

Advance Policy Questions for Scott W. Stucky
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?

Congress established USCAAF (then known as the Court of Military Appeals) in 1950 to provide appellate review of courts-martial by a specialized civilian court that possessed both judicial independence and the requisite expertise, in order to promote good order and discipline in the armed forces while ensuring that justice was done in individual cases.

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

I have more than 25 years of experience with military law; indeed, if the term is broadly defined, my entire career, other than my time in private practice from 1978 to 1982, has been engaged in military law. With respect to the appellate review of courts-martial, I served for four years (1987-1991) as a Reserve appellate government counsel in the Air Force, writing more than 100 briefs for the government in appeals before the Air Force Court of Military Review and the U.S. Court of Military Appeals. I then served for seven years (1991-1995, 1997-1998, 2001-2003) as a Reserve appellate military judge on the Air Force Court of Military Review (later the Air Force Court of Criminal Appeals), one of the service courts directly below USCAAF in the military justice system. During this time, I wrote approximately 75 judicial opinions on a wide variety of issues.

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?

I have attempted to keep abreast of developments in USCAAF's jurisprudence by regularly reading the Court's advance sheets. I do not believe that there are other actions that I need to take at this time.

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

The Secretary of Defense, under 10 U.S.C. 113, exercises "authority, direction, and control" over the Department of Defense. He normally would not be involved in particular military justice matters, but is ultimately responsible for policy in all

areas

of the Department.

Article 141 of the UCMJ provides that USCAAF "is located *for administrative purposes only* in the Department of Defense." [emphasis added] Thus, my relationship with the Secretary would be that of a member of an independent judicial establishment within the Department. The drafters of the Code and subsequent Congresses clearly intended that the military justice system, including USCAAF, be truly independent of command influence (see Article 37). In practice, colorable examples of interference with the system by senior officials of the Department (as opposed to local commanders) have been very rare. *See, e.g., United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988). Nevertheless, it is essential that the judges of USCAAF be ever vigilant to guard the system against any such possibility, as the Court of Military Appeals did in the *Carlucci* case.

The Chief Judge of the USCAAF

Under Article 143 of the UCMJ, the Chief Judgeship of USCAAF is determined by seniority of commission. The Chief Judge has certain administrative responsibilities, but is essentially first among equals with respect to the other judges of the Court. I would expect that my relationship with the Chief Judge would be one of mutual respect and collegiality, such as should be the case in an appellate court. The fact that the present Chief Judge is a friend for whom I have always had the highest respect would only serve to strengthen the relationship.

Judges of the USCAAF

Except for the administrative duties lodged in the Chief Judge, the judges of USCAAF are equal, differing only in seniority. I would expect that my relations with my fellow judges would be marked by that mutual respect and collegiality that should characterize relations among judges on any well-functioning appellate court.

The General Counsel of the Department of Defense

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 prescribe. The General Counsel is not normally involved in the day-to-day operation of the military justice system, but is substantially involved in the formulation of the Department's legal policy and its legislative recommendations to Congress. Subject to the caveats on the independence of USCAAF mentioned above in the context of the Secretary of Defense, I would anticipate that my relationship with the General Counsel would be one of respect, but would not be marked by frequent interaction. It should be noted that the judges of USCAAF serve on the statutory Code Committee established by Article 146 of the UCMJ, which is charged with the responsibility of making an annual survey of the operation of the UCMJ. As members, the judges may have interaction with the General Counsel in making recommendations for statutory amendments to the UCMJ.

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

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

Legal Issues

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

The very significant growth in sex offenses, particularly those involving children and child pornography, continues unabated. USCAAF continues to decide cases involving the Child Pornography Protection Act, 18 U.S.C. 2252A, e.g., *United States v. Cendejas*, 62 M.J. 334 (2006), and may be expected to continue to do so.

The USCAAF recently entered the field of privacy rights in e-mail sent and maintained on a government server, see *United States v. Long*, 64 M.J. 57 (2006). This area will no doubt be productive of litigation for years to come.

Allegations of ineffective assistance of counsel continue to occupy a substantial amount of the USCAAF's attention. See, e.g., *United States v. Miller*, 63 M.J. 452 (2006); *United States v. Osheskie*, 63 M.J. 432 (2006); *United States v. Edmond*, 63 M.J. 343 (2006).

constitutional rights of the Article 125 of the UCMJ (2003), in the absence of facts such as those present in *United States v. Marcum*, 60 M.J. 198, and its progeny, remains unresolved.

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?

The revised Article 120 was based upon a draft uniform State code which has been enacted, as I understand, by several States in whole or in part. Thus there should exist some body of precedent upon which the USCAAF may draw, as it sees fit, in construing Article 120. Since virtually all the substantive offenses under the new article could have been charged under the UCMJ prior to its enactment, I do not anticipate any major changes in substantive offenses.

The revised Article 120 may present problems in implementation for the armed forces, at least initially. Congress in the UCMJ has traditionally enacted rather broad statutory language and then left the details of implementation to the Executive in the *Manual for Courts-Martial*. It has been thought that this approach preserved the ability of the Executive to take into account the exigencies of military operations. The highly-detailed nature of the revised article will likely reduce the area for Executive discretion in the *Manual*, thus prompting a different approach to its implementation.

Jurisdiction of the USCAAF

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

Yes.

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

No. Section 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007 amended Article 2 of the UCMJ to clarify the applicability of court-martial jurisdiction to persons accompanying the armed forces in the field in time of declared war or a contingency operation. Section 4(a) of the Military Commissions Act of 2006 amended that article to clarify the applicability of such jurisdiction to lawful enemy combatants who violate the law of war. I do not believe that further modification of court-martial jurisdiction in general, or USCAAF's jurisdiction in particular, is necessary at the present 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. New, 55 M.J. 95 (2001) (status of legality of an order as question of law; application of political question doctrine to courts-martial).

United States v. Marcum, 60 M.J. 198 (2004) (constitutionality of Article 125 of the UCMJ as applied, in light of *Lawrence v. Texas*, 539 U.S. 558 (2003)).

United States v. Moreno, 63 M.J. 129 (2006) (due process implications of excessive delays in post-trial review; applicability of *Barker v. Wingo*, 407 U.S. 514 (1972) to courts-martial).

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

Consistency in decisionmaking and respect for precedent are essential to any appellate court. Indeed, the need for stability in doctrine over time was the principal reason that this Committee cited for the expansion of USCAAF from three judges to five in 1989. While USCAAF must retain the flexibility to meet changed circumstances, the doctrine of *stare decisis* should normally be followed. In the rare case when an applicable precedent is overruled, the USCAAF owes to the lower courts and to practitioners in the military justice system a clear explanation of its rationale for doing so.

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 in all judicial decisionmaking in the United States, the Constitution comes first. Next is federal statutes, primarily the UCMJ but also other federal laws that may be applicable in a particular case (for example, the statutes concerning child pornography, which have been construed by USCAAF on a number of occasions.) Then come the rules and procedures set out in the *Manual for Courts-Martial*, which is an executive order. In the military justice system, the *Manual* is particularly important, since Congress in the UCMJ has usually chosen to employ broad statutory language and left implementation up to the President. The rules of evidence and much of the procedure of courts-martial are to be found in the *Manual*. Next would be DOD and service regulations.

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?

Article 36 of the UCMJ provides that the President may prescribe rules which, so as he considers practicable, shall apply the principles of law and rules of evidence applicable in the U.S. district courts, but which may not be contrary to or inconsistent with the UCMJ. Thus, the rule prescribed by the President in the *Manual for Courts-Martial* will normally take precedence, whether or not it is the same as that applied in the district courts. If the *Manual* is silent on a particular question, then recourse should be had to the rule applicable in the district courts, if one exists and it is not contrary to the UCMJ. If a *Manual* rule itself contravenes the Constitution or the UCMJ, then the rule applicable in the district courts (if it differs from the *Manual* rule and is not subject to the same infirmities) should be applied.

Military Justice System

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

Strengths:

- Free, trained, defense counsel are provided to the accused at both the trial and appellate levels.
- Article 31 of the UCMJ affords the accused greater protection against self-incrimination than most civilian criminal justice systems.
- An elaborate system of appellate review is provided, both within each service and by USCAAF, with certiorari to the U.S. Supreme Court.
- The independence of defense counsel and trial and appellate judges against command influence is carefully secured by law, regulation, and judicial oversight.
- Sufficient resources are available to ensure that each case receives proper attention, without the pressure to plea-bargain that is common in civilian courts.

Weaknesses:

- The public does not have a good understanding of the workings of the system, and sometimes perceives it to afford fewer rights than it does, or to be an instrument of command influence.
- Occasional incidents of actual (or attempted) command influence sully the reputation of the system.
- The role of the commander as convening authority continues to be controversial, since it combines judicial and disciplinary functions in ways that are foreign to civilian criminal justice systems.

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

Congress, in the UCMJ, provided a subtle and largely successful balancing of the two. On the one hand, public and professional reaction to the operation of military justice during World War II necessitated the construction of a uniform system that would afford the accused substantially more rights, and secure them more firmly, than the old Army and Navy systems. On the other hand, Congress also recognized that the imperatives of war require that the armed forces be different from civilian society. Commanders must have the authority to enforce good order and discipline, both to maintain morale and to ensure readiness for combat. Thus, the UCMJ retained the commander's role as the convening authority with respect to referring charges, selecting court members, and post-trial review, while providing statutory protection against command influence and ultimate review of serious cases by a civilian court insulated from command. The fact that the UCMJ has had only two major overhauls since its enactment in 1950, and is being used successfully in armed forces and in situations far removed from those of that time, illustrates the success of Congress in balancing these equities.

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?

My perception is that the system has adapted successfully to the exigencies of the operations in Afghanistan and Iraq. The Committee should carefully consider any proposals for changes suggested by the Judge Advocates General in light of these experiences, if such suggestions are made.

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?

The USCAAF stated in *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986) that "command influence is the mortal enemy of military justice." Indeed, the problem of command influence under the pre-UCMJ systems was one of the principal reasons for the establishment of an independent civilian court in the UCMJ. Accordingly, USCAAF has a continuing responsibility carefully to supervise the military justice system and to take action whenever unlawful command influence threatens the rights of individuals and the integrity of the system. My reading of recent cases strongly

supports the conclusion that the USCAAF takes allegations of such influence very seriously.