Military Law

Eugene R. Fidell

Abstract: Military justice – the system for ensuring good order and discipline within the armed forces – remains the military legal establishment's bedrock activity. Court-martial and nonjudicial punishment rates are down, but major breaches of discipline arising both on deployment and at home continue to demand attention by civilian leaders, commanders, and judge advocates. Important legal and public policy issues remain to be resolved with respect to the limited availability of review by the Supreme Court, the exercise of court-martial jurisdiction over civilians, the use of military commissions to prosecute unlawful belligerents, increasing reliance on high-tech weaponry, and repeal of the Don't Ask, Don't Tell policy. As technology, national policy, and expectations of proper treatment (of our own personnel, of civilians, of enemies of various kinds) evolve, this will be an increasingly dynamic era for law and legal institutions in the realm of national defense.

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Two recent events dramatically highlight the complexity of Americans' vision of military law. In one, Congress enacted legislation to make the senior uniformed lawyers of the Army, Navy, and Air Force three-star officers.[1] In the other, the Chief Justice of the United States, writing for himself and three other justices, dismissed military justice as "a rough form of justice."[2]

Chief Justice Roberts's comment was both a disservice to the military and a sign of how easy it is to fall prey to incorrect preconceptions. In fact, he could not have been further from the truth, not only as to courts-martial but as to the role of law in general within the armed forces.

Law plays a powerful role in the conduct of military affairs. Difficult issues lurk, such as the constitutionality of subjecting government contractors and other civilians to courts-martial for offenses committed during contingency operations. But these will be resolved through the orderly and transparent processes of the law and a balance struck between the insistent call of operational needs, on the one hand, and the constraints imposed by the Constitution and laws, on the other. While the tension

EUGENE R. FIDELL is a Senior Research Scholar in Law and the Florence Rogatz Lecturer in Law at Yale Law School. He is President of the National Institute of Military Justice and served in the U.S. Coast Guard from 1969 to 1972.

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between the two may at times be worrisome, and while in important respects American military justice differs from civilian federal criminal justice[3] and is out of step with contemporary international norms, military law and lawyering have never stood taller than they do today as bulwarks of our democracy.

Military justice – the system for ensuring good order and discipline – is the core legal activity within the military establishment. Its current record is impressive. Despite, or perhaps because of, the fast tempo of current operations in Iraq and Afghanistan, court-martial and nonjudicial punishment[4] rates are down significantly from where they were ten years ago (see Figure 1).

There are three kinds of courts-martial. Summary courts-martial are intended for minor offenses, and are not viewed as criminal proceedings. They can impose only one month's confinement. Special courts-martial are misdemeanor-level courts, and can impose a year's confinement and a bad-conduct discharge. General courts-martial are felony-level courts and can impose any punishment up to and including the death penalty.[5] In the fiscal year ending September 30, 2010, the services tried 2,816 special and general courts-martial and 2,840 summary courts. A decade earlier, the comparable data were 4,723 and 2,699, respectively. At the second appellate stage, during the Term of Court that ended on August 31, 2010, the court of appeals received 721 petitions for discretionary review and decided a mere 43 cases by full opinion. The comparable data for ten years earlier were 753 and 110, respectively. Even allowing for the use of administrative separations to weed out men and women not suited to military service, our current military is widely viewed as a highly disciplined force. Despite a well-regarded Army officer's cogent argument against doing so,[6] a new maximum security military prison was constructed at Fort Leavenworth, Kansas, in 2002. As of November 29, 2010, the prison, which has a capacity of 460, housed 433 men.[7] (Women who are convicted by courts-martial are confined elsewhere.)

The picture, however, is far from perfect. Sadly, a handful of military members continue to get into very serious trouble. At present, six men are on military death row at Fort Leavenworth, and additional capital cases are in the pipeline. All these cases involve extremely violent acts, and it is not surprising that they wound up with capital sentences. How many of these men will in the end be executed remains to be seen. Under the Uniform Code of Military Justice (UCMJ), no execution can occur without the personal affirmative approval of the president,[8] and our chief executives have been in no hurry to grant that approval, perhaps in part because a surprising number of military death row inmates have been members of racial minorities. President George W. Bush approved a death sentence (that of Army Specialist Ronald A. Gray) in 2008, but all the others are still in the review process. To put military capital punishment in perspective, the U.S. armed forces have not conducted an execution since April 13, 1961, when Private John A. Bennett was executed for the rape and attempted murder of a young girl in occupied Austria. President Eisenhower approved the sentence, and President Kennedy declined to interfere after taking office.

Even after approval, military death cases remain subject to habeas corpus review in the federal courts; one such case is now pending. Habeas corpus review can consume as much time in military death penalty cases as it does in civilian capital cases. For example, Private Dwight J. Loving,

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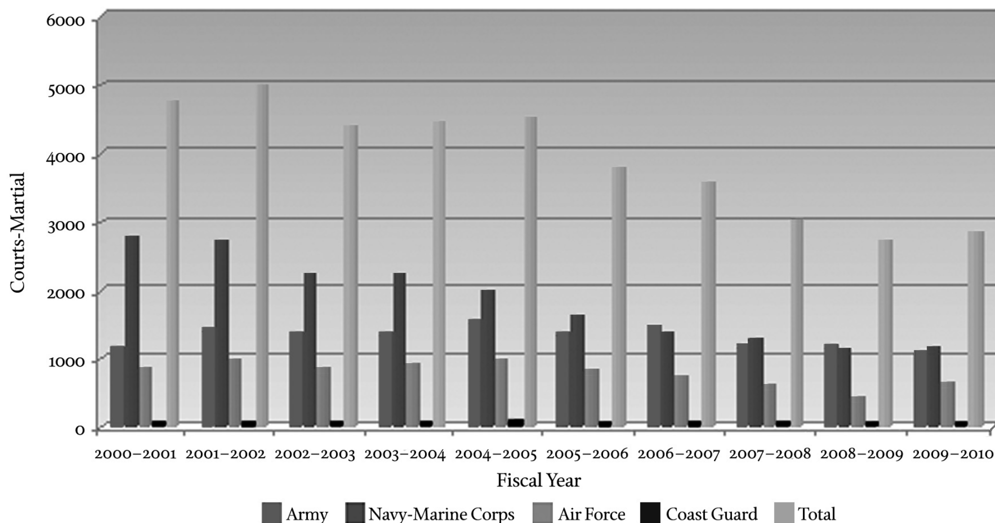
Figure 1
General Courts-Martial and Bad-Conduct Special Courts-Martial in the United States, 2000 to 2010



Source: Clerk of the United States Court of Appeals for the Armed Forces.

one of the current death row inmates, was convicted in 1989. Another, Master Sergeant Timothy Hennis, was convicted in 2010.[9] When the time comes for the next military execution, as one must assume it will, the method of execution will be lethal injection[10] and the place of execution will likely be the Federal Correctional Complex at Terre Haute, Indiana.

Capital cases, invariably involving terrible crimes of violence, represent only a small part of the business of courts-martial. The system adjudicates a range of noncapital cases as well. Sex crimes, offenses against children, drug offenses, and cases involving child pornography loom large in the military justice dockets. There have also been serious noncapital cases of violence directed at citizens of Iraq and Afghanistan. A number of these, from places such as Haditha, Hamdaniya, and Mahmudiyah, have understandably attracted substantial attention and at times raised questions as to whether the so-called fog of war was supplanting the Rule of Law. Outcomes, from charging decisions, to verdicts, to sentences, have been puzzling. Initial steps have been taken,[11] but a full analysis of the administration of justice in these combat settings remains to be done.

Happily, despite the political divide in which the country finds itself, no commissioned officers have been charged with speaking contemptuously of either President George W. Bush or President Obama,[12] although dismissive treatment of President Obama led to the early retirement of General Stanley W. McChrystal and, presumably, adverse evaluations for officers on his staff.[13] There have been high-profile cases involving members who have resisted deployment either for political reasons or because of family responsibilities, and one "birther" officer – an Army doctor – has been prosecuted for refusing to deploy without proof that President Obama met the constitutional eligibility requirement of native birth.[14] A military justice investigation has been

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opened as a result of apparently politically motivated leakage of classified documents and combat video.[15] Only a few in-service conscientious objector cases have gone to court; most have been resolved within the military personnel and record-correction systems.

Most courts-martial are resolved by guilty pleas involving pretrial agreements. While this is desirable because it reduces costs and uncertainty, it has the undesirable side-effect of reducing the overall courtroom experience level of judge advocates. Conviction rates in contested courts-martial remain high.

In addition to the traditional core of military justice – that is, cases involving uniformed personnel – two other categories have received attention in recent years, although in each instance it remains uncertain whether they will play a significant role. The first of these involves the exercise of jurisdiction over civilians. In a series of cases beginning with *United States ex rel. Toth v. Quarles*,[16] the Supreme Court rejected efforts to subject former military personnel, dependents, and civilian employees to trial by court-martial. Courts-martial for civilians for offenses committed in Vietnam were rejected on the basis that that was not a declared war.[17] In 2006, Congress modified the UCMJ to permit courts-martial for persons serving with or accompanying an armed force in the field in time of declared war or contingency operation,[18] a term that includes U.S. operations in both Iraq and Afghanistan. This power has almost never been used, and it remains unknown what would happen if such a prosecution were subjected to constitutional challenge under the earlier Supreme Court jurisprudence.

Contractors have played an enormous role in Iraq and Afghanistan. Like uniformed personnel, the vast majority of contractor personnel are highly responsible and law-abiding. Nonetheless, a certain amount of contractor misconduct – some of it very disturbing both to Americans and to local nationals – has occurred. Given the constitutional cloud hanging over court-martial jurisdiction for these individuals, Congress has looked to other means to ensure their accountability, such as expanding the "Special Territorial and Maritime Jurisdiction"[19] and passage of the Military Extraterritorial Jurisdiction Act of 2000.[20] However, those measures have rarely been put to the test, and have already been shown to suffer from serious loopholes. Since it appears improbable that the United States will be fully able to wean itself from reliance on contractors in the foreseeable future, further attention to contractor indiscipline is warranted.

The second unusual category of military criminal prosecutions is the military commission system. These tribunals – unlike courts-martial – are concerned with crimes committed by persons other than American forces and civilians working with them.[21] Military commissions have been controversial in the past, as, for example, when used during the Civil War to prosecute Confederate sympathizers in the North even though the civilian courts remained open.[22] Commissions were always recognized in the UCMJ, but until President George W. Bush revived them in 2001,[23] they had not been used since World War II, when one was convened, for example, to try German saboteurs.[24] The first generation Bush administration commissions were invalidated by the Supreme Court in *Hamdan v. Rumsfeld*,[25] leading Congress to enact Military Commissions Acts in 2006 and 2009.[26] The resulting commissions have produced only an unimpressive handful of convictions, none of them (so far) involving so-called high value detainees, such as Khalid Sheikh Moham-

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med. Even the few convictions that have been obtained have been severely criticized. One case, involving Omar Khadr, a Canadian national who pleaded guilty to killing a U.S. soldier with a grenade in Afghanistan, was resolved with a plea agreement requiring that he be turned over to Canadian authorities in a year's time. The case proved especially controversial because Khadr was underage at the time of the offense, thus raising an issue of international law.[27]

The Obama administration has devoted considerable attention to establishing criteria for deciding which Al Qaeda cases should be tried by military commission and which in the federal district courts. Ahmed Khalfan Ghailani was initially set to be tried before a military commission[28] but wound up being prosecuted in the U.S. District Court in Manhattan.[29] Controversy continues to rage over where other Guantánamo detainees should be tried, prompting legislation that would preclude the transfer of detainees into the United States even for the purpose of trial.[30] In 2011, the administration announced that several high-value detainees would be tried by military commission after all.

In recent years, under pressure from the Reporters Committee for Freedom of the Press and the National Institute of Military Justice,[31] the armed forces have taken steps to make information about pending military justice cases available to the public in order to facilitate media coverage and public attendance. On the other hand, the Defense Department ignored requests for notice-and-comment rule-making when it issued a new *Manual for Military Commissions* in 2010.[32] It also needlessly added to doubts about the military commission system by barring from Guantánamo four journalists who reported the name of a witness, Sergeant Joshua Klaus, who had been an interrogator, even though he had previously given a newspaper interview and, indeed, had been prosecuted for misconduct as an interrogator.[33]

But if the U.S. military justice system continues to enjoy an excellent reputation, it remains imperfect[34] and suffers from a lack of sustained, knowledgeable oversight by Congress.[35] As more Iraq and Afghanistan veterans attend law school and enter public life, the number of knowledgeable federal legislators can be expected to increase from its current low level.

It has been said that "due process enhances discipline."[36] But what process is due? In a number of respects, the U.S. military justice system does not comport with contemporary international standards. Those standards disfavor the use of military courts to try civilians or retired military personnel. Similarly, they disfavor the use of military courts to try civilian-type offenses that lack service connection, even if the offenses are committed by active-duty military personnel.[37] The military justice system is "command centric" in that key decisions as to who should be prosecuted, on which charges, and at which level of court-martial are in the hands of commanders rather than prosecutors or independent court administrators. The Supreme Court found that the Constitution does not require military judges to have the protection of fixed terms of office.[38] They in effect serve *as judges* at the pleasure of the service, with "the needs of the service" as the controlling consideration. Although the Army and the Coast Guard have voluntarily instituted judicial terms of office,[39] their regulations have significant loopholes, and the other branches have not even done that.[40]

This interservice disparity is itself a useful reminder that, despite its name, the UCMJ does not provide a uniform sys-

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tem; in important respects the administration of military justice is organized and regulated on a service-by-service basis. A remarkable example is the fact that the services cannot even agree on a single burden of proof for nonjudicial punishment[41] or a single set of rules of professional responsibility. The services continue to maintain separate major training facilities for judge advocates. These are located at Charlottesville, Virginia (Army), Newport, Rhode Island (Navy-Marine Corps), and Montgomery, Alabama (Air Force). That Congress continues to tolerate such an extravagance is astounding, especially in an era of austerity. As long as the central governing document of military law purports to establish a uniform system, judge advocate instruction should be "purple" – that is, truly integrated.

Perhaps the UCMJ's most glaring deficiency is the fact that most courts-martial are never eligible for review by the U.S. Supreme Court. Until Congress provided for direct Supreme Court review of court-martial cases in the Military Justice Act of 1983, courts-martial could only reach the highest court by the circuitous means of habeas corpus petitions or other forms of collateral review in the federal courts. This changed in the 1983 Act, but that measure excluded from direct Supreme Court review cases in which the then-Court of Military Appeals had exercised its power under the UCMJ to deny discretionary review.[42] That limitation distinguishes courts-martial from all other criminal cases decided by the federal and state courts and should be repealed. The U.S. situation is not as dismal as, for instance, that of Pakistan, where the government has thwarted access to that nation's supreme court by refusing to release the necessary court-martial records of trial in sensitive cases.[43] Nonetheless, it is indefensible that the U.S. system denies persons who have served the country the same chance – slight though it may be – as any other American of having the highest court of the land review their case.

Management of the military legal program has had its ups and downs in recent years, but for the most part, it has enjoyed success. The Defense Department has benefited from a tradition of highly qualified attorneys called from private life to serve as general counsel. That tradition was violated during the Bush administration, with devastating effects in connection with the use of torture on detainees. To their credit, the judge advocates general stood firm, although perhaps too discreetly, in resisting the then-general counsel's efforts to secure their agreement to interrogations that violated Common Article 3 of the Geneva Conventions[44] as well as the Convention Against Torture.[45] None of them resigned in protest, but they still deserve credit: their efforts helped protect American service members by permitting us to argue to others that as a matter of policy and principle we do not abuse prisoners. Unfortunately, Congress has effectively granted impunity to those who violated both policy and principle and did torture detainees in the country's name.[46] There is no serious congressional or executive branch movement to ensure a full accounting (much less punishment).

In 2008, Congress provided that judge advocates general would serve in the grade of lieutenant general and vice admiral,[47] on the theory that this would afford them a stronger voice in the highest councils of their branch. Even though the number of flag and general officers seems to rise inexorably, this change reflects the constructive role these officers played in fending off what might have been an

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even more catastrophic injury to America's international reputation as a result of the Bush administration's willingness to indulge in torture under the euphemism of "enhanced interrogation techniques."

For many years, controversy smoldered over the respective roles of the judge advocates general and the civilian service general counsels. Which of these officials was the service secretary's primary legal advisor?[48] This was the subject of a congressionally directed[49] panel cochaired by former Secretary of the Army John O. Marsh and former Secretary of the Air Force F. Whitten Peters. The resulting report had a calming effect, but its only specific recommendations were to elevate the judge advocates general to three-star rank and retain the requirement that general counsels be appointed by the president and confirmed by the Senate.[50] Congress also mandated a review of the provision of legal services within the Navy and Marine Corps.[51] The results of that review remain under study.

Recruitment and retention of judge advocates appear to be satisfactory. In part, this clearly reflects patriotic sentiment. To some extent, however, it also reflects the general economic downturn and reduced professional opportunities for attorneys in the private sector.

With respect to personnel-related legal issues within the force as a whole, the "Don't Ask, Don't Tell" (DADT) statute Congress enacted in 1993 was controversial until its repeal at the end of 2010. It caused unimaginable pain to serving personnel and the loss of more than twelve thousand members, many of whom possessed urgently needed language and other skills, or fine combat records, or both. In addition to the direct impact on the services, DADT was an enduring source of friction with the legal academy. Despite the Solomon Amendment's provision for cutting off federal funds to noncompliant institutions of higher learning,[52] some law schools refused to permit military recruiting through normal placement channels on the grounds that DADT made the military a discriminatory employer. The government ultimately prevailed in the Solomon Amendment litigation,[53] and it is to be hoped that relations between these two important institutions will continue to improve. Part of the healing process may lie in the increasing flow of talented recent veterans into law schools – as students and, in a few cases, as faculty. The number of schools offering courses in military law is increasing. This is an important development because, in a democratic society, the military should not have a monopoly on learning in the field of military justice.[54]

The military is a microcosm – albeit a big one – of American society. As a result, many of the legal issues that confront Americans generally also appear within the armed forces. For example, legal issues are likely to emerge within the services as a result of such broader societal phenomena as large-scale gangs[55] and other forms of extremism; the continuing upsurge in religious (especially, but not only, Evangelical) fervor; and the sudden appearance of the Tea Party. At times, these developments may interact in powerful ways. In the next several years, we may face resistance by chaplains from some faith groups to the repeal of DADT. Reconciling personal belief systems with the need for a disciplined, cohesive fighting force will continue to occupy the military lawyers on whom commanders increasingly rely.

Operational law is "[t]hat body of domestic, foreign, and international law that impacts specifically upon the activities of U.S. forces in war and operations other than war. . . . It is a collection of diverse legal and military skills, focused on

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military operations. It includes military justice, administrative and civil law, legal assistance, claims, procurement law, national security law, fiscal law, and international law."[56] Operational law can no longer be described as "a growth area." It has grown. With the years-long conflicts in Iraq and Afghanistan, vast numbers of judge advocates have supplemented their training at service and civilian law schools with practical experience advising commanders at all levels of their duties under the law of armed conflict. In operational settings as volatile as those in which the United States and its allies have been engaged since 9/11, utmost care is critical in targeting and other decisions, since the slightest miscue can have devastating and virtually immediate effects not only on the battlefield but around the world as a result of contemporary instantaneous communications. New ways of exerting military force, such as drones operated at an enormous remove from the traditional battle space, have triggered heated debate, especially if the operators are not uniformed personnel.[57] The decision to employ drones to target an American citizen has raised additional concerns.[58]

Two important developments in operational law highlight the partnership between the government and universities. The first of these, the *Manual on International Law Applicable to Air and Missile Warfare* (and its accompanying *Commentary*) was developed by the Program on Humanitarian Policy and Conflict Research at Harvard University. The second is the long-awaited *Department of Defense Law of War Manual*, the product of a decade-long effort spearheaded by Colonel W. Hays Parks.[59] Together, the publications mark a new chapter in which – notwithstanding the many changes that warfare and the law of armed conflict have witnessed in recent decades – commanders in the field and their legal advisors will be better equipped to uphold the United States' commitment to meticulous compliance with international law.

A further aspect of operational law concerns *lawfare*. Major General Charles J. Dunlap, Jr., the concept's leading expositor, describes it as a "strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective."[60] The virtues of this form of power include reduced risk to the wielder and to human life in general. It is also likely to decrease the taxpayers' burden. A major question surrounding lawfare is its impact on the division of labor and authority between the commander and the commander's legal advisor. Unless carefully monitored by both attorney and client, there could be a danger of legal mission creep.

Military operations also have post-operational aspects. One is the obscure but important task of examining and paying claims and making ex gratia payments. The timely and intelligent performance of this largely thankless task can pay handsome dividends in mitigating the hard feelings that inevitably arise from the collateral damage caused by military operations, even where local sentiment favors those operations.

A final indicator of the role of law within the military ironically takes us outside the military. It concerns the extent to which the federal courts defer to military decision-making. Congress long ago excluded certain military actions from the Administrative Procedure Act.[61] Decisions on security clearances remain off-limits.[62] Nonetheless, a good deal of military decision-making is subject to judicial review for compliance with the Constitution, statutes, and agency regulations, or to ensure that decisions are supported by substantial evidence and are not arbitrary and capricious, or an abuse of

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discretion.[63] Important personnel matters, such as the correction of military records or discharge upgrades, remain subject to judicial review, although the courts have in recent years tended to adopt a highly deferential standard.[64] While the extent of deference varies from circuit to circuit and, on the Supreme Court, from justice to justice,[65] it is ever-present and works powerfully in the government's favor. Barring the kind of grave issues that have repeatedly been presented in the Guantánamo detention and military commission cases,[66] the military typically has little to fear from the federal courts.[67] And when it does lose, some powerful reason is almost certainly at work.[68]

The end of the Cold War did not bring an end to military law any more than it brought an end to military readiness or operations. The new era is one in which new challenges have already arisen with remarkable rapidity and kaleidoscopic variety. As technology (including weapons and intelligence-gathering systems, cyberwarfare, ubiquitous Internet access, digital photography, cellular telephones, and the blogosphere), national policy, and expectations of proper treatment (of our own personnel, civilians, and enemies of various kinds) evolve, this will be an increasingly dynamic era for law and legal institutions in the realm of national defense.

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ENDNOTES

[1] National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, 110th Cong. (2008), sec. 543, 122 Stat. 3, 114.

[2] *United States v. Denedo*, 129 S. Ct. 2213, 2225 (2009) (Roberts, C.J., dissenting) (quoting *Reid v. Covert*, 354 U.S. 1, 35 – 36 (1957) (plurality opinion)). At issue was whether a former Navy enlisted man who was a Nigerian citizen could invoke the ancient writ of error coram nobis in order to obtain review of his claim that he had been misadvised about the immigration implications of pleading guilty in a special court-martial. The Chief Justice's dismissive characterization of military justice prompted one of the judges of the U.S. Court of Appeals for the Armed Forces to respond in another case. *Loving v. United States*, 68 M.J. 1, 28 n.11 (C.A.A.F. 2009) (Ryan, J., dissenting). In the interest of full disclosure, I should state that I was one of Petty Officer Denedo's attorneys in the Supreme Court.

[3] See U.S. Const. amend. 5 (no requirement for indictment by grand jury for cases arising in the land and naval forces and in the militia when in actual service in time of war or public danger). Article 36(a) of the Uniform Code of Military Justice (UCMJ) states that except as otherwise provided in the statute, court-martial procedures shall, so far as the president considers practicable, apply the principles of law and the rules of evidence generally recognized in civilian federal criminal trials; see 10 U.S.C. sec. 836(a).

[4] *Nonjudicial punishment* is summary discipline imposed by commanders for minor offenses. It is authorized by article 15 of the UCMJ; see 10 U.S.C. sec. 815. Depending on the branch of service, it may be called "NJP," "Article 15," "captain's mast" (as it is referred to in the Navy and Coast Guard), or "office hours" (as it is known in the Marine Corps). It is not a criminal proceeding, although it can only be imposed for offenses under the UCMJ.

[5] Each level of court-martial may also impose additional kinds of punishments. See generally arts. 16, 18 – 20, UCMJ, 10 U.S.C. sec. 816, 818 – 820; *Manual for Courts-Martial, United States* (2008 edition), Rule for Courts-Martial 1003.

[6] Lawrence J. Morris, "Our Mission, No Future: Closing the United States Army Disciplinary Barracks," *The Kansas Journal of Law & Public Policy* 6 (1996): 77.

[7] Email message to the author from U.S. Army Colonel Shawn Shumake, Director of the Office of Legal Policy, Office of the Under Secretary of Defense for Personnel and Readiness, November 30, 2010. The original plan, in 1994, was for a facility with the slightly higher capacity of 510. See Peter J. Grande, *Images of America: United States Disciplinary Barracks* (Charleston, S.C.: Arcadia, 2009), 8. Lieutenant Colonel (ret.) Peter Grande is Chief of Staff of the U.S. Disciplinary Barracks.

[8] Art. 71(a), UCMJ, 10 U.S.C. sec. 871(a).

[9] I am indebted to Colonel Dwight H. Sullivan, the leading expert on the military death penalty, for information about past and current military capital cases.

[10] Military Police, *U.S. Army Corrections System: Procedures for Military Executions*, Army Regulation 190-55 (Washington, D.C.: Headquarters, Department of the Army, January 17, 2006), sec. 3-1.

[11] See Major Franklin D. Rosenblatt, "Non-Deployable: The Court-Martial System in Combat from 2001 to 2009," *The Army Lawyer*, Department of the Army Pamphlet 27-50-448 (September 2010), 12, 15 n.14. Major Rosenblatt discusses analyses by the Army Center for Law and Military Operations of after-action reports.

[12] See art. 88, UCMJ, 10 U.S.C. sec. 888.

[13] Where the fault lies remains a matter of dispute; see Thom Shanker, "McChrystal Article Inquiry Leaves Questions Open," *The New York Times*, September 23, 2010, http://www.nytimes.com/2010/09/23/world/asia/23military.html?ref=stanley_a_mcchrystal.

[14] Associated Press, "Maryland: Obama-Doubting Army Doctor Sentenced," *The New York Times*, December 17, 2010. See U.S. Const. art. II, sec. 1, cl. 5.

[15] On the arrest of Army Specialist Bradley Manning, see Elisabeth Bumiller, "Army Leak Suspect Is Turned In, by Ex-Hacker," *The New York Times*, June 8, 2010. To see the full video of civilians killed in Baghdad that was released by WikiLeaks, visit http://www.youtube.com/verify_age?next_url=http%3A//www.youtube.com/watch%3Fv%3Dis9sxRfU-ik. Subsequent leaks have involved vast quantities of U.S. diplomatic reports. Reactions to the leaks have included pursuit of WikiLeaks founder Julian Assange, efforts by various governments and private entities to thwart fundraising and further dissemination of the leaked documents, and threatened as well as actual retaliation by WikiLeaks supporters. See, for example, Ravi Somaiya, "Activists Say Web Assault for Assange is Expanding," *The New York Times*, December 11, 2010.

[16] 350 U.S. 11 (1955).

[17] *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

[18] Art. 2(a)(10), UCMJ, 10 U.S.C. sec. 802(a)(10).

[19] 18 U.S.C. sec. 7.

[20] 18 U.S.C. sec. 3261 et seq.

[21] General courts-martial may also try "any person who by the law of war is subject to trial by a military tribunal"; see art. 18, UCMJ, 10 U.S.C. sec. 818, but they have not been used for this purpose since the UCMJ took effect in 1951. Military commissions now have their own statute and procedural manual and are subject to appellate review by courts other than those established by the UCMJ.

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[22] *Ex parte Milligan*, 71 U.S. 2 (1866). After prevailing in the Supreme Court, Milligan won nominal damages against those responsible for his arrest, trial, and imprisonment; *Milligan v. Hovey*, 17 F. Cas. 380 (Cir. Ct. D. Ind. 1871). He was represented in that case by Benjamin Harrison, who later served as twenty-third president of the United States.

[23] Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (2001).

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

[25] 548 U.S. 557 (2006).

[26] The current statute is codified at 10 U.S.C. chap. 47A.

[27] See *United States v. Khadr*, 1 M.C. 223 (2008) (denying motion to dismiss for lack of jurisdiction).

[28] See *United States v. Ghailani*, 1 M.C. 387 (2009) (amended trial schedule).

[29] *United States v. Ghailani*, Crim. No. S10 98-1023 (S.D.N.Y. 2010). See generally Charlie Savage, "Terror Verdict Tests Obama's Strategy on Trial," *The New York Times*, November 18, 2010.

[30] Charlie Savage, "Holder Denounces a Bill to Bar Detainee Transfers," *The New York Times*, December 10, 2010.

[31] The Reporters Committee for Freedom of the Press, "Military Dockets: Examining the Public's Right of Access to the Workings of Military Justice" (Arlington, Va.: RCFP, August 2008), http://www.rcfp.org/militarydockets/whitepaper.pdf.

[32] Jonathan Tracy, "Revise Army Manual in Public," *The Miami Herald*, March 31, 2010, http://www.miamiherald.com/2010/03/31/1555969/revise-army-manual-in-public.html.

[33] "Veteran Reporter Barred from Guantanamo," *On the Media*, NPR, May 14, 2010, http://www.onthemedia.org/transcripts/2010/05/14/01.

[34] See, for example, Kevin J. Barry, "A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice," *Law Review of Michigan State University – Detroit College of Law* 57 (2002).

[35] Donald N. Zillman, "Where Have All the Soldiers Gone II: Military Veterans in Congress and the State of Civil-Military Relations," *Maine Law Review* 58 (2006): 135.

[36] Lieutenant General Richard C. Harding, Judge Advocate General, U.S. Air Force, "A Revival in Military Justice," *The Reporter* 37 (2) (Summer 2010): 4 – 5.

[37] See, for example, Commission on Human Rights, *Draft UN Principles Governing the Administration of Justice Through Military Tribunals*, E/CN.4/2006/58, January, 13, 2006. The Supreme Court abandoned the service-connection requirement in *Solorio v. United States*, 483 U.S. 435 (1987). The decision overruled *O'Callahan v. Parker*, 395 U.S. 258 (1969).

[38] *Weiss v. United States*, 510 U.S. 163 (1994). This ruling dramatically highlights the stark distinction between military justice and civilian criminal justice. Justice Scalia observed in his concurring opinion:

> [N]o one can suppose that similar protections against improper influence [as provided in the UCMJ] would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive. I am confident that we would not be satisfied with mere formal prohibitions in the civilian context, but would hold that due process demands the structural protection of tenure in office, which has been provided in England since 1700, see J. H. Baker, An Introduction to English Legal History 145 – 146 (2d ed. 1979), was provided in almost all the former English colonies from the time of the Revolution, see Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 S. Ct. Rev. 135, 138 – 147, and is provided in all the States today, see National Center for State Courts, Conference of State Court Administrators, State Court Organization 1987, pp. 271 – 302 (1988). (It

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is noteworthy that one of the grievances recited against King George III in the Declaration of Independence was that "he has made Judges dependent on his Will alone, for the tenure of their offices.") Id. at 198–199 (Scalia, J., concurring in part and in the judgment).

39 Legal Services, Military Justice Army Regulation 27-10, sec. 8-1*g*, 13-13 (November 16, 2005) ("AR 27-10"); U.S. Coast Guard, Commandant Inst. M5810.1E, Military Justice Manual sec. 6.E (May 2011). The disparity was upheld in *Oppermann v. United States*, 2007 U.S. Dist. LEXIS 43270 (D.D.C.), aff'd mem., 2007 U.S. App. LEXIS 26169 (D.C. Cir. 2007).

40 The disparity was upheld in *Sanford v. United States*, 586 F.3d 28 (D.C. Cir. 2009).

41 Only the Army requires proof beyond a reasonable doubt (the standard for civilian criminal trials and courts-martial) in Article 15 proceedings; AR 27-10 secs. 3-16*d*(4), 3-18*l*, and Appendix B-2 n.2. Another discrepancy is that because of the "vessel exception," Navy and Coast Guard personnel often lack the right to reject nonjudicial punishment. See art. 15(a), UCMJ, 10 U.S.C. sec. 815(a); see generally Major Dwight H. Sullivan, "Overhauling the Vessel Exception," *Naval Law Review* 43 (1996): 57. A recent proposal would also deny the refusal right to those serving in a combat zone. Rosenblatt, "Non-Deployable," 32–34.

42 28 U.S.C. sec. 1259(3); art. 67a(a), UCMJ, 10 U.S.C. sec. 867a(a). The UCMJ still requires "good cause" for the Court of Appeals for the Armed Forces to grant review; art. 67(a)(3), UCMJ, 10 U.S.C. sec. 867(a)(3). This is in sharp contrast to the geographical courts of appeals, whose appellate jurisdiction is not discretionary: a litigant in those courts need not show good cause to secure review of final judgments in criminal cases; 28 U.S.C. sec. 1291; Federal Rules of Appellate Procedure 4(b) (criminal appeals as of right).

43 See *Akram v. Federation of Pakistan*, S.P. Nos. 04/I/1993, 44/I/1993 (Pak. Fed. Shariat Ct. 1993) (directing government to amend rules to ensure right of court-martial defendants to copies of case records). The case is discussed in Umar Cheema, *Military Courts vs. Supreme Court?, Commandos Seek Supreme Court's Intervention*, http://forum.pakistanidefence.com/index.php?showtopic=89239. The journalist who prepared this story was later abducted, beaten, and publicly humiliated; see Bob Dietz, "The Significance of Umar Cheema's Abduction," Committee to Protect Journalists, September 9, 2010, http://cpj.org/blog/2010/09/the-significance-of-umar-cheemas-abduction.php; Jane Perlez, "Pakistani Journalist Speaks Out After an Attack," *The New York Times*, September 25, 2010. See also "Who Attacked Umar Cheema?" *The New York Times*, September 29, 2010. In *Anderson v. Harrison*, Misc. Dkt. No. 20051419 (A.C.C.A. Feb. 2, 2006) (dismissed as moot), a soldier confined at the U.S. Disciplinary Barracks had to seek an extraordinary writ in order to be able to retain his art. 54(d), UCMJ, 10 U.S.C. sec. 854(d), copy of the record of trial in his cell.

44 Geneva Conventions of 1949, Common Article 3.

45 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984); entered into force June 26, 1987.

46 Detainee Treatment Act of 2005, Public Law 109-148, sec. 1004, 119 Stat. 2740 (2005), codified at 42 U.S.C. sec. 2000dd-1. This provision for the "Protection of United States Government personnel" "relates to actions occurring between September 11, 2001, and December 30, 2005." See Military Commissions Act of 2006, Public Law 109-366, sec. 8(b), 120 Stat. 2636 (2006), reproduced in 42 U.S.C. sec. 2000dd-1 note.

47 See National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, 122 Stat. 3, 114 (2008).

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[48] See generally Lieutenant Commander Kurt A. Johnson, "Military Department General Counsel as 'Chief Legal Officers': Impact on Delivery of Impartial Legal Advice at Headquarters and in the Field," *Military Law Review* 139 (1) (1993).

[49] See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375, sec. 574, 118 Stat. 1811 (2004).

[50] See Independent Review Panel to Study the Relationships Between Military Department General Counsels and Judges Advocates General, *Legal Services in the Department of Defense: Advancing Productive Relationships*, September 15, 2005, 68 and 68 n.189, http://www.wilmerhale.com/files/Publication/35196dbc-fad7-45ad-bc44-5c27d03b4897/Presentation/PublicationAttachment/745b0324-5de9-4d69-8d6f-5fec9cf3761f/Preston_DODReport_0905.pdf. The senior uniformed lawyer position in the Marine Corps – the Staff Judge Advocate to the Commandant – would be elevated to Major General.

[51] National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84, sec. 506, 123 Stat. 2190, 2274 (2009).

[52] 10 U.S.C. sec. 983(b)(1).

[53] *Rumsfeld v. F.A.I.R.*, 547 U.S. 47 (2006).

[54] See generally Eugene R. Fidell, "Military Justice Instruction in Civilian Law Schools," *Journal of Legal Education* 60 (1) (2011).

[55] See Gustav Eyler, "Gangs in the Military," *Yale Law Journal* 118 (2009): 696.

[56] International and Operational Law Division, The Judge Advocate General's School of the Army, Operational Law Handbook A-1 (1994).

[57] Peter Singer identifies some of the thorny legal questions that may arise from the use of robotics for military purposes in Peter W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (New York: Penguin, 2009), chap. 20.

[58] See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

[59] See generally W. Hays Parks, Senior Associate Deputy General Counsel (International Affairs), Department of Defense, "National Security Law in Practice: The Department of Defense Law of War Manual," remarks at a meeting of the American Bar Association Standing Committee on Law and National Security, University Club, Washington, D.C., November 18, 2010, http://www.abanet.org/natsecurity/hays_parks_speech11082010.pdf.

[60] Charles J. Dunlap, Jr., "Does Lawfare Need an Apologia?" remarks at the Frederick K. Cox International Law Center War Crimes Research Symposium on Lawfare, Case Western Reserve School of Law, September 10, 2010. General Dunlap's remarks are published in *Case Western Reserve Journal of International Law* 43 (March 2011). See also U.S. Army Brigadier General Mark Martins, "Reflections on 'Lawfare' and Related Terms," *Lawfare*, November 18, 2010, http://www.lawfareblog.com/2010/11/reflections-on-%E2%80%9Clawfare%E2%80%9D-and-related-terms. General Martins notes alternative meanings, such as *unfair*, *"War"-fare*, and *counterinsurgency*.

[61] 5 U.S.C. sec. 551(1)(F) – (G) (courts-martial, military commissions, military authority exercised in the field in time of war or in occupied territory).

[62] *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

[63] 5 U.S.C. sec. 706. At times, the Constitution can even stand in the way of what seems to be the clear demand of military personnel legislation. Thus, in *Dysart v. United States*, 393 F.3d 1303 (Fed. Cir. 2004), and its progeny, what certainly seemed to be a requirement of the

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Defense Officer Personnel Management Act that promotions improperly or unduly delayed would take effect by operation of law, see 10 U.S.C. sec. 624(a)(2), fell afoul of the Supreme Court's treatment of the Appointments Clause, U.S. Const. art. II, sec. 2, cl. 2, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155 – 156 (1803).

[64] See, for example, *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989).

[65] See generally Eugene R. Fidell, "Justice John Paul Stevens and Judicial Deference in Military Matters," *UC Davis Law Review* 43 (2010): 999.

[66] See, for example, *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008).

[67] See, for example, *Winter v. NDRC*, 555 U.S. 7 (2008) (effect of antisubmarine warfare exercises on marine mammals). The Supreme Court shows no signs of overruling its own decision in *Feres v. United States*, 340 U.S. 135 (1950), which effectively immunizes the government from tort claims by military personnel. Efforts to secure corrective action from Congress have also fallen on deaf ears despite the terrible facts of a number of cases (involving, for example, medical malpractice) in which it seems impossible to justify denying conventional tort damages.

[68] See generally John F. O'Connor, "Statistics and the Military Deference Doctrine: A Response to Professor Lichtman," *Maryland Law Review* 66 (2007): 668.

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