

Advance Policy Questions for Gregory Maggs
Nominee for Judge on the United States Court of Appeals for the Armed Forces

Duties and Qualifications

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 judges?

Answer: The Uniform Code of Military Justice (UCMJ) authorizes the USCAAF to review decisions of the four military Courts of Criminal Appeals (CCAs) with respect to matters of law. 10 U.S.C. § 867. The USCAAF judges primarily use this authority to correct legal errors, resolve conflicts on legal issues among the four CCAs, and provide civilian oversight of the military justice system.

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

Answer: I believe that my civilian and military legal background and experience have prepared me to perform the duties of a USCAAF judge.

Much of my early civilian legal experience was closely connected with judicial decision making. I served as a law clerk for Judge Joseph Sneed of the U.S. Court of Appeals for the Ninth Circuit and for Justice Anthony M. Kennedy and Justice Clarence Thomas of the U.S. Supreme Court. In these positions, I observed and learned from distinguished jurists and contributed to their work. Subsequently, the Supreme Court appointed me to serve as a special master in a complex case that took almost five years to resolve. I have also been an assistant to two other special masters for the Supreme Court in complex cases.

My military legal background also has provided me with relevant qualifications. I am a colonel in the U.S. Army Reserve in the Judge Advocate General's Corps. I have spent almost ten of my twenty-seven years in the Army Reserve as a military judge, assigned either as an appellate judge on the Army Court of Criminal Appeals or a trial judge in the Army's first judicial circuit. In addition, I have served as a commissioner (law clerk) at the Army Court of Criminal Appeals and as a trial counsel (prosecutor) at the 101st Airborne Division. In these positions, I have been assigned to more than 250 military cases at the trial and appellate level.

I am a graduate of the Military Judge Course and the Judge Advocate Officer Basic and Advanced Courses. I was previously assigned to the Office of the Judge Advocate General, Criminal Law Division, where I assisted members of the Joint Service Committee in reviewing and amending the Manual for Courts-Martial. I am a co-author of *Modern Military Justice: Cases and Materials* (West Academic, 2d ed. 2014), a leading textbook. I have taught military justice classes at the U.S. Military Academy and the George Washington University, and written law review articles on military justice.

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: If confirmed, I will take several actions to enhance my ability to perform my duties as a judge on the USCAAF. I will need to study the USCAAF rules of court and work with the clerk of court to ensure that I fully understand them. I will also study more fully the extensive recent amendments to the UCMJ, the pending proposed amendments to the Manual for Courts-Martial (MCM), and the USCAAF's recent decisions. I will also take every opportunity to learn from the current, as well as former, USCAAF judges.

Relationships

What are the respective roles of each of the following with respect to the military justice system and, if confirmed, what would be your relationship with:

The Secretary of Defense

Answer: The Secretary of Defense has several roles with respect to the military justice system. For example, the Secretary has authority to convene a general court-martial, 10 U.S.C. § 822(a)(2), and to designate the general court-martial convening authority for joint task forces, Rule for Courts-Martial (RCM) 201(e)(1)(B). In addition, the Secretary often forms important committees, such as the Military Justice Review Group, to study the military justice system and recommend changes.

The Secretary of Defense, however, has a very limited relationship with USCAAF judges. The UCMJ provides that the USCAAF "is located *for administrative purposes only* in the Department of Defense." 10 U.S.C. § 941 (emphasis added). Accordingly, while the Secretary of Defense has authority over organizational matters, such as providing security for the USCAAF's courthouse, the Secretary has no authority to remove the USCAAF judges or direct their decisions in any case.

The General Counsel of the Department of Defense

Answer: The General Counsel of the Department of Defense also has several roles with respect to the military justice system. For example, the General Counsel has responsibility for administering the federal regulations establishing the Joint Service Committee. 32 C.F.R. § 152.4(a)(1). This Committee reviews and proposes changes to the MCM and proposes legislation to amend the UCMJ. *Id.* § 152.1(b). Like the Secretary of Defense, the General Counsel also does not have a direct relationship with USCAAF judges. The General Counsel has no authority to remove the USCAAF judges or direct their decisions in any case.

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

Answer: The Judge Advocates General and Staff Judge Advocate to the Commandant of the Marine Corps have several key roles in the military justice system. For example, they designate officers to serve as military judges, 10 U.S.C. § 826(c); they may review the records of certain courts-martial that are not reviewable by the Service Courts of Criminal Appeals, *id.* § 69(a); and they make inspections in the field in supervision of the administration of military justice, *id.* § 6(a). These officers have a limited relationship to the USCAAF judges because the UCMJ grants them authority to order that certain cases will be reviewed by the USCAAF. *Id.* § 867(a)(2). But like the Secretary and the General Counsel of the Department of Defense, they have no authority to remove the USCAAF judges or direct their decisions in any case.

The Chief Judge of the USCAAF

Answer: The Chief Judge presides at court sessions and has a variety of administrative duties in leading the USCAAF. 10 U.S.C. § 143(b). If confirmed, I anticipate having a collegial relationship with the Chief Judge, whom I have known for many years. In deliberations over cases, however, I would exercise independent judgment.

Other judges on the USCAAF

Answer: If confirmed, I anticipate having a collegial relationship with the other judges on the USCAAF, much as I have had a collegial relationship with other military judges in the Army. While I would respect and seek to learn from my colleagues' opinions, I would exercise independent judgment in reaching my conclusions.

The military courts of criminal appeals

Answer: The USCAAF reviews the decisions of the CCAs and may take action with respect to matters of law. 10 U.S.C. § 867(c). The USCAAF must state and explain its holdings clearly so that the CCAs can follow its decisions in future cases.

Legal Issues

What do you anticipate would be the most significant legal issues you will be called upon to address, if confirmed?

Answer: If confirmed, my role would be to review cases to determine whether they are correct as a matter of law. 10 U.S.C. § 67(c). In performing this role, I would view any legal issue that is properly before the court as a "significant legal issue." That said, I would anticipate the USCAAF in the coming years will be called to address many new issues arising out of the recently enacted Military Justice Act of 2016. Under Canon 3(A)(6) of the Code of Conduct for Federal Judges, I believe that it would be inappropriate for me to identify and comment on specific issues because they might come before me if I am fortunate enough to be confirmed as an USCAAF judge. The Code of Conduct provides guidance to both "judges and nominees for judicial office." Canon 1, Commentary.

What challenges, if any, do you anticipate that the military services and the USCAAF will encounter in implementing the changes to the Uniform Code of Military Justice enacted in the Military Justice Act of 2016?

Answer: Whenever new legislation is passed, questions may arise about its scope, meaning, and constitutionality. The Military Justice Act of 2016 is likely no exception to this principle, especially because the Act changes so many different provisions of the UCMJ. The Senate Committee Report characterizes the Act as constituting the most significant reforms to the Uniform Code of Military Justice since it was enacted. Again, under Canon 3(A)(6) of the Code of Conduct for Federal Judges, I believe that it would be inappropriate for me to identify and comment on specific issues because they might come before me if I am fortunate enough to be confirmed as an USCAAF judge.

Jurisdiction of the USCAAF

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

Answer: The principal expectation of Congress in creating the USCAAF (initially known as the Court of Military Appeals) was to “establish a civilian court of military appeals, completely removed from all military influence or persuasion.” H.R. Rep. No. 81-491, at 7 (1949). In my view, the USCAAF has maintained its intended independence from military authority. I am not aware of any suggestion that military commanders or the Judge Advocates General have any ability to direct the decisions of the USCAAF judges. Judges of the USCAAF are protected from outside pressure because they have a tenure of 15 years, 10 U.S.C. § 942(b), and the President can remove them before the expiration of 15 years only for neglect of duty, misconduct, or mental or physical disability, *id.* § 942(c).

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

Answer: I am not aware of any legislative changes needed regarding the role, responsibilities, or jurisdiction of the USCAAF. I am aware that, following thorough study, Congress recently addressed these subjects in the Military Justice Act of 2016. For example, Congress added a new provision regarding review of punishments for contempt. *See* Pub. L. 114-328, § 5230 (amending 10 U.S.C. § 848). If confirmed, my role as a judge would be to apply faithfully the legal rules enacted by Congress in the UCMJ, assuming they are consistent with the Constitution and Supreme Court precedent.

Decisions of the USCAAF

Please describe three decisions of the USCAAF in the past 10 years that have been the most significant in your opinion.

Answer: In *United States v. Morton*, 69 M.J. 12 (C.A.A.F. 2010), the USCAAF held that the “closely related offense” doctrine violates Due Process. This doctrine previously had

authorized an appellate court to uphold a guilty plea when the providence inquiry established guilt of an offense different from but “closely related” to the crime to which the accused has pleaded guilty. The *Morton* decision overruled five USCAAF precedents and required reconsideration of many pending appeals.

In *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), the USCAAF held that the government must charge and prove the terminal element of an article 134 offense (i.e., that the conduct was either “prejudicial to good order and discipline” or “service discrediting”). This decision overruled six USCAAF precedents. It caused a major change in practice. The decision also appears to have prompted Congress, in the Military Justice Act of 2016, to define by statute many of the article 134 offenses previously defined only in part IV of the MCM.

In *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), the USCAAF adopted the “elements test” for determining whether one offense is a lesser included offense of another. Previously, lesser included offenses were established by listing them in the MCM. The *Jones* decision overruled two USCAAF precedents and required review of many additional cases by the CCAs. The decision also appears to have prompted Congress, in the Military Justice Act of 2016, to amend the UCMJ to create a new standard for identifying lesser included offenses.

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

Answer: The USCAAF should adhere to the same principles of *stare decisis* as other federal appellate courts. Usually, to promote stability in the law and equality of outcomes, prior decisions should control subsequent decisions. But of course, no court is infallible. If the USCAAF decides that it made a mistake in a previous decision, it may overrule or abrogate the decision. The USCAAF also should reconsider precedents that have been called into question by Supreme Court decisions or amendments to the UCMJ or MCM. It would be inappropriate for me to identify and comment on specific examples because they might come before me if I am fortunate enough to be confirmed as a USCAAF judge. *See* Canon 3(A)(6) of the Code of Conduct for Federal Judges.

In view of article 36 of the Uniform Code of Military Justice, 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: Prior USCAAF decisions have held that rules of evidence and procedure are invalid or must be limited when they conflict with the Constitution or the UCMJ. These decisions generally have not invalidated rules of evidence or procedure that conflict with service regulations. I previously have cited examples illustrating these propositions in my article, *Judicial Review of the Manual for Courts–Martial*, 160 Mil. L. Rev. 96 (1999). It would be inappropriate for me to comment further on these examples because the issue might come before me if I am fortunate enough to be confirmed as a USCAAF judge. *See* Canon 3(A)(6) of the Code of Conduct for Federal Judges.

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: Article 36 requires the President “so far as he considers practicable,” to promulgate rules that apply the principles “generally recognized in the trial of criminal cases in the United States district courts.” I believe that it would be inappropriate for me to identify and comment on examples of the application of this rule because the issue might come before me if I am fortunate enough to be confirmed as an USCAAF judge. *See* Canon 3(A)(6) of the Code of Conduct for Federal Judges.

Military Justice System

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

Answer: The military justice system contains various strengths. It is a mature system, regularly improved over the past decades. It is a system capable of providing world-wide justice to Service Members. It is a system conducted by highly trained military lawyers and military judges. In most cases, it operates without unreasonable delay. Its decisions are respected by Service Members and civilians. I am unaware of major weaknesses of the military justice system that have not been addressed by Congress, especially given the extensive study of the system and extensive amendments in the Military Justice Act of 2016. If confirmed, my role as a judge would be to apply faithfully the legal rules enacted by Congress in the UCMJ and by the President in the MCM, so long as they are consistent with Supreme Court precedent.

In your opinion, does the military justice system afford a fair and just system for military personnel accused of violations of the Uniform Code of Military Justice?

Answer: Yes, in my opinion, the system is fair and just when it operates as intended. But of course errors at trial may make the treatment of an accused unfair in a specific instance. The CCAs and the USCAAF have appellate jurisdiction to correct these errors.

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

Answer: Congress and the President have developed rules establishing the rights of victims of offenses after an extensive study of the military justice system, using surveys and other empirical data. The Special Victim Counsel program is perhaps the best example. If confirmed, my role as a judge would be to apply faithfully the legal rules enacted by Congress in the UCMJ and by the President in the MCM, consistent with Supreme Court precedent.

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

Answer: Although commanders have the duty to maintain discipline and have authority to do so in part by referring cases to courts-martial or imposing non-judicial punishment, commanders must respect the rights of Service Members granted by the Constitution, the UCMJ, and the Manual for Courts-Martial (MCM). For example, the UCMJ specifically prohibits commanders from unlawfully influencing a court-martial. 10 U.S.C. § 837.

Do you believe that changes to the military justice system are called for in light of the experiences of the military services in Iraq and Afghanistan?

Answer: I am not aware of any legislative changes that are called for in light of the experience of the military in Iraq and Afghanistan. I am aware that, following a very thorough study, Congress recently addressed this subject in the Military Justice Act of 2016 and the Department of Defense has done so as well in implementing rule changes. For example, a pending proposed amendment to R.C.M. 804(b) addresses circumstances in which the accused may consent to participate in trial proceedings by remote means without having defense counsel physically present at the accused's location. If confirmed, my role as a judge would be to apply the legal rules enacted by Congress in the UCMJ and by the President in the MCM, consistent with the Constitution and Supreme Court precedent.

In your view, are changes to the military justice system called for in light of changes in U.S. criminal jurisprudence?

Answer: Again, I am not aware of any legislative changes that are called for in light of changes in U.S. criminal jurisprudence. I am aware that, following thorough study, Congress recently addressed this subject in the Military Justice Act of 2016. For example, Congress amended Article 19(c) to allow the military judge, with the consent of the parties, to designate a military magistrate to preside over a court-martial. This change brings the military justice system in line with modern practice in federal criminal courts of having United States Magistrate Judges try petty offenses. If confirmed, my role as a judge would be to apply the legal rules enacted by Congress in the UCMJ and by the President in the MCM, consistent with Supreme Court precedent.

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 constitutional requirements for the defense of a capital case?

Answer: The Supreme Court has held that the Sixth Amendment guarantees defendants in criminal cases a right to "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Counsel is constitutionally ineffective if "counsel's conduct so undermine[s] the proper functioning of the adversarial process that [a] trial cannot be relied on as having

produced a just result.” *Id.* The Supreme Court has said that the “same principle applies to a capital sentencing proceeding.” *Id.*

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 the overturning of death sentences on appeal?

Answer: The USCAAF has overturned death sentences on appeal for variety of reasons. Examples of errors resulting in a reversal of a death sentence include failure of the military judge to instruct the court members to vote first on the lightest proposed sentence, *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998); the military judge’s erroneous granting of a challenge to a panel member who expressed reservations about the death penalty, *United States v. Quintanilla*, 63 M.J. 2 (C.A.A.F. 2006); and possible prejudice to the accused by panel members who may have double counted aggravating factors, *United States v. Curtis*, 33 M.J. 101 (C.M.A. 1991). Given that the sample size is small, generalizations are difficult. But one factor that may account for the errors at trial is the inexperience of counsel and military judges with the complex requirements of capital cases.

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

Answer: Judges of the court to which I have been nominated do not have a role in preparing court-martial practitioners for prosecution and defense in capital cases. Taking an active role in preparing lawyers to handle cases before the court would be inconsistent with the role of the judge as a neutral decisionmaker in an adversary proceeding. If confirmed, my role as a judge would be to apply the legal rules enacted by Congress in the UCMJ and by the President in the MCM, rather than to set the policies for training counsel in capital cases. Congress recently has studied this matter in depth and has amended the UCMJ to require that, to “the greatest extent practicable, in any capital case, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases.” 10 U.S.C. § 827.

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, if any, of the USCAAF in addressing this problem?

Answer: The UCMJ prohibits unlawful command influence. 10 U.S.C. § 837. Although all judges in the military justice system must enforce this provision, it is especially important for USCAAF judges to guard against the threat of unlawful command influence. USCAAF judges are usually the only civilian judges to review a court-martial. Congress has made USCAAF independent in large part so that it can serve this function.