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## Appellate Review of Courts-Martial in the United States

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KEYNOTE SPEECH

APPELLATE REVIEW OF COURTS-MARTIAL IN THE  
UNITED STATES

*January 24, 2020*

*Chief Judge Scott W. Stucky<sup>+</sup>*

*United States Court of Appeals for the Armed Forces*

William Tecumseh Sherman was one of the greatest commanders of the 19<sup>th</sup> century. His accomplishments in the Civil War are immortal, and he became Commanding General of the Army. Less known is the fact that he briefly, and without much success, practiced law in, of all places, Leavenworth, Kansas. Sherman expressed himself vigorously on the subject of law and the armed forces. I read this quote because it illustrates the accepted view of the subject for much of the nation's history and helps to explain some of what I intend to cover in speaking of the development of appellate review of courts-martial:

[I]t will be a grave error if, by negligence, we permit the military law to become emasculated by allowing lawyers to inject into it principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.

The object of the civil law is to secure to every human being in a community all the liberty, security and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.

These objects are as wide apart as the poles, and each requires its own separate system of laws— statute and common. 'An army is a collection of armed men obliged to obey one man.' Every enactment, every change of rule which impairs the principle weakens the army, impairs its value, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and

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<sup>+</sup> President George W. Bush appointed Scott W. Stucky to the United States Court of Appeals for the Armed Forces on December 20, 2006. He became Chief Judge on August 1, 2017. He graduated from Wichita State University, where he received a commission as a second lieutenant, U.S. Air Force Reserve, through ROTC. He then attended Harvard Law School, from which he graduated in 1973.

military men must meet them on the threshold of discussion, else armies will become demoralized by engrafting on our code their deductions from civil practice.<sup>1</sup>

The military justice system is the oldest system of federal jurisprudence in the United States—older than the Constitution, older even than the nation. Since we had an army before we had a nation, it was necessary to have a system for disciplining that army. The revolutionaries shared the traditional English distrust for standing armies, which dates back to Cromwell and James II. The Mutiny Act of 1689, which authorized discipline in the army and required annual parliamentary authorization for its existence, was Parliament's reaction to those excesses after the Glorious Revolution of 1688.<sup>2</sup>

The first American Articles of War were enacted by the Second Continental Congress in 1775. The Constitution, in Article I, section 8, gave Congress the power "To make Rules for the Government and Regulation of the land and naval Forces."<sup>3</sup> Congress reenacted Articles of War in 1806, 1874, 1916, and 1920. Articles for the Government of the Navy, separate from the Articles of War, were also enacted, first in 1799.

The Constitution also provided, in Article III, that "The judicial Power of the United States" was to be lodged in "one supreme Court" and such inferior courts as Congress might establish and that these courts should be staffed by judges appointed during good behavior.<sup>4</sup> So how did we end up with a separate system of military justice, staffed by judges who do not enjoy the Article III protections of life tenure and protection against salary reduction? Remember what General Sherman said about the different objects of military and civil law; the Framers were fully aware of them at the beginning of the Republic.

In fact, Congress has from the beginning lodged cases that would seem to be within the Article III judicial power in so-called "legislative courts," established by Congress under other constitutional provisions than Article III. While it is clear that Congress' authority to do this is broad, the limits of the power are by no means clear, as we shall see. The Supreme Court, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>5</sup>—a less-than-successful 1982 attempt to draw lines between matters that had to go to the Article III courts and those that did not—listed courts-martial as one of three traditional areas where Congress has used Article I courts.<sup>6</sup>

Courts-martial have therefore been understood from the beginning to be different, and to warrant separate constitutional treatment from civil or criminal

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1. WILLIAM T. SHERMAN, *MILITARY LAW*, 130 (W.C. & F.P. Church, 1880).

2. See *Court-martial*, BRITANNICA ONLINE ENCYCLOPEDIA (Apr. 12, 2018), <https://www.britannica.com/topic/court-martial-military-law>; *English Bill of Rights*, HISTORY (Mar. 6, 2018), <https://www.history.com/topics/british-history/english-bill-of-rights>.

3. U.S. CONST. art. I, § 8, cl. 14.

4. U.S. CONST. art. III, § 1.

5. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

6. *Id.* at 71.

controversies in the Article III courts. They stand on a different, but equally valid, constitutional foundation (Article I rather than Article III), and they have a purpose beyond doing justice and resolving controversies (*viz.*, to ensure good order and discipline in the armed forces) which has no civilian analogue. Their function also imports certain requirements (portability, speed, the use of lay personnel) which do not appear in the civil courts.

The traditional understanding of the relations of courts-martial to the Article III courts was set out in *Dynes v. Hoover*<sup>7</sup>, where a sailor who had been convicted of attempted desertion by a naval court-martial brought an action of assault and battery and false imprisonment.<sup>8</sup> The Court stated:

Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other . . . . With the sentences of courts martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law . . . civil courts have nothing to do, nor are they in any way alterable by them.<sup>9</sup>

In other words, if a court-martial was properly convened, had jurisdiction over the person and the offense, and followed whatever internal rules were prescribed to govern courts-martial, that ended the matter. The Article III courts would go no further (and remember, this was collateral, not direct review.) The accused had whatever rights Congress elected to give him, or the customs of the service required, and no more. Remember, for instance, that flogging was not abolished in the Navy until 1850, and in the Army until 1861.

Although the Civil War resulted in the mobilization of millions of men, there was no move to change the court-martial system until World War I. We like to think of judicial review as one of those things which has always been around—a view we probably get from the Langdellian method of teaching law through the close study of appellate opinions (itself a post-Civil War novelty.) In fact, direct judicial review of courts-martial was unknown until after World War II. (For that matter, general judicial review of civilian federal criminal convictions did not begin until 1891, with the inception of the Circuit Courts of Appeals.)

Until after World War I, there was no review of courts-martial under the Articles of War other than by the convening authority, except in a very few cases involving the death penalty, dismissal of an officer, or general officers. The President was required to confirm death sentences (with certain wartime

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7. *Dynes v. Hoover*, 61 U.S. 65 (1858).

8. *Id.* at 77

9. *Id.* at 79, 82.

exceptions), dismissals of officers and cadets in peacetime, and all sentences involving general officers.

The Navy had even less due process. The tradition of reposing absolute authority in the captain of a ship was so strong that no formal review existed at all until the Civil War, and then only in capital cases.

Two controversies, one in each service, focused public attention on the systems of military justice and eventually resulted in limited reform, although wholesale change had to wait until after World War II.

The Navy's controversy was the alleged mutiny on the ship *Somers* in 1842.<sup>10</sup> The ship was on a cruise intended to train midshipmen who would become naval officers. The captain, Alexander Slidell Mackenzie, heard rumors that one of the midshipmen, Philip Spencer, was conspiring with sailors to take over the ship and convert her into a pirate. Mackenzie was no buffoon; he was a cultured man who was a distinguished author and naval historian. One of his brothers was later a United States Senator from Louisiana. Spencer was, to put it mildly, a behavior problem, who had been thrown out of colleges and engaged in a drunken brawl on another ship. He was sullen, disobedient, and given to fraternizing with the ship's enlisted men. Unfortunately for Mackenzie, he was also the son of the current Secretary of War, a New York politician named John C. Spencer, whose connections had gotten him the naval appointment and kept him from being dismissed. Mackenzie was at first inclined to disregard the allegations, but eventually put Spencer and two enlisted men in irons. Over the next few days, matters went from bad to worse; discipline among the crew declined and several more men were put in irons, calling into question whether the remaining crew could run the ship. Eventually Mackenzie convened a council of the officers of the ship, which heard substantial ex parte testimony from members of the crew. Based on this and on a paper made by Spencer written partially in Greek, the council recommended Spencer and two sailors be put to death. Although the ship was only a few days out of the Virgin Islands at the time, Mackenzie thought the situation too dangerous to wait and ordered the sentence executed.

There were multiple legal problems with the affair. Mackenzie had no authority to convene a general court-martial, and, even if he had, there were not enough senior officers on board the *Somers* to constitute one. The accused were not afforded even the limited rights then prescribed for naval courts-martial; they were not present and could not confront or question the witnesses or other evidence against them.

Needless to say, the news that the Secretary of War's son had been hanged caused a political uproar. A naval court of inquiry was convened, which exonerated Mackenzie; but by that time, he had demanded a court-martial

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10. See Joshua Kastenbeg, *A Sesquicentennial Historic Analysis of Dynes v. Hoover and the Supreme Court's Bow to Military Necessity: From its Relationship to Dred Scott v. Sandford to its Contemporary Influence*, 39 U. MEM. L. REV. 595, 609–10 (2009).

himself. He was court-martialed on the orders of the Secretary of the Navy, a highly competent Virginian named Abel P. Upshur. The charges will be familiar to the judge advocates here: in addition to murder, they included conduct unbecoming and cruelty and maltreatment. The court-martial eventually found the charges “not proved,” though by a divided vote. The findings went to the convening authority, the Secretary, and were considered in a Cabinet meeting under President John Tyler. Secretary Spencer, far from recusing himself, called for a second trial. Secretary Upshur, backed by the President, saw it as an issue of double jeopardy. A fist fight broke out between the two secretaries, which Tyler helped quell.

The immediate legal effect of the affair was modest; when Congress overhauled the naval articles in 1862, it included a requirement that capital sentences be confirmed by the President.<sup>11</sup> The administrative consequences were far greater; the affair led directly to the founding of the U.S. Naval Academy in 1845, to replace the training of midshipmen at sea.<sup>12</sup> Finally, the literary consequences must be mentioned. The first lieutenant on the *Somers*, Gert Gansevoort, who had a distinguished career in the Civil War, was a cousin of the author Herman Melville. It is thought that Melville was inspired to write *Billy Budd* by the affair. Two other consequences are worthy of mention: President Tyler appointed Upshur Secretary of State later in 1843; in that office, he was active in the effort to annex the Republic of Texas. In February 1844, he was killed (along with the incumbent Secretary of the Navy) in the explosion of a naval gun on board the U.S.S. Princeton, which was conducting a VIP cruise on the Potomac River. President Tyler survived only because he was below decks at the time. So, Upshur, like Philip Spencer, died on a U.S. naval vessel. Spencer himself, before his naval career, had briefly been a student at Union College, where he was one of the founders of a fraternity, Chi Psi, which exists today. The fraternity immortalized him in a song, the refrain of which proclaims that “Humanity received a blow when Philip Spencer died.”<sup>13</sup> Humanity may or may not have received a blow, but Mackenzie’s naval career certainly did.

The Army situation, which had far greater immediate legal consequences, was the Houston mutiny of August 1917. The United States had entered World War I in April, and the Army was building an installation near Houston. The 3<sup>rd</sup> Battalion of the 24<sup>th</sup> Infantry was ordered to proceed from New Mexico, where it was doing Mexican border duty (this being the age of Pancho Villa,) to Houston to guard the construction site. The 24<sup>th</sup> was one of the two black

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11. An Act for the Better Government of the Navy of the United States, Pub. L. No. 37-204, Art. 19, 12 Stat. 600, 605 (1862).

12. Gary A. LaValley, *The Record—March 1998*, THE UNITED STATES NAVAL ACADEMY ARCHIVES, <https://www.archives.gov/publications/record/1998/03/us-naval-academy-archives.html>

(last visited May 31, 2020).

13. W.H. Ross, Jr., *Phillip Spencer*, CHI PSI FRATERNITY, <https://cdn.ymaws.com/www.chipsi.org/resource/resmgr/songbook/philipspencer.pdf>.

infantry regiments in the rigidly segregated Army. The commissioned officers were white, but all the NCOs and troops were black. After an encounter with the Houston police that resulted in the arrest and beating of two privates and a corporal, a group of soldiers took weapons from the camp armory and marched on the town. A violent encounter ensued, which left 20 people dead—four soldiers, four policemen, and 12 civilians. By the next day, order was restored, the soldiers were disarmed, and the battalion was sent back to New Mexico. Later, the whole regiment was transferred to the Philippines. The Commander of the Southern Department, Major General John Wilson Ruckman, convened at Fort Sam Houston in San Antonio, the largest mass court-martial in U.S. history, with 64 members of the battalion on trial for murder, mutiny, and related offenses. The court-martial panel included three brigadier generals, seven colonels, and three lieutenant colonels. Seven soldiers agreed to testify against others in exchange for clemency. Some two hundred witnesses testified over 22 days. There were very significant problems with testimony identifying those who took part in the violence, as the night was dark and rainy. In the end, virtually all the accused were convicted (41 received life sentences) and 13 were sentenced to death. While the Articles of War required presidential confirmation of capital sentences, there was an exception for convictions of murder, mutiny, and certain other offenses in wartime. The record of trial for each day of the court-martial was reviewed and approved that night by the departmental judge advocate. Thus, when the sentences were adjudged and the court-martial adjourned, the record of trial was almost immediately ready for action by General Ruckman, the convening authority, which was all that was required. The 13 men were hanged on 11 December. A public uproar ensued when the news came out, and less than three weeks later a War Department order prohibited the execution of any death sentence until it was reviewed in the Judge Advocate General's office. Shortly after, the War Department suspended all death sentences until they could be reviewed by the President. Two additional courts-martial eventually tried 55 more soldiers, six of whom were hanged after the President reviewed their cases and approved the sentences. In 1920, Congress amended the Articles of War to require the institution of boards of review in the office of the Judge Advocate General. These boards were not courts, but administrative entities that reviewed the records of trial for legal sufficiency and clemency. In World War II, branch boards of review were set up in the overseas theaters, which handled thousands of courts-martial. This system survived until 1948, when Congress enacted the Elston Act. That statute, among other reforms, established a Judicial Council made up of three general officers and continued the boards of review. The Judicial Council, while it provided a higher level of review, was still within The Judge Advocate General's office and was not a court, nor intended to be one. The Elston Act was opposed by the supporters of a uniform code and service unification because it was single-service legislation; it passed only by being incorporated into the peacetime draft bill that was making its way through Congress at the time. (A naval version of

the Act never went anywhere and the Air Force, after its separation from the Army, claimed that the Act did not apply to it.) In the end, the Elston regime only lasted two years. In 1950, it and the naval articles were replaced by the Uniform Code of Military Justice (UCMJ), the regime that, with modifications in 1968 and 1983, exists today.

Until 1950, there was still no direct judicial review of courts-martial, only collateral review by habeas corpus. In the Navy, the tradition of the supremacy of the captain at sea was so strong that there were not even boards of review until World War II.

After World War II, during which there were over two million courts-martial, 80,000 general court-martial convictions, several hundred death sentences, and nearly 150 executions, dissatisfaction with the administration of military justice resulted in a remarkable (by today's standards) degree of public consensus that change was necessary. Equally remarkable by today's standards was the willingness of Congress to put in years of effort to fix the problem. A panel headed by Professor Edmund M. Morgan of Harvard drafted a Uniform Code of Military Justice to replace both the Articles of War and the Articles for the Government of the Navy. Both Houses of Congress held extensive hearings, and in 1950, the Code was signed into law by President Truman.

One of the novelties of the UCMJ was the institution, for the first time, of direct civilian judicial review of courts-martial. This was not popular with many in the services, who felt that it threatened command prerogatives. (In fact, the Elston Act's Judicial Council, which provided administrative, not judicial, review within the Army, was an alternative that many judge advocates favored.)

In the end, however, the supporters of real judicial review won out, although the course of debate was by no means straightforward. In the House, the name "Judicial Council" was dropped because members thought it sounded too much like a "city council"; it was replaced by "Court of Military Appeals," a name that dated back to General Samuel Ansell's suggested reforms after World War I. The Morgan Committee had recommended a provision that authorized each of the service secretaries to appoint one judge. This survived internal Department of Defense ("DOD") review but was objected to by the Bureau of the Budget (now Office of Management and Budget ("OMB")), which likely pointed out the obvious Appointments Clause problems inherent in the provision, and held that the President should do the appointing. The draft bill was so modified and returned to Congress; in the House, Senate confirmation of the nominees was added. The other major issue—one which has raised its head from time to time over the years—was the tenure of the judges. The House thought that life tenure was necessary to depoliticize the Court and included it in the House bill. However, in the Senate the thinking was different. Senator Leverett Saltonstall, the ranking Republican on the Armed Services Committee, and the influential Senator Estes Kefauver thought that life tenure would make the Court a dumping ground for political hacks. Senator Richard Russell, who would later chair the Armed Services Committee for almost 15 years, was

opposed to life tenure for any judge on any court. The Senate inserted an eight-year term in its version of the bill. The present 15-year term, with initial staggering (15, 10, and 5 years) was arrived at in conference with the House. There was also some skirmishing over pension and retirement benefits for the judges, but that issue was not ultimately resolved until the 1990 amendments to the Code.

So, what do we have? What is the CAAF?

—Originally a three-member court, known as the U.S. Court of Military Appeals. At the height of service dissatisfaction with the Court around 1960, an Army commission recommended a court-packing plan which would have added two seats, to be appointed from retired military officers, for four-year terms. Although the three-judge size had inherent problems, this effort went nowhere. It was not until 1990 that the Court was expanded to its present five members. The name was changed to the U.S. Court of Appeals for the Armed Forces in 1994, at the same time that the Courts of Military Review (the old boards of review) were re-designated as Courts of Criminal Appeals.

The judges are appointed by the President, with Senate advice and consent, to 15-year terms. Originally, the President designated one judge as the chief judge, who remained chief until the President, or one of his successors, designated someone else. Thus, Robert Quinn, the original chief judge, served as such for almost 20 years until President Nixon designated someone else, and Chief Judge Robinson Everett was chief judge for virtually his whole tenure on the Court. Now, the chief judge is the senior judge who has not yet served as chief, and he serves five years or until his term expires, whichever comes first.

There is one unique provision on membership:

No person may be appointed as a judge within seven years after retirement from active duty as a regular commissioned officer.

This provision was obviously intended to emphasize the civilian nature of the court, and by extension the principle of civilian control of the armed forces. The Code has always required that the judges be appointed from civilian (formerly “civil”) life, but that phrase was undefined until the 1990 amendments to the Code. Indeed, when Judge Brosman was appointed in 1951, he was on active duty as an Air Force Reservist—a problem which was solved only by a hasty cutting of orders and a search for an appropriate civilian suit at a nearby haberdasher’s. In 1990, a prohibition on the appointment of any person who retired from an armed force with more than 20 years’ active service was inserted. This was replaced in 2013 by the present language, which tracks the requirements for the appointment of the Secretary of Defense.

The judges receive the same salary and clerk allowance as Article III circuit judges. Each judge is entitled to five chambers staff—normally three law clerks and two administrative people, although the individual judges have broad discretion in this area.

The court’s jurisdiction is set out in Article 67, UCMJ. There are three categories: capital cases, in which plenary review is mandatory; cases certified

by one of The Judge Advocates General (“TJAGs”), where some action, though not necessarily plenary consideration, is required; and petition cases (the great majority of them), where review is discretionary. The court thus works internally like the Supreme Court, not the Article III courts of appeals, in that much chambers time is spent in reviewing petitions and deciding what cases to review. The court always sits en banc, not in panels.

Normally, vacancies on the court are quickly filled, with a minimum of political fuss. Judge Ohlson’s nomination was an exception, although the delay in his confirmation had absolutely nothing to do with his qualifications and everything to do with unrelated political issues involving the Justice Department. One of the great advantages to Article I status is that legislative jurisdiction over the court and the UCMJ lies with the Armed Services Committees of Congress, not the Judiciary Committee. The court and the Code benefit greatly from knowledgeable oversight by members and staff who care about these areas of law. The same is true, in normal times, with respect to the Senate Armed Services Committee and nominations to the court.

With that, I will close and take your questions. I want to commend the staff of the *Law Review* for choosing military justice as the subject for its Symposium. The subject and its practitioners can only benefit from this kind of scholarly attention. Too often it is walled off in specialized publications not known to the civilian bench and bar, let alone the general public. Thank you for all the work you have put into this endeavor.