EUGENE R. FIDELL

Zen and the Jurisprudence of the U.S. Court of Appeals for the Armed Forces

EDITOR'S NOTE: ON Nov. 17–18, 2006, the National Institute of Military Justice sponsored a symposium entitled Current Issues in Military Law: A Program for Teachers at American University's Washington College of Law. This commentary is adapted from remarks offered by Eugene R. Fidell at a workshop held at the symposium: Jurisprudence of the United States Court of Appeals for the Armed Forces. The views expressed here do not necessarily represent the position of the National Institute of Military Justice.

In Kyoto, Japan, there are many extraordinary Zen temples. It is a phenomenal and somehow—even for us foreigners—a moving aesthetic. From a brief visit in the 1970s I remember the gardens in particular: They were largely composed of pebbles, and the temple functionaries would periodically rake these into dreamy patterns, using simple wooden implements. It was a timeless and beautiful process. Never a stone added. Never a stone subtracted. They were simply rearranged. Is the jurisprudence of the U.S. Court of Appeals for the Armed Forces like a Zen garden, with the judges wielding Microsoft Word and Westlaw instead of rakes?

Not likely, if for no other reason than the fact that we have a new "natural court." The recent confirmation of two new judges—enough to grant review under the court's practice—can change a great deal. We already have a new Congress, probably one that has a heightened interest in all things relating to the military and the law. So the subject could not be more timely.

***

To discuss the court's jurisprudence, we really have to talk about its business. Just what are the court's cases about? It does seem that a remarkable part of the court's business has little or nothing to do with the classic core concerns of military justice. Doesn't it seem that child pornography and intrafamily violence play an inordinate role in the court's work?

What do the data show? First, let us consider trial-level data. For the period from Sept. 11, 2001, through Aug. 26, 2006—nearly five years—the five most common offenses for Army soldiers tried in Iraq, Kuwait, and Afghanistan involved (in descending order of frequency) alcohol offenses (108 cases), making false official statements (106), larceny of nonmilitary property (63), willful dereliction (53), and assault consummated by a battery (49).[1] These data involve only general and special courts-martial; many other minor offenses (including some the public perceived as far more serious allegations of prisoner abuse) were handled through nonjudicial punishment or through administrative corrective measures.

Turning to the appellate phase, a totally unscientific study of the 76 cases that were decided by the Court of Appeals for the Armed Forces by full opinion for the term ending Sept. 30, 2006, indicates that the seven largest categories of cases that reach the court are (in descending order) sex offenses of every kind imaginable, often involving children (29 cases); drug possession (again, everything imaginable—from marijuana to mushrooms) (20); making false official statements or swearing falsely (9); nonsexual assaults (8); and murder, larceny, and disobedience (a three-way tie at 7). Further behind in the standings were child pornography (6) and unauthorized absence (6). Four cases involved obstruction of justice and three involved threats. The incidence of charges involving drugs, pornography, and offenses against children are disquieting. These are each hardy perennials in the garden of military justice. At least with regard to the pornography cases, the free availability of fast Internet connections on government computers has proven a strong temptation for many a soldier or sailor.

For comparison purposes, data available on prosecutions in the British army for the year ending January 2005 show that the largest category by far is absence without leave (187 cases), with the next five largest categories being assault with intent to commit grievous bodily harm and obtaining property by deception (both 87), battery (72), and indecent assault and theft (both 55). There were eight British prosecutions for use of racially aggravated words, assault, or harassment, four for ill treatment of soldiers, and one for disgraceful conduct of a cruel kind.[2]

And while we are talking about what cases the court hears, let's not forget the cases it doesn't hear—

not those it turns down, but those Congress has excluded from its reach: the military commission cases. It remains a mystery why Congress eschewed the Court of Appeals in favor of the U.S. Court of Appeals for the District of Columbia Circuit in passing the Detainee Treatment Act of 2005[3] and the Military Commissions Act of 2006.[4] Perhaps the new Congress will revisit that misallocation of jurisdiction when the various proposals to amend the Military Commissions Act move through the legislative process, although, of course, their fate at the White House would remain uncertain, to say the least.

***

With that by way of preface, what is the jurisprudence of the U.S. Court of Appeals for the Armed Forces? It continues to be one of paternalism. Some years ago I identified some themes derived from the court's work.[5] Let's see if they are still accurate:

- Questions about the availability of review were long resolved in favor of finding, exercising, and preserving the court's jurisdiction. *Goldsmith*[6] obviously had a chilling effect, and there are not many recent cases—with the possible exception of *Kreutzer*,[7] where it ordered an appellant removed from the military's death row at Fort Leavenworth—in which the Court of Appeals has had chalk on its jurisdictional spikes. On the other hand, the court decided to retain its requirement for two votes to grant review even when its membership was reduced to three with the retirement of Chief Judge Gierke and Judge Crawford.[8] Obviously, requiring two votes out of three raises a higher barrier to review than does requiring two votes out of five. The change is all the more unfortunate because, under current law, denial of a petition closes the door to direct review by the U.S. Supreme Court. Although it is fortunate that the hiatus between the full court that sat until Sept. 30, 2006, and the one that sits now (with the two 2006 vacancies having been filled) was mercifully brief, litigants whose petitions were ruled on by the interim bobtailed court will have been shortchanged.
- Doubts as to whether the accused desires to invoke the court's jurisdiction will be resolved in the accused's favor. This principle continues to hold sway. The court certainly tries to discern and follow the appellant's personal intent when, as occasionally happens, it receives papers from both the appellant and appellate defense counsel.
- The court will err on side of generosity in efforts to achieve substantial justice and to protect the accused from potential lapses by counsel even when pursuit of these goals sets the court apart from the approach of other appellate courts.
- The court encourages the personal involvement of the accused in the pursuit of appellate remedies. I won't call the court's *Grostefon*[9] practice an addiction, but the judges remain committed to it, as witnessed by the 2006 rules change proposal to permit appellants 30 days past submission of the supplement to the petition for grant of review (equivalent to a petition for a writ of certiorari) in which to add issues personally identified by the party.[10]
- The court makes a special effort to involve the private bar and other interests outside the military community in order to temper the tendency to insularity that is inherent in the institutional setting in which it performs its functions. This contrasts sharply with the Judge Advocates General's unfortunate refusal in 2006 to cooperate with National Institute of Military Justice's National Court-Martial Docket Project.[11] What does the court's media relations program consist of? Can it do a better job of getting out the word on its decisions? The court's Web site[12] is adequate but could use a renovation. The Web site is more current now than it has been at times in the past. The four intermediate service courts of criminal appeals would do well to emulate it in this respect.

Query: Will the concerns expressed here and abroad about the administration of military justice at trial continue as cases arising in Iraq and Afghanistan move into the appellate pipeline?

***

Finally, can we evaluate the jurisprudence of the U.S. Court of Appeals for the Armed Forces in terms of its stance toward other bodies of law? When it comes to state law, there is still not very much interaction between the decisional law of the Court of Appeals and that of the state courts, as *Shepard's Citations* shows.

As for military commission law,[13] Congress has, as Prof. Muneer Ahmad has noted, hermetically sealed this area off in the Military Commissions Act.[14]

In examining the court's interaction with other federal courts, two illustrations come to mind. First, the court was firm in its demand in *Harding*[15] for exhaustion of Article III court remedies before it would overturn an abatement of proceedings when a civilian mental health provider refused to turn over treatment records in response to a court-martial subpoena. A second area of interaction involves the effect of the court's gatekeeper role on collateral review, since there is currently no direct review provided for denied cases[16]—or is it for denied issues, as the solicitor general's successful opposition to the certiorari petition in *McKeel*[17] insisted? Affirming a case such as *Oppermann v. United States,*[18] concerning the interservice disparity in judicial terms of office, would have permitted the appellant to seek certiorari rather than having to resort to the district court.

JURIPRUDENCE *continued on page 30*

Before her term expired, Judge Susan J. Crawford of the Court of Appeals issued a string of dissents and separate concurrences concerning what she viewed as departures from Supreme Court and geographical circuit precedent[19] and the limits of the court's role vis-à-vis the President.[20] Was she right? Of course, the Supreme Court has not granted certiorari in a military case for some time, so we don't know if her view will be vindicated. We also do not know where the two new judges will come out on these kinds of issues.

What of the court's own precedents? What, if anything, will come of the "declared war or a contingency operations" amendment to the in personam jurisdiction granted by Article II?[21] Is *Averette*[22] still good law? Perhaps we will find out if some enterprising military lawyer—availability of the Military Extraterritorial Jurisdiction Act of 2000[23] notwithstanding—seeks to charge a contractor employee working in Iraq.

Foreign legal developments still play essentially no role in the court's jurisprudence. Don't expect to see references to developments such as the triservice military justice innovations in the United Kingdom's Armed Forces Act of 2006;[24] Australia's new defense legislation;[25] cases heard by the European Court of Human Rights, such as *Martin v. United Kingdom*;[26] or the Decaux Principles being developed under the auspices of the United Nations Commission on Human Rights.[27]

***

Because I began these comments with a reference to Zen, I will close with another reference to Zen—it concerns the interaction between the court's jurisprudence and that of the other federal courts. A famous *koan*, or riddle, attributed to the Japanese master, Hakuin (1686–1769), asks, "What is the sound of one hand clapping?" The answer, of course, is that it is the sound of a Zen master slapping his pupil's cheek. When it comes to the U.S. Court of Appeals for the Armed Forces, there is no question of one hand clapping; the court's jurisprudence is inevitably linked—albeit to varying degrees—to other bodies of law. Quite how that linkage will play out will be worth following as the court settles in with its two new judges and under the leadership of a new chief judge. This could be the beginning of a new era in American military justice. Stay tuned. **TFL**

Eugene R. Fidell is president of the National Institute of Military Justice and a partner in the Washington, D.C., firm of Feldesman Tucker Leifer Fidell LLP. He is also an adjunct professor of law at the Washington College of Law, American University.

Endnotes

[1]Data courtesy of the Office of the Clerk of Court, U.S. Army Judiciary, Arlington, Va.

[2]British Army, Army Prosecuting Authority, Statistics, available at www.army.mod.uk/apa/statistics.htm.

[3]Detainee Treatment Act of 2005, § 1005(e)(3), 119 Stat. 2680, 2743 (2005).

[4]Military Commissions Act of 2006, § 3(a), 120 Stat. 2600, 2622 (2006), adding 10 U.S.C. § 950g(a).

[5]The themes appear in Eugene R. Fidell, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 3–4 (12th ed. 2006), available at www.nimj.org/documents/CAAFR12.pdf.

[6]*Clinton v. Goldsmith*, 526 U.S. 529 (1999).

[7]*Kreutzer v. United States*, 60 M.J. 543 (C.A.A.F. 2005) (mem.) (4-1 decision); *cf. Quintanilla v. United States*, 63 M.J. 322 (C.A.A.F. 2006) (mem.) (writ appeal petition denied as moot). I am indebted to Col. Dwight H. Sullivan for suggesting that there may be even more jurisdictional chalk on the robing room carpet, considering cases such as *United States v. Leak*, 61 M.J. 234 (C.A.A.F. 2005) (4-1 decision), and *Loving v. United States*, 64 M.J. 132 (C.A.A.F. 2006) (4-1 decision).

[8]The National Institute of Military Justice asked the Court to adjust its practice while the court was under strength; *see* Letter from Eugene R. Fidell, president, and Kathleen A. Duignan, executive director, National Institute of Military Justice, to William A. DeCicco, clerk of the court, U.S. Court of Appeals for the Armed Forces, Nov. 2, 2006, available at www.nimj.org/documents/CAAFltr.pdf. The court declined to adopt the suggestion; *see* Letter from William A. DeCicco, clerk of the court, U.S. Court of Appeals for the Armed Forces, to Eugene R. Fidell, president, National Institute of Military Justice, Nov. 16, 2006, thereby adhering to its "rule of two."

[9]*United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[10]71 Fed. Reg. 64.251, 64.253 (2006) (proposed Rule 19(a)(5)(C)).

[11]*See* Letter from Judge Advocates General to Kathleen A. Duignan, executive director, National Institute of Military Justice, Nov. 7, 2006, available at www.nimj.org/documents/DOD&NIMJltrs.pdf.

[12]The court's Web site can be found at www.armfor.uscourts.gov.

[13]*See* Eugene R. Fidell, Dwight H. Sullivan, and Detlev F. Vagts, *Military Commission Law*, ARMY LAWY., Dec. 2005, at 47.

[14]Military Commissions Act of 2006, § 3(a), 120 Stat. 2600, 2602 (2006), adding 10 U.S.C. §§ 948b(c)–(e).

[15]*United States v. Harding*, 63 M.J. 65 (CA.A.F. 2006).

[16]Art. 67a(a), 10 U.S.C. § 867a(a).

[17]*McKeel v. United States*, 127 S. Ct. 554 (2006).

[18]Civil No. 06-1824 (D.D.C.) (pending).

[19]*See*, for example, *United States v. Toohey*, 63 M.J. 353, 364 (C.A.A.F. 2006) (Crawford, J., dissenting), citing *United States v. Cary*, 62 M.J. 277, 279 (C.A.A.F. 2006) (Crawford, J., concurring in the result).

[20]*United States v. Miller*, 63 M.J. 452, 459–462 (C.A.A.F. 2006) (concurring in the result).

[21]John Warner National Defense Authorization Act for Fiscal Year 2007, § 552, 120 Stat. 2083, 2217 (2006) (amending art. 2(a)(10), UCMJ, 10 U.S.C. § 802(a)(10)).

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

[23]18 U.S.C. §§ 3261 *et seq*.

[24]C. 52.

[25]Defence Legislation Amendment Act 2006, No. 159 (Australia), available at www.austlii.edu.au/_au/legis/cth/num_act/dlaa20061592006275.txt/cgi-bin/download.cgi/download/au/legis/cth/num_act/dlaa20061592006275.rtf.

[26]*Martin v. United Kingdom*, Application No. 40426/98 (Eur. Ct. Hum. Rgts. Oct. 24, 2006).

[27]United Nations Economic and Social Council, Commission on Human Rights, 62nd Sess., *Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice Impunity: Issue of the Administration of Justice Through Military Tribunals*, UN Doc. E/CN.42006/58 (Jan. 13, 2006) (draft principles governing the administration of justice through military tribunals).

BROWN *continued from page 25*

parents every time she presides at naturalization hearings and administers the oath of citizenship to new citizens.

Judge Brown has settled into her role as a federal judge. Her office at the Mark O. Hatfield Federal Courthouse includes a small piano and a collection of red glass dishes, all well-ordered with white doilies reminiscent of old German homes. She spends her limited spare time with her husband and their very large but close family, including sisters, brother, nieces, nephews, cousins, stepchildren, and grandchildren—nearly all of whom live within a short drive of Portland. An avid traveler, gardener, and knitter, Brown and her husband recently took the extraordinary step of moving out of the city to live in a more rural setting in Clackamas County.

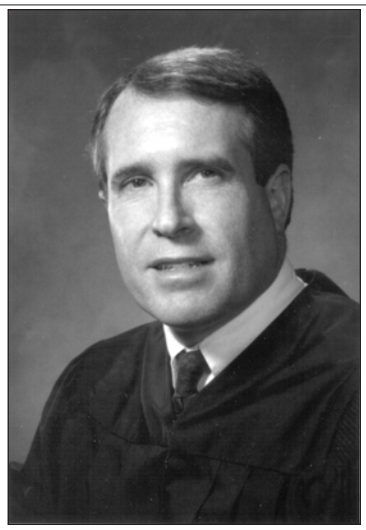
Judge Brown looks forward to work every day, considers it an extraordinary privilege to serve as a federal judge, and notes that her favorite part of the job is the "daily ability to accomplish something." **TFL**

Heather J. Van Meter is an attorney in the Portland, Oregon, office of Williams, Kastner & Gibbs PLLC. She is a past president of the U.S. District Court of Oregon Historical Society and continues to serve on the group's newsletter/Web site committee.

EXCHANGE *continued from page 12*

have been incredibly enthusiastic. At the kickoff event, Chief District Judge B. Lynn Winmill met with law students and fielded questions about federal court practice. The chapter's past president, Ted Creason, also took the opportunity to introduce the Federal Bar Association to the students and to invite them to become law student members. Two other "Juice with the Judge" gatherings are planned in the central and southern part of the state with Judge Larry M. Boyle and Judge Mikel H. Williams. In addition to the "Juice with the Judge" program, the Idaho Chapter has offered to pair any interested law student member with a mentor-member of the chapter. The "Juice with the Judge" and chapter law student membership programs received an enthusiastic welcome from the law students; from the law school's placement officer, Anne-Marie Fulfer; and from Donald Burnett, the dean of the law school. **TFL**

Chapter Exchange is compiled by Anne Daugherty, FBA manager of chapters and circuits. Send your chapter information to adaugherty@fedbar.org or Chapter Exchange, FBA, 2011 Crystal Drive, Ste. 400, Arlington, VA 22202.



Idaho Chapter: At the kickoff event of the "Juice with the Judge" program—Chief District Judge B. Lynn Winmill, U.S. District Court for the District of Idaho.