

Advance Policy Questions for Margaret A. Ryan
Nominee to be Judge of the United States Court of Appeals for the Armed Forces

Duties

Subchapter XII of chapter 47 of title 10, United States Code, establishes the United States Court of Appeals for the Armed Forces (USCAAF) and provides for its organization and administrative procedures.

What is your understanding of the duties and functions of USCAAF and its judges?

It is my understanding that the function of the United States Court of Appeals for the Armed Forces (“USCAAF”) is to provide civilian oversight of the military justice system through independent judicial review of the intermediate military courts, in accordance with its jurisdiction. The scope of the USCAAF’s jurisdiction is set forth in Article 67 of the Uniform Code of Military Justice (“UCMJ”), and includes mandatory review of all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death; cases reviewed by a Court of Criminal Appeals that a service Judge Advocate General orders sent to the USCAAF for review; and discretionary review of cases reviewed by a Court of Criminal Appeals, upon petition of the accused. The USCAAF also has jurisdiction to consider petitions for extraordinary relief under the All Writs Act, 28 U.S.C. § 1651.

The duty of the USCAAF’s judges is to ensure independent civilian oversight of the military courts through appellate review of the decisions of the criminal courts of appeal, and to provide guidance to the military trial courts and criminal courts of appeal through the opinions of the USCAAF.

The judges of the USCAAF have another statutory duty, which is advisory rather than judicial in nature. The judges of the USCAAF are part of the Code Committee, prescribed by Article 136 of the UCMJ. The Code Committee is tasked with providing an annual report to this Committee and to the Secretary of Defense, among others. The report includes information on the number and status of pending cases and any recommendations relating to the uniformity of policies as to sentences or proposed amendments to the UCMJ.

What background and experience do you possess that you believe qualifies you to perform these duties?

My background and experience includes service in the U.S. Marine Corps as a communications officer, a company and platoon commander, a judge advocate, and the Aide de Camp to the 31st Commandant of the Marine Corps (General Charles G. Krulak); service as a law clerk to two federal appellate judges (the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States, and the Honorable

J. Michael Luttig, Circuit Judge of the U.S. Court of Appeals for the Fourth Circuit); and representation of private sector clients in a variety of litigation forums throughout the United States, currently as a Partner in the litigation and appellate practices at the law firm of Wiley Rein & Fielding LLP. At all times, I have endeavored to perform these services and duties to the highest standards of excellence and with the civility, fairness, and integrity that are the hallmarks of the judicial temperament that I believe a member of the USCAAF should possess.

Due to the dual interests that underlie the UCMJ -- namely, the protection of the rights of service personnel and the disciplinary role of commanders -- I believe that a familiarity with the military and the military justice system is also ideal, keeping in mind that Article 142 of the UCMJ specifically provides that each judge of the USCAAF is to be appointed from civilian life by the President, with the advice and consent of the Senate. Through my military service, I became familiar with the military justice system both as a client, from my time as a commander, and as an advocate, from my duties as a judge advocate.

Do you believe that there are actions you need to take to enhance your ability to perform the duties of a judge on the USCAAF?

Any position, particularly one as important as a judge on the USCAAF, requires ongoing efforts to improve one's own abilities. If confirmed, I would review and stay abreast of amendments to the UCMJ, the Rules for Courts-Martial, and the Military Rules of Evidence. I would also continue to read cases rendered by the USCAAF and relevant decisions of the Supreme Court of the United States. If confirmed, communicating with judges on the USCAAF and other courts, reviewing analogous cases by other federal appellate courts, and reviewing scholarly articles on the military justice system would be key ways to continue to enhance my perspective as a judge.

Relationships

What are the respective roles of each of the following with respect to the military justice system and, if confirmed, what would your relationship be with:

The Secretary of Defense

As set forth in Article 141 of the UCMJ, the USCAAF falls under the Department of Defense for administrative purposes only and is wholly independent of the Secretary of Defense. The Secretary of Defense is responsible for the formulation of policy related to all matters of direct concern to the Department of Defense. In part at least, that responsibility for military justice policy is exercised through the Joint Services Committee. The Joint Services Committee reviews the Manual for Courts-Martial ("MCM") and the UCMJ annually to ensure that they fulfill their function as a comprehensive body of criminal law and procedure, and recommends legislation or other changes.

The Secretary of Defense is directly involved in the military justice system in other ways. For example, he is authorized to be a convening authority for a general or special courts-martial and also has the ability to promulgate orders and regulations, violations of which may be actionable under the UCMJ. If confirmed, I would perform my duties independently, and with the expectation that I would not have any direct relationship with the Secretary of Defense.

The Chief Judge of the USCAAF

The Chief Judge of the USCAAF is senior in commission among the judges of the court who have not previously served as the chief judge, and serves in that position for a term of five years. The Chief Judge has precedence and presides at any session he attends, and it is my understanding that he oversees the administrative functioning of the USCAAF. If confirmed, my relationship with the Chief Judge would be independent on any issue requiring or related to a vote on a petition, argued case, or writ, and my expectation is that the relationship would be collegial and professional.

Judges of the USCAAF

If confirmed, my relationships with the other judges on the Court would be independent on any issue requiring or related to a vote on a petition, argued case, or writ, and my expectation is that the relationships would be collegial and professional.

The General Counsel of the Department of Defense

As set forth in Article 141 of the UCMJ, the USCAAF falls under the Department of Defense for administrative purposes only and is wholly independent of the Department of Defense. The General Counsel of the Department of Defense is the chief legal officer of the Department of Defense. He performs such functions and delegated duties with respect to the military justice system as the Secretary of Defense may prescribe. As one example of his delegated duties, the General Counsel is responsible for coordinating any recommended legislation or changes recommended by the Joint Services Committee. If confirmed, my relationship with the General Counsel of the Department of Defense would be independent, and my expectation is that the relationship would be collegial and professional.

The Judge Advocates General of the Army, Navy and Air Force and the Staff Judge Advocate to the Commandant of the Marine Corps

The USCAAF is independent of both the Department of Defense and the Services. Each Service Chief has a Judge Advocate General, who both provides advice on military justice matters to the Service Chief and oversees the judge advocates throughout that Service. In addition, each Judge Advocate General has specific duties under the UCMJ and Rules for Courts-Martial with respect to the military justice system. For example, each Judge Advocate General is responsible for: (1) ensuring field visits, either personally or through

senior representatives, to supervise the administration of military justice; (2) the professional supervision of military judges and counsel; and (3) review of and action on certain records of trial. A Judge Advocate General may also certify questions to the USCAAF after a decision of a Criminal Court of Appeals. Moreover, each of the listed Judge Advocate Generals are members of both the Joint Services Committee and the Code Committee.

If confirmed, my relationship with each Judge Advocate General would be independent, and my expectation is that the relationships would be collegial and professional.

Legal Issues

What do you anticipate would be the most significant legal issues you will face if confirmed as a judge of the USCAAF?

It is of great importance that the USCAAF continue to serve the function for which it was created and remain vigilant against unlawful command influence. Every legal issue faced by USCAAF is significant, both as to the individual appellant in a given case, and because it gives guidance to the trial and criminal courts of appeal. The specific legal issues USCAAF will face in the future will be determined by decisions of the criminal courts of appeal, the issues presented to USCAAF, and the petitions granted.

What challenges, if any, do you anticipate that the Armed Services and the USCAAF will encounter in implementing the changes to article 120 of the UCMJ regarding the offense of rape by October 1, 2007, as provided in section 552 of the National Defense Authorization Act for Fiscal Year 2006?

My understanding is that Article 120 of the UCMJ was amended in regard to the definition of the offense of rape, among other changes. As with any amendment to a criminal statute, the challenges of implementing Article 120 will be revealed through its application and interpretation in specific cases. I expect that some of those issues may ultimately reach the USCAAF.

Jurisdiction of the USCAAF

In your view, has the USCAAF fulfilled the expectations of Congress when the Court was established in 1951?

I believe that the USCAAF has fulfilled the expectation of Congress that it would provide independent judicial review of the military courts and civilian oversight of the military justice system.

In your view are there any legislative changes needed regarding the role and responsibilities or the jurisdiction of the USCAAF?

None that I am aware of at this time.

Decisions of the USCAAF

Please describe the three decisions of the USCAAF since 2001 which you believe to have been the most significant.

- *United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001) – analyzing challenge for cause based on implied bias of a member and recognizing that implied bias undermines public confidence in the military justice system.
- *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003) – emphasizing that the petitioner’s right to a full and fair review of findings and sentence under Article 66 embodies the concomitant right to have that review conducted in a timely fashion, and that these rights must be recognized, enforced, and protected by the government, by the appellate attorneys, and by the USCAAF.
- *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006) – reemphasizing that unlawful command influence is the mortal enemy of military justice and that, where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of criminal proceedings.

What is your view of the role of *stare decisis* in terms of prior decisions of the USCAAF?

Stare decisis, or adherence to principles of law set forth in prior decisions, is a fundamental judicial principle. Adherence to precedent promotes the evenhanded, predictable, and consistent development of legal principles; fosters reliance on judicial decisions; and contributes to the actual and perceived integrity of the judicial process. *Stare decisis* is a well-recognized principle of judicial decision-making, but an appellate court may re-evaluate previous decisions if, for example, the precedent at issue has been called into question by subsequent legal developments.

In view of Article 36 of the UCMJ, what is your view as to the hierarchy of sources of law that must be applied by the USCAAF in determining appropriate rules of evidence and procedure in courts-martial?

As a general matter, cases subject to the UCMJ, to which Article 36 applies, have applied the rules of evidence and procedure set forth in the Manual for Courts-Martial, which includes the Rules for Courts-Martial, governing pretrial, trial, and post-trial procedures, and the Military Rules of Evidence. The USCAAF should apply these rules unless it

concludes that they are inconsistent with the Constitution of the United States or the UCMJ. The USCAAF is also guided by its own precedent and bound by the decisions of the Supreme Court of the United States.

In your view, what is the appropriate standard for determining when the USCAAF should apply a rule that is different from the rule generally applied in the trial of criminal cases in the Federal district courts?

Where the Rules for Courts-Martial and Military Rules of Evidence are not contrary to or inconsistent with the Constitution, the UCMJ, or controlling precedent, they should be applied. If they are silent on an issue, or set forth a rule contrary to or inconsistent with the Constitution or the UCMJ, it is appropriate to look to analogous rules applied in the Federal district courts. Military Rule of Evidence 101 provides that where no rule governs an evidentiary issue, the rule of evidence generally applicable in the trial of criminal cases in the Federal district courts applies. Where both sources are silent, the Military Rules of Evidence, much like the Federal Rules of Evidence, applies the rule of evidence applicable at common law.

Military Justice System

In your view, what are the major strengths and weaknesses of the military justice system?

Major Strengths:

- Greater protections against self-incrimination under Article 31.
- Ability to participate in pre-trial proceedings in front of an impartial investigating officer under Article 32, including the right of accused and defense counsel to be present, and the right to present evidence and cross-examine witnesses.
- The right of every defendant to qualified defense counsel at every phase of trial, post-trial, and appellate proceedings.

Major Weaknesses:

- Actual or perceived instances of unlawful command influence.
- Perception that commanders play too great a role in the military justice system.
- Potential for significant variances in the treatment of similar offenses between different commands.

What is your view of the relationship between the rights of service personnel and the disciplinary role of commanders?

The military justice system is intended to protect both the rights of service personnel and the

disciplinary role of commanders, as the preamble to the Manual for Courts-Martial recognizes. The UCMJ seeks to ensure fairness to services members, while ensuring that commanders maintain the ability to ensure good order and discipline necessary for national security. It is crucial to morale and public confidence that the military justice system vigorously protect the right of service members, and both be fair and perceived to be fair. It is also necessary for the good order and discipline of the military that commanders are able to enforce standards of behavior not applicable in civilian society.

Do you think that changes to the military justice system are called for in light of the experiences of the Armed Services in Operations Enduring Freedom and Iraqi Freedom?

The military justice system is intended to operate in a decentralized fashion and to contain the flexibility necessary to adjust to operations and deployments. I am not aware of any changes that are needed in light of the experiences of the Armed Services in Operations Enduring Freedom and Iraqi Freedom based on the knowledge I have at this time. However, the Services, the Joint Services Committee, and the Code Committee are charged with annual review of the UCMJ and the military justice system. I am confident that if changes are needed, recommendations for change will be made to or by the Senate Armed Services Committee.

Command Influence

The problem of command influence, including instances involving judge advocates as well as commanders, is a constant threat to the military justice system.

What is your view as to the role of the USCAAF in addressing this problem?

It has long been recognized that unlawful command influence is the mortal enemy of military justice. Article 37 of the UCMJ prohibits unlawful command influence; the USCAAF, comprised of civilian judges, is a further bulwark against unlawful command influence. As such, USCAAF has, and must continue: to be vigilant against the taint of unlawful command influence at any stage of legal proceedings; to ensure that allegations of unlawful command influence have been properly litigated at trial and on appeal; and to ensure remedies appropriate to the circumstances of the particular case.