

Advance Policy Questions for Kevin A. Ohlson
Nominee to be a Judge on 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 the USCAAF and its judges?

The duty of the judges on the United States Court of Appeals for the Armed Forces (USCAAF) is to ensure independent civilian oversight of the military courts. This responsibility is accomplished through appellate review of the decisions of the military courts of criminal appeals. The judges also have the duty of serving on the Code Committee which meets annually for the purpose of making an annual survey of the operations of the Uniform Code of Military Justice. This committee also is responsible for preparing an annual report that, among other things, provides information about the number and status of pending cases in the military court system.

The function of the United States Court of Appeals for the Armed Forces is to provide independent civilian oversight of the military justice system through appellate review of the decisions of the military courts of criminal appeals. In exercising this responsibility, the USCAAF is responsible for reviewing those cases where a military court of criminal appeals has affirmed a death sentence, where a service Judge Advocate General orders a case to be sent to the USCAAF after it has been reviewed by a military court of criminal appeals, and where, upon petition of the accused and for good cause shown, the USCAAF has granted review of a decision rendered by a military court of criminal appeals.

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

First, I served as a judge advocate officer in the United States Army for four years. During that time I not only became familiar with the military justice system by serving as a trial counsel and prosecuting a number of criminal cases, I also became familiar with the men, women, mission, and ethos of the United States Armed Forces. I achieved the latter by attending Air Assault school, attending Airborne school, being on “jump status” as a parachutist at Fort Bragg for four years, deploying to four foreign countries, and serving in Saudi Arabia (with two very brief forays into Iraq) during the Persian Gulf War and being awarded the Bronze Star.

Second, I served as a federal prosecutor in the United States Attorney's Office for the District of Columbia. In that capacity I indicted and prosecuted a wide variety of cases in a fast-paced, high-volume office, and I became very familiar with the criminal justice system and the duties and responsibilities of prosecutors.

Third, I was appointed as a member of the Board of Immigration Appeals. In that position I served in a judicial capacity deciding appeals in immigration cases. This professional opportunity enabled me to gain an understanding and appreciation of the role and function of adjudicators at the appellate level.

Fourth, I served as a senior manager within the Department of Justice, and the experiences I had in those positions would help me to run an efficient and productive chambers if I were to have the honor of being confirmed by the Senate.

Fifth, I served for two years as the Chief of Staff and Counselor to the Attorney General, which provided me with a broad appreciation of the policy issues that confront any criminal justice system.

And sixth, I currently serve as the Chief of the Department of Justice's Professional Misconduct Review Unit. In collaboration with the attorneys who work for me, I review instances where federal prosecutors have been accused of misconduct, I determine whether misconduct actually occurred, I write detailed memoranda explaining my reasoning, and then I impose discipline, if appropriate. Serving in this position has reinforced for me the vital importance of performing one's duties consistent with the highest standards of honor, excellence, integrity, and fairness.

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?

Being considered for a position that is as important, as challenging, and as consequential as serving as a judge on the U.S. Court of Appeals for the Armed Forces is a tremendous honor, and I would very willingly take any steps that may be helpful in enhancing my ability to perform those duties. Accordingly, if I have the privilege of being confirmed by the Senate, and even during the confirmation process, I will endeavor to obtain a more in-depth knowledge of the legal issues facing the USCAAF by reviewing and refreshing my memory of the UCMJ, the Rules for Courts-Martial, and the Military Rules of Evidence, and by reading key decisions of the USCAAF and scholarly articles about the military justice system.

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 is authorized to be a convening authority for general or special courts-martial, and may promulgate orders and regulations that are actionable under the UCMJ. Further, because the Secretary is responsible for the formulation of policy related to matters directly affecting the Department of Defense, working through the Joint Services Committee the Secretary may propose legislative or other changes to the Manual for Courts-Martial and the Uniform Code of Military Justice.

However, Article 141 of the Uniform Code of Military Justice clearly states that the United States Court of Appeals for the Armed Forces is located in the Department of Defense “for administrative purposes only.” Therefore, although it is unlikely that I would have any interaction with the Secretary of Defense even if I were confirmed, if I did so I would treat him or her with the greatest respect and courtesy, but I would always be mindful of the fact that, when it comes to my professional duties and responsibilities, USCAAF judges are wholly independent of the Secretary of Defense.

The Chief Judge of the USCAAF

The Chief Judge of the USCAAF is selected based on seniority of commission among those judges on the court who have not previously served in that position. The term of service is five years. The Chief Judge presides at court sessions, and oversees the administrative functions of the court. If confirmed, my relationship with the Chief Judge would be both collegial and respectful, but when it comes to decision-making in cases, I would fully exercise my independent judgment.

Judges of the CAAF

If confirmed, I would expect my relationship with the other judges on the court to be very collegial, and I would closely listen to and consider their points-of-view on all issues that come before the court. However, when it comes to a vote on a petition, a writ, or a case, if confirmed I would exercise my independent judgment in each and every matter.

The military courts of criminal appeals

The United States Court of Appeals for the Armed Forces reviews all cases where a military court of criminal appeals has affirmed a death sentence, where a service Judge Advocate General orders the case to be sent to the USCAAF after it has been reviewed by a military court of criminal appeals, and where, upon petition of the accused and for good cause shown, the USCAAF has granted review of a decision rendered by a military court of criminal appeals. If confirmed, I would give full and due consideration to the analysis and reasoning of members of the military courts of criminal appeals in each and every case that comes before me. However, I ultimately would exercise my independent judgment in deciding each case.

The General Counsel of the Department of Defense

Although the General Counsel is the chief legal officer of the Department of Defense, Article 141 of the UCMJ states that the USCAAF falls under the Department for administrative purposes only. Thus, the court does not fall under the purview, management, or supervision of the General Counsel. However, the General Counsel does have the authority to exercise those delegated duties as the Secretary may prescribe, and thus coordinates any proposed legislative changes to the UCMJ that the Joint Services Committee may recommend. If confirmed, my relationship with the General Counsel would be respectful and cordial, but I would act independently in my role as a judge.

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

The Judge Advocates General of the Army, Navy, and Air Force, and the Staff Judge Advocate to the Commandant of the Marine Corps, provide advice on military justice matters to the Service Chiefs and to the Commandant, respectively. They are responsible for such actions as supervising the administration of military justice, overseeing the judge advocates and military judges within their service, and reviewing and taking action on certain records of trial. Additionally, a Judge Advocate General may certify questions to the USCAAF, and serves as a member of both the Joint Services Committee and the Code Committee. If confirmed, my relationship with these senior officers would be collegial and respectful, but I would always maintain my judicial independence and neutrality.

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?

If confirmed, undoubtedly one of the most significant legal issues I would be called upon to address would be the changes to Article 120 of the Uniform Code of Military Justice regarding the offense of rape. I also firmly believe that when deciding cases, the judges on the Court of Appeals for the Armed Forces must continue to be vigilant about protecting the integrity of the military justice system from the corrosive effects of command influence and ineffective assistance of counsel. And finally, I believe the court will be confronted with issues arising from the use of emerging technology as it pertains to such issues as possession of child pornography and the right of privacy.

Jurisdiction of the USCAAF

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

Yes, very much so. Not only has the court provided the necessary civilian oversight of the military justice system, it also has provided independent judicial review in military justice cases and has served as a bulwark against unlawful command influence.

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

I am not aware of the need for any changes at this time.

UCMJ Jurisdiction over Civilians

Section 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007 amended the Uniform Code of Military Justice to clarify that persons serving with or accompanying an armed force in the field are subject to the UCMJ during a contingency operation as well as in a time of declared war.

What challenges, if any, do you anticipate that the Armed Services and the USCAAF will encounter in implementing the UCMJ with regard to persons serving with or accompanying an armed force in the field?

As with any new law that has not been thoroughly reviewed by the courts, there likely will be a number of challenges to this piece of legislation when and if it is invoked in any additional cases in the future. First and foremost, if it is a United States citizen who is prosecuted pursuant to this provision of the UCMJ, the issue will undoubtedly arise whether its application to a civilian violates a defendant's constitutional guarantees, such as the right to a trial by a jury of one's peers. Second, the CAAF will have to wrestle with determining the scope

of the law. For example, issues that may arise in any specific case will likely include determining the definition of such phrases as “serving with or accompanying an armed force,” “in the field,” and “contingency operation.” Third, there will be issues about whether the appropriate person within the military command structure exercised jurisdiction in any particular case.

The Armed Services also will likely encounter challenges when implementing this UCMJ provision. I anticipate that when confronted with a case where this UCMJ provision is potentially applicable, the Armed Services may become concerned about the need to delay taking action until the Department of Justice has reviewed the case to determine whether DoJ will exercise jurisdiction. Further, when a particular case arises, depending upon the circumstances of the alleged offense, the American public may express concerns about the invocation of this provision of the UCMJ and the resulting prosecution of a civilian who is a United States citizen in the military justice system.

Decisions of the USCAAF

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

* *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). This case reiterates the fact 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 fairness, and the apparent fairness, of criminal proceedings.

* *United States v. Prather*, 69 M.J. 338 (2010). In this case the accused was charged with aggravated sexual assault for engaging in sexual intercourse with a person who was substantially incapacitated. The court held that an accused’s burden to prove the affirmative defense of consent by a preponderance of the evidence unconstitutionally shifted the burden onto the defense to disprove an element of the offense.

* *United States v. Lee*, 66 M.J. 387 (2008). After conviction at court-martial, the accused alleged that his detailed defense counsel failed to adequately disclose a conflict of interest. The USCAAF held that counsel provided to or retained by the accused must provide reasonably effective assistance, and that where a constitutional right to counsel exists, there is a correlative right to representation that is free from conflicts of interest.

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

The doctrine of *stare decisis* is an essential guiding principle for any appellate court. In the military justice system this doctrine is especially important because it provides both commanders and service members with needed stability, consistency, and predictability regarding the handling of criminal offenses. However, there may be rare instances where applicable precedent should be overturned. This step should only be taken after long and careful consideration, and in those instances when it does occur, I believe the judges of the USCAAF are obligated to explain their rationale for doing so clearly, fully, and persuasively.

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?

First and foremost, the USCAAF must ensure that its decisions are consistent with the Constitution. The USCAAF is also bound by the decisions of the United States Supreme Court. Next, the court should look to the provisions of the Uniform Code of Military Justice, other applicable federal statutes, and its own precedents. Then the court should apply the rules and procedures set forth in the Manual for Courts-Martial. Finally, the court should look to 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?

When the Manual for Courts-Martial and the Military Rules of Evidence provide guidance in a particular matter, and when that guidance is not contrary to or inconsistent with the Constitution, binding Supreme Court precedent, or the UCMJ, then those rules are applicable. It is only when the Manual for Courts-Martial or the Military Rules of Evidence are silent on an issue that the court should look to analogous rules applicable in the federal civilian courts.

Military Justice System

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

In my view, the following are the major strengths of the military justice system. First, every accused in the military is entitled to a free, qualified defense counsel at every step of the judicial process. Second, there are sufficient resources devoted to criminal cases in the military

so that every case receives the necessary and proper amount of attention. Third, in the military justice system there is no undue pressure for either the government or the defendant to plea bargain a case. Fourth, the accused's right to be present at, and to participate in, the Article 32 proceeding far exceeds any rights that a similarly-situated defendant would have in the civilian justice system. And fifth, the jurors in the military are uniformly educated, informed, and engaged.

In my view, the two greatest weaknesses of the military system are the potential for command influence to play a role in the ultimate outcome of a criminal case, and the flawed perception among some that the military system doles out "drumhead justice" because of their mistaken belief that the rights of the accused are not adequately protected.

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

At the core of the Uniform Code of Military Justice is the delicate balance that exists between the rights of service members on one hand and the need for commanders to maintain good order and discipline on the other hand. In the military justice context, an effective military force is grounded both on the high morale that is sustained by the knowledge and belief of the average service member that he or she will be treated fairly and that his or her rights will be protected, and on the ability of commanders to enforce high standards of behavior in a wide variety of situations, some of which are not analogous to those found in civilian society. In striking this balance, the UCMJ empowers a commander to take such steps as serving as the convening authority and selecting court members, while at the same time providing service members with a variety of rights and with strong protections against command influence. The fact that fundamental changes to the military justice system have been relatively rare over the last six decades serves as a testament to the fact that the UCMJ has struck this balance correctly.

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?

I believe the military justice system has proven itself to be remarkably adept at adjusting to the varied situations arising out of the many operations, missions, and deployments of our armed forces during the last decade. Accordingly, I am not currently aware of any changes that are needed in light of the experiences of the Armed Services in Iraq and Afghanistan. However, if confirmed I would always be keenly interested in any recommendations that may be generated by the Joint Services Committee or the Code Committee, as well as any legislative proposals that may be made by, or to, the Congress, including the Senate Armed Services Committee.

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?

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a framework for determining whether the performance of a defense counsel in a capital case was constitutionally adequate. Specifically, *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 later cases the Supreme Court 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?

In the vast majority of death penalty cases in the military that have been overturned on appeal, the reason for the reversal has been due to ineffective assistance of counsel.

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

In capital cases it is critically important for both the trial counsel and the defense counsel to be top-notch lawyers of the highest caliber. Next, these lawyers must receive the necessary training in order to ensure that they are fully aware of all the facets of handling a capital case so that they will be informed and effective advocates at each stage of the proceedings. Further, these lawyers must have significant experience litigating cases; training is vitally important, but there is no substitute for hands-on litigation experience in the courtroom when handling a capital case. Next, the lawyers must have ready access to assistance and support in handling certain legal aspects of issues that are unique to capital cases. And lastly, the lawyers on both sides must have adequate time to prepare their cases. Even great lawyers with great training, great experience, and great access to resources cannot perform at a level commensurate with what we must demand in all capital cases unless they have adequate time to analyze and prepare the case.

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?

As the USCAAF reiterated in *United States v. Lewis*, 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 criminal proceedings. Accordingly, the USCAAF has been, and must continue to be, vigilant against the corrosive effects of unlawful command influence at every stage of legal proceedings. Further, the court must ensure that all allegations of unlawful command influence are fully litigated at trial and on appeal. And finally, in those cases where unlawful command influence has occurred, the court must take strong, appropriate action to remedy the problem.

Precedent Under Military Commissions Act

The Military Commissions Act of 2009 (MCA) provides that the judicial construction and application of the Uniform Code of Military Justice, while instructive, is “not of its own force binding on military commissions established under this chapter.” In addition, the MCA amended Article 39 of the UCMJ to provide that the findings, holdings, interpretations, and other precedents of military commissions “may not form the basis of any holding, decision, or other determination of a court-martial.”

What is your understanding of the relationship between the judicial construction of the UCMJ and the judicial construction of the MCA?

The rules of evidence and procedure in the Manual for Military Commissions (MMC) differ in several important respects from those in the Manual for Courts-Martial (MCM). For example, the MMC allows for admission of certain hearsay evidence “not otherwise admissible under the rules of evidence applicable in trial by general courts-martial.” The Manual notes that these differences “reflect the [Secretary of Defense’s] determinations that departures are required by the unique circumstances” arising out of the conduct of certain military and intelligence operations. However, despite these differences, the procedures for military commissions are generally based on the procedures for trial by general courts-martial under the Uniform Code of Military Justice. Nonetheless, as noted above, while the judicial construction and application of the UCMJ are to be considered instructive, they “are not of their own force binding on military commissions.” Therefore, the judges within the military commission system are authorized to

interpret the MMC provisions that are the same or similar to provisions in the UCMJ in a different manner than they otherwise would be required to interpret them if USCAAF precedential decisions were binding upon them.