



by James S. Richardson Sr.

Chief Judge James E. Baker U.S. Court of Appeals for the Armed Forces

Chief Judge James Baker of the U.S. Court of Appeals for the Armed Forces (USCAAF) likes to remark that the best legal training he ever had was serving in the Marine Corps as an infantry officer: “There is a lot of yelling, and at a young age you are given the opportunity to make decisions for which you are held accountable.”

Baker began his “legal training” in the Platoon Leaders Class as a college freshman. He found a recruiting brochure on the floor of the college post office. In fact, the floor was littered with brochures, military service not being the first choice among college students in the 1970s as a career or summer camp option. The program, the Platoon Leader’s Class, has a student enlist in the Marine Corps during undergraduate studies and attend the Officers’ Candidate Screening Course at Marine Corps Base Quantico, Va., in two increments during summer vacation. Upon successful completion of the course and graduation from undergraduate school, the student is then commissioned a second lieutenant in the U.S. Marine Corps.

While Baker had not always planned to join the Marines, his choice of public service was a good fit. Baker, then and now, feels a keen sense of service responsibility and public duty. “Given the good fortune I had to go to a place like Yale, I felt an even greater sense of responsibility to serve. The only question was where. The Marines seemed like the hardest service I could perform.” Baker was also aware of the long tradition of public service, including military service, at Yale. This service symbolically dates to Nathan Hale and extends through the nation’s history. One of the Navy’s first six ROTC units was formed at Yale, which also served as one location for the Army’s Civil Affairs School during World War II. Twenty-seven names are on the Memorial Hall from the Vietnam Conflict alone.

Baker is also quick to point out that service comes in many forms, public and private. As an illustration, he recites the



names of more than 30 clerks who have worked in chambers and, like Bubba Blue describing the preparation of shrimp for Forest Gump, recounts their activities in all four branches of the military, the Peace Corps, the National Security Staff (NSS), the Agency for International Development, the Departments of Homeland Security, Defense, and Justice, state government, the judicial branch, the Congress, and as public defenders and prosecutors.

In Baker’s case, on graduation he reported to the Basic



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School where all Marine Officers—including lawyers—learn the basics of military tactics and life, then on to the Infantry Officer Course. He was subsequently assigned as a rifle platoon leader, weapons platoon leader, and company executive officer. Service as an aide-de-camp to the commanding general at Camp Lejeune followed. Baker resigned his regular commission to join the staff of Sen. Daniel Patrick Moynihan, for whom he had interned in college. Moynihan had served in the administrations of four presidents—two Democratic and two Republican, a fact Baker found appealing and consistent with his own nonpartisan approach to national security. Baker served as a legislative assistant and acting chief of staff until Moynihan encouraged him to attend law school in order to better prepare for a career in government. He returned to New Haven and, while completing his law degree, co-authored a book entitled *Regulating Covert Action* with Professor Michael Reisman. He also stayed in the reserves as an infantry officer. “I grew up in Massachusetts along the route the British took to Lexington and Concord. I liked the idea of being available if needed as an infantry officer,” Baker explained. He stayed in the reserves as an infantry officer until joining the court.

Upon graduation from law school, Chief Judge Baker joined the Office of the Legal Advisor at the State Department, known by the acronym “L.” There he served as a line attorney for the Intelligence, Counterterrorism, and Diplomatic Security bureaus, handled extradition matters, and served as the department’s liaison to the Iran-Contra Independent Counsel. He also spent a year in the Bureau of Oceans, Environment, and Science, serving as legal adviser at a number of treaty negotiations.

After three years at the State Department, Chief Judge Baker was seconded to the President’s Foreign Intelligence Advisory Board and then became deputy legal advisor to the National Security Council. As a career civil servant, he subsequently served as special assistant to the President and legal adviser to the National Security Council. In 1999, he received the Colonel Nelson Drew Award—the NSC’s highest honor, awarded in memory of a respected NSC (now NSS) staff member killed on a peace mission to Bosnia. The award is given for “distinguished contributions to the formation of peaceful cooperative relationships between states, and U.S. security policy for global peace.” In addition, the director of central intelligence presented Baker with the Director’s Award for “superior contributions in the fields of intelligence and National Security.”

In 2000, President Clinton nominated Baker to be a judge on the U.S. Court of Appeals for the Armed Forces (USCAAF). Upon confirmation, he was sworn in as the 18th judge on that court, and became chief judge upon the retirement of then Chief Judge Andrew Effron on Oct. 1, 2011.

As a judge of the USCAAF, Chief Judge Baker has continued to write on the issues of national security. In 2007, he completed his second book on the subject, *In the Common Defense: National Security Law for Perilous Times* (Cambridge University Press, (2007)).¹ He is also the author of numerous book chapters and articles on national security law and process. In addition, he has written about some of his legal role models, like Jack Downey, John Sparks, and

Peter Murphy. These are lawyers who have acted with moral courage and grace when the pressure was on. Baker hopes to encourage others to consider their own role models and how they might guide future conduct.

The Work of the Court

The USCAAF hears appeals of cases arising under the Uniform Code of Military Justice (UCMJ). In the military justice system, the trial court is known as a court-martial; it is presided over by a military judge, a judge advocate designated by the senior lawyer in each service to perform this function. The appeal of right is to a court of criminal appeals (CCA), and each service has a CCA. The CCAs are made up of senior military judges and colonels or, in the case of the Navy, captains. These courts usually sit in panels of three and can both review questions of law and find facts. From the CCAs, appeal can be taken to the USCAAF and, in certain cases, from the USCAAF to the Supreme Court.

The USCAAF is composed of five civilian judges. The Court always sits en banc, as a state Supreme Court might. The judges are nominated by the President, confirmed by the Senate, and appointed by the President to 15-year terms. As Chief Judge Baker notes, the civilian nature of the court is important, as it reflects the constitutional principle of civilian control and oversight of the military. As a result, judges cannot have retired from active duty. Such retirement could present an actual conflict of interest, because the secretary of defense retains authority to recall retired officers to active duty—which in theory he could do or threaten to do if he did not like a decision of the court. As importantly, a young service member might view a bench of retired military officers as a bench of retired military officers, rather than a civilian court.

In this regard, as in others, Baker places emphasis on the theory or reason behind the law and not just the result. As he explains, the military justice system is not well known or understood—it is rarely taught in law school. Therefore, it is all the more important for judges and practitioners to explain what it is they do and why. One can and should debate the merits of a particular legal provision or rule. Healthy debate should be based on knowledge of the law, rather than anecdotal reporting or myth. Such discussion is also an outstanding source of comparative knowledge and insight with regard to federal and state civilian practice.

The court’s docket is composed entirely of criminal cases with sentences of at least one year in confinement and/or a punitive discharge. Because personal jurisdiction under the UCMJ is based on service status, rather than the nature or location of the offense, a servicemember who commits a criminal offense in violation of U.S. federal and state law anywhere in the world is potentially subject to prosecution in the military justice system. Thus, the questions of law that

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come before the court are the sorts of questions that might come before any state or federal court hearing criminal appeals and address a range of First, Fourth, Fifth, and Sixth Amendment questions, along with classic matters of criminal law dealing with the elements of offenses and evidentiary rules. Often the questions are whether, how, and why the law should apply differently—or in the same manner—in a military context.

The functioning of the USCAAF is unusual among federal courts of appeal. With the exception of death penalty cases and government appeals,² it is a court of discretionary jurisdiction. An appellant seeks review by “petitioning” the court for a grant of review. The court then determines whether good cause is shown to grant review, which takes a vote of at least two of the five judges. After granting review, the court can order additional briefs and oral argument before reaching a final decision.

For this reason, Baker considers the petition or “gatekeeping” phase of review to be as important as the opinion-writing phase. The petition is the key to the court house. The decision to grant a petition also determines whether or not a particular case is subject to potential Supreme Court review, as Congress has generally limited the Supreme Court’s jurisdiction to cases in which the USCAAF has granted review or relief. That means that for the large majority of cases, USCAAF will constitute the service member’s only civilian court review.

The court’s docket has declined by almost 50 percent during the last decade. This parallels a decline in the number of courts-martial in the Armed Forces generally and a corresponding decline in the number of annual petitions from approximately 2,000 in 2000 to 1,000 today. There are different theories and explanations for this decline, some of which go beyond the absolute incidence of misconduct.

Chief Judge Baker notes that the number of judges on the court is not just addressed to work load. It is also a source of relative stability to the law and thus military practice. Under its former structure with three judges, the retirement or departure of a judge and the appointment of his/her replacement could substantially alter the Court’s jurisprudence on an issue. However the present structure of five judges offers greater continuity, and more opportunity to spot and debate the issues at hand.

Outside the Courtroom

The Judicial Canons encourage judges to participate in extrajudicial law related activities as a means to advance understanding of the law, but also to ensure that judges do not become cloistered from society at large. Chief Judge Baker seeks to do this in two ways. He teaches or has taught national security law at five law schools, including the Georgetown University Law Center, Yale Law School, the University of Iowa College of Law, the University of Pittsburgh School of Law, and Washington University School of Law. He notes that many of his students have gone on to serve as judge advocates, and that one of the joys of serving on the USCAAF is the opportunity to meet and speak with judge advocates. “This is a bar composed of persons who have chosen to ‘uphold and defend’ the Constitution as their

mission. There is no higher calling in the law, and this what they do every day, one-small piece at a time, all of which aggregates into ‘the rule of law’ and a Nation that is both secure in its safety and in its values.”

He also meets with judges and lawyers from different countries, especially and including those engaged in military justice transformation. There tend to be two recurring and historic tensions with military justice: first, how to provide for a just and fair system of adjudication in a hierarchical culture that protects the accused from undue command influence; second, ensuring accountability and good order and discipline within militaries around the world that are not inclined to credibly investigate and prosecute allegations of misconduct.

Different countries and different systems have addressed or are addressing these tensions. Those that do not do so successfully are likely to have change thrust upon them from outside. This is an important source of comparative knowledge and insight for the United States model. One model may not fit all circumstances, especially given the variance in military size, missions, legal heritage and more. It would make little sense, for example, for New Zealand—with a military that may have ten courts-martial a year—to adopt a U.S. model of CCAs and USCAAF geared to address 5,000 courts-martial a year, including many in a deployed context. However, as a general matter, the adoption of the UCMJ in 1950 is a good illustration of how a military justice system can evolve in a timely manner, consistent with the rule of law, and at the same time preserve good order and discipline in an armed force. Whatever the system, it is clear from talking with judges from around the world that the federal judiciary in the United States remains a gold standard against which judicial independence and performance are measured. It is also clear that judicial process can have as much to do with a successful outcome as the substance of the law. The missing ingredient in some systems, for example, is not lack of commitment, but a lack of trained lawyers to exercise that commitment.

During his investiture, Chief Judge Baker summed up his feelings about the Court of Appeals for the Armed Forces as follows:

Law is at its best when it provides a structure where people can go about their business with confidence that they are safe to think freely and safe from physical intrusion. When government law enforcement does interfere, we must be treated fairly and in a manner consistent with democratic values. Our military offers so many people overseas the security and space for law to take hold, and one reason I am excited about this appointment is that I am part of a larger system which so many of you are part of, that gives our service personnel the confidence that as they help others, they too will be treated with respect and justice. ☺

Endnotes

¹Judge Baker’s book, *IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERIOUS TIMES*, was reviewed in the September 2008 issue of *The Federal Lawyer*.

²Review of affirmed capital sentence is mandatory.