

Advance Policy Questions for John E. Sparks
Nominee to be a Judge on the United States Court of Appeals for the Armed Forces

Duties

Subchapter XII 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 the USCAAF and its judges?**

Answer: Congress established the court in 1950 to provide specialized independent civilian review of courts-martial with the goal of promoting good order and discipline in the Armed Forces while also ensuring just treatment of the accused.

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

Answer: I spent 7 years as an infantry officer, 15 years as an active duty judge advocate, and almost 15 years as the senior adviser to a judge on the USCAAF. My duties as an infantry officer included time spent as an executive officer and a commanding officer of a rifle company. My years as a judge advocate included extensive trial experience as a military prosecutor, defense counsel and military judge. As adviser to a sitting USCAAF judge, I was intimately involved in the research and drafting of appellate opinions for that judge.

****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?**

Answer: I continue to stay abreast of developments in military justice and the criminal law generally, and I do not believe there are other actions I need to take at this point.

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

Answer: Under 10 U.S.C. 113, the Secretary of Defense exercises “authority, direction, and control” over the Department of Defense. Although the Secretary is not involved in day-to-day military justice matters, he is ultimately responsible for setting policy with regard to all

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matters affecting the Department including the area of military justice. Article 141 of the UCMJ provides that USCAAF “is located for administrative purposes only in the Department of Defense.” This is consistent with the congressional drafters’ intent that the court be established as an independent entity outside of the purview of the Secretary while also recognizing, at the time, that the court would need some level of support. As far as I could tell from my years working at the court, this arrangement has worked well and the relationship between the Department and the court is a good one. If confirmed I would strive to maintain the quality of this important relationship.

The Chief Judge of the USCAAF

Answer: Under Article 143, the Chief Judge is determined by seniority of commission. The Chief Judge is for all practical purposes the “agency head,” so to speak. As such, he has a variety of administrative duties that the associate judges do not have. I have known the current Chief Judge for about 13 years and our relationship is one of mutual respect. If confirmed, I expect this relationship of mutual respect and collegiality to continue.

Judges of the CAAF

Answer: Except for the administrative duties lodged in the Chief Judge, the judges of the USCAAF are equal, differing only in seniority. I have known all of the current judges on the court for a number of years. As with the current Chief Judge, my relationship with the associate judges has been one of mutual respect and I do not expect this to change if I am confirmed.

The military courts of criminal appeals

Answer: The courts of criminal appeals are established under Article 66 of the UCMJ to conduct mandatory appellate review of cases “in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.” I have always been impressed with the competence of the judges sitting on these courts and the quality of their work. It has been my experience that they have a healthy respect for the USCAAF judges and that the relationship between the lower courts and the USCAAF is a good one. If confirmed, I would not expect this to change.

The General Counsel of the Department of Defense

Answer: Under 10 U.S.C. 140(b), the General Counsel of the Department of Defense is the chief legal officer of the Department, and performs such duties as the Secretary may

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prescribe. Though not normally involved in the day-to-day operation of the military justice system, the General Counsel is substantially involved in the formulation of the Department's legal policy and its legislative recommendations to Congress. Although I expect my relationship with the General Counsel would be one of mutual respect if I am confirmed, I do not expect that it will be marked by frequent interaction.

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

Answer: Under Article 6 of the UCMJ, the Judge Advocates General are statutorily responsible for the administration of military justice within their respective services. The relationship of the judges of the USCAAF to the Judge Advocates General must therefore, while remaining mutually respectful, always maintain the distance essential to the appearance, and indeed the actuality, of judicial neutrality and independence.

Legal Issues

****What do you anticipate would be the most significant legal issues you will be called upon to address if confirmed as a judge of the USCAAF?**

Answer: As far as I know, cases involving sex offenses such as child pornography, child sex abuse and sexual assault continue to occupy a significant portion of the court's docket. Regarding sexual assault cases in particular, I anticipate that a number of new issues will likely confront the court given the changes to the statutory offenses in recent years, including issues likely to arise concerning the very important role of the special victims counsel. Secondly, I anticipate that the issue of the continued viability of the military death penalty may eventually find its way to the court, depending what, if anything, the Supreme Court ends up saying about the death penalty generally.

Jurisdiction of the USCAAF

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

Answer: Yes. The court continues to provide effective and necessary civilian review of military cases and remains an independent bulwark against unlawful influence.

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

Answer: None that come to mind at this time.

Decisions of the USCAAF

Please describe the three decisions of the USCAAF since 2005 which you believe to have been the most significant.

Answer: *United States v. Denedo*, 66 M.J. 114 (C.A.A.F. 2008). The accused in this case pleaded guilty in 1999 to certain offenses. Seven years later he discovered that his court-martial conviction rendered him eligible for deportation. He petitioned the Court of Criminal Appeals for a writ of error coram nobis alleging that his defense counsel had not informed him of this potential consequence. The lower court denied his petition and he appealed to the USCAAF. The USCAAF held that Denedo had met the requirements for such a writ.

United States v. Miller, 67 M.J. 385 (C.A.A.F. 2009). This case overruled longstanding case law that suggested an accused was on notice of a lesser included offense under Article 134 because every enumerated offense under the UCMJ was *per se* prejudicial to good order and discipline. Thus, *Miller* rejected the notion of implied elements.

United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). This case held that a specification charged under Article 134 must allege either expressly or by necessary implication one of the terminal elements of Article 134 or else it fails to state an offense. Previously, the express allegation of the terminal elements of Article 134 had not been viewed as necessary.

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

Answer: The doctrine of *stare decisis* is an essential guiding principle for any appellate court since it provides consistency and stability in the law. There may be instances where a precedent has become unworkable or other developments in the law have reduced the precedent to nothing more than a less than useful relic of a prior era. In such cases the continued vitality of the precedent should be examined. Otherwise, courts should adhere to the doctrine for the reason stated.

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****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 addressing rules of evidence and procedure in the administration of the military justice system?**

Answer: Generally, the courts have considered the following hierarchy of sources: the Constitution as applied to members of the armed forces; the UCMJ and other applicable statutes; the Manual for Courts-Martial and other applicable Executive Orders and presidential issuances; other rules incorporated into military practice under authority recognized by the Manual for Courts-Martial; and other executive branch issuances. As a general matter, the courts under Article 36 have applied the provisions of the Manual for Courts-Martial unless a Manual provision is contrary to or inconsistent with the UCMJ or the Constitution.

****In your view, what is the appropriate standard for determining when the USCAAF should apply a Rule for Courts-Martial or Military Rule of Evidence that is different from the rule generally applied in the trial of criminal cases in the Federal district courts?**

Answer: Under Article 36, if the matter is governed by the Manual for Courts-Martial, and the provision is “not contrary to or inconsistent with” the UCMJ or the Constitution, the courts generally have determined that the Manual provision is applicable. If there is no rule in the Manual, the courts have looked to the rules generally applicable to the trial of criminal cases in the federal district courts to the extent not inconsistent with the UCMJ. Further, if a properly issued executive branch rule is more protective of the accused than the rule generally applied in federal courts or at common law, the courts generally have viewed the executive branch issuance as applicable.

Military Justice System

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

Answer: In my view the following are strengths of the system, 1) qualified defense counsel provided free of charge to the accused at both the trial and appellate level; 2) Article 31 of the UCMJ which affords the accused greater protections against self-incrimination than most civilian criminal justice systems; 3) a system of appellate review within each service and by the USCAAF with certiorari to the U.S. Supreme Court; and 4) sufficient resources devoted to the trial of criminal cases so that each case receives the necessary and appropriate amount of attention.

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I consider the following to be weaknesses remaining in the system, 1) because of the very nature of a military organization there remains the constant potential for unlawful influence to affect the disposition of cases before and after trial; and 2) the military's inability to overcome a flawed perception among some members of the public and the media that the military justice system is not at all protective of an accused person's rights and is therefore, anything but a credible criminal justice system.

****In your opinion, does the military justice system afford a fair and just system for military personnel accused of violations of the UCMJ?**

Answer: In the context of the need to maintain good order and discipline, I believe the military justice system is both fair and just. However, that is not to say that there isn't well founded criticism of the system, or that there are not problems with the system upon which reasonable minds might debate. Because the system rests upon the delicate balance between maintaining good order and protecting the rights of the accused, the military courts, the USCAAF and Congress must remain vigilant to ensure that the system is, and is perceived to be, a credible criminal justice system.

****In your view, does the military justice system appropriately address the rights of victims of offenses prosecuted in courts-martial?**

Answer: Prior to the recent, and welcomed, attention to sexual assault victims, I would have disagreed with the statement that the system appropriately addresses the rights of victims. However, the recent emphasis on victims (including provisions in the most recent Authorization Act) has resulted in changes that I believe in time will sensitize the system to the interests and welfare of all crime victims.

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

Answer: With the advent of the UCMJ in 1950, I believe the Congress struck an appropriate, albeit delicate, balance. Commanders must have the authority to enforce good order and discipline in order to maintain morale and to ensure the readiness of the fighting force. Thus, the UCMJ retains the commander's role as the convening authority with respect to referring charges, selecting court members, and post-trial review. On the other hand, it provides an accused statutory protection against unlawful influence and a robust appellate review process to a civilian court completely insulated from any command structure. Although there are some very obvious differences between the military system and most civilian systems, Congress

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recognized that there are a wide variety of situations arising in the military environment that simply have no analog 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 Iraq and Afghanistan?**

Answer: My perception from afar is that the military justice system appears to have adapted to the frenzied pace of a decade or more of combat operations. However, Congress may wish to elicit experiences of those on the ground to determine whether any changes are warranted.

****In your view, are changes to the military justice system called for in light of changes in American criminal jurisprudence?**

Answer: At the moment, I believe the USCAAF has done an admirable job of blending elements of federal civilian criminal jurisprudence into the military system when it has deemed it appropriate.

Capital Cases in the Armed Forces

The ability of the military justice system to provide qualified personnel and resources necessary to capably defend and prosecute death penalty cases and respond to the constitutional requirements associated with such cases has come under scrutiny.

****What is your understanding of the requirements under constitutional precedent for the defense of a capital case?**

Answer: *Strickland v. Washington*, 466 U.S. 668 (1984), is the seminal case for examining the performance of defense counsel in capital cases. *Strickland* requires the defendant to prove both that the counsel's representation was deficient, and that there is a reasonable probability that, but for the counsel's deficiency, the outcome of the trial would have been different. In more recent cases, the Supreme Court has held that failure to conduct a thorough investigation of potential mitigating factors may constitute ineffective assistance of counsel. (*See Wiggins v. Smith*, 123 S.Ct. 2527 (2003); *Porter v. McCollum*, 130 S.Ct. 447 (2009).

****Based on your review of military jurisprudence regarding death penalty cases since the U.S. Supreme Court ruling in *Furman v. Georgia*, what are the issues or errors that have most frequently resulted in overturning of death sentences on appeal?**

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Answer: My experience is that ineffective assistance of counsel is the leading reason that military death sentences are overturned.

****What do you consider to be the essential elements in preparing court-martial practitioners for the prosecution and defense in capital cases?**

Answer: First and foremost, I believe each side of the case should employ at least one experienced criminal trial litigator. The defense should have at least one lawyer who is specially trained and qualified in the trial of capital cases. All counsel should be well trained in the use and examination of expert witnesses—particularly, mental health experts and mitigation specialists. Although I am far from possessing any expertise in capital litigation, my experience in reading the records in these types of cases over the years reveals to me that these may be areas of concern.

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?**

Answer: Because of its unique status as an independent entity, separate and apart from the uniformed military establishment, the USCAAF remains the bulwark against unlawful influence. I believe the court has embraced its responsibility in this area over the years and continues to abide by its own view that unlawful command influence is the mortal enemy of military justice, and where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of court-martial proceedings.