissions that U.S. citizens do not. On the other hand, U.S. citizens will always have access to our federal courts through the writ of habeas corpus, while foreign nationals may not. Despite these wrinkles, the Supreme Court has repeatedly supported the jurisdiction of military commissions to try foreign nationals, both under customary international law and the Constitution.

The jurisdiction for courts-martial and military commissions are as varied and distinct as the constitutional authority for these two courts. Each court's jurisdiction is restricted differently. These jurisdictional boundaries are affected by the location and nature of the crime, the location of the court that tries the offenders, the status of the offenders at the time they committed their offense and at the time of trial, and whether peace has been declared. Yet, despite these variations, courts-martial and military commissions share jurisdiction over violations of the laws of war. This shared jurisdiction can be misleading and give some the impression that courts-martial and military commissions are more alike than they are. A close examination of the jurisdiction of the two courts highlights their different natures.

Conclusion

Military commissions and courts-martial are both valid trial venues, but they serve different purposes. Courts-martial are a part of military law and are intended "to promote justice, to assist in maintaining good order and discipline in the armed forces, [and] to promote efficiency and effectiveness in the military establishment."[257] Military commissions are "an important incident to the conduct of war" whereby a military commander can "subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."[258] Military commissions also serve as a valuable part of military government where, as a result of war, no other government exists. These different purposes are reflected in their different constitutional bases and jurisdictional boundaries.

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[250] *Id*. at 769.

[251] *Id*. at 779–80.

[252] *Id*.

[253] *Id*. at 780.

[254] *Id*. at 767.

[255] *Id*. at 767–68, 781.

[256] *Id*. at 769.

[257] MCM, *supra* note 87, pt. I, § 3.

[258] *Ex parte* Quirin, 317 U.S. 1, 28 (1942); *In re* Yamashita, 327 U.S. 1, 11(1946).

A Majority of One: A Summary and Analysis of *An Oral History of Colonel Denise K. Vowell (Retired), United States Army, 1973–2006*[1]

Colonel George R. Smawley[*]

A judicial opinion . . .is ideally a product not only of analysis but also of experience, which is why brilliant twenty-five-year-olds are not judges. The twenty-five-year-old can do the analysis, but he cannot articulate the judge's experience.[2]

Introduction

Over the past twenty-four months, as the evolutionary arch of military justice practice cambers toward a paradigm that is more judicial and civilianized, the challenges faced by practitioners are more dramatic than at any time in a generation. An existential threat to the current command-centric system arises, in part, from a political current that sees the commander's role in good order and discipline as inadequate, and calls into question the ability of the system to mete out justice most particularly with issues like sexual assault.

This is nothing new. In the years following WWII, the 1950 Uniform Code of Military Justice (UCMJ) was introduced in response to political dissatisfaction with military justice under the Articles of War. It established rules and procedures for courts and pretrial investigations, and detailed rights of appellate review. Nearly thirty years later, with the advent of the war in Vietnam, the 1968 amendments to the UCMJ were implemented, dramatically expanding the rights of Soldiers and the establishment of a more professional and institutionalized judiciary.[3] By 1980, the Army created the Trial Defense Service (TDS), an independent criminal defense bar, moving the system further still away from the influence of commanders. The recent congressional focus changes the way the military conducts key pre-trial investigations, what advice and authority is available to commanders, the prosecution of complex sexual assault cases, and the legal services to which victims are entitled.[4] Some have advocated sentencing guidelines for the military[5] and tenured judges with fixed terms of office.[6] Most controversial has been the effort, which received majority support in the U.S. Senate in 2013, to remove commanders almost entirely from the military process.[7]

What is lost in the discussion is what critics are NOT saying, particularly with regard to the quality and efficacy of the modern military judiciary—now well into its fourth decade—which functions independently and impartially within the command-centric military justice system.[8] For all the scrutiny and legislative initiatives about the role of commanders and quality of legal training and expertise, the contrasting absence of any meaningful discussion about the competence and capacity of the Army judiciary in dealing with high-profile litigation is quietly profound. So too are

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[1] Major Temi Anderson, Major Aaron Lykling & Major David O'Dea, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, *An Oral History of Denise K. Vowell, Colonel (Retired), U.S. Army 1973–2006*, (Nov. 2012) [hereinafter Oral History].

[2] RICHARD A. POSNER, REFLECTIONS ON JUDGING 46 (2013). Judge Posner has served on the U.S. Court of appeals for the Seventh Circuit since 1981, and is a senior lecturer at the University of Chicago Law School. He is widely considered among America's premier jurists.

[3] *See* The Judge Advocate Gen.'s Sch., U.S. Army The Background of the Uniform Code of Military Justice, (1959), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/background-UCMJ.pdf (last visited Sept. 20, 2014).

[4] *See* The Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013–2014), *available at* https://beta.congress.gov/bill/113th-congress/senate-bill/1752 (last visited Sept. 20 2014) (requiring, among other things, that each military Service establish a centralized system to convene general and special courts-martial and detail judges and members). *See generally* Charles "Cully" Stimson, *Military Sexual Assault Reform: Real Change Takes Time*, HERITAGE FOUNDATION, http://www.heritage.org/research/reports/2014/03/military-sexual-assault-reform-real-change-takes-time (last visited Sept. 19, 2014).

[5] *See* Major Steven Immel, *Military Sentencing Guidelines*, 165 Mil. L. Rev. 159 (2000); UCMJ art. 56 (2012) *amended by* Nat'l Def. Authorization Act, H.R. 3304 (2014).

[6] COX COMM'N, NAT'L INST. OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 2 (May 2001) [hereinafter COX COMM'N], *available at* http://www.loc.gov/rr/frd/Military_Law/pdfCox-Commission-Report-2001.pdf (last visited Sept. 19, 2014).

[7] *See* Helene Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Cases*, N.Y. TIMES, Mar. 6, 2014, http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?_r=0 (last visited Sept. 20, 2014).

[8] *See* UCMJ art. 26 (2008) (military judges are directly responsible to The Judge Advocate General or her designee); *id.* art. 37 ("No authority may censure, reprimand or admonish . . . a military judge . . . 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 proceedings."); *see also* United States v. Graf, 35 M.J. 450, 463 (C.M.A. 1992) ("The Uniform Code of Military Justice provides substantial independence and protection for military judges, both trial and appellate, despite their subordinate position in the military hierarchy.").

the remarkable military jurists who brought it to where it is today. This matters because at time when the integrity of the system is brutally scrutinized as unfair to certain classes of victims and defendants, the successful development of an Army judiciary that is widely deemed experienced, expert, and as good as its civilian counterpart is a vitally important institutional accomplishment.

Colonel Denise Vowell, the former Chief of the Army Trial Judiciary and the first female officer to serve in that position, was among that small but dedicated cohort who brought it to where it is today.[9] During a thirty-two year career, Colonel Vowell distinguished herself as the first true lioness of the Army legal corps. Her career spans the Vietnam War; the Women's Army Corps (WAC); service as the first female staff judge advocate (SJA) (supervising legal advisor) of an Infantry division; the first female division SJA to serve in a contingency operation (Bosnia); Chief of the Army Torts Branch; assignments as both a trial and appellate judge, and concluding as the Chief Trial Judge for the Army Judiciary. Despite widely recognized accomplishment in numerous legal and leadership positions, Colonel Vowell's unique and defining legacy remains her relentless and unapologetic advocacy and cultivation of an Army judiciary filled with proven leaders and lawyers *experienced* in life and the law, and who by any measure have the capacity and talent equal to any other cohort within the Army or broader legal profession.

Her ability to change the narrative on what military trial judges should be, how they are selected and assigned, and the professional and educational opportunities they should have affords her a substantive legacy meriting study for what it says about the Army, and the ability of a single leader to achieve meaningful institutional change. It is also a lesson in the experience of female leadership in the Army legal services, from the late 1970s when there were hardly any to today when all real or perceived ceilings have clearly been shattered, capped off by the 2013 appointment of the Army's first female Judge Advocate General (TJAG).[10]

In noting Vowell's intellectual acumen and vocal commitment to civic principle and social justice, a high school teacher once observed that, "Denise is never in a minority; she is a majority of one."[11] She was self-assured, confident, assertive, and committed to the certain moral righteousness of her actions. An unapologetic feminist,[12] her personal and professional narrative is the story of a woman who beat the odds to become the first in her family to attend college; who was informed and defined by her experience in the turbulent social and political environment of the late 1960s; and who went on to enlist and serve as one of the Army's top leaders and jurists.

Denise Vowell was that rare Army lawyer who mattered in an institutional way, and whose contributions to military justice survive in a professional culture forever improved through her efforts. This summary and analysis of her 2013 Oral History attempts to capture the narrative of her life experience, and how it shaped and informed her professional contributions to the Army. It is a story worthy of study for its lessons of one remarkable officer's personal journey in Army law, and the development of the Army Judge Advocate General's Corps more generally.

Family and Upbringing

Colonel Vowell was born during the summer of 1952 in Flint, Michigan, one of five children. The family settled in the area following her father's discharge from the Marine Corps, and like so many others in the greater-Detroit area, her parents made a living in support of the automotive industry, an experience that left a profound impression on her. She recalls that by age twelve, "I had decided that I was never going to work for General Motors and I was never going to marry anyone who did."[13]

Important, however, was her father's work as a committeeman for the United Auto Workers union, where he helped represent workers in disputes with management: "those workers accused of smuggling out a whole car one part at a time. . . or caught in possession of a General Motors flashlight in their trunk."[14] Her father would come home in the evenings and recall the stories and the struggles of workers with management. Her mother also worked full time for General Motors in an administrative office, at a time when mothers with five children rarely worked outside the home. From those two role models, a father who advocated on behalf of employees and a mother who successfully managed work and family, Vowell developed the capacity for multi-tasking and "the sense of fighting for justice. . .," which would later play such an important role in her professional life.[15]

This early and affirmative awareness of equitability and fairness observed through her father's union activity soon manifested itself into action. During her later years in high school, Vowell was actually expelled from school for distributing information on birth control in response to the

[9] *See generally* Colonel George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Court Judge and Brigadier General (Retired) Wayne E. Alley (U.S. Army, 1952–1954, 1959–1981)*, 208 MIL. L. REV. 213 (2011) (providing a look at the history and career of another notable military judge).

[10] Lieutenant General (LTG) Flora D. Darpino, U.S. Army, The 39th Judge Advocate General, 1 September 2013–present. Lieutenant General Darpino followed Vice Admiral Nanette M. "Nan" DeRenzi, U.S. Navy, and the first female military Service TJAG, promoted on July 20, 2012.

[11] Oral History, *supra* note 1, at 21.

[12] Interview with Denise K. Vowell (Colonel, U.S. Army (Retired)), at the Pentagon in Arlington, Va. (July 10, 2014) [hereinafter Vowell Interview] (on file with author).

[13] Oral History, *supra* note 1, at 4.

[14] *Id*. at 5.

[15] *Id*. ("and don't work for General Motors").

appalling pregnancy rates among her classmates.[16] She made and wore black armbands in solidarity with other students following the four student deaths at Kent State University, and distributed them to others.[17] At one point, she even threatened her high school administration with legal action via the American Civil Liberties Union (ACLU) following the expulsion of a friend for violation of the dress code, which made him instantly subject to the draft. The friend later died while serving in Vietnam.[18]

Indeed, Vowell maintains that the Vietnam War was a defining event for her and informed her thinking about the changes in American society going on at the time.[19] She remembers,

> Flint was a racially divided community. The '68 riots in Detroit destroyed the city for years and years. I grew up listening to Dr. King's speeches, the whole Civil Rights movement, and I saw it as a women's rights movement, as well. If you think back, the suffragettes really got their start in the anti-slavery movement, historically. So I think those things got me mobilized about politics and securing the right to vote for 18-year olds. I vividly remember Kent State. I stayed up all night watching the '68 Democratic Convention . . . and following the trial of the Chicago Seven; that fascinated me. That was one of the things that really got me interested in law, watching that trial and watching the defense so masterfully manipulate the judge into error.[20]

The other quality she received from her parents was a genuine love of travel and the outdoors. During her childhood, Vowell and her four siblings spent their recreational time hunting, fishing, and backpacking along the lake near their home in Holly, Michigan. In middle school, she participated in the National Rifle Association's safe hunter class and went deer hunting for the first time.[21] That love of the outdoors would later inform her personal and professional life, and was instrumental in preparing her for some of the discomforts occasioned by the Army.

Vowell's early years progressed as so many do with a focus on education and family,[22] a period in which she describes herself as among the "raven-tressed kids because I was the bookworm and the tom-boy and very much a rebel."[23] She flourished in school and kept herself busy with a mix of political activism, 4-H, the Tolkien Society of America,[24] and a paid newspaper column for local and regional papers that she began writing in her freshman year.[25] She even tried to integrate her high school cross-country team, which failed when they were unable to secure a women's coach.[26]

Throughout her teenage and high school years, Vowell's parents gave her the room to run her own race, express her concerns for social justice and politics, and assert herself personally and publically but not without a bit of friction. She remembers,

> bitter arguments over school busing and Vietnam and anti-war protesters . . . and something about lying down in front of a school bus or something—huge arguments. But on the other hand, they supported me in things like my Mom getting me back into school [after an expulsion]. . . . I don't think they quite knew what to do with me.[27]

In the end, her parents had afforded her the example of what was good, and Detroit, what was not. Vowell recalls,

> In this town if you were a guy, when you graduated from high school you went to work for General Motors, you joined the Army, or you went to jail. And if you were female, you got pregnant and got married or got married and got pregnant. The sequence of the latter was kind of up to you, or luck. I wanted out of Holly very badly.[28]

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[16] *Id*. 15–16. "When I graduated ten percent of my classmates where either pregnant or a parent; ten percent. This is a small town; not much to do and plenty of places to go unsupervised." *Id*. at 16.

[17] *Id*. at 19. The 1970 shooting of thirteen Kent State University students by Soldiers from the Ohio National Guard, killing four and wounding nine. *See* Jerry M. Lewis & Thomas R. Hensley, *The May 4 Shootings at Kent State University: The Search for Historical Accuracy*, OHIO COUNCIL FOR THE SOC. STUD. REV., vol. 34, no. 1, Summer, 1998, at 9-2, *available at* http://dept.kent.edu/sociology/lewis/lewihen.htm (last visited June 15, 2014) (published in revised form).

[18] Oral History, *supra* note 1, at 17.

[19] *Id*., at 18.

[20] *Id*. at 18–19. The Chicago Seven refers to the trial of political activists accused of inciting riots during the 1968 Democratic National Convention. *See generally* The Chicago Seven Conspiracy Trial, summarized at the historical page for the Federal Judiciary, at http://www.fjc.gov/history/home.nsf/page/tu_chicago7 _narrative.html (last visited June 15, 2014).

[21] Oral History, *supra* note 1, at 6.

[22] *Id*. at 9–11.

[23] *Id*. at 9.

[24] *Id*. at 22. Vowell recalls of the JR Tolkien Society, "[W]e published magazines; we would write our own work, poems, poetry, short stories, short plays, art work, [and] run them off on a mimeograph." *Id*.

[25] *Id*. at 11. "The editor of the local newspaper gave me a job when I was a freshman. I got paid two dollars for my column. I wrote a weekly column on the high school for the newspaper and then he would occasionally pay me 10 cents an inch for feature stories that I would write." *Id.*

[26] *Id*. at 13.

[27] *Id*. at 20.

[28] *Id*. at 9.

Education

The journey out of Holly led Vowell to become the first person in her family to attend college, a process that her parents supported but which she navigated almost entirely alone.[29] She entered Illinois State University in 1970 with the intention of becoming a teacher.[30] The university, like Vowell, was in the process of reinventing itself from its narrow focus on producing educators to become a broader, more relevant and modern university. This created opportunities for students interested in participating in the school's evolving narrative and Vowell was quick to join the debate.

She was elected to the academic senate and, not surprisingly, became fully engaged in campus politics, including speakers bureaus, faculty and administration search committees, and budgeting.[31] Over the course of a couple years, her leadership at the university afforded her the opportunity to interact and moderate events among civic leaders of the day, including Betty Frieden, Phyllis Schafly, Ralph Nader, and Senator George McGovern, who offered her a position on his 1972 presidential campaign staff, which she declined.[32]

Vowell was also politically active in the local community, where she served on the town zoning commission and ran unsuccessfully for the county board of supervisors.[33] In-between, she worked to support herself with jobs as a paraprofessional in the university counseling department, a waitress, a library aide, and a breakfast cook in the men's dorm.[34] She recalls the pride of being able to manage on her own but that money was tight.

Academically, her studies in the social sciences were the ideal intersection of Vowell's driving interests in politics' "ability to change peoples' lives for the better," and philosophy's lessons in arguing both sides of a matter, how to critically analyze issues, the nuances of facts, and the art of public speaking.[35] Those lessons and cognitive skills, in particular the discipline of research and fully considered facts and theories, later became a hallmark of her leadership and judicial style and temperament. As a chief judge, appellate counsel, and senior defense counsel, she recalls that, "When one of my [military] subordinates would come in with question, I [asked them] well, what did you look at? Have you thought about this?" As a trial judge she was

> famous for saying, 'let's get the book out. Does everyone have their books? Okay. We're in recess. Where are your manuals? Let's open them—what does Rule 1001(b)(5) say? . . . where do we fit in that . . . tell me why this is not here, counsel.' Because in the military, far more than anywhere else, trial judges play that role. The training role of turning recent law school graduates into litigators and sometimes you learn from your very big mistakes."[36]

Entry into the U.S. Army Women's Corps (WAC) and the Military Police Corps, 1973–1976

Lieutenants with no tact become colonels with force of character; you have the job.[37]

College was not an easy experience for Vowell, who recalls "struggling financially—working three jobs, attending school full-time, being very involved in outside campus activities, and sleeping three or four hours a night."[38] Although unapologetically opposed to the war in Vietnam, she never considered herself anti-military, as others in that movement were, and so was open to the idea of joining the armed forces given the many benefits and opportunities it afforded.[39] So, during her junior year in 1973, Vowell enlisted in the U.S. Army via the Women's Army Corps College Junior program ("CJs"). This followed a conversation she had with a young WAC recruiter, Lieutenant Judith Zier, who she met at a job fair.[40]

> They would pay you as an active duty corporal and would commission you as a WAC second lieutenant upon graduation with a two-year obligation. I thought, that's the GI Bill for law school. . . and my last year in college without having to work [and the freedom] to do the things I would like to do academically.[41]

But the decision was one she made alone, and it did not receive much support from those close to her. She lost a very serious relationship over it and still recalls her father's comment that, "women Soldiers are either lesbians or prostitutes, which are you?"[42] A sentiment echoed also by one of her college professors.[43] But she needed the money

[29] *Id.* at 21.

[30] *Id.* at 22.

[31] *Id.* at 25.

[32] *Id.* at 26.

[33] *Id.*

[34] *Id.* at 27.

[35] *Id.* at 32–33.

[36] *Id.* at 35.

[37] *Id.* at 59. Major General Clyde W. Spence, Jr., then Chief of Staff for 1st Cavalry Division, describing Vowell in his decision to select her as the Commander, Division Headquarters Company.

[38] *Id.* at 36.

[39] *Id.* at 35.

[40] *Id.* at 36, 40.

[41] *Id.* at 37.

[42] *Id.*

[43] *Id.*

and, undeterred by the cynicism, drove forward with the enlistment and was surprised by how much she thoroughly enjoyed it, both for its organization and, importantly, the military's special place in history as a vanguard for social equality. Vowell remembers,

> I was amazed—I liked those women. I liked the structure. I liked what they were doing. I liked the classes. [The program] was basically a four-week basic training session except they treated us better than the recruit private. [T]his was 1973—the great WAC expansion. The draft had ended, and they couldn't get enough men. This was the only place in America where women got the same pay for the same work. The military can be a great equalizer. I mean in the 1970s it was the only place in America where white men worked for black men. That was a big change.[44]

She completed her senior year in college with honors, and was commissioned with a fellow female student immediately following graduation in 1974. They were put on excess leave for the summer, which Vowell divided between waitressing at a truck stop and hunting elk in Colorado with friends, followed by backpacking from the northern shore of Lake Michigan up to the Tahquamenon River.[45]

In the early fall, she reported for active duty to the WAC Center at Fort McClellan, Alabama. The class became one of the first to receive branch assignments akin to their male counterparts in career fields like Military Intelligence, the Adjutant General's Corps, and the Military Police Corps.[46] This was a significant and, for some, an emotional period of transition for the officers of the Women's Army Corps, with some older officers experiencing "a sense of separation who were saddened by its demise." But younger officers, including Vowell, were eager to leave behind the WAC to its pending dissolution and associate with conventional Army service branches.[47] She recalls,

> In the past, WACs were primarily in the administrative fields. There were some that were in others, but the branches that had opened fairly recently [to women] were things like the Military Police and Ordnance—so they brought representatives from the branches to come down and talk to us. And most of [them] brought a male lieutenant colonel and a female lieutenant who turned on and off the lights and flipped the slides, which was not particularly impressive. . . . There were two branches that were different. The Ordnance Corps actually brought women who helped present the briefing; they were a part of it. The MP Corps didn't bring any women at all and commented [that their] women were all out doing jobs. They didn't assign women to turn out the lights and flip slides.[48]

So Vowell - who had opposed the war, fought for social justice, worked with the Illinois State University police, and volunteered at a rape crisis center - became a Military Police officer. Following the WAC basic course, she reported to the MP school at Fort Gordon, GA,[49] where she was one of only ten female officers in her fully integrated basic course.[50] Vowell recalls that the women did exceptionally well in the MP branch courses, in part, because they were motivated to succeed, in contrast to many of the men who "sort of navigated to ROTC to get out of the draft and now their payback was coming due. . . ."[51]

Following completion of the MP officer basic course, Vowell was assigned to Fort Knox, KY, where she was the second female to be assigned to the Provost Marshal's Office (the provost marshal had fired the first one).[52] It was a good introduction to the Army, with progressive leaders who took her under their wing and where she developed the skills and sense of humor required to deal with men in a male-dominated military culture.[53] She would need it. In the post-Vietnam era, the Army was still acculturating to the idea of female leaders. Several years later, while serving as the Security Platoon Leader for the 1st Cavalry Division, she remembers one memorable exchange when a G3 (Operations) lieutenant colonel told Vowell that she "even sounds like a Soldier" to which she retorted, "My God, Sir, I AM a Soldier!"[54] She recalls that the female officers:

> had to be better than the guys. You had to look better, act better, be smarter, and not . . . be afraid to [be confrontational] . . . [And as she would explain to some of the female enlisted Soldiers], you cannot use being a woman as an excuse. 'Well, I have cramps so I can't work today. Too bad, you know, the Russian hordes had just poured through the Fulda Gap. I don't

[44] *Id.* at 38.

[45] *Id.* at 39.

[46] *Id.* at 40–41.

[47] Vowell Interview, *supra* note 10.

[48] Oral History, *supra* note 1, at 41.

[49] The U.S. Army Military Police School moved to Fort McClellan in July 1975.

[50] Oral History, *supra* note 1, at 42.

[51] *Id.*

[52] *Id.* at 43.

[53] Vowell Interview, *supra* note 10.

[54] *Id.*

> think they are interested in whether you have cramps or not.' So you had to enforce those standards, but live them yourself.[55]

Living the standard for female leaders in the mid-1970s also meant operating within an Army that some deemed an instrument of social change with regard to gender equality, something Vowell considered a "false dichotomy so long as leaders made rational choices."[56] In her mind, the military had a primary mission related to national defense that, while not unaffected by social and political currents, should not be defined by them. She cites, for example, General Eisenhower's early opposition to female integration in the military prior to World War II and his change of heart upon its conclusion when women Soldiers had clearly proven their worth as combat multipliers.[57] Social evolution had to complement the mission, conditioned in part upon evolving social acceptance for change whether concerning integration of African Americans, women, or more recently gay and lesbian military members.

> I do believe that the military can be an instrument of social change, but there has to be a point. If we had tried to integrate openly gay people when I enlisted it would have failed miserably, I think. But [now] because society has changed somewhat, the younger the person you talk to the more accepting they are going to be of gay and lesbian individuals. I know that two of the women in my WAC officer basic class and my MP Officer basic class were gay. I absolutely know. I would have far rather shared a foxhole with them than with most of the men, because at least I knew they would have my back and not because they were interested in me sexually, but because they were focused on accomplishing the mission. . ..
>
> So there is a balance that has to be struck, but to some extent I think the military can be out in front of it.[58]

In 1975, after her short but successful tour at Fort Knox, Vowell was assigned to the 1st Cavalry Division, at Fort Hood, TX, where she served in the division's military police company. It was there she experienced the limitations of gender integration and the narrow developmental opportunities for female MP Officers, particularly with regard to field training and leadership– the "MP company didn't take women to the field because it was too much trouble."[59]

As a female division MP platoon leader, she was prohibited from serving with the three platoons aligned with maneuver (combat) brigades and so was assigned to the security platoon.[60] But that didn't stop her. During one memorable division field exercise, a brigade commander demanded the division provost marshal send forward an MP platoon leader. Short on options, he sent Vowell.

> I still remember the look on [the brigade commander's] face when I walked into his [tactical operations center]. . . . He looks at me and says, "but, but, but, you're a woman!" "Yes," Vowell responded, "been one all my life. I'm also your brigade provost marshal; now what do you want me to do?" He burst out laughing.[61]

Still, the awareness of the limitations on developmental career experience for female MP Officers, and its cultural undertone, was one of the things that led Vowell to consider the move from the MP Corps to another branch of the Army.

> I looked around and thought, you know, they are never going to let me be the Provost Marshal General. I mean, there are limits on what they're going to let women do in the MP Corps. . .I don't think that I'm limited as an Army attorney the same way I am by attitudes and prejudices. There are still going to be some, but it's going to be better.[62]

Further motivating her to consider the legal field was the lack of MP branch leadership she experienced at 1st Cavalry Division, particularly the provost marshal, who she remembers as a "miserable excuse for a human being."[63] In one episode, Vowell was in charge of building a prisoner of war camp during a force-on-force exercise between 1st Cavalry Division and 2d Armored Division. During the course of the operation, and pursuant to authorities in Army policy, she ordered the notional prisoners to dig their own

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[55] Oral History, *supra* note 1, at 44.

[56] *Id.* at 45.

[57] *Id.* at 46.

[58] *Id.* at 46–48. Vowell notes the early opposition of male Soldiers in the Pacific to the assignment of women to that theater of war, and how it dramatically dissipated after women were integrated there, and of the recognition of their value to the mission once the opportunity was afforded them. Vowell offers her opinion that, "in terms of racial integration, sexual integration, gender integration, I don't think we've harmed our military by any of them and we've made not only our Army, but our nation, stronger." *Id.* at 49. *See generally* MATTIE E. TREADWELL, THE WOMEN'S ARMY CORPS, UNITED STATES ARMY IN WORLD WAR II (1954); BETTIE J. MORDEN, *The Women's Army Corps*, 1945–1978 U.S. Army Center of Military History (CMH) 1990, *available at* http://www.army.mil/cmh-pg/books/wac/index.htm (last visited June 18, 2014).

[59] Oral History, *supra* note 1, at 50.

[60] *Id.* at 57; Vowell Interview, *supra* note 10.

[61] Oral History, *supra* note 1, at 57.

[62] *Id.* at 49–50.

[63] *Id.* at 52.

slit trenches, which led to one of them being medically evacuated due to back spasms.[64]

For this, the provost marshal openly reprimanded Vowell on the site and in front of her troops on the misinformed grounds that she was somehow abusing the Soldier in his role play as a prisoner of war. Vowell was furious, and remembers,

> I got in my jeep and I drove to where my company commander was. I took my .38 [pistol] out of my holster and [removed] all five rounds and I said, "Here sir, put these in the safe or I'll shoot the son of a bitch." He didn't ask me what son of a bitch I was talking about, and just sat me down and fed me M&Ms until I calmed down.[65]

That said, she also continued to encounter wonderful leaders who demonstrated not only superior leadership but also a clear willingness to utilize Vowell's professional capacity without regard to her sex. For example, shortly after the POW field incident Vowell was selected to serve as the Executive Officer for the 1st Cavalry Division Headquarters Company, where she was responsible for the operation of the headquarters, including its battle tactical operations centers, quartermaster support, and associated support.[66] She replaced a male officer who had been relieved by the commanding general, who was reported to have said, "This time get a good officer, and don't rule out a woman."[67]

She was also later selected to command the Division Headquarters Company with over 400 Soldiers,[68] and, thereby, became one of the first female company commanders in the Regular Army (as opposed to the WAC). It was a job she did not want but grew to love in large measure because of the quality of the noncommissioned officers on her staff, recalling fondly that "those NCOs were the people that kept me out of jail."[69] She enjoyed almost everything about being in the 1st Cavalry Division—the Soldiers, the field exercises, even the assorted cavalry horses she had on her property books.[70] And yet, despite success as a platoon leader, executive officer, and company commander, her experience caused her to do some soul searching.

> I looked around the division at a command and staff meeting one day and said, "Who would I want to be here when I grow up?" And I listened to people talk and watched and I was the only [woman in the room]. And the guy that was most listened to, besides the CG, was the division SJA; a guy named Charlie White. All of my mentors have been men, because there weren't any women. And Charlie was certainly one of those . . . he helped me put my [Funded Legal Education Program] application together. . . . I thought, I want to be Charlie when I grow up. I want to be the SJA of the 1st Cavalry Division.[71]

Law School, Entry to the Judge Advocate General's Corps, and Fort Bliss, 1977–1985.

Vowell was accepted into the Judge Advocate General's Corps FLEP program in 1977, and entered law school at the University of Texas School of Law (UT) the following spring.[72] Charlie White was the one who called her with the good news of her selection for the program.[73] She found the contrast from the demands of company command a relaxing one, and while characteristically studious and active in moot court, the board of advocates, and related criminal law course work, she also embraced the balance school afforded and managed her days in a way so as not to "cut into her M*A*S*H rerun time."[74] Although there were few FLEP officers at UT, the law school had a significant and diverse veteran population with which Vowell formed a military law society and a military law association, a forum to talk about issues and "an excuse to drink beer on student fee money."[75]

In-between semesters, Vowell returned often to Fort Hood where her husband—also an active duty officer—was stationed. She did developmental training with the 1st Cavalry Staff Judge Advocate's (SJA) office, reviewed records of trial, participated in military court cases, and otherwise sought and received the training necessary for the practice of law with a focus on advocacy.[76] She recalls the post-trial work for the SJA office was particularly valuable.

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[64] *Id.* at 55.

[65] *Id.*

[66] *Id.* at 56.

[67] *Id.*

[68] *Id.* at 65.

[69] *Id.* at 60.

[70] *Id.* at 58, 62. Vowell recalls,

> I owned the horses. I had horses on my property books. The Cavalry was the land of many hats at that time. The Pony Platoon all wore their—the horse platoon all wore their black Stetsons. The MP Company actually wore pearl grey Stetsons. I had mine until it got stolen at the officers' club one night. [The] Claims office wouldn't pay my claim.

Id. at 62.

[71] *Id.* at 61–62.

[72] *Id.* at vi (Curriculum Vitae).

[73] *Id.* at 63.

[74] *Id.* at 68.

[75] *Id.* at 67.

[76] *Id.* at 70–72.

> I basically read records of trial, dictated a summary of the evidence, analyzed any legal issues that were raised and then looked for the ones to spot. . . .It forced me to look at what looks good [and what] you could learn from a record about how to do things or how not to do things, and to issue spot.[77]

As for academics at UT, she enjoyed civil procedure and conducted independent study projects focused on military law, including the military rules of evidence, history of search and seizure, and Fourth Amendment warrant requirements.[78] She was active in advocacy organizations, and served as the Note and Comment Editor for the American Journal of Criminal Law.[79] In all, Vowell remembers that she was focused on doing criminal work where she could leverage her unique experiences as a military police officer and company commander.[80]

She graduated from law school with honors in 1981, and later joined approximately 100 other officers in the 97th Army Judge Advocate Officer's Basic Course held at The Judge Advocate General's School adjacent to the University of Virginia School of Law in Charlottesville.[81] She spent the period between the bar exam and the Basic Course at the Fort Bliss SJA office, working in client services for Captain Scott Black, who later became The Judge Advocate General of the Army (TJAG).[82] Vowell's excitement and anticipation at this first step to an Army legal career were immediately tempered when she learned that she was pregnant with her first child. She recalls: "I thought my career was over. The only other female JAG I knew before I got to Fort Bliss . . . had three little girls and had been twice passed over for major, and she blamed that on her having children; . . . it is what things were like then."[83]

Years later, Vowell learned that The Judge Advocate General at the time suggested returning her to her basic branch (Military Police) because of the pregnancy but relented after the Chief of the Personnel Branch, Colonel Barry Steinberg, twice asked that she be allowed to stay.[84] As proof of her capacity and determination, Vowell completed and passed a standard Army Physical Fitness Test (APFT) (push-ups, sit-ups, two mile run) in her fifth month of pregnancy.[85] She spent the remainder of her three months or so in Charlottesville coming to terms with the prospect of motherhood - not something she had sought or planned - and how it might alter her professional and personal life.[86]

Following the Basic Course, Vowell returned to Fort Bliss to rejoin her husband, who had been assigned there following completion of a short twelve-month month tour in Korea. She remembers El Paso as a nice city with easy access to a university, concerts, sporting events, and an active social life among and between members of the legal community.[87] "Scott Black's wife, Kim, was the lamaze teacher for the JAG office. Several of us had children right around the same time, so we would play cards, board games, or something with the babies in tow."[88] In all, it was a very welcoming and supportive community, both personally and professionally.

Vowell's first assignment was as the claims officer and Special Assistant U.S. Attorney for the installation, where her leadership experience and understanding of Texas law proved hugely beneficial. She remembers an SJA office that was very much focused on professional legal service, but did "absolutely little" in the way of Soldier skill development—no field exercises, or organized legal office physical training—with the exception of trial counsel, including Vowell, who elected to train with the units and commanders they advised and supported.[89]

One of those units was the 70th Ordnance Battalion. Vowell recalls long runs with its Soldiers and leadership, followed by sitting around with the commander, Lieutenant Colonel Charles Viall, his executive officer and command sergeant major, talking discipline and military justice.[90] She bonded easily with the command team, which had lots of women due to the military occupational specialties prevalent in the unit. Years later, when Vowell was promoted below the zone to lieutenant colonel, Viall came to the ceremony where he pressed a set of colonel's rank in her hand for good luck, a testament to the great commander/judge advocate relationship they had enjoyed.[91]

In addition to her experience with claims and military justice, Vowell's SJA, Colonel Edwin Wasinger, decided to give her a taste of being a judge. Recognizing that many Soldiers decline to accept non-judicial summary courts martial because the presiding officer is from their unit, Wasinger made experienced judge advocates from his office available to battalion commanders to serve on summary courts throughout the installation. Vowell was one of them, and over the course of two years, she was the summary court

[77] *Id.*

[78] *Id.* at 74–76.

[79] *Id.* at vi (Curriculum Vitae).

[80] *Id.* at 78.

[81] *Id.* at 79. Currently, The U.S. Army Judge Advocate General's Legal Center and School.

[82] Lieutenant General Scott C. Black, (U.S. Army, 1974–2009), The 37th Judge Advocate General of the Army (2005–2009).

[83] Oral History, *supra* note 1, at 79–81.

[84] *Id.* at 81.

[85] *Id.* at 90.

[86] *Id.* at 81.

[87] *Id.* at 94.

[88] *Id.*

[89] *Id.* at 85.

[90] *Id.* at 86.

[91] *Id.*

officer for over thirty cases where she served as the "judge, jury, prosecutor, and defense counsel all rolled into one."[92]

Toward the end of her tour at Fort Bliss, from 1984-1985, following assignments as a trial counsel and magistrate court prosecutor, she became the chief of military justice. At times she struggled with her infant daughter, Elizabeth, and the tough balance between the obvious professional demands, a dual-military family, and quality child care.[93] During this time she also became pregnant with her second child, a son named Andrew. In a spirited recollection of that period, Vowell recalls how she was nearly rejected by the Command and Services Staff School (CAS3) (a nine-week course) at Fort Leavenworth, when she showed up several months pregnant and refused to accept a medical drop from the course.

Despite a medical profile from an OB/GYN that said she could do "anything except skydive or ski," her CAS3 staff leader remained deeply concerned. Vowell remembers the exchange.

> So when I walked in to meet him with my profile in hand, he said, "Well, [this is] a very stressful course and you really should take this medical drop." [To which Vowell responded] "Look, I've got a 20 month old at home, and I'm the chief of military justice for a major military installation that has seen a 300 percent increase in sex crime prosecutions in the last year alone. This course is going to be a piece of freakin' cake. . . . I will take the diagnostic APFT test tomorrow morning. I will take it and I will pass it and I will take and pass the record APFT test when we take it at the end of the course."[94]

She did both.

Professionally, Vowell recalls the explosion of sex offense cases that she attributed to police agencies, prosecutors, and courts evolving sensitivity to the idea that "he said/she said" assaults could be actual rapes, informed by the fact that the standard for constructive force was changing inside the military.[95] And there were of course other cases, as well:

> We also had a lot of larceny-type offenses [including] a big mess hall skimming off the meat and selling it on the local economy. We had a dentist who was sexually molesting his patients. Ted Dixon unsuccessfully prosecuted him. He went judge-alone and it was the fraternity of old colonels, I think [the dentist and the judge were both colonels]. . .there was some room for doubt, but it was not a very plausible story. "Well, I had my hand in his pants because I couldn't get a pulse. He seemed to pass out and I was going for the femoral artery." That was the story—I didn't believe it, but the judge did.[96]

Notably, she remembers her first military judge rather poorly as an officer "who had been passed over several times to colonel and every time he blamed the government more and more. He was bitter."[97] The experience of trying cases before him convinced Vowell that she never wanted to be a military judge.[98] This view later changed with his successor, Colonel Gale Garner, a former Chief Trial Judge for the Army who was in his terminal assignment at Fort Bliss prior to retirement and who Vowell remembers as professional, polite, predictable, evenhanded, and knowledgeable.[99] He revived her faith in the judiciary. Several judge advocates who worked for her were similarly inspired by Garner and later joined Vowell on the trial judiciary, including Colonel Ted Dixon and Colonel James Pohl (who adjudicated the highly publicized case of US v. Brigadier General Jeffrey Sinclair).[100]

Vowell remembers her time at Fort Bliss as a dynamic period in military justice practice following the adoption of the 1984 *Manual for Courts-Martial* (*MCM*) and its associated changes to the practice of military justice, including the evolving criminal defense bar—the Trial Defense Service (TDS) which was still in its early years of development.[101] Previously, local SJAs supervised and assigned both prosecutors and criminal defense attorneys, leading to issues of perceptions of fairness. She reflects that,

> Before TDS was created, I didn't think that there was a problem [with the quality of judge advocates for the defense], but there could certainly be a perception problem. I did see that there was reluctance on the part of some SJA's to let good officers go [to the defense bar].[102]

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[92] *Id.* at 87. Vowell notes that she acquitted two of them.

[93] *Id.* at 88.

[94] *Id.* at 89.

[95] *Id.* at 96–97.

[96] *Id.* at 97.

[97] *Id.* at 98.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 98–99. United States v. Sinclair, Army No. 20140211 (Headquarters, Fort Bragg, Gen. Court-Martial Order No. 16 (22 September 2014)).

[101] The 1984 version of the *Manual for Courts-Martial* (*MCM*) replaced and substantially changed the *Manual for Courts-Martial, United States* (1969). The 1969 *Manual* superseded the *Manual for Courts-Martial, United States* (1951). For history of the *Manual*, see MANUAL FOR COURTS-MARTIAL, UNITED STATES, A21-1 to A21-3 (2012).

[102] Oral History, *supra* note 1, at 101.

Her assignments at Fort Bliss, nearly all of them supervisory in nature, were a rewarding transition from the MP Corps to the practice of military law, particularly justice. It prepared her professionally, and helped her establish the confidence she needed as she headed into the Judge Advocate officer graduate course, a master's program, and what turned out to be what she would describe as the "second toughest year of her life."[103]

The Judge Advocate Graduate Course, Government Appellate Division, and Senior Defense Counsel for Germany, 1985–1990

The final year of her assignment at Fort Bliss was spent as a single mother, while her husband was in Boston working on an Army-sponsored master's in business administration degree. She looked forward to being in Virginia, closer for them and for the benefit of their two young children.[104] It was not to be. Vowell recalls that about two weeks after she arrived at the graduate course her husband told her their marriage was over, remarking, "We have nothing in common besides ten years and two kids. I want a divorce."[105]

She was devastated.[106]

Through this difficult time, she also recalls the support she received from her classmates and faculty, particularly her advisor, Major Tom Romig, who in later years became The Judge Advocate General of the Army.[107] "He and his wife Pam were just incredibly supportive of me."[108] The academic work at the graduate course afforded Vowell the chance to "compartmentalize" her personal life and focus some attention on her long held interest in criminal law, among other things.

Her demonstrated interest in the military justice system found expression in her choice of scholarly work, where she wrote and later published a paper detailing the origins and development of military sentencing, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, in which she considered and critiqued the history of various sentencing philosophies (e.g., retributivist, utilitarian, and the four criteria of deterrence, incapacitation, rehabilitation, and denunciation).[109] In writing the article, Vowell hoped to show how, "if you understand where something came from, you can then, therefore, more effectively argue it. It allowed me to go back to the beginning of the military court—the Civil War courts-martial, look at the World War I courts-martial, and look at sentencing and how we evolved the sentencing hearing we [now] have."[110] Her detailed analysis of the historical evolution of sentencing practice in the military has been widely cited, and it reveals the serious consideration by which Vowell, and other judges, attempt to achieve a sense of balance in the military's adversarial method of sentencing. Vowell notes,

> how is it going to feel when you have this young sergeant standing in front of you with some combat ribbons on his chest and you're about to sentence him to jail for 20 or more years. How are you going to do that? How are you going to feel when you do that? If you tell me it's not going to be hard then you need to find a new line of work. We [judges] tend to be like doctors, somewhat detached from the people we operate on. You have to think as a judge that you are not just operating on some faceless individual draped and prepped, but that you are dealing with, real human beings with real problems and needs. And how can our sentencing system better serve the needs of the military?[111]

The paper and her academic performance at the school drew notice by the leadership, as—unavoidably—did her gender. The personnel assignments office for the JAG Corps approached her to remain on the faculty at the school by emphasizing the need for a female instructor.[112] She found the rationale unpersuasive and lobbied hard for an assignment within the realm of military justice but that would allow her to reconstitute her personal life following the divorce and to care for her two very young children.[113]

To accommodate, in 1986 the assignment office settled on a follow-on tour at the Government Appellate Division (GAD), U.S. Army Legal Services Agency, outside of Washington, D.C. It was a chance to do criminal law work without the time commitment required for litigation or working with commanders.[114] She was only there a (uncharacteristically short) year when she married a fellow judge advocate, who needed a developmental assignment in labor law. To keep the couple together, they were assigned

[103] *Id.* at 110.

[104] *Id.* at 110–11.

[105] *Id.* at 111.

[106] *Id.*

[107] Major General Thomas A. Romig, U.S. Army (1972–2005), The 36th Judge Advocate General of the Army, 2001–2005.

[108] Oral History, *supra* note 1, at 111.

[109] Captain Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87, 99 (1986). 99.

[110] Oral History, *supra* note 1, at 112–13.

[111] *Id.* at 114.

[112] *Id.* She remembers the dialogue with the Personnel, Plans, and Training Office, "it was, we need a woman on the faculty, we want you to stay. Not, 'Denise, you're a great instructor, you've got a lot of background . . . So part of it was how it was pitched to me." *Id.*

[113] *Id.* at 116.

[114] *Id.*

to the U.S. Army Europe in 1987 where he served as a labor counselor and Vowell was a senior defense counsel.[115]

The transition from prosecution to the defense was almost seamless, and she immediately invested her considerable energies into training and supervising young counsel while trying cases all over Europe. For three years, she fondly remembers "trying cases in Italy and Belgium and Holland, and had clients from colonels to privates." She specifically remembers four murder cases, and defending a doctor whom she thought must have wanted to be caught because she "knew privates who could smuggle dope better than he could."[116] Another case involved "a special weapons unit in the Netherlands where a third of the Soldiers were busted for heroin; a third of [them]. I mean they used to joke about smoking opium down range sitting with the special weapons."[117]

One memorable story from this period was a bet that Vowell made with then Major John Altenburg, who later became the Deputy Judge Advocate General of the Army.[118] In an earlier assignment as a prosecuting trial counsel, Altenburg had successfully tried a Soldier by the name of Milton Hargrove for murder. The basic facts alleged that Hargrove, whose armor unit was returning from gunnery, loaded a round in the turret of a parked tank while the tube was in travel lock, and fired it at the tank immediately behind him, killing two Soldiers and seriously injuring two others. It was known as the "tank killer" case.[119]

A core element of the government's case was that Hargrove was sane at the time of the crime, in contravention to the testimony from seven psychiatrists who either said that he was not or were unsure. Altenburg prevailed for the prosecution by using a series of lay witnesses to demonstrate Hargrove's sanity. The appellate courts validated the sanity issue but an instructional error was realized in which the trial judge had incorrectly inserted an "if" into the element—the "act if known to the accused" rather than "act known to the accused"'[120] While at GAD, Vowell argued for the government that Hargrove's actual knowledge was not an issue.[121]

Years later, while serving as a Senior Defense Counsel, Vowell bet Altenburg, then the Assistant Executive Officer for the Office of The Judge Advocate General, U.S. Army Europe and Seventh Army, Germany, that if the Court of Military Appeals was persuaded by her appellate argument in the Hargrove case, Altenburg would redirect an incoming judge advocate to her office to assist with a growing case load. If she lost, then she would quietly go without the additional help until the end of her tour.[122] Shortly thereafter the court ruled 2 to 1 in the government's favor; she won the bet. Accordingly, Altenburg later redirected a young first lieutenant to her office who had won the trial advocacy award during the Judge Advocate Officers Basic Course.

The officer was Charles Pede,[123] who currently serves in the rank of brigadier general as the Chief Judge for the Army Court of Criminal Appeals and Commander, U.S. Army Legal Services Agency. Together, with others, they successfully defended a series of memorable cases throughout Europe, including a complex premeditated murder case involving spousal abuse and blood splatter evidence.[124] From that experience and so many others, Vowell recalls fondly the camaraderie of working as part of a litigation defense team and making a difference in the lives of young Soldiers accused of criminal misconduct. "And you could watch young judge advocates go from never having set foot in a courtroom before to soloing . . . You get such a kick out of seeing what people can do."[125]

Plans Officer for the Office of The Judge Advocate General, Chief of Torts Branch for Army Litigation Division, and Circuit Judge and Chief Circuit Judge, Army Trial Judiciary, 1990–1996

In 1990, Vowell returned from her tour in Germany to an assignment as a plans officer in the Pentagon, working in the Office of The Judge Advocate General. "Not fun years," as she remembers, "but I learned a lot about how the Army operates."[126] In 1992, she was among the very few judge advocates in recent history to be promoted to lieutenant colonel ahead of her peers (below the zone of consideration), and was one of only two women within the cohort promoted that year.[127] From there, she moved to her dream job as the Chief of Torts Branch at the Litigation Division for the U.S. Army Legal Services Agency, located in Arlington, Virginia.

> I was getting to work with great litigators, U.S. Attorney's offices all over the country [and the Department of Justice's main office]. Worked with some really

[115] *Id.* at 117.

[116] *Id.* at 118.

[117] *Id.* at 77.

[118] Major General John D. Altenburg, U.S. Army (1973–2002), Deputy Judge Advocate General (then known as The Assistant Judge Advocate General) (1998–2002).

[119] Oral History, *supra* note 1, at 119–20.

[120] *Id.* at 120.

[121] *Id.* at 121.

[122] *Id.*

[123] Brigadier General Charles N. Pede, U.S. Army (1984–present), Commander, U.S. Army Legal Services Agency/Chief Judge, U.S. Army Court of Criminal Appeals.

[124] Oral History, *supra* note 1, at 122–25.

[125] *Id.* at 126.

[126] *Id.* at 127.

[127] JUDGE ADVOCATE PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY (1992–1993) (Office of The Judge Advocate Gen., Dep't of the Army (on file with author).

> difficult issues involving AIDS litigation and the Army's blood banking program, a medical experimentation case that was just appalling, and just the usual: everything from bubbas with a six-pack and a HUMVEE on a National Guard weekend who plowed through a stop sign and killed or maimed somebody.[128]

After two years of highly productive and enjoyable litigation work, Vowell was faced yet again with the difficult choice between her personal and professional ambitions. In 1994, her final year at Litigation Division, she had impressed Major General Michael Nardotti,[129] who at the time was the Assistant Judge Advocate General for Civil Law and Litigation. General Nardotti queried Vowell about her interest in becoming the SJA for the 1st Cavalry Division, Fort Hood, a position he himself once held.[130]

It was another dream job for Vowell. But then her personal life came to the fore; her husband was retiring from the Army and did not want to return to Texas, and the marriage was in trouble. She reflects,

> So I was faced with a real choice. I had two children who are 10 and 12. My step-kids were pretty much grown and out of the house at that point. But they were going to go with me, wherever I went, *but could I be both an effective mom and an effective staff judge advocate without support at home? I mean, I'd been a single parent before. I knew how hard it was. And I knew how hard being a division SJA would be.*[131]

As an alternative, Colonel Ferdinand Clervi, suggested she consider becoming a trial judge. She resisted at first, questioning whether she had the temperament.[132] Then, perhaps by design, Brigadier General Thomas Cuthbert,[133] the Commander at the U.S. Army Legal Services Agency, took Vowell to lunch one day and made the same pitch - "I want you to be a trial judge. We haven't had a woman on the bench for 14 or 16 years."[134] She remembers the conversation and her thoughts at the time.

> The last female trial judge had been a woman named Nan Hunter, during the Vietnam era. There hadn't been any women who'd had the developmental assignments to be [judges] and there weren't very many women field grade officers. He said, "I'm going to make you an offer you cannot refuse. If you will go on the trial bench, I will guarantee that you will be assigned here, the First Judicial Circuit (Washington, DC)." So sometimes you are faced with impossible choices, so you make the best one. And I made the one that was best for my kids and me, and I ultimately think probably the best for the Army, and took the job and fell in love with it, didn't think I would.[135]

Joining the Army judiciary was the move that would later help define her career and contribution to Army jurisprudence, and she embraced it. She had tried cases and served at the government appellate division, and so had seen and studied the mistakes of others. She was self-aware of the "role shift" she had to make from those earlier experiences, "that just because you would do it one way does not mean that they're doing it wrong."[136] Indeed, Vowell found that self-awareness itself is an invaluable tool and characteristic for the young (and perhaps not so young) jurist.

> You have to know yourself. [For example] I know that I sometimes have a short flash-to-bang. And so when I was going into a case that I knew was going to be contentious [or had] people that I thought were going to get under my skin, I would prepare six sticky notes—yellow sticky paper that said, "be mellow, mellow yellow." And I would put them up on the inside of the lip of the bench and every time anybody did something that ticked me off, I would grab one of those pieces of paper and I would tear it up and throw it into the trash can that was under the bench. And when I finished the sixth one, I would announce we needed to take a recess. And I would go back into chambers and prepare six more.[137]

While the art of judging was all new to Vowell, she was confident that the Army and her life experiences had afforded her the developmental experiences required for the job. Among the techniques Vowell developed and advocated then, and subsequently, were the role shift and awareness noted previously, the need for intellectual and

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[128] Oral History, *supra* note 1, at 128.

[129] Major General Michael J. Nardotti, Jr., U.S. Army (1969–1997), The 34th Judge Advocate General of the Army, 1993–1997. *See generally* Major George R. Smawley, *The Soldier-Lawyer: A Summary and Analysis of An Oral History of Major General Michael J. Nardotti, Jr., United States Army (Retired) (1967–1997)*, 168 MIL. L. REV. 1 (2001).

[130] Oral History, *supra* note 1, at 128.

[131] *Id.* (emphasis added).

[132] *Id.* at 128–29.

[133] Brigadier General Thomas R. Cuthbert, U.S. Army (1961–1996).

[134] Oral History, *supra* note 1, at 129.

[135] *Id.*

[136] *Id.* at 133.

[137] *Id.*

emotional objectivity, the challenge of sentencing, the sense of the needs and concerns of panel members, and underappreciated responsibility of being in charge of a court room.[138] She also discovered the judiciary was a place well suited to introverts like herself, who are personally attuned to the independent role that military judges play within the Army community, noting that "the guys and gals who are big social animals have a much harder time adjusting to the bench. . .the ability to socialize on an installation is going to be severely curtailed."[139]

Among the things counsel would do that concerned—and angered—Vowell the most was anything approaching gamesmanship, by either party. Examples include failure to give notice of an alibi defense and then raising it in the middle of trial and failure to properly notify of rape shield evidence, and those who seemed incapable of using the MCM.[140] "I had no problems with people who were learning and, you know, [being] inept as they were learning."[141] But she had little patience for judge advocates who intentionally attempted to acquit themselves of professional standards, or omitted them by lack of effort or due diligence.

Perhaps her greatest concern and observation as a military trial judge at the turn of the decade and thereafter, was the rapidly decreasing quality and experience of criminal litigators. To Vowell and her peers on the bench, it seemed almost generational.

> One of the lines from one of my military judges was, "we have the myopic leading the blind." We have people who are chiefs of justice who have never tried a contested case. We have become so enamored of Chapter 10s [adverse administrative discharges in lieu of courts martial] and deals that we are unwilling to take and try the hard cases. . . . Nobody is entitled to a Chapter 10.[142]
>
> I was at the point of saying this is our core competency. This is our statutory mission and if we continue to present JAGs who don't know what they are doing in front of panels, we are going to lose the respect and confidence of those officers. . . . Our military justice system was designed in the Uniform Code in the '50s to function with a group of people who had experience—the first brigade commander I prosecuted for at 1st Cav Division had tried over 250 cases as a line officer. We had line officers with that level of experience who we don't have now. The convening authorities don't have that experience now. So you have to have people who are experienced in the military justice system who can convey that to them. It's a very different kind of Army.[143]

A particular observation Vowell had concerned the military's approach to the prosecution of sexual assault within its ranks. In her experience the Army had no greater problem with this particular crime than a similarly situated college town, attributing much of the problem to youth and alcohol/drugs. Citing the impact they had, she recalls that courts-martial generally decline during deployments, and that "if you take booze and their families away from American Soldiers it's amazing how well behaved they are."[144] The other problem was self-inflicted: a poorly drafted punitive article in UCMJ Article 120 [Rape and sexual assault generally], which Vowell describes as "a thought experiment that got in the hands of people in Congress that shouldn't have had it [the problems were not communicated] before it suddenly became law...and was unconstitutional."[145]

Staff Judge Advocate, 1st Infantry Division, Germany and Bosnia, 1996–1997

In 1996, after two successful years on the trial bench, the JAG Corps leadership again approached Vowell about returning to the operational Army as a staff judge advocate. This time it was MG Kenneth Gray, then the Deputy Judge Advocate General,[146] who inquired whether she had any interest in serving as an SJA for one of the Army's few Infantry divisions.[147] She said yes, and recalls the timing was now right.

> My kids are now 12 and 14; it's a little easier in many respects—you can leave a 14 year old and a 12 year-old home alone to make dinner and trust that they won't

[138] *Id.* at 131–34.

[139] *Id.* at 135–36.

[140] *Id.* at 140.

[141] *Id.* at 141.

[142] *See* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ch. 10, at 81 (6 June 2005) (RAR 6 Sept. 2011) (Discharge in Lieu of Trial by Court-Martial).

[143] Oral History, *supra* note 1, at 142-143.

[144] *Id.* at 144.

[145] *Id.* For an instructive history of the development of UCMJ Article 120 and associated sex crimes, including the discussion between the definitions of force and consent, see SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (Jan. 13, 2005), *available at* www.dod.mil/dodgc/php/.../subcommittee_reportmarkharvey1-13-05.doc. (last visited Oct. 3, 2014).

[146] Major General Kenneth D. Gray (U.S. Army 1966–1997, Deputy Judge Advocate General (1993–1997). *See generally* Lieutenant Colonel George R. Smawley, *By the Content of Character: The Life and Leadership of Major General Kenneth D. Gray (Ret.) (1966–1997), The First African-American Judge Advocate General Officer*, 195 MIL. L. REV. 128 (2008).

[147] Oral History, *supra* note 1, at 129–30.

> kill each other or barbeque the dog; a 10 year old and 12 year old not so much.[148]

So in July 1996, she replaced Scott Black, with whom she had served at Fort Bliss, as the 1st Infantry Division SJA, headquartered in Würzburg, Germany. She recalls fondly the tremendous support she received from the Black family in making the transition to Germany, and the excitement at the prospect of an operational deployment to Bosnia.[149] LTG Black told her she would not deploy, "we're going to go down and be the covering force to get 1st Armored out of Bosnia, but we're not staying—you won't deploy, it's just going to be a brigade covering force operation."[150]

But he was wrong, as often happens in military planning. A couple weeks later in mid-July the commanding general, Major General Monty Meigs, told Vowell to start packing, and by September they were gone.[151] And with that Vowell, just weeks into her first tour as a staff judge advocate, became the first woman to lead an Infantry division legal office during a deployed contingency operation.[152] In a broader context, it is also worth noting that Colonel Kathryn Stone, U.S. Army (Retired), became the first female Army staff judge advocate to enter into a declared combat operation when she deployed with the 10th Mountain Division (Light Infantry) into Uzbekistan and Bagram, Afghanistan, in support of *Operation Enduring Freedom* in 2001–2002. They followed women like Major Ann Wansley, the first female Army Judge Advocate to serve in Vietnam in 1966–67, and Major Nancy A. Hunter, who was the second (1970).[153]

Operationally, an element of the 1st Infantry Division headquarters had been added to command the Multinational Division-North sector of the NATO area of responsibility. They fell under the commanding general for U.S. Army Europe (USAREUR), who was selected to command the NATO mission from Sarajevo. The SJA for USAREUR was Colonel Malcolm H. "Mac" Squires (since retired), who currently serves as the civilian Clerk of Court for the Army Court of Criminal Appeals.[154] The principal tactical element was the Second "Dagger" Brigade, 1st Infantry Division based in Schweinfurt, whose judge advocate was Major Sharon E. Riley.[155] Vowell was in Wurzburg, an hour so a way, and she and Major Riley planned much of the legal support to deploying forces in the evening over dinner at Vowell's home. She remembers,

> We'd go to my quarters. I'd cook dinner for my kids. We'd eat dinner. Sharon would eat dinner with us and then she and I would work on the deployment after dinner or I'd put her to work chopping vegetables—Sharon never ate enough vegetables. . . . So we joked that we planned the deployment over my dining room table or my kitchen counter.[156]

Among the challenges Vowell recalls was the general lack of context and experience for planning the kind of peace-enforcement mission that the Bosnia mission required. It was rather new to the leaders in Europe who had for decades prepared and trained for a very different sort of conflict.

> I grew up in the Army in the Cold War. We were always fighting the Fulda Gap problem. The Russian hordes were going to pour through the Fulda Gap. They were going to push to Frankfurt. We were going to nuke them until they glowed, declare victory and everybody was going to go home. Yeah, right.[157]

What she and her commander found instead was a large multinational, multi-component force based at Tuzla, with subordinate brigade and battalion-size units from the United States, Russia, Norway, Poland, Turkey and Denmark. All but the Turks brought lawyers, and Vowell was the technical supervisor for all of them.[158] Moreover, Major General Meigs retained his flag during the year-long deployment, and so remained the commanding general and general courts-martial convening authority for Wurzburg-based units some 695 miles away, making it among the largest JAG offices in the Army at the time.[159]

The legal challenges she and her team faced would be familiar to those who served in post-9/11 conflicts in Iraq and Afghanistan. A majority of her time was spent on fiscal law issues, including humanitarian and civic relief missions without the benefit of humanitarian or civic relief funding. She recalls one instance, where,

> The division surgeon came and said, "Denise, I've got about 800 units of flu vaccine left over. I want to give it to the Russians." [He] used two words that should never appear in the same sentence

[148] *Id.* at 130.

[149] *Id.*

[150] *Id.*

[151] General Montgomery C. Meigs, U.S. Army (1967–2003).

[152] Oral History, *supra* note 1, at 130–31.

[153] FREDERIC L. BORCH, III, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 56 n.75 (2001).

[154] Oral History, *supra* note 1, at 152.

[155] Colonel Riley currently serves as the Staff Judge Advocate for the U.S. Army Training and Doctrine Command, and was formerly the Acting Commander, The U.S. Army Judge Advocate General's Legal Center and School (2013–2014).

[156] Oral History, *supra* note 1, at 152.

[157] *Id.* at 154.

[158] *Id.*

[159] *Id.*

> together. . . . Russians and give, because we had no acquisition and cross servicing agreement. So I said, "Doc, explain to me how it is medically necessary for the safety of American Soldiers for the Russians to be vaccinated against the flu." It's the first time I'd ever heard the term herd immunity. I hear it a lot now. . . . So I write up a legal opinion that says it is for force protection and medical necessity that the Russians be vaccinated. I didn't use the word . . . give.[160]

Another situation involved a well-intentioned initiative by a young JAG captain, who was fluent in Russian and had previously worked in Yugoslavia, to have Russian soldiers jump out of American helicopters under the guise of "interoperability training."[161] Problem was that the young captain had raised the idea directly with an American general officer, who ran it directly to NATO headquarters in SHAPE, Belgium. And it was approved. Colonel Pat Finnegan, the Army legal advisor to SHAPE, called Vowell to question the whole idea and how it happened and what to do, agreeing between them that the idea was bad law and poor policy. But there was nothing either of them could do.

Finally, although she regretted not interacting more with the local population due to security concerns, there was at least one memorable instance where she attended a conference of Bosnian judges in Tuzla. There, she encountered a Sarajevo judge who asked her and those assembled, as a former judge, "what does an honorable judge do when faced with an unjust law?"[162]

> His dilemma was this. . . based on the right of return, he had a situation where there was a widow from Srebrenica and her four surviving children living in an apartment that was formerly occupied by a Bosnian Serb, who wanted to return home. [The judge related] "I am supposed to evict based on the right or return . . . but she can't go back to Srebrenica and live. And you are sending her back to where her husband and two older sons were gunned down and buried in a mass grave." So, an ethical dilemma.[163]

No doubt judge advocates who worked similar issues in Iraq, dealing with Kurds, Shia, and Sunni judges, have similar stories. In the end, Vowell and her team helped write the lessons learned that would inform judge advocates years later in how to plan and conduct legal operations in combat; whether working fiscal law challenges, balancing military justice requirements locally or over hundreds of miles, targeting and rules of engagement issues, and the creative lawyering required for an immature theater with volatile security and force protection concerns. She was particularly proud of the success 1st Infantry Division had in integrating active army and reserve component personnel, something she would later seek to replicate as the Army's Chief Trial Judge.[164]

Senior Service College and Chief, Tort Claims Division, U.S. Army Claims Service, 1997–1999

In 1997, having recently been promoted to colonel, Vowell entered the Industrial College of the Armed Forces (ICAF) following her ten month deployment in Bosnia.[165] She used the experience of the year in Tuzla as a basis of her study, asking—"How do you stop something like that from happening? How do we make better choices? It's a great lesson in why you never want to wear a blue beret."[166]

During her year at ICAF, based at Fort McNair in Washington, DC, Vowell fulfilled a promise she made to Major General Meigs to capture and summarize their experience and the fiscal law challenges they faced and overcame in Bosnia.[167] It was something new at the time, in a legal discipline still considered nuanced and the portfolio of specialists, mostly contract attorneys of which there were too few. The original draft of the paper, used to satisfy her academic requirements, was deemed too long by publishers. But a friend and fellow judge advocate, Colonel Steve Castlen, thought the paper was timely and important, and personally championed it with the editor of the *Military Review*, who published it in 2000—*Using Operations and Maintenance Funds in Contingency Operations*.[168] Two years later and thereafter, as U.S. forces prepared for operations in Iraq and Afghanistan, Vowell's paper served as a must-read for judge advocates planning and serving in contingency operations, particularly regarding the fiscal challenges.

Following the year at ICAF, Vowell sought to become the Chief of the Army's Litigation Division, based at the time in Ballston, Virginia. But the position was encumbered by then Colonel David Carey, who was later promoted to

[160] *Id.* at 156–57.

[161] *Id.* at 157.

[162] *Id.* at 160.

[163] *Id.* at 160–61.

[164] *Id.* at 168.

[165] The 2006–2007 Bosnia experience was an important year for her personally and professionally, despite the hardship on her family; she would not have traded it for anything. Vowell gives much credit to the gifted staff who made the deployment a success, including judge advocates Sharon Riley, Paul Turney, Eric Krauss, Chief Warrant Officer Three Octavia Saine, and Chief Legal Noncommissioned Officer Master Sergeant Angela Thomas. *Id.* at 163–67.

[166] *Id.* at 159.

[167] *Id.* at 158.

[168] Denise Vowell, *Using Operations and Maintenance Funds in Contingency Operations*, MIL. REV., vol. LXXX, Mar.–Apr. 2000, at 38; Oral History, *supra* note 1, at 159.

general officer,[169] and so she agreed instead to take the position as the Chief of the Torts Branch at the nearby U.S. Army Claims Service based at Fort Meade, Maryland.[170] It was an important and interesting job involving management and supervision of nearly a dozen attorneys who, on behalf of the Army, conducted pre-litigation claims investigations and settled those they could.[171] Her year at Fort Meade was characterized by resolving a back-log of long standing cases, working on internal systems for the management of cases, and bringing her sense of leadership and practical approach to problem solving to Army claims.[172]

Associate Judge, U.S. Army Court of Criminal Appeals, Chief Trial Judge, U.S. Army, 1999–2006

Her follow-on assignment after the year at Fort Meade came about as the result of an argument between Vowell and Major General Walter Huffman, the serving TJAG at the time,[173] regarding what she had been promised and what was now possible. Huffman had previously and informally told her she was in line for the Litigation Division position but reversed course when he decided to leave Colonel Carey in place for an additional year. She remembers,

> So that is when the TJAG and I yelled at each other; probably not the wisest career move. So I was told then I could go to [the OTJAG office of] professional responsibility. I said investigating my friends and neighbors is not where it's at for me. I could go to the Office of Congressional Legislative Liaison; yes, put an introvert in that job. I don't think so. Or I could go to the court . . . .[174]

It was a relatively easy decision. Strange as it may seem, both personally and professionally, Vowell was attuned to the idea of a quiet and reflective work experience. Her second marriage had recently ended, and as a newly single mother, the relatively staid and predictable battle rhythm of Army Court of Criminal Appeals combined with her love of military justice made the move an obvious one under the circumstances.[175] While she missed working in an environment with young captains and felt there weren't enough oral arguments,[176] Vowell found the process of judicial review and the camaraderie of the court both welcoming and rewarding. In particular, she enjoyed having peers for the first time since she was a captain, people she could talk to as equals both in rank and professional experience.[177] "That was the joy of ACCA," she remembers fondly, "you had colleagues."[178]

But as in all things there were exceptions. Vowell remembers rather vividly an exchange she had with the Clerk of Court regarding substitute panel members, added to the standing three member panels when there were conflict cases, where her long standing commitment to social justice and legal professionalism led to occasional friction.

> I told the Clerk if he ever gave me another rape case involving two particular judges he was a dead man. One of them didn't think rape existed unless somebody was hit on the head and dragged out into the woods. The other was just lazy. So then I ended up being the referee between the two because one is arguing the ideological position and the other is just arguing for the sake of it because he hadn't read the freakin' record. That and you're going to need to bring some towels in to mop the blood off the floor of the deliberation room.[179]

She used her two years at the appellate court to apply the lessons and perspective she had forged over the previous years of leadership and law, even in the small things. For example, drawing from her time as a government appellate attorney, where she felt the efforts of appellate counsel were inadequately reflected in the opinions of the court, Vowell used her position to prod the judges to set out the facts of the case for the record in greater detail even if it meant making decisions longer—and not to ignore elements of a case simply because they did not support a particular opinion.[180] It was about drafting the best possible opinions, not only legally but also fairly and in a balanced way that served both parties, practitioners, and the broader audience for judicial achievement.

While she could have remained and flourished on the appellate court a total of five years, until her mandatory retirement, Vowell felt that after all she had seen and done that she had something important to offer the trial judiciary, and the Army leadership who oversaw it. So when the Chief Trial Judge position came open in the summer of 2001, she

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[169] Brigadier General David P. Carey, U.S. Army (1977–2005).

[170] Oral History, *supra* note 1, at 170–71.

[171] Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1291, 1402, 2401–2402, 2411–2412, and 2671–2680 (2006), as currently implemented by U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS ch. 4 (8 Feb. 2008). The U.S. Army Claims Service settlement cap at the time was $100,000, with higher amounts requiring approval by the Secretary of the Army.

[172] Oral History, *supra* note 1, at 170–71.

[173] Major General Walter B. Huffman, U.S. Army (1965–2001), The 35th Judge Advocate General of the Army (1997–2001).

[174] Oral History, *supra* note 1, at 172.

[175] *Id.*

[176] *Id.*

[177] *Id.* at 181.

[178] *Id.*

[179] *Id.* at 179–80.

[180] *Id.* at 180.

reached back to Major General Romig and asked if she could have the job, and he agreed.[181]

After twenty-seven years in the Army, having served among its very few female Infantry division staff judge advocates at the time and perhaps only its second female trial judge, Vowell assumed leadership of Army's Trial Judiciary where she would influence the administration, assignment, selection, and education of military trial judges. The timing of her assignment, on the eve of 9/11 and all that would follow, also required her to work with the JAG Corps leadership on reserve force structure as it related to the judiciary, where she "saw great opportunities for integrating reserve judges into operations much more effectively."[182]

One of the underappreciated aspects of the Chief Judge's role is the close nexus they can have with their peers from the other Services. Vowell notes,

> When I became the Chief Trial Judge, the Chief Trial Judge of the Navy-Marine Court was a woman. The Chief Trial Judge of the Coast Guard was a woman, and we promised the Air Force counterpart that we wouldn't sexually harass him. We talked a lot. We worked together a lot.[183]

They collaborated in cross-service details of trial judges, various educational programs and courses, and worked across Service cultures and distinctions in things like sentencing scenarios and rules of court.[184] "We did everything we could to help people understand how their personal predilections might have impacted their decisions."[185]

This applied as well to the growing number of Reserve Component judges, who were required as the conflicts in Iraq and Afghanistan increased the demand and opportunities for their mobilization and service. Vowell was highly attentive to the orientation and acculturation of reserve officers with very different civilian professional experiences now working as Army trial judges at home and abroad.[186] For example, in 2003 she mobilized an officer who in his civilian life was a District Court Judge in Fairfax County, Virginia. He was assigned a drug case at a local installation in which he approached the sentence the same way he would a first time offender in district court, which was far lighter than that of his active component peers. Vowell reached out to him, and offered not criticism but perspective. She mentored, "you are sentencing in a different culture. Let's talk about the philosophies and military sentencing. If that's your sentence, that's your sentence; nobody is going to change that, but you ought to think about [the nuances of military culture vice civilian culture]."[187]

This approach to the Reserve Component judges was important since their service in the coming decade of conflict would become an essential combat multiplier. The Army has historically brought its military justice system forward during contingency and combat operations,[188] and the challenges faced by Vowell and the Army trial judiciary in the years immediately following 9/11 and ensuing *Operations Iraqi Freedom* and *Enduring Freedom* should not be underestimated. From 2003 to 2005, the number of courts-martial tried in the combat theater of operations increased from 37 to 144, a more than three-fold increase in just 36 months.[189] Cases were tried in a host of facilities in Iraq and Afghanistan under some of the most austere conditions since the American experience in Vietnam. They were supervised by military judges sourced from across Europe and the continental United States, including Vowell herself, who personally tried felony-level cases in Kandahar, Afghanistan, and Kuwait.[190]

At this time the Army trial judiciary reported trying roughly 1,400 cases annually from 2003–2005, divided among 17-22 individual judges in any given year.[191] The Reserve Component and its 18 or so military judges (at the time) played an important role in the success of the judiciary's support of military justice for the hundreds of cases tried in the deployed environment. Over time, Vowell worked to strengthen the cohort of reserve judges by making it smaller and increasing the deployment, mobilization, and education opportunities to increase their qualified contingent capability.[192] The goal of the restructuring was to make them more plug-and-play with the active Army, which was widely considered a success.

Thoughts on the Army Judiciary and the selection process for Military Judges—Experience, Temperament, and Common Sense

[181] *Id.* at 173.

[182] *Id.*

[183] *Id.* at 182.

[184] *Id.* at 182–83.

[185] *Id.* at 184.

[186] *Id.*

[187] *Id.* at 185.

[188] *See generally* BORCH, *supra* note 152; DEFENSE LEGAL POLICY BOARD, REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES, FINAL REPORT (May 30, 2013) [hereinafter FINAL REPORT], *available at* http://www.caaflog.com/wp-content/uploads/20130531-Subcommittee-Report-REPORT-OF-THE-SUBCOMMITTEE-ON-MILITARY-JUSTICE-IN-COMBAT-ZONES-31-May-13-2.pdf (last visited Sept. 12, 2014) (The DLPB is a Federal Advisory Committee established to provide independent advice to the Secretary of Defense).

[189] Colonel Mike Hargis, U.S. Army Trial Judiciary, Today's Military Justice Environment (20 June 2014) [hereinafter Trial Judiciary Briefing] (on file with the author).

[190] Vowell Interview, *supra* note 10.

[191] Trial Judiciary Briefing , *supra* note 187.

[192] Vowell Interview, *supra* note 10.

So one day you're a lawyer and the next day you are a judge and its natural to think that not much has changed - you were a player, now you're a referee, but it's the same game. Not quite. A good judge is impartial, of course, but he's a product manager rather than just a referee, trying to produce a good product (good decisions) with inputs from lawyers and staff.[193]

During one encounter at an event sponsored by the National Association of Women Judges, Vowell, sitting as a panel member with former Supreme Court Justice Sandra Day O'Connor in the audience, remembers discussing the role of both actual and perceived judicial independence and its implications. When asked about it in the military context, she responded, "President Bush said to a reporter at The Washington Post that Abu Ghraib should be closed and torn down. The next week [Army] Judge Jim Pohl ordered it preserved as a crime scene. Now, that's the independence of the military judiciary. Justice O'Connor smiled and nodded at the point."[194]

The relative independence of the Army judiciary, and the important role trial judges play in the credibility and function of the military justice system, was forever on Vowell's mind. The reputation of the military judiciary, in particular, was never lost on her. Since developments like the creation of a trial judiciary in 1968,[195] and adoption of the federal rules of evidence and modernization of the rules for courts-martial in 1984, the challenge had been to bring military judges into the system in a constructive way that did not destroy the balance between commanders and the 4th Amendment rights of Soldiers.[196]

It was while she was sitting as a trial judge in the Army's 1st Judicial Circuit, in 1994, following the wave of reforms begun in 1968, that the U.S. Supreme Court upheld the system of non-tenured military judges against a due process challenge in *Weiss v. United States*, where the defendants challenged the structure of courts-martial based on the lack of presidential appointment and fixed terms for military judges.[197] Concurring in that decision, Justice Ginsburg wrote: "Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history . . . ."[198] Thus, by the mid-90s, the military justice system and judiciary had achieved its goal of improving its legitimacy in the eyes of those observing it – gains Vowell was determined to maintain and advance.

In particular, one of her great legacies was the aggressive way she approached the selection and cultivation of highly competitive Army judge advocates to serve on its trial bench. Her approach was in keeping with the standards of the civilian federal judiciary. Almost by design, the American judiciary draws practitioners to the bench from a variety of backgrounds with wide and diverse experience in private practice, academia, and government service and life more generally. Of this, noted federal circuit judge Richard Posner, of the 7th Circuit Court of Appeals, has written:

> The United States is unusual in the porousness of the membranes that separate the different branches of the legal profession. The judiciary both federal and state is a lateral-entry institution (like the military) rather than a conventional civil service; and unlike the British lateral—entry judiciary, in which the judges are drawn from a narrow, homogeneous slice of the legal profession—namely, senior barristers—American judges are drawn from all branches of the profession, including academic.[199]

In Vowell's mind, the Army should be no different. From 2001-3003, as the Boards Officer for the Army JAG Corps personnel office, the author witnessed Vowell's active interest in the career patterns and performance evaluations of prospective trial judges, both from those who had expressed interest in the bench and those she worked to recruit. Unsatisfied by mere reputation or the analysis of personnel officers, she personally vetted the officers who would sit on the trial judiciary. She purposefully engaged assignments officers, staff judge advocates, and Judge Advocate General Officers in pursuit of the best possible judges for the Army. She had clearly observed the deference and respect Soldiers gave military judges during courts-martial, and of civilians before civilian civil and criminal courts. So, she thought,

> why is it within our own Corps that we don't hold judges in that same esteem [as civilians do]? We don't see it as a career enhancing move. So when I became the chief trial judge, this was one of the things I wanted to focus on. For example, how

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[193] POSNER, *supra* note 2, at 332–33.

[194] Oral History, *supra* note 1, at 148.

[195] The Military Justice Act of 1968 created the position of the military judge to preside over courts-martial and to separate the judicial function (previously occupied by line officers) from the chain of command. It shifted the responsibility for military judges from commander to the respective Judge Advocate Generals for the various military services. *See generally* United States v. Mitchell, 37 M.J. 903 (N.M.C.M.R 1993) (detailing the legislative history of the Military Justice Act of 1968).

[196] Vowell Interview, *supra* note 10.

[197] Weiss v. United States, 510 U.S. 163 (1994) (The current process for military judicial assignments satisfies the Appointments Clause prescribed by Article II, Section 2 of the Constitution.). The constitutionality of the military courts-martial was originally considered and validated by the Supreme Court in *Dynes v. Hoover*, 61 U.S. 65 (1857). For an interesting legislative history on the 1968 Military Justice Action, see *Military Justice, Joint Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, and Special Subcommittee of the Committee on Armed Services, United States Senate*, 89th Cong., 2d Sess. (1966), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MJ_hearings-1966.pdf (last visited Oct. 7, 2014).

[198] *Weiss*, 510 U.S. at 194 (Ginsburg, J., concurring).

[199] POSNER, *supra* note 2, at 337–38.

> we pick—yes, only 50% of lieutenant colonels can be promoted to colonel. And the trial judiciary maybe ought to have a share [among officers passed over for promotion], but it should not have more than its share. And we had far less with the people that I helped pick and encouraged TJAG to pick and recruited. So I'd like to think we turned that around.[200]

Indeed, over past decade or so the Army has dramatically improved the way it educates, selects, and develops its judges. Even in the basics of judicial training, such as the Military Judges Course, which the Army Chief Trial Judge can shape and influence, great strides were advanced under Vowell and championed by her successors. In 2014, for example, this course, which is attended by most military service trial and appellate judges, was recognized by the American Bar Association (ABA) Judicial Division National Conference of Specialized Court Judges (NCSCJ) with the ABA's Judicial Education Award in recognition of its "*successful efforts* in providing high quality judicial education and training trial and appellate judges in every branch of the United States military and Department of Homeland Security."[201]

In the area of judicial assignments and talent management, for the most recent 2013–2014 assignment cycle, The Judge Advocate General assigned former (female) trial judges to serve as SJAs for two of the Army's high profile divisions—Colonel Susan Arnold to the 101st Infantry Division and Colonel Allison Martin to the 1st Cavalry Division. The former SJA for the 25th Infantry Division, Colonel Mark Bridges, was a former trial judge and returned to the trial bench in 2014. The current Chief Trial Judge for the Army, Colonel Tara Osborne, was previously the SJA for the 2d Infantry Division; her immediate predecessor, Colonel Mike Hargis, previously served as the SJA for U.S. Special Forces Command. Other trial judges with previous experience as SJAs include Colonel Chris Frederickson, Colonel Andrew Glass, and Lieutenant Colonel Steve O'Neill. The same goes for the appellate court, where the former SJA for the 82nd Airborne Division, Colonel Lorraine Campanella, currently sits on the Army Court of Criminal Appeals, and Colonel Jan Aldykiewicz, who departed ACCA in 2014, now serves as the SJA for the large and complex installation at Fort Polk, LA.[202]

So, help turn it around, Vowell most certainly did.

By actively encouraging greater professional diversity for the judiciary—enhancing the scope of *experience* that officers selected for the bench had and would one day take back to other senior leadership positions—she fortified both the bench and professionalism of those who advise commanders. Colonel Campanella, whose tour as the SJA for the 82d Airborne Division included a year-long deployment to Afghanistan, observes:

> My experience as former SJA caused me to often question the sensibility of an opinion. The SJA experience can bring the discussion and execution of justice back to reality. The diversity of experience and thought in each panel (former judges, former SJAs, criminal law experts) creates a kind of synergy that results in high quality well thought-out, analyzed, and instructive opinions.
>
> Similarly, judge experience can provide greater insight to SJAs. We are all a product of our experience and exposure. Judges are uniquely positioned to thoughtfully and critically evaluate the full spectrum of the execution of military justice. This leads to a greater understanding of the rules and limits thereof facilitating SJAs to better inform the discussion with commanders. Naturally then, they make ideal legal advisors.[203]

What are the attributes Vowell looked for in military judges? Reduced to the basics, there were three: criminal law experience, temperament, and common sense.[204] Vowell explains,

> I really looked for people who had worked both sides of the aisle. It wasn't an absolute bar if you had only worked one, but I really went into it with a degree of skepticism. If you philosophically chose not to be in the Trial Defense Service, then you should not be on the bench. . .you

[200] Oral History, *supra* note 1, at 147.

[201] Letter from Hon. Karl Grube, Awards Comm. Chair, Nat'l Conference of Specialized Court Judges, to Colonel James F. Garrett, Dean, Judge Advocate Gen.'s Legal Ctr. & Sch. (May 15, 2014) (award presented August 7, 2014) (on file with author).

[202] E-mail from Lieutenant Colonel Laura Calese, Pers., Plans and Training Office, Office of The Judge Advocate Gen., to the author (July 7, 2014, 07:09 EST) (on file with the author).

[203] E-mail from Colonel Lorianne Campanella, Associate Judge, U.S. Army Court of Criminal Appeals, to the author (Oct. 3, 2014, 09:46 EST) (on file with author).

[204] Oral History, *supra* note 1, at 186. The emphasis on experience over (or in conjunction with) a particularly promising young intellect has been echoed by other senior jurists, including Judge Posner, who has written,

> Law attracts some very bright people. But it is not profound. It is one of the simplest professional fields. . . . It's because legal analysis doesn't really cut very deep that young judges are rare. The young are analytically sharper than the old but lack experience. In an analytically weak field, *experience may be essential to successful problem solving*.

POSNER, *supra* note 2, at 354 (emphasis added).

> ought to have both sides. . . .[As for] judicial temperament, people can have, you know, like me, a short flash to bang time, but you have to learn to compensate for it. And if you have, that's great. But if you are a yeller or a screamer, routinely, then you probably ought not to be on the bench. The big thing was common sense. You can't teach that. And if you don't have it you ought not be on the bench. So you looked for things that were goofy or oddball in people's past. I looked at their personnel files. I called people that they practiced in front of to say, what do you think. . . .And I was also looking for people that had promotion potential. . . .People who had a variety of military experiences who had been deputies or officers in charge or staff judge advocates. [205]

Her efforts in the selection, education, mentoring, and advancement of the right sort of officers for the Army judiciary were informed by her own early experience on the trial court.[206] The quality of the military judge Vowell was looking for, whether in the Active Army or the Reserve Component, was someone whose professional and life experience had prepared them for a very different kind of defendant being tried in a system specifically designed for the needs of the military while adhering to the basic tenets of American jurisprudence. As suggested previously, the circumstances that defined many military defendants during 2003-2011, in particular, were unique.

The intersection between military operations and military justice - over 800 Army courts-martial were conducted during this period in deployed environments, compared to only 42 for the Navy and U.S. Marine Corps and 13 for the Air Force - required a different judicial optic from that of the typical county or state judge.[207] The idea that military defendants are sometimes different than those in civilian life was memorably captured in the movie *Breaker Morant*[208] about the court-martial of a young British officer serving in the Second Boer War accused of the murder of captured enemy soldiers.

> The fact of the matter is that war changes men's natures. The barbarities of war are seldom committed by abnormal men. The tragedy of war is that these horrors are committed by normal men in abnormal situations, situations in which the ebb and flow of everyday life have departed and have been replaced by a constant round of fear and anger, blood and death.
>
> Soldiers at war are not to be judged by civilian rules . . . even though they commit acts which, calmly viewed afterwards could only be seen as unchristian and brutal. . . . we cannot hope to judge such matters unless we ourselves have been submitted to the same pressures, the same provocations, as these men whose actions are on trial.[209]

The pressures of soldiering described in the movie are accounted for in the character of military panels who may sit in judgment of service members accused of crimes but also in the trial and appellate judges who sit in review of the facts, law and procedure, as well as guilt or innocence and appropriate sentence. The answer to the question Vowell noted previously—"how is it going to feel when you have this young sergeant standing in front of you with some combat ribbons on his chest and you're about to sentence him to jail for twenty or more years. How are you going to do that?"[210]—is that the officers the Army assigns to its judiciary will have the experience and the perspective required to do so. She worked tirelessly to ensure that was the case.

She reminded her officers that "the best decisions are the ones that tell a story in a way that others can understand what happened and how it got decided. If it wasn't close then say so."[211] To do this she advised judges to acquire skills like writing out the facts before making rulings, circulating decisions to solicit criticism, and to generally avoid ruling from the bench.[212]

Vowell also considered the structure of the judiciary itself. As previously noted, she spent considerable time working, empowering, and integrating the Reserve Component judges into the Army judiciary, many of whom had considerable experience through their civilian practices. She worked with the Chief Trial Judges from the other services to detail Army judges to Navy/Marine and Air Forces cases, and vice versa. For example, Vowell personally tried a case for the U.S. Coast Guard (a vessel hazarding case) where she noted the different service cultures and how that might one day inform a joint judiciary, which she believed could work at the appellate level but not the trial courts, which are heavily influence by specific

[205] Oral History, *supra* note 1, at 186–87.

[206] Vowell Interview, *supra* note 10.

[207] FINAL REPORT, *supra* note 186.

[208] BRUCE BERESFORD & DAVID STEVENS, BREAKER MORANT 1980, *available at* http://books.google.com/books/about/Breaker_Morant.html?id=GADsAAAAMAAJ (last visited Oct. 3 2014). *See also* GEORGE WITTON, SCAPEGOATS OF THE EMPIRE: THE TRUE STORY OF BREAKER MORANT'S BUSHVELDT CARBINEERS (2009); Lieutenant Commander David D. Furry, *Scapegoats of the Empire, The True Story of Breaker Morant's Bushveldt Carbineers*, 192 MIL. L. REV. 127 (2007).

[209] BRUCE & STEVENS, *supra* note 206.

[210] Oral History, *supra* note 1, at 114.

[211] Vowell Interview, *supra* note 10.

[212] Oral History, *supra* note 1, at 186–87.

traditions, norms, and regulations.[213] She also felt that there was merit to an enhanced institutional military judiciary, which although not an Article III court could be built through a combination of rotating tenured assignments and a permanent cohort akin to the permanent professors appointed to serve six or more years at the U.S. Military Academy. [214]

She was not alone in the openness to a more civilianized military judiciary. In 2001, the year she became the Chief Trial Judge, the National Institute for Military Justice sponsored a high-profile look at the role of the commander within the military justice system that recommended, among other things, a judiciary that was far more static and empowered.[215] Led by Walter T. Cox, III, a former Judge of the Court of Appeals for the Armed Forces, the "Cox Commission" made a series of recommendations for reform of the system including the establishment of a standing judiciary of tenured judges rather than courts convened by commanders on an ad hoc basis.[216] The Commission also argued for a migration of key powers held by convening authorities to the judiciary, including the approval of expert witnesses,[217] pretrial petitions,[218] and assistance to pre-trial investigative hearings,[219] as well as the random selection of panel members.[220]

Short of such a holistic change in the military justice system, Vowell and others like her worked tirelessly to make the existing system fulfill its promise of justice through a highly effective, impartial, effective, and talented cohort of military judges. In the years that followed, the Army made extraordinary gains, for example, in the selection, training, and resourcing of special victim prosecutors and special victim advocates in case involving sexual assault or abuse. The trial counsel and trial defense advocacy programs for prosecution and defense bars within the Army have never been stronger. It is a tribute to Vowell's efforts (and those like her) over many years, in shaping a professional culture where enormously gifted and experienced Army lawyers are integrated into the judiciary with the same selectivity as those who advised the commanders who convened their courts.

Thoughts on Women in the Army JAG Corps

I never thought of myself as different. . . . My observation really, in those early days, is that if you could do the job you were accepted. I think you really had to demonstrate you could do the job, whereas a fellow might be able to goof off a little . . . . As a woman I felt that I must do my very best at all times, maybe not to let [other females] down, or let my folks down, or let anybody down really . . . . So I tried to do my best, but I found acceptance wherever I went, really. If you were competent, people didn't worry about what gender you were.[221]

—Colonel Elizabeth R. Smith, U.S. Army,
The First Female Colonel of the Army JAG Corps

Any consideration of Denise Vowell's service would be incomplete without at least a passing mention of the era in which it occurred. In the mid-1970s, a defining characteristic of her early career was that it happened at a time with very few female mentors or peers. It is hard to imagine, when women are leading at the strategic three and four star-level and currently serve as The Judge Advocate Generals for the Army and the Navy, that Vowell's promotion to the rank of major in 1986 made her one of only fourteen female field grade officers in the Army JAG Corps.[222]

Of those fourteen, three were lieutenant colonels and the rest were majors. There were no female active duty Judge Advocate colonels, and no general officers regardless of component or military service. At the time of her early promotion to lieutenant colonel in 1992, she was one of only five women serving in that rank among approximately 209 men. By the time she was promoted to colonel in 1997, she was one of only three of 126. In contrast, seventeen years later, there are twenty-four (of approximately 146) female colonels serving as the senior leaders in some of the most complex commands in the Army.[223]

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[213] Vowell Interview, *supra* note 10.

[214] *Id*. *See generally* 10 U.S.C. 403 (2006) (U.S. Military Acad., Section 4336, Permanent professors; director of admissions). *See also* Clyde Tate & Gary Holland, *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, ARMY LAW., Oct. 1992, at 23.

[215] COX COMM'N, NAT'L INST. OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 2 (May 2001) [hereinafter COX COMM'N], *available at* http://www.loc.gov/rr/frd/Military_Law/pdfCox-Commission-Report-2001.pdf (last visited Sept. 19, 2014). *See generally* Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195, 195–96 (2000).

[216] COX COMM'N, *supra* note 213, at 8–9.

[217] *Id.* at 7–8.

[218] *Id.* at 5.

[219] *Id.* at 8–9.

[220] *Id.* at 6–8.

[221] Lieutenant Colonel George R. Smawley, *The First Female Colonel of the U.S. Army Judge Advocate General's Corps: A Summary and Analysis of The "Oral History of Colonel Elizabeth R. Smith Jr. (USA Retired) (1951–1978)*, 179 MIL. L. REV. 171, 186 (2004) (citing the Oral History of Colonel (COL) Elizabeth R. Smith, Jr., United States Army (Retired) (1951–1978), at 23 (Jan. 1989) (unpublished manuscript, author unknown, on file with The Judge Advocate General's Legal Center and School (TJAGLCS) Library, U.S. Army, Charlottesville, Va.).

[222] Oral History, *supra* note 1, at 105. She recalls: "I was at government appellate division when I was selected for promotion to major. There were 10 women in the zone, seven were selected. That selection doubled the number of women field grade officers in the JAG Corps. Doubled." *Id*.

[223] JUDGE ADVOCATE PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY (1985–1986, 2013–2014) (Office of The Judge Advocate Gen., Dep't of the Army) (on file with author). These include Army Forces Command (Colonel Vanessa Berry), Training and Doctrine Command

Vowell's varied career pattern was not what many might expect for a successful Army lawyer, a fact she readily admits.

> If you take all of the wrong answers to the question of "what are career enhancing jobs," that was my career pattern as a JAG before I was selected below-the-zone for lieutenant colonel. Assignments are what you make of them. Some of it is also who you work for. I'll give you an example. I had two children in my first assignment. One of my basic course classmates was a woman who had a perfect LSAT score, who was selected out of the Transportation Corps for the FLEP program. . . . She was the number one graduate from her graduate course and then she was passed over for major. So I called her up and said, "what happened?" And she said, "I had two children and I worked for a staff judge advocate who didn't think I belonged in the Army much less the JAG Corps, as a result." . . . . So those are some of the luck of the draw.[224]

But Vowell also attributes some of the early struggles of women in the Army JAG Corps, and perhaps more broadly the Army itself, as a function of long-held stereotypes toward not only women in the military but also toward the positions they held and the jobs they did—that they were not real Soldiers, and even if they were their contribution was limited to less glamorous roles in combat service support. This idea—that not all Soldiers are created equal—extends to the success and desirability of positions on the trial judiciary, as well. She notes,

> So unless you put people on promotion board who are diverse, you don't get a diverse selection. And unless you see people doing the jobs you don't think you can aspire to those jobs. Fred Clervi once told me that the year I became a trial judge and then left the judiciary and went off to become a division SJA, he had triple the number of applicants for trial jobs. Because you see something good – that the job is desirable and leads to advancement – and that is how the JAG Corps functions. We look at what jobs people get and where they came from. . .[225]

As a military judge she expressly recalls a female deputy staff judge advocate, a major, seeking guidance regarding the perception that her staff judge advocate would not assign women to brigade trial counsel positions or send them to the operational law courses because of their sex, and of the impact on advancement and opportunity that this might have.[226] On the other hand, she also recalls the efforts by others to open up all positions based on merit and ability. In particular she remembers in the late 1990s when Major General John Altenburg would tell audiences at the Judge Advocate General's School that "there is no job in the JAG Corps a woman cannot do,"[227] and what a change it was for the leadership to address the integration issue publicly.

In her own way, Vowell and others worked quietly to afford mentoring and collegiate opportunities to the growing cohort female officers in the JAG Corps. One particular effort arose from a remark by a male lieutenant colonel at the Government Appellate Division to the effect that a small group of female officers going to lunch were "plotting" like hens in a coop. From that came "hen luncheons" and dinners, where female judge advocates came together as an informal mentoring group from across the Washington, DC area to liaise and socialize in a way many of them never could in the early years of their careers.[228]

Conclusion

Vowell retired from the Army in early 2006, after nearly five years as the Chief Trial Judge, including over a year as a retiree-recall (beyond the mandatory 30 years of service). She declined the offer of a sixth full year to accept a position as a Special Master for the U.S. Court of Federal Claims, where her judicial, academic, and torts experience made her ideally suited for the job that attempts to resolve disputes and keep people out of civil court.[229] She was sworn in there on February 1, 2006.[230]

She had once hoped to walk the Appalachian Trial when she retired, and no doubt still will, but that journey had to wait. In military retirement, or what passed for it given her work with the Court of Claims, she missed most the camaraderie of old friends and interactions with young captains, and the opportunities to mentor and coach and

(Colonel Sharon Riley), Installation Command (Colonel Marian Amrein), the Joint Staff (Colonel Michelle Ryan), U.S. Army Africa (Colonel Daria Wollschlaeger) and three combat divisions—1st Armor Division and Fort Bliss (Colonel Karen Carlisle), 1st Cavalry Division (Colonel Alison Martin), and the 101st Airborne Division (Air Assault) and Fort Campbell (Colonel Susan Arnold). Other key leadership positions occupied by female senior leaders include The Army's Chief Trial Judge (Colonel Tara Osborn), Director of the Judge Advocate Legal Center (COL Tania Martin), the Executive Officer for the U.S. Army Legal Services Agency (Colonel Mary Bradley), and the Administrative Law and International & Operational Law division chiefs for the Office of The Judge Advocate General (Colonel Jody Hehr and Colonel Jane Ellen Bagwell, respectively).

[224] Oral History, *supra* note 1, at 102–03.

[225] *Id.* at 107.

[226] *Id.* at 108.

[227] *Id.* at 109.

[228] Vowell Interview, *supra* note 10.

[229] Oral History, *supra* note 1, at 175, 177.

[230] *Id.* at 176. Denise Vowell was appointed as Special Master on 1 February 2006. She was designated Chief Special Master by the court to succeed Patricia E. Campbell-Smith, effective 19 September 2013.

train.[231] And despite nearly a decade of time and distance between now and the Army she left, she remains concerned about its future and of the practice of military law.

She sees, in some ways, an Army akin to the post-Vietnam force she entered in the 1970s that was divided by those who had combat experience, and what it means for a cohesive force and mutual understanding of what those experiences meant, and what they did not.[232] Vowell is reminded of what a tired Army looks like, and of the need to teach those without the benefit of combat experience its lessons, while simultaneously transitioning to a force from an operational setting to one focused on generating the leadership and skills required grow future leaders, run units, installations, and the institutional Army.[233]

Vowell wishes, for example, she had time to do more to advocate the establishment of Veterans courts qualified to address post-traumatic stress disorder defenses, and assist deserving veterans with the benefit of adjudicative forums educated and enabled to assist them with the challenges they face with combat-related misconduct.[234] Vowell reminds us in the waning era on combat operations in Southwest Asia, that, "Maybe we need to sit down and think about what did we learn from Vietnam and how did we handle. . . ." the repercussions of an Army weary of war and needing to reset itself.[235]

As for how she is remembered, as the young woman from Holly, Michigan, who went to law school and joined the Army in the early 1970s at a time when opportunities were starting to open up for women, if only just, Vowell looks on her leadership and service within the judiciary as her greatest professional accomplishment—her contribution to its heightened esteem.[236] As for the rest, she remains satisfied with things she achieved and the bit of balance she found along the way, and "was glad I took the time to spend at my kids' football games and doing scouting with my daughter and then with other people's daughters and sons . . . ." One day, perhaps, she may take them on that much deferred hike up the Appalachian Mountains, and tell the stories of what it was like to be a female Soldier in the 1970s, a key leader of an Infantry division in Bosnia, and a judge who meted justice in peace and war while lifting up others to do the same.

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[231] *Id*. at 188.

[232] *Id*. at 192–93.

[233] *Id*. at 193.

[234] *Id*. at 193–94.

[235] *Id*. at 195.

[236] *Id*. at 206.

IN HONOR OF CHARLES J. STRONG

TECHNICAL EDITOR, *THE ARMY LAWYER* AND THE *MILITARY LAW REVIEW*, 1995 TO 2015

"Joining the Army was the best decision that I made" – Charles Strong

After more than 41 years of service to this nation, Charles J. Strong, Technical Editor of *The Army Lawyer* and the *Military Law Review*, retires from government service at the end of January 2015. A devoted Soldier and Civilian employee, Chuck has faithfully served the people of the United States with dedication, commitment, and honor. In recognition of that service, this issue of *The Army Lawyer* – the five-hundredth issue – is dedicated to Chuck and his tireless efforts to do his duty with diligence and devotion.

Born the fifth of seven children, Chuck grew up in Havre de Grace, MD, graduating from high school in June 1970. After attending a year of community college on a scholarship, Chuck decided that he "wanted more and was not getting it" at school and, without telling his parents, enlisted in the United States Army.

In August 1971, Chuck left for basic training at Ft. Dix, NJ. Although he enlisted to become a translator, Chuck was told that there were no spots available at the language school and was given an opportunity to leave the Army. But Chuck chose to stay. He completed advanced individual training at Ft. Gordon, GA, and in February 1972, Chuck reported for duty as a 72B (Teletype Operator) at the Turkish/United States Logistics Detachment in Turkey. There although a junior enlisted Soldier himself, he supervised an office of three Soldiers who processed the detachment's communications.

Private Charles L. Strong, U.S. Army
October 1971

In February 1973, Chuck completed his tour in Turkey and was assigned to Ft. Meade, MD, and, after on-the-job training, served as a chaplain's assistant. In August 1974, Chuck again returned overseas, the first of three assignments to Germany, where he served as a company clerk. It was in this assignment that Chuck began the tradition that has become nearly a legend: brewing coffee for his team.

In August 1974, Chuck completed his term of enlistment and was honorably discharged from the Army. He enrolled at the College of Santa Fe in New Mexico, to study Education and Spanish. Earning the accolades of his professors – one of whom said of Chuck: "it is not often that one finds a young man of his caliber" – Chuck graduated *Magna Cum Laude* with his bachelor's degree in May 1978 and was recruited to work for a local law firm, beginning his legal career.

After two years in New Mexico, Chuck wanted to return home. And in May 1980, Chuck began substitute teaching at two local high schools, including his alma mater. But the call of service remained strong. And in February 1981, Chuck returned to active duty, this time as a 71D – legal clerk.

First assigned to the 8th Army in Germany, Chuck served in almost every division within that office: legal assistance, Trial Defense Service, and military justice. While serving with the 8th Army, in April 1982, Chuck was promoted to the grade of Specialist Five (E-5).

In 1984, Chuck was re-assigned to the U.S. Army Southeastern Task Force in Vicenza, Italy, where he served as the non-commissioned officer in charge of the criminal-law division. Later that year, Chuck was re-assigned to Camp Darby, Italy, to serve as the non-commissioned officer in charge of that legal office, working the gamut of legal actions.

In June 1985, Chuck returned to the United States and was assigned to the Aberdeen Proving Ground in Maryland as a battalion and brigade paralegal. That same year, Chuck received his lateral promotion to Sergeant. And later, now-Sergeant Strong volunteered to return to Trial Defense Service. Chuck told the author that he enjoyed his time as a defense paralegal because he was "trying to help as many people as [he] possibly could" – something that he could do best in TDS.

On 1 June 1987, Chuck was promoted to the rank of Staff Sergeant. In December 1988, now-Staff Sergeant Strong returned to Germany, where he served as a Corps' criminal-law division's non-commissioned officer in charge – a position above his pay grade. In December 1991, Chuck was re-assigned to Ft. Benjamin Harrison, where he became an instructor and developer of the paralegal Soldier Training Publications and Self-Development Tests. In essence, Chuck's team developed

the curriculum that trained, tested, and certified the Army's paralegal team. Earning the grade of Sergeant First Class on 1 May 1993, Chuck later moved to Charlottesville when his position was brought to The Judge Advocate General's School. On 30 June 1995, Chuck concluded his active-duty career.

Staff Sergeant Strong, U.S. Army
July 1988

But Chuck did not leave public service, continuing to serve in the U.S Army Reserve and, significantly, becoming a member of the publications team at the school. Hired in December 1995 as an Editorial Assistant, Chuck has been a part of the evolution of the regiment's flagship publications for more than 19 years. Indeed during his long tenure, Chuck has edited 72 issues of the *Military Law Review* and 225 issues of *The Army Lawyer*. More importantly, though, Chuck has worked with more than 21 graduate courses and, by his own count, more than 38 officer editors.

Among his many accomplishments, Chuck was at the forefront of the significant technological change in how these publications are produced. One of his first editors, now-Colonel Albert Veldhuyzen, U.S. Army Reserve, who is now the incoming Staff Judge Advocate of Army Reserve Medical Command in Tampa, Florida, wrote:

I had the opportunity to work with Chuck Strong at a time of great change . . . . Our challenge was to modernize and stay relevant in the fast-changing world of print communications . . . . Without Chuck's skill, dedication, and enthusiasm, our transformation would not have been possible.

[In particular, g]iven the significant advances in software technology, Chuck and I believed we could improve the publications process. We experimented with Adobe Framemaker . . . . We wrote up a proposal and convinced the . . . leadership to allow us to proceed . . . . We pushed through this big change while, at the same time, rolling out our publications the traditional way—this was quite a feat made possible by Chuck's work ethic, involving many late nights and weekends.

Because of these desktop-publishing skills, for two years, Chuck published the school's annual bulletin, which is an important part of its American Bar Association accreditation. And later, Chuck became responsible for the electronic distribution of both publications to the regiment's website and the Library of Congress – bettering the website by working with information-technology experts to ensure that the publications were electronically searchable.

But Chuck's technical skills are only part of his immense contribution to the school. Chuck has been a mentor to all, editors and students alike. As just one example of many, the members of the 59th Graduate Course honored Chuck with a commemorative book for his gracious assistance to their class. And more particularly, Major Takashi Kawaga, one of Chuck's editors, writes of Chuck's mentorship:

Chuck Strong is the ultimate encourager and trainer of all editors and grad-course students. His passion is to help anyone in need, always looking for an opportunity to serve and impart his wisdom. I always appreciated his incredible attention to detail and his sincere encouragements that makes you feel that you can do no wrong. . . . Though I appreciated his technical expertise . . . . , I appreciated more his enthusiasm to help the Soldier next to him. He will be dearly missed at the school, especially by the editors and the grad-course students of the future.

Chuck's mentorship and encouragement led him to take on a special responsibility, that of actively assisting the international students. Of that duty, Chuck told the author that he "always wanted to be an ambassador for my country." And an ambassador Chuck has been: reaching out to those students to ensure that they were set up for success in their studies.

Finally Chuck's personal commitment to producing the best possible publication is legendary. As he told the author, the "most important [requirement] is that we put out the most accurate information in the most timely manner that we can." Chuck's commitment to excellence is exemplified in The Judge Advocate General's personal commendation for his tireless effort to research and coordinate the 50th Anniversary issue of the *Military Law Review*. Indeed Chuck is simply unwilling to accept anything less than his best – and the best effort of his team. In his straight-forward style, Chuck expressed to the author that he "just could not do" anything less.

Chuck's love of the U.S. Army and its Soldiers is legendary, both because of his commitment to this organization but also his sincerity. Chuck has always been particularly concerned for those Soldiers who are serving in harm's way. In that light, he has organized efforts to provide care packages for many of those deployed Soldiers, something that is dearly appreciated by all.

Indeed of Chuck's compassion, care, and concern, his last Chair of Administrative and Civil Law, Lieutenant Colonel Bill Mullee, writes it best:

Chuck Strong has been an integral figure in the Administrative and Civil Law Department [ADA] *for many years. He has routinely impressed me during our two and a half years together with the genuine care and concern he demonstrates for any visitor who steps into ADA. Chuck immediately jumps up from his desk to greet the visitor and makes him or her feel welcome by offering a cup of his famous coffee. More than that, whenever a new faculty member has joined the department, Chuck has gone out of his way to help get that officer established. He exudes a positive attitude that is infectious and sets a great example for all of us in how to deal with others. Simply stated, he makes all of us feel like we are part of his family.*

Chuck is a true patriot who loves our Nation and who loves to discuss issues affecting it. I have always enjoyed our early morning chats about those issues, and been impressed with his keen intellect as we discuss them. I will miss those discussions and having him on this amazing team, but know that his decision to retire is the best possible decision for him. I sincerely appreciate all that he has done for ADA, the LCS, the Army, and our Nation.

Chuck told the author that "joining the Army was the best decision [he] made" and that he simply has "no regrets." As anyone who has worked with Chuck would know, he loves his country, and he loved being a part of this team. And over the past 19 years, Chuck has become "the lifeblood" of the Administrative and Civil Law Department, and is simply an institution at The Judge Advocate General's Legal Center and School. Major Keirsten Kennedy sums up Chuck's legacy perfectly stating, "[t]he Army JAG Corps has lost a masterful technical editor with Mr. Strong's retirement, but all of us who have worked with Mr. Chuck Strong have gained a lifelong friend." As he heads to his well-deserved retirement, we honor his contributions to this school; and we thank him for his service. He will be missed.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS) is restricted to students who have confirmed reservations. Reservations for TJAGLCS CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates' training office. U.S. Army Reserve (USAR) and Army National Guard (ARNG) Soldiers must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department, at (800) 552-3978, extension 3172.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: https://www.jagcnet.army.mil. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: http://www.afjag.af.mil/library/index.asp. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:	American Academy of Judicial Education P.O. Box 728 University, MS 38677-0728 (662) 915-1225
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252

FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University Law School 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000
NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222

NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

4. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for the career progression and promotion eligibility for all Reserve Component company grade judge advocates (JA). It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD) at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each December.

b. Phase I (nonresident online): Phase I is limited to USAR and ARNG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC). Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC, they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrollment in Phase I, please go to JAG University at https://jagu.army.mil. At the home page, find JAOAC registration information at the "Enrollment" tab.

c. Phase II (resident): Phase II is offered each December at TJAGLCS. Students must have submitted by 1 October all Phase I subcourses, to include all writing exercises, and have received a passing score to be eligible to attend the two-week resident Phase II in December of the same year.

d. Students who fail to submit all Phase I non-resident subcourses by 2400 hours EST, 1 October 2015, will not be allowed to attend the December 2015 Phase II resident JAOAC. Phase II includes a mandatory Army Physical Fitness Test (APFT) and height and weight screening. Failure to pass the APFT or height and weight may result in the student's disenrollment.

e. If you have additional questions regarding JAOAC, contact MAJ T. Scott Randall, commercial telephone (434) 971-3359, or e-mail thomas.s.randall2.mil@mail.mil.

5. Mandatory Continuing Legal Education

a. Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state to remain certified to perform the duties of an Army JA. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

b. To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations, and requirements for Mandatory Continuing Legal Education.

c. The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

d. Regardless of how course attendance is documented, it is the personal responsibility of JAs to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist JAs in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3307 if you have questions or require additional information.

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primarily mission is dedicated to servicing the Army legal community, but alternately provides Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGLCS publications available through JAGCNet.

b. You may access the "Public" side of JAGCNet by using the following link: http://www.jagcnet.army.mil. Do not attempt to log in. The TJAGSA publications can be found using the following process once you have reached the site:

(1) Click on the "Legal Center and School" link across the top of the page. The page will drop down.

(2) If you want to view the "Army Lawyer" or "Military Law Review," click on those links as desired.

(3) If you want to view other publications, click on the "Publications" link below the "School" title and click on it. This will bring you to a long list of publications.

(4) There is also a link to the "Law Library" that will provide access to additional resources.

c. If you have access to the "Private" side of JAGCNet, you can get to the TJAGLCS publications by using the following link: http://www.jagcnet2.army.mil. Be advised that to access the "Private" side of JAGCNet, you MUST have a JAGCNet Account.

(1) Once logged into JAGCNet, find the "TJAGLCS" link across the top of the page and click on it. The page will drop down.

(2) Find the "Publications" link under the "School" title and click on it.

(3) There are several other resource links there as well. You can find links the "Army Lawyer," the "Military Law Review," and the "Law Library."

d. Access to the "Private" side of JAGCNet is restricted to registered users who have been approved by the Information Technology Division, and fall into one or more of the categories listed below.

(1) Active U.S. Army JAG Corps personnel;

(2) Reserve and National Guard U.S. Army JAG Corps personnel;

(3) Civilian employees (U.S. Army) JAG Corps personnel;

(4) FLEP students;

(5) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

e. Requests for exceptions to the access policy should be e-mailed to: itdservicedesk@jagc-smtp.army.mil.

f. If you do not have a JAGCNet account, and meet the criteria in subparagraph d. (1) through (5) above, you can request one.

(1) Use the following link: https://www.jagcnet.army.mil/Register.

(2) Fill out the form as completely as possible. Omitting information or submitting an incomplete document will delay approval of your request.

(3) Once you have finished, click "Submit." The JAGCNet Service Desk Team will process your request within 2 business days.

g. Contact information for JAGCNet is 703-693-0000 (DSN: 223) or at itdservicedesk@jagc-smtp.army.mil

2. The Judge Advocate General's Legal Center and School (TJAGLCS)

a. Contact information for TJAGLCS faculty and staff is available through the JAGCNet webpage at https://www.jagcnet2.army.mil. Under the "TJAGLCS" tab are areas dedicated to the School and the Center which include department and faculty contact information.

b. TJAGLCS resident short courses utilize JAG University in a "blended" learning model, where face-to-face resident instruction (on-ground) is combined with JAGU courses and resources, allowing TJAGLCS short course students to utilize and download materials and resources from personal wireless devices during class and after the course. Personnel attending TJAGLCS courses are encouraged to bring a personal wireless device (e.g. laptop or tablet) to connect to our free commercial network to access JAGU course information and materials in real-time. Students must have their AKO username and password to access JAGU unless the wireless device has a Common Access Card (CAC) reader. Additional details on short course operations and JAGU course access are provided in separate correspondence from a Course Manager.

c.. Personnel desiring to call TJAGLCS can dial via DSN 521-3300 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the TJAGLCS Information Technology Division at (434) 971-3264 or DSN 521-3264.

3. Distributed Learning and JAG University (JAGU)

a. *JAGU:* TJAGLCS's primary Distributed Learning vehicle is JAG University (JAGU), which hosts the Blackboard online learning management system used by a majority of higher education institutions. Find JAGU at https://jagu.army.mil.

b. *Professional Military Education:* JAGU hosts professional military education (PME) courses that serve as prerequisites for mandatory resident courses. Featured PME courses include the Judge Advocate Officer Advanced Course (JAOAC) Phase 1, the Pre-Advanced Leaders Course and Pre-Senior Leaders Course, the Judge Advocate Tactical Staff Officer's Course (JATSOC) and the Legal Administrator Pre-Appointment Course.

c. *Blended Courses:* TJAGLCS is an industry innovator in the 'blended' learning model, where face-to-face resident instruction ('on-ground') is combined with JAGU courses and resources ('on-line'), allowing TJAGLCS short course students to utilize and download materials and resources from personal wireless devices during class and after the course. Personnel attending TJAGLCS courses are encouraged to bring a personal wireless device (e.g. laptop, iPad, tablet) to connect to our free commercial network to access JAGU course information and materials in real-time. Students must have their AKO user name and password to access JAGU unless the wireless device has a Common Access Card (CAC) reader. Additional details on short-course operations and JAGU course access are provided in separate correspondence from a Course Manager.

d. *On-demand self-enrollment courses and training materials:* Self enrollment courses can be found under the 'Enrollment' tab at the top of the JAGU home page by selecting course catalog. Popular topics include the Comptrollers Fiscal Law Course, Criminal Law Skills Course, Estate Planning, Law of the Sea, and more. Other training materials include 19 Standard Training Packages for judge advocates training Soldiers, the Commander's Legal Handbook, and specialty sites such as the SHARP (Sexual Harassment/Assault Response and Prevention) site and the Paralegal Proficiency Training and Resources site.

e. *Streaming media:* Recorded lectures from faculty and visiting guests can be found under the JAGU Resources tab at the top of the JAGU home page. Video topics include Investigations Nuts and Bolts, Advanced Contracting, Professional Responsibility, Chair Lectures and more.

f. *Naval Justice School Online (NJS Online):* JAGU is also the home of the Naval Justice School Online Legal Education Program. Find it by going to the JAGU home page and selecting the 'NJS Online' tab. NJS Online features 'LAWgos,' which are "shot in the arm" self-paced, small chunks of targeted learning in various topics. NJS Online also

features multi-week courses taught over a number of weeks with facilitated instruction. Most courses are open enrollment for servicemembers across the DOD.

g. *Contact information:* For more information about Distributed Learning/JAGU, contact the JAGU help desk at https://jagu.army.mil (go to the help desk tab on the home page), or call (434) 971-3157.

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