

THE IMPORTANCE OF BUILDING FIRES: LESSONS LEARNED AS A JUDGE ON THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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I. INTRODUCTION: JUDICIAL HUMILITY AND A TWO-PART RETROSPECTIVE

Humility is an important judicial trait. Someone who already knows all the answers, or thinks he does, is not going to explore the law and listen at oral argument in the same manner as someone who is open to argument. Indeed, the ability to genuinely and openly hear both sides of a case is a form of humility—one that is perhaps most valuable to a judge.

Judges should also be humble because it is remarkable how many different ways one can perform the functions of a judge, even when there are only a handful of tasks that judges perform. Appellate judges read, write, ask questions, and argue. Trial judges add to this list the skills of courtroom and docket management. There are some wrong answers, but no right or absolute answers about how to perform these duties. As I like to say, on a court of five judges, there are five different answers to every question. This too, is a source of humility.

In this light, I am wary of offering advice to judges and lawyers, although this is what I have been asked to do by providing a retrospective on my fifteen years on the United States Court of Appeals for the Armed Forces, including the last four as Chief Judge. I have chosen to do so in two sections. Section I is academic in tone and describes the role, purpose, and composition of the USCAAF, the Article I federal court that

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hears appeals arising under the Uniform Code of Military Justice. It starts with a brief primer on the military justice system and ends by addressing three questions that may be of particular interest to a wider audience, as they reflect the three subject areas about which I get asked the most questions when visiting law schools:

- How is this Article I court of appeals different from Article III courts of appeals?
- Why do sexual assault and child pornography figure so prominently in the military justice docket?
- No matter what sort of case is being heard, does oral argument matter in this court, and if so, what are the hallmarks of an effective oral argument?

Section II takes a more personal tone, presenting four observations about judicial practice derived from a few of the “lessons” that I hope I learned along the way. My overt agenda is to inform; my hidden agenda is to encourage the next generation of judges to enjoy and appreciate the role as much as I have. Here are the main points:

- It takes time—years—to become a judge.
- Although there are no agreed-upon criteria for evaluating judges, every judge should find a way to assess his or her performance, perhaps by creating and using a personal “report card.”
- As ambassadors of the law, judges are “always on duty” and should both understand and convey to a larger audience the meaning of the rule of law.
- Clerks are vital, not least as a source of inspiration, friendship, knowledge, diversity, and—yes—work.

The article concludes by suggesting that judges must know how to build a fire, when to build a fire, and when it is best to

wait, all of which is to say that they must place their legal and judicial lives in perspective. The judge who learns when, how, and why to build a fire—real or metaphorical—will better serve the law and the interests of justice.

II. THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES¹

A. The Court, the Military Justice System, and Procedure under the Uniform Code of Military Justice

The United States Court of Appeals for the Armed Forces comprises five civilian judges who are nominated by the President, confirmed by the Senate, and appointed to fifteen-year terms. The Court was created in 1951 following World War II, during which there were approximately 1.7 million courts-martial.² These courts-martial were conducted in accordance with the Articles of War of 1920 and the Articles for the Government of the Navy of 1937. These Articles, it is fair to say, had more in common with the times and practices of George Washington's Continental Army than they did with emerging twentieth century concepts of due process and justice.³ Stated simply, many returning veterans, including a number recently elected to Congress, were not satisfied with the modicum of justice and due process they had observed during the War.⁴ The United States military needed and deserved something better.

1. Until 1994, the USCAAF was known as the Court of Military Appeals. Congress changed the name of our Court, as well as those of the lower appellate courts in the military justice system, to better reflect the courts' roles and to reflect that the Court operates as and like a federal court of appeals. One wonders as well whether the judges might have preferred a military acronym other than "COMA." See H.R. Conf. Rep. No. 103-701, at 174-75 (1994).

2. Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 28 (1970).

3. For example, following the Houston Riot of 1917, thirteen black soldiers were summarily executed after the largest court-martial in U.S. military history, having received no appellate review. For a comprehensive account of this incident, see Robert V. Haynes, *The Houston Mutiny and Riot of 1917*, 76 S.W. HIST. QUARTERLY 418 (Apr. 1973).

4. One of these veterans was Gerald R. Ford, the future president, who served with distinction on the carrier USS Monterey and was elected to Congress from Lansing, Michigan, in 1949. See Andrew S. Effron, *United States v. Dubay and the Evolution of*

A new Uniform Code of Military Justice was drafted, signed into law in 1950, and implemented in 1951.⁵ As stated in the Preamble to the Manual for Courts-Martial, the purpose of military law and thus of the Code is “to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”⁶ Among other things, the Code sought to regulate the influence of command, and to enshrine the concept of civilian oversight, in the form of a civilian appellate court to hear appeals.⁷ Additional significant reforms to the Code were made with wholesale legislative amendments in 1968 and 1983, including the adoption of the position of military judge. In addition, change has come more incrementally through statutory amendment and case law interpretation and adjustment.

Jurisdiction under the Code is based on service status.⁸ That is, a member of the military is subject to the Code whether he or she is on or off duty, anywhere in the world, provided that he or she is a member of the Armed Forces at the time. Jurisdiction extends to reservists and members of the National Guard as

Military Law, 207 MIL. L. REV. 1, 4 (2011) (quoting Rep. Ford: “[T]hese court-martial boards are not attempting to decide one way or the other—is the man guilty or innocent. They are only trying to figure out what the captain of the ship, or the commanding officer of a station, wants done with the man.”).

5. See Sherman, *supra* note 2, at 49.

6. UNITED STATES DEPARTMENT OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES at I-1 (2012).

7. However, this latter principle was lost, or perhaps merely diluted, when Congress amended the statute in 2013 to permit retired military officers to serve on the Court after a cooling off period of seven years. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 128 Stat. 672 (2013) (amending 10 U.S.C. § 942(b)(4) to provide that “[a] person may not be appointed as a judge of the court within seven years after retirement from active duty as a commissioned officer of a regular component of an armed force”).

8. See *Solorio v. United States*, 483 U.S. 435 (1987) (holding that offense charged need not be related to military service if defendant was a service member when offense was committed). Jurisdiction also extends “[i]n time of declared war or a contingency operation,” to “persons serving with or accompanying an armed force in the field.” 10 U.S.C. § 802(a)(10). As a constitutional matter, however, the ability of the military to exercise jurisdiction over civilians raises serious questions. See *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality) (concluding that “the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections”). As a practical matter, however, only one military prosecution in recent history has involved a civilian contractor, and the circumstances of that case are unlikely to repeat. *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012).

well, when they are serving in a federal status. The offenses tried under the Code are exclusively criminal, the vast majority of which involve common-law crimes like murder, rape, and larceny, as well as military crimes, like desertion and insubordination. The Code also incorporates by reference or assimilation the federal criminal code and state law.

In the United States military justice system, the trial court is known as a court-martial⁹ and there are no standing trial courts. Courts-martial are convened for the purpose of trying a particular case or cases. However, there are lawyers, known in the military as judge advocates, designated to serve as full-time military judges. Charges are brought by senior commanders, who are known for this purpose as convening authorities, because they convene courts-martial. Indeed, one critical difference between military and civilian practice is the role of the commander.

The commander is a—if not the—central actor in the military justice system. This is intuitive with respect to non-judicial punishment, which is a process of administrative punishment provided by the Code to commanders as a disciplinary tool.¹⁰ However, it is also true of courts-martial. To start, the commander helps to set the command climate in a unit. For example, he or she will set the example and tone regarding the unit's attitudes toward sex, sexual harassment, discipline, and the use or abuse of alcohol and pornography. Depending on the level of command, the commander, as well as subordinate commanders, also exercises budget and command authority over the personnel and units responsible for investigating allegations of crime. In a deployed setting this may involve choices between MPs and investigators serving in a security, infantry, or enforcement role. The commander, as convening authority, also initiates charges, brings charges, and selects the officers and/or

9. Although there are three different types of courts-martial (and a specialist should know the differences between them) that level of detail is not necessary here. The reader should be aware that the Military Commissions at Guantanamo Bay represent an entirely different system and should not be confused with the Uniform Code of Military Justice or the U.S. military justice system generally. *See* The Military Commissions Act of 2009, Pub L. No. 111–84, 123 Stat. 2190 (2009).

10. *See* 10 U.S.C. § 815 (describing range of disciplinary actions available).

enlisted personnel who will serve as members¹¹ of the court, if the accused has elected to be tried by members rather than judge alone. The commander also must review the results of courts-martial. Where permitted by law, the convening authority may also grant clemency to a convicted service member.

In terms of rights, there are a number of essential differences between military and civilian practice. For example, a service member is entitled to a military defense counsel, without cost, all the way to the Supreme Court of the United States, regardless of his or her financial means. Although a service member can pay for civilian counsel instead, this means that at a typical court-martial the United States and the defendant will be represented by lawyers of comparable training and experience.

In addition, while the rules of evidence are virtually the same as in federal civilian practice, there are a number of procedural differences, and here it should be noted that the differences do not always accrue to the benefit of discipline and the government and to the detriment of the service member. Indeed, many of the rights granted service members and the procedures designed to protect those rights in military proceedings are designed to account for the potentially coercive influence of the chain of command and grade differentials in military life. Among other things, members of the military are entitled to a rights warning similar to a Miranda warning, not just when they are in custody, but at the moment when they are suspected of an offense and subjected to questioning.¹² In contrast, a service member's first and fourth amendment rights are more constrained than those in civilian life, taking into account the differing nature of civil and military life.

11. This is the military's rough equivalent of a jury. But it is not a jury of one's peers. To the contrary, members are required to be senior to the accused and are selected based on the criteria in 10 U.S.C. § 825 (setting out qualifications) and 10 U.S.C. § 825(d)(1) (providing that "[w]hen it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade").

12. See 10 U.S.C. § 831(b) (providing that "[n]o person . . . may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial"); see also 10 U.S.C. § 832(d)(1) (providing that "[t]he accused shall be advised of the charges against the accused and of the accused's right to be represented by counsel").

And although, as in civilian practice, a vast majority of military cases are resolved through pleas and plea agreements, the judicial inquiry into whether a plea is knowing and voluntary is more searching in military practice. The inquiry to ensure that the plea colloquy satisfies the elements of the offense is more searching as well.¹³ Finally, military sentencing is conducted on an individual basis without reference to sentencing guidelines.¹⁴

In the case of a conviction, the appeal of right is to a service appeals court composed of senior judge advocates designated to serve in the role of appellate judges. Thus, there are Army; Navy and Marine Corps; Air Force; and Coast Guard Courts of Criminal Appeals.¹⁵ These CCAs have authority to review questions of fact as well as questions of law in addition to reviewing whether particular sentences are appropriate. From each of these standing courts, either the appellant or the Government can appeal questions of law to the USCAAF, which provides a source of uniformity, beyond the Code, among the services. From the USCAAF, appeal can be taken to the Supreme Court of the United States.

USCAAF jurisdiction extends to cases in which the sentence is one year or longer, or results in a punitive discharge, or both.¹⁶ In 2000, there were approximately 5000 qualifying courts-martial in the Armed Forces. Today, there are about half that number (2700), although history suggests that this number may trend up.¹⁷ The complexity of the cases is also on the rise.

13. Appropriately, this practice takes its name from the leading case in the area, *United States v. Care*, 40 C.M.R. 247 (1969).

14. See, e.g., James E. Baker, *Is Military Justice Sentencing on the March? Should It Be? And Where Should It Head? Court-Martial Sentencing Process, Practice, and Issues*, 27 FED. SENT'G REP. 72, 77 (2014).

15. 10 U.S.C. § 866 (requiring establishment of courts of criminal appeals and outlining their jurisdiction and function).

16. 10 U.S.C. § 867.

17. For example, the number of general courts-martial more than doubled from 1943 through 1946. See Committee on the Uniform Code of Military Justice, and Good Order and Discipline in the Army, *Report to the Honorable Wilbur M. Brucker, Secretary of the Army* 251 (Jan. 18, 1960) (showing 14,782 general courts-martial in 1943, when U.S. forces were still fighting World War II, and 35,977 in 1946, the first full year after the War). This history seems to suggest that the number of courts-martial will rise now that far fewer service members are deployed in Iraq and Afghanistan. However, during the Vietnam era, the number of courts-martial reached its height in the year running from July 1968 through June 1969, with 109,656 courts convened across the services during that year, which was also when U.S. involvement in the conflict reached its height. See *Annual*

The corollary observation is that counsel and judges have been trying fewer cases as well as fewer contested cases, which may result in additional error simply based on the absence of practice.

USCAAF jurisdiction is mandatory in the case of government appeals and death sentences, and discretionary in other cases where “good cause is shown.”¹⁸ As with other federal courts, the All Writs Act applies in aid of the Court’s jurisdiction, but does not itself extend the Court’s jurisdiction. Thus, the Court also hears a variety of writ appeals along with a comparatively high number of cases about jurisdiction.

B. How Is the USCAAF Different from Other Appellate Courts?

I like to say that the USCAAF is an Article I court, located in Article II (“for administrative purposes only”¹⁹), performing Article III functions. As with other appellate courts, a judge’s time here is taken up reviewing petitions, preparing for oral argument, and drafting opinions. There are, however, some important distinctions from Article III appellate practice.

First, the USCAAF is a specialized court, like the United States Tax Court or the United States Court of Federal Claims. This results in repetitive practice and, in theory, the development among its judges of expertise about criminal law and its application in the military context.

Second, unlike Article III appellate courts, the USCAAF has discretion to choose which cases it grants and hears, unless the case extends to death or involves appeal by the Government. Discretionary review has resulted in a docket that gives the Court the opportunity to hear oral argument in virtually every case granted. During my tenure, the USCAAF heard a high of seventy-six cases in the 2005–2006 term, and a low of thirty-three cases in the 2011–2012 term.²⁰ In this regard, it is more

Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces 4 (1969) (Exhibit A). An electronic copy of the Report is available at <http://www.armfor.uscourts.gov/newcaaf/annual/1969AnnualReport.pdf> (accessed May 1, 2015; copy on file with Journal of Appellate Practice and Process).

18. 10 U.S.C. § 867(a).

19. 10 U.S.C. § 941.

20. See *Report of the United States Court of Appeals for the Armed Forces* in CODE COMMITTEE ON MILITARY JUSTICE, ANNUAL REPORT 3 (2006) (statistical report showing

akin to a state supreme court that hears discretionary rather than mandatory appeals, than it is like an Article III appeals court. However, in contrast to the Supreme Court, neither the USCAAF nor any other court within the military justice system has supervisory authority beyond the authority to review appeals and regulate the membership of its bar. Thus, the ability to initiate and effectuate change within the system largely resides with the Judge Advocates General of the various services, and ultimately with the Secretary of Defense, the President, and the Congress.²¹

Third, because Congress has delegated authority to the Commander in Chief to provide procedural rules and regulations for courts-martial, the Court's practice includes interpretation of the Constitution, federal and state statutes, and Presidential directives. The majority of legal questions presented to the Court arise in one of three areas: challenges under the first, fourth, fifth, and sixth amendments; procedural or evidentiary challenges under the Rules for Courts Martial or Military Rules of Evidence; or challenges to the legal sufficiency of the evidence presented at courts-martial.

One of the most interesting aspects of the role of judge on the USCAAF is determining how and with what differences constitutional safeguards should apply in the military context. Thus, while Supreme Court decisions are binding on all federal courts of appeals, because its case law is generally not addressed to the military context, the USCAAF plays a central role in determining how and in what manner Supreme Court precedent applies in the military context.²² The USCAAF's fourth amendment case law is particularly fluid and current given the volume of child pornography cases raising search-and-seizure issues that come before it, as well as the myriad of different

"opinion summary"); *Report of the United States Court of Appeals for the Armed Forces* in CODE COMMITTEE ON MILITARY JUSTICE, ANNUAL REPORT 15 (2012) (same).

21. While the Code authorizes the judges to participate on a committee to review the Code and recommend amendments to it, 10 U.S.C. §946(b), the judges generally defer to the Joint Service Committee, the Judge Advocates General, and the Secretary, conscious of the conflicts that might arise were they to recommend or validate changes that they then were asked to review on appeal.

22. *See, e.g.,* *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) (applying *Lawrence v. Texas*, 539 U.S. 558 (2003), to the military justice system).

housing and berthing arrangements that might apply to military members stationed around the world.

Finally, the USCAAF hears criminal cases arising in contexts other courts do not address, including cases involving exclusively military offenses like desertion, and those involving service members deployed overseas, both in and out of combat. Thus, the Court plays a national security as well as a justice role in upholding military discipline, consistent with Constitutional values. It also must address when and how the rules of evidence and procedure apply to combat situations as well as where to draw the line between lawful authorized violence sanctioned by the state and criminal violence perpetrated by the individual.

An obvious distinction between the USCAAF and other appellate courts is the fact that the court's jurisdiction is exclusively criminal in nature. In military practice that means a docket dominated by sexual-assault and child-pornography cases. There are a number of reasons for the high volume of each.

C. Child-Pornography and Sexual-Assault Cases in the USCAAF

1. Child-Pornography Cases

The background for our child-pornography caseload is straightforward: First, the Internet has provided easy and seemingly anonymous access to pornography, including child pornography. Second, child pornography is almost exclusively viewed by adult males, most aged eighteen to thirty-nine.²³ This is the core demographic in the military. Third, in the military a person who possesses child pornography is more likely to get caught and prosecuted than in civilian life. This reflects a number of factors including close quarters, a sense of duty, and

23. Janis Wolak, David Finkelhor & Kimberly J. Mitchell, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings From the National Juvenile Online Victimization Study 2* (2005) (showing, in Table 1, that all offenders identified were men, and that fifty-two percent were between eighteen and thirty-nine). An electronic copy of this report is available at <http://www.unh.edu/ccrc/pdf/jvq/CV81.pdf> (accessed May 1, 2015; copy on file with Journal of Appellate Practice and Process).

in some cases an obligation to report the conduct of one's peers, and the fact that the use of government technology is monitored.

Thus, child pornography is a problem in military life, just as it is in civilian life. For sure, only a small percentage of individuals in both communities view child pornography, but it is nonetheless a meaningful number: Child pornography is a multi-billion dollar industry.²⁴

Nor is child pornography a victimless crime as is sometimes asserted. While the law distinguishes between actual and virtual children, the majority of cases I have seen involve real children, depicted in various states of dress and undress, usually in coy and provocative positions or actually being sexually assaulted by adults. When the pictures are viewed and transferred, the children depicted are in a visual sense violated again.²⁵ There is also evidence that the viewing of child pornography is linked to direct-contact offenses by those who view it.²⁶ In addition, child pornography generally depicts young children, so we are not talking about seventeen- or eighteen-year-old soldiers and sailors viewing inappropriate pictures of the sixteen-year-old girls they might have dated in high school before enlisting. We also see perpetrators of all grades and ranks, including senior and junior commissioned officers, senior and junior enlisted personnel, as well as persons in all professional fields, including members of the medical and chaplain corps. Child pornography is, in short, a major problem for the military and for military courts.²⁷

In addition, multiple legal issues might arise in a child-pornography case, in contrast to, for example, an unauthorized-absence case. This is intuitive in an area that will invariably involve a search and a seizure of evidence involving electronic media. However, with every change and evolution in social

24. H.R. REP. NO. 4120, at 1 (2008).

25. *Id.*

26. The clinical debate that I have seen in expert testimony, and in talking with people who treat sexual offenders in prison, is over the predictive connection between viewing child pornography and direct-contact offenses and the percentage to place on such a connection.

27. Where I can do so in a manner consistent with my role, I sometimes ask clinicians whether there is a reason why child pornography might be more prevalent in the military than society at large. The answer is no. Thus, what appears to be higher in the military is not the viewing of child pornography, but the incidence of its discovery and prosecution.

media, and as the purveyors and users of child pornography seek additional methods to disguise and hide possession, new applications of fourth amendment law emerge.

The complexity of these legal issues is compounded by what a lay person would find to be complicated and convoluted case law. But courts, including ours, find it hard to make sense of them too. We have struggled, for example, to distinguish between pictures of children that are criminal and constitute child pornography, pictures that are constitutionally protected under the First Amendment, and pictures that are distasteful, but neither criminal child pornography, as defined by statute, nor constitutionally protected. The problem largely originated with the Supreme Court's invalidation of parts of the Child Pornography Prevention Act, concluding that the statute could reach too far and encompass constitutionally protected artistic expression as well as virtual images of children that might fall outside the criminal law.²⁸ However, if the Supreme Court was worried about Romeo and Juliet,²⁹ the federal courts of appeals have been inundated with cases seeking to distinguish between distasteful and sometimes shocking photos of children that some view as lawful child erotica and others view as criminal child pornography. I am skeptical that the Congress, the Supreme Court, or most importantly the Constitution, intended such a nuanced result when it comes to the difference between criminal and constitutional images of real children depicted in a pornographic manner for the purpose of sexual gratification.³⁰

The legal complexity has a further dimension in the military because conduct in the military that is service discrediting or that undermines good order and discipline might be criminal³¹ even if the same conduct is not treated as

28. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002) (holding two provisions of the law to be unconstitutionally overbroad).

29. *E.g., id.* at 247 (noting that Shakespeare's Romeo and Juliet are "the most famous pair of teenage lovers, one of whom is just 13 years of age," and that Shakespeare "portrays the relationship as something splendid and innocent").

30. *See, e.g., United States v. Warner*, 73 M.J. 1 (C.A.A.F. 2013); *United States v. Barberi*, 71 M.J. 127 (C.A.A.F. 2012).

31. 10 U.S.C. § 934 (directing courts-martial to take cognizance of "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces"). Thus, for example, adultery, sexual harassment, and expressing public criticism of the President while in uniform can all be grounds for punishment in the military context.

criminal—and may in fact be protected—in civilian life. Although the case law is dated, the Supreme Court has recognized, as has our court, that both the special nature of military life and culture and the Constitutional underpinnings of the military permit the drawing of such distinctions between military and civilian life.³² Thus, in military practice, the possession of some pornographic pictures of children may be criminal even if they do not fall within the definition of child pornography found in the Child Pornography Prevention Act or upheld by the Supreme Court.³³

2. *Sexual-Assault Cases*

If I was surprised upon becoming a judge by the prevalence and nature of child-pornography cases (and I was), I was not surprised by the number of sexual-assault cases that I have seen while sitting on our court. Those who track crime statistics have known for some time that sexual assault is the most underreported of criminal offenses, for reasons including guilt, shame, embarrassment, and trauma.³⁴

Because the military does not keep complete statistics and because we are a court of discretionary review, and thus see neither all the cases that are appealed nor any of those resulting

32. See, e.g., *Chappell v. Wallace*, 462 U.S. 296, 303–04 (1983) (noting that “the Constitution contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel.”); *Parker v. Levy*, 417 U.S. 733, 743 (1974) (recognizing that “the military is, by necessity, a specialized society separate from civilian society” that has “developed laws and traditions of its own during its long history” because “it is the primary business of armies and navies to fight or ready to fight wars should the occasion arise”) (internal citations and quotation marks omitted); *United States v. Marcum*, 60 M. J. 198, 205 (C.A.A.F. 2004) (Baker, J.) (acknowledging that “constitutional rights may apply differently to members of the armed forces than they do to civilians” because “[t]he military is, by necessity, a specialized society”) (internal citation and quotation marks omitted).

33. See, e.g., *Ashcroft*, 535 U.S. 234.

34. The debate in this area is not about whether sexual assault occurs in the military; instead, the debate centers on the magnitude of under-reporting and the polling methodology used to estimate actual numbers. Depending on the study cited and methodology used, it is possible that only one in three, one in four, or one in five rapes are in fact reported. This, in part, accounts for some of the variances in the numbers given for sexual assaults in the military ranging from 19,000 one year to 26,000 another year. Service members’ confidence, or lack of confidence, in a command’s response to reporting impacts numbers, as do the polling questions asked.

in acquittal below, empirical data is hard to come by. However, I estimate that well over half of the cases I have seen in petition form or through grants have involved some form of sexual assault. This is not a new phenomenon. It has been this way since I joined the court fifteen years ago. The surprise, I suppose, is that the number of sexual assaults is a surprise to so many in the public at large.

What should a larger audience know about these cases?

First, as is generally appreciated, sexual assault has lasting psychological impact on victims and their families. However, what might not be appreciated is that before the post-9/11 conflicts, a principal means by which the military studied PTSD was through the study of sexual assault victims.

Second, more often than not alcohol—by which I mean excessive alcohol use—is a factor. Time and time again we see cases where the victim is assaulted after passing out.

Third, this means that rape is not just a criminal matter; it is also a leadership challenge. Effective leaders do not allow their soldiers and sailors to drink to excess alone or in groups without first ensuring that there is a buddy to protect or watch over them. Effective leaders do not set or tolerate a command climate that condones the sexual denigration of female or male service members or tolerates sexual innuendo or misconduct. Effective leaders also watch over barracks conduct, including and especially on weekends and pay nights.

Finally, this is not exclusively a military problem. As is now generally understood, the incidence of rape and sexual assault on campus, which in one study was projected at 31,302 per year,³⁵ is comparable to that in the military. What is different in the military is that sexual assault is not only a matter of justice, but also a matter of national security. Perceptions about sexual assault in the military impact recruiting and unit morale, and can undermine mission accomplishment. Consider the impact if a unit leader is accused of raping a subordinate in the same unit. Such an incident will impact confidence in the

35. Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization among College-Age Females, 1999–2013* at 4 (Dec. 2014). An electronic copy of the report describing the study's results is available at <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> (accessed Apr. 15, 2015; copy on file with Journal of Appellate Practice and Process).

leadership generally. It will distract service members from the performance of their duties. And, it may result in the necessity of removing critical personnel from the unit. Thus, sexual assault, like child pornography, plays a significant role in military justice.

D. The Role and Importance of Oral Argument at the USCAAF

1. Does Oral Argument Matter?

Appellate judges are often asked whether oral argument matters. The question seems especially suited for this court, which has the luxury of hearing oral argument in almost every case we grant. Of course, as with much else, the answer to the question is case specific and judge specific. In any given case, oral argument may be important to one judge and not to another. Obviously, if several judges determine that a case fits into a legal rubric that they have already addressed or resolved for themselves, then argument may be less important in deciding the case. But it may nonetheless be important to one or more of those judges in confirming their evaluations of the case and hearing the questions from the other judges.

Oral argument delays resolution of the case and takes a significant amount of preparation time that judges and counsel could spend on other cases. Therefore, I would not vote for oral argument if I did not think I would get something out of it.³⁶ My view is that oral argument is often important and sometimes essential. Counsel should remember that argument can not only impact the result, but can also influence the theory on which the case is decided and the shape of the decision to come. In an adversarial process, then, oral argument is more than just the most visible and culminating aspect of representation. It can be the key to resolving the case. Here are some suggestions—beyond preparation and knowing the law and the facts cold—for getting the most out of oral argument.

36. For this and other reasons, the USCAAF has moved during the course of my term from a practice of automatically granting oral argument in every granted case to debating in conference whether we would be better advised to decide the case on the briefs. Thus, counsel before the USCAAF should, as in any court, be prepared to win or lose on the briefs.

a. Making Oral Argument Matter: Some Rules of Thumb

i. Use the Brief as a Springboard

Assume that the judges have read the briefs, outlined the case, and debated the outcome in chambers. Give them something more. Judges read too many briefs to want to sit through a dramatic reading of a brief they have already read. Oral argument is the opportunity for counsel to highlight the law or the critical facts that judges should pivot on. A brief might present the seventeen reasons why appellant or the government should prevail; oral argument zeroes in on the single critical argument and fact. That being said, counsel are also well advised to identify that critical argument and fact when they write their briefs. An oral argument built on the base of an effective brief is more compelling than an argument discovered and developed on the fly. Judges can tell when an argument was discovered the night before in front of a mirror. That is not to say the better argument should not be raised, but why not raise it in the brief and set the table for oral argument?³⁷

ii. Give the Judges a Context for Their Decision

In this court, oral argument is also an opportunity to convey those aspects of the case that depend on military culture and context. We are often asked whether military service is important to serving as a judge on the court. My answer comes in four parts. First, we are a civilian court fulfilling the constitutional purpose of civilian oversight of the military. Second, sometimes people outside a culture are the ones who ask the most insightful questions; they do not carry the burden of received wisdom embedded in the culture. Third, it is helpful but not essential because in an adversarial system it is the duty

37. Although briefing is not my topic here, I point out in passing that it is a mistake to write the brief as if it were the only brief that the judge will have to read. Judges read brief after brief after brief. If a judge were reading only one brief, repetition, lack of precision, and even a spelling error might be forgiven. But to a judge reading ten briefs, longer is not better and sloppy doesn't trump shipshape. An appellate court does not need length or repetition; it needs to know what question of law is at stake, what principle of law will be upheld or will fall when the case is decided, and why justice is better served one way or the other. That's what goes into the brief.

of counsel to bring essential military knowledge to the attention of the court, not the role of the judge to apply his or her background to fill in the gaps. Fourth, all that being said, prior service can be helpful in identifying the right questions to ask.

iii. Be Yourself

One of the hardest things to do as a young appellate counsel is to find your legal voice. But you must be yourself. We all find our legal voices in our own time and own way. Sincerity rather than mimicry is the best form of advocacy. In my view, a few “ums” and “ahs” interjected around a sincere argument are more effective than an argument made by a caricature of Clarence Darrow . . . unless of course you are Clarence Darrow, in which case you should proceed apace.

iv. Respect the Process by Considering the Case as a Whole

Integrity and honesty are also useful. By that I don't mean candor toward the court. We certainly expect and receive that from judge advocates. What I mean is recognition that there are two sides to most issues. Recognition of the arguments on the other side shows respect for the process and is a form of honesty. After all, what kind of message does it send to a court, which granted the issue in the first instance, to declare that only a fool would think there was a legal issue here? Also, remember that in a forum in which the same lawyers appear often before the same judges, one's reputation for telling it as it is, and for valuing justice and fair argument above winning are important.

v. Address Your Audience

Speak to all the judges, in our case all five, or at least three of the five. It is very easy to get trapped in a gerbil loop with an active questioner. But counsel must find a way to address at least a majority of the court. I also sometimes wonder if counsel have read all of our cases and understand the underlying judicial debates that are part of our discussions as a court. Listen to the judges' dialogue as well as their questions and respond to both.

Expect to be asked questions that fall within these debates, even if that is not how you see the case. This is the application of professional intelligence in the legal field.

vi. Think of Moot Court as Essential

Oral argument is about story telling. Moot sessions allow counsel to tell their stories without the pressure of appearing in court, and also allow them to test strategies like what to do if you cannot answer a question (as often happens), go blank (as sometimes happens), or fall over at the podium (as once happened). And a moot court that strives to predict the sorts of questions that the panel will ask can be especially valuable. I once heard two of our outstanding counsel describe during a Q&A session after the Court heard argument at a law school their role-playing of the various judges during moot court sessions. And in fact, they went on to demonstrate! What we saw, beyond a sense of humor, was an ability to forecast the types of questions each judge would ask and how they would respond, not just the manner and style in which the question would be asked. Whether these counsel would ever thrive as thespians remained doubtful. What was—and is—clear is that moot practice is immensely valuable to counsel in actual argument.

vii. Rely on Your Second Chair

One thing counsel do not do enough of is to consult with the second chair. Why not? If you do not know the answer to a question, why not consult with the second chair, who in the military context is usually a more senior attorney? Moreover, if you are representing the United States you may well have a duty to consult if you do not know whether the views you are expressing in fact represent the views of the United States.

viii. Focus on the Importance of Your Role

Finally, and always, remember that whatever side of the aisle you are appearing on, you are part of an honorable profession dedicated to upholding and defending the law.

II. THE IMPORTANCE OF BUILDING FIRES

When I was a young lieutenant at Infantry Officer Course, I was engaged in a weeklong live-fire exercise involving day and night maneuvers, no sleep, and one meal a day. The exercise included various evolutions requiring one unit to fire just ahead or over the heads of another as they approached the objective. It was the middle of winter, there was snow on the ground, and we were freezing. We spent most of our energy feeling sorry for ourselves, which made us less effective with our weapons and as leaders.

During a lull in the action, a major walked up to us and barked, “What are you lieutenants doing?”

I responded, “Looking for the enemy, so that we might close with him and attack.”

As we were in Quantico, Virginia, our interrogator quickly came to the conclusion that he was not dealing with the sharpest bayonet ever to be pulled from the scabbard. He responded, “No, lieutenants. What you are doing is freezing. Build a fire!”

Like cavemen discovering flame for the first time, we muttered, “Fire? . . .”

“Yes, lieutenants, build a fire,” Major Caveman snapped.

So we did. We soon returned to our happy, grimy, and ferocious infantry selves. But I realized later that I had learned an important leadership lesson that was also an important life lesson: When you can build a fire, build a fire.

This is not a bad life lesson for judging either. Part of judging and judgment comes from placing the law and the facts into perspective. It also helps to be able to place life in perspective as well. Therefore, in this section, I address a handful of “additional lessons” that I have learned, and—I hope—applied to the practice and role of judging. How and whether one addresses the subjects that follow will, in part, define one’s judicial personality and determine whether one learns when, whether, and how to build a fire.

A. Expect to Spend Years Learning the Job

When I was appointed a judge, I sought advice from a number of judges about preparing and performing the duties. A

chief justice of a state supreme court told me that it would take time to learn the job. And by time, this judge meant appellate time, which is measured in years, not days or minutes. Three years, to be exact. It was great advice. But I was skeptical . . . at first. At the National Security Council or in the Marines, if you did not know the job after three days, or perhaps even three minutes, you were gone. Did judges really take that long?

I knew that appellate judges don't do a lot of different things; they do a lot of the same thing. They read. They write. They ask questions. But every lawyer can read and write. And, as anyone who has ever staffed a senior official will tell you, it is usually easier to ask questions than to answer them. So in theory, it shouldn't take that long to learn the judge's job, right?

Wrong.

It took me forever to write my first opinion. I struggled with the sterile and formulaic template of an opinion. I struggled to find my judicial voice, or any judicial voice. Then I wrestled with capturing the voice of five judges in one without losing my own voice in the process. It was hard work. But I finally realized that an opinion is no more than a statement by a court of the reasons for its decision. It is not a piece of art. It is not a novel. It most certainly is not poetry. (Indeed, judges that try to make it so run the risk of standing alone.)

Then I set about finding a vehicle with which I was comfortable and that would enable me to write rapidly. In my case, that was a memorandum to the President, which I had learned to write in minutes under the pressure of serving as a NSC staff member for seven years. Confronted by my first case of judicial writer's block, I decided to return to this more comfortable form of writing: a memo to the President explaining what the appellate question was and the options for resolving it. It worked. But that was not all I had to learn.

I also realized along the way that it takes time to become a judge because, generally, it is not the skill of reading or writing that must be learned, but the temperament and patience that yield the judgment and bearing of a judge. Those qualities color the decisions that a judge must make: What types of questions should I ask at oral argument, and with what tone? How much of an appellate question should this court address? When should I dissent and when should I accept that, while an opinion might

not say it just the way I would, it nonetheless captures the essential points? Should I give speeches, and if so, what can or should I say?

Here, two rules of inversion come to mind. First, the more senior the court, the easier it probably is to learn and perform the job. It is harder to be a trial judge than an appellate judge. A trial judge must spot the issues as they come, rapidly apply the law, and do so with lives or livelihoods directly at stake. And trial judges usually must do so alone, knowing that if they get it wrong in the eyes of an appellate court, they may have to do it all over again. In contrast, appellate judges can take time to research an issue. They may also have the benefit of the courage that comes from knowing that they are not alone in their conclusions.

The second rule of inversion is that the less “prestigious” a court might be (stated very much in quotes) the harder may be the task at hand. Here I think of my late friend Jack Downey, who served for over thirty years as a Superior Court Judge in New Haven, Connecticut, primarily in Juvenile Justice Court. It is hard to find a role that could be more important or challenging than determining the culpability of a juvenile and then determining whether to remand a child to the custody of the state. Lives are saved or broken in such moments. Developing that sort of judgment and temperament takes time, even if you happen to have the temperament, experience, and grace of a man like Jack Downey. Few do.³⁸

There is also an argument here for judicial tenure of some significant length. In the military, judge advocates are designated to serve as military judges by the top lawyer in each service. So designated, they serve “as directed.” There is no term of office or tenure. However, military judges typically serve for an ordinary military assignment, which is to say two to four years. This may make military sense. It may make career sense. But it does not make judicial sense. It takes that much time to learn the job. Would any of us know the names Learned

38. John T. Downey, a former CIA officer who spent over twenty years as a prisoner in China after being shot down during a mission, graduated from Harvard Law School after his return to the United States, and was a commissioner of Connecticut’s Public Utility Control Department before becoming a judge. *See, e.g.,* Douglas Martin, *John T. Downey Dies at 84; Held Captive for 20 Years*, N.Y. TIMES, Nov. 20, 2014, at B19.

Hand, Frank Johnson, Benjamin Cardozo, Felix Frankfurter, Louis Brandeis, or Sandra Day O'Connor if each had served for only three years as a judge before moving on to something else?³⁹

B. Find a Standard by Which to Judge Yourself

1. Remember that Measurement is Important

It is helpful to have a clear standard against which to measure your performance when transitioning to the role of judge. There is no agreed-upon metric by which to judge judges. In the United States this reflects the absence of agreed-upon standards against which to objectively, or even subjectively, assess judicial performance. In part, this is because standards are tricky. How do you measure wisdom, or judgment? And how do you avoid an effusion of partisan political perspective in doing so? What about the nature of the metrics available? One might consider the number of cases decided or the speed with which appeals are heard, for example, as indicia of timely performance, but speed alone can also result in error. Who, for example, would prefer that a court err on the side of speed rather than accuracy when their own case is called? Likewise, one might consider reversal rates in evaluating a trial judge. But don't we want our trial judges calling it as they see it, rather than predicting how an appellate court may eventually decide a case? Moreover, as Justice Jackson once reminded his colleagues on the Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final."⁴⁰

Nonetheless, standards, guidelines, and metrics are important for several reasons. First, judges for the most part are

39. There is also a structural argument to be made. Military judges who serve without tenure will appear less independent, and may even be—or appear to be—beholden to the chain of command for promotion and assignment. As a result, the military judges in Canada and Australia are required to hold tenured office—life tenure in the case of Canada and ten years in the case of Australia. *See* Security of Tenure of Military Judges Act, S.C. 2011, c. 22 (amending the National Defence Act to provide that "[a] military judge ceases to hold office on being released at his or her request from the Canadian Forces or on attaining the age of 60 years"); Defence Legislation Amendment Bill 2006 (providing, in section 18AAP(4), that "[a] Military Judge holds office for 10 years").

40. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

driven lawyers who want to do well in whatever task it is they are performing. It helps judges to have a bar to reach for or exceed. Second, standards and metrics are a source of independence and impartiality. They insulate judges from allegations that they are not performing their jobs or are performing their jobs badly by upholding the law in unpopular cases. Third, standards may diminish the role of politics in elected judicial positions, demonstrating that high-performing judges have met or exceeded the standards of the office and that the standards are outcome neutral. Finally, agreed-upon standards provide internal pressure on judges to perform their duties with diligence and dignity. In most systems, judges can be removed only for good cause, by elective means, or by impeachment. That leaves flexibility in the manner in which judges perform the functions of the office. Standards and metrics make it easier to see whether a judge is performing well, without relying on counsel to say that the judge is falling below standards, or relying on the intervention of other judges, which can intrude on both the independence of individual judges and the collegiality of their courts.⁴¹

2. Consider Creating a Report Card

If I were starting over again, I would spend more time at the outset creating a mechanism by which to evaluate my growth and performance as a judge—a personal report card. It would be daring, but I might also ask my law clerks to fill out the report card in a no-fault manner, but only after they departed chambers.

41. It bears noting in the context of this discussion that in the military context, where judges do not have tenure and are subject to promotion boards, they are not evaluated as judges, but as officers. Structural independence is provided by having judges write the fitness reports of other judges. But military judges are nonetheless evaluated using normative officer fitness reports, not on the quality of their judicial work. In other words, they are literally being evaluated on how they look in uniform, not how they behave in robes. Moreover, because military judges compete for promotion as officers and not as judges, they are competing on the basis of the military virtues they demonstrate as opposed to their primary duties as judges. This is perhaps not the arrangement that judges rather than officers would craft to best promote judicial excellence.

a. Use the Canons, the Guidelines, and the Framework as Benchmarks

The Judicial Canons provide in essence the minimum ethical standards for judicial performance that could be included on a report card:

- A judge should uphold the integrity and independence of the judiciary.
- A judge should avoid impropriety and the appearance of impropriety in all activities.
- A judge should perform the duties of the office fairly, impartially, and diligently.
- A judge may engage in extrajudicial activities that are consistent with the obligations of judicial office.
- A judge should refrain from political activity.⁴²

Similarly, the ABA has issued Guidelines for the Evaluation of Judicial Performance that could reasonably be included:

- Legal ability.
- Integrity and impartiality.
- Communication skills.
- Professionalism and judicial temperament.

42. Administrative Office of the U.S. Courts, [uscourts.gov](http://www.uscourts.gov), *Code of Conduct for United States Judges*, <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx> (accessed April 20, 2014; copy on file with Journal of Appellate Practice and Process). And the Administrative Office supplements the canons with opinions interpreting and applying the principles in practice. Administrative Office of the U.S. Courts, [uscourts.gov](http://www.uscourts.gov), Guide to Judiciary Policy, *Published Advisory Opinions*, <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/published-advisory-opinions.aspx> (accessed April 20, 2014; copy on file with Journal of Appellate Practice and Process).

- Administrative capacity.

For specialized courts, the ABA Guidelines add as requirements the knowledge and skills necessary to understand and decide the relevant issues, and for appellate courts they add, “the quality of his or her preparation for and participation in oral argument and on his or her effectiveness in working with other judges of the court.”⁴³ However, the ABA Guidelines do not have any specialized standing in the law or with the judiciary. They are guidelines.

In contrast, the Judiciary of the United Kingdom has adopted a framework for judicial evaluation.⁴⁴ The document is advisory as well, but it was “developed through a comprehensive process involving detailed discussion with more than 500 judges.”⁴⁵ It is also expressly offered as a “self-development aid to individuals,”⁴⁶ and includes categories on

- Knowledge and technical skill.
- Communication and authority.
- Decisionmaking.
- Professionalism and integrity.
- Efficiency.
- Leadership and management.⁴⁷

43. American Bar Association, *Black Letter Guidelines for the Evaluation of Judicial Performance*, http://www.americanbar.org/content/dam/aba/publications/judicial_division/ipec.final.authcheckdam.pdf (Feb. 2005) (accessed Apr. 20, 2015; copy on file with Journal of Appellate Practice and Process).

44. Courts and Tribunals Judiciary, Judicial Studies Board, *Framework of Judicial Abilities and Qualities*, <https://www.judiciary.gov.uk/publications/framework-of-judicial-abilities-and-qualities/> (May 2010) (accessed Apr. 20, 2015; copy on file with Journal of Appellate Practice and Process).

45. *Id.* at 1.

46. *Id.*

47. *Id.* at 2.

The Framework echoes the ABA Guidelines. However, the Framework is more comprehensive and purposeful than the ABA Guidelines and the judicial canons. First, it includes “Leadership” as a core competence, which makes sense to me: Judges are leaders in the law and they should act like it. In addition, the Framework provides concrete examples of the judicial traits that it espouses and illustrates the ways in which those qualities might be demonstrated. For example, the Framework’s category of Leadership and Management includes as components of “core abilities and technical skill” the following:

- Strategically plans and organizes.
- Manages change.
- Supports and develops talent.
- Manages quality standards.
- Encourages and facilitates teamwork.⁴⁸

The Framework thus comes closer than the other examples to presenting objective standards by which a judge may evaluate his or her own performance, or by which others might evaluate any judge’s performance.

b. Find Additional Guidance in Scholarly Publications and through Working with Academics

Academic commentary is a source of evaluation as well. However, depending on the court, this sort of evaluation can seem to be all or nothing. The Supreme Court may have too much of a good thing, with every aspect of its existence routinely analyzed. Our court receives a lot less academic attention, as Article I courts and state courts generally do. This

48. *Id.* at 16.

is unfortunate, as academic commentary is an important form of democratic oversight.⁴⁹

That being said, in my own case, the best professional input I received came from Professor Baldus of Iowa Law School,⁵⁰ where I have served as an adjunct professor since 2004. Until Dave's untimely death in 2011, I would travel to Iowa City each spring to teach a seminar on national security law. As soon as I arrived, by which I mean the minute I arrived, Dave would say hello and then begin asking questions about my opinions from the previous year. Why did I say this? Why didn't I cite that? What influence would this statement have? Why did the military do it this way, rather than that way? The inquisition would continue the next day in the hallway at school. Sometimes, when I had to prepare for class, I would literally duck under my desk when I heard Dave coming down the hallway. (So much for judicial dignity). Other times, I had to ask my office to arm me with memos and briefs from past cases so that I could better prepare for the Baldus examination. This was just the sort of feedback I needed to develop my voice and my confidence as a judge, in part because I never doubted for a second that Dave was driven by friendship and an abiding commitment to justice, the law, and the role of judges in upholding both.

c. Learn from Judicial Role Models

Field Marshal Slim, who fought in two world wars and was wounded four times, concluded that there are two types of courage, moral and physical, and that of the two moral courage is more rare. While I do not have Slim's standing to make this observation, I agree. And I note that moral courage is the

49. I should note here that the attention we receive is generally thoughtful. More of that sort of commentary would be a valuable contribution to democratic oversight of the military. It would also serve as a civil-military relations bridge, not only from the standpoint of scholarly inquiry, but also because professors who focus on the work of the USCAAF could encourage students who have no experience with the military to perceive it through a different lens.

50. David C. Baldus, famous for his groundbreaking work on race and the death penalty, was the Joseph B. Tye Professor of Law at Iowa from 1969 until 2011. See The University of Iowa, Law Library, Archive, *David C. Baldus*, <http://library.law.uiowa.edu/david-c-baldus> (accessed Apr. 10, 2015; copy on file with Journal of Appellate Practice and Process).

courage that most lawyers and judges practice if they have the opportunity to practice courage at all. I have also found that legal role models are an important source not only of judicial examples, but of the sort of moral courage that sets great judges and public servants apart.⁵¹ Some of my legal role models are judges, some are not. Some are lawyers, some are not.

You will find your own examples to admire and perhaps emulate. However, some caution is due: If you try too hard to be someone else you might fall short at being yourself or finding your own voice. And caricatures of other judges don't always play well either. The wit and sarcasm of a Scalia may not sound the same or play the same way on a different stage in a different setting.

That said, Learned Hand is a great model for a judge, just as Hemingway might be a great model for a writer. But it is somewhat awkward to have Learned Hand as your judicial role model, as choosing him doesn't strike me as particularly humble.⁵² It seems sort of like having George Washington as your military role model or Abraham Lincoln as your political role model.

Frank Johnson is also a terrific model of what it means to serve as a judge with moral courage whose work brings the ideals of the Constitution to life. But circumstances gave Judge Johnson the opportunity to use his outstanding personal qualities in a way that made him great: He was assigned to the three-judge panel deciding the case generated by Rosa Parks's refusal to sit at the back of the bus⁵³ only three weeks after he was appointed to the federal bench, and went on to decide numerous other important cases as the civil rights era unfolded.⁵⁴

51. For a more detailed discussion of role models, see James E. Baker, *Exercising Discretion in the Middle Grey: Model Rules and Role Models in the Ethical Practice of National Security Law*, in U.S. INTELLIGENCE COMMUNITY LAW SOURCEBOOK 1, 7–19 (Andrew M. Borene ed., 2012).

52. Learned Hand is widely regarded as the most distinguished judge of his generation never to sit on the United States Supreme Court. *See, e.g.*, Philip Hamburger, *The Great Judge*, LIFE, Nov. 4, 1946, at 117, 117, 128 (characterizing Hand's absence from the Supreme Court as "a matter of keen disappointment to a large section of the American bar," and indicating that a then-sitting Supreme Court justice had called Hand "the most distinguished living English-speaking jurist").

53. *Browder v. Gayle*, 142 F. Supp. 707, 720 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956).

54. One obituary described Judge Johnson as "the legendary Federal jurist from Alabama whose historic civil rights decisions led to ostracism, cross-burnings and death

If one were to choose to measure one's performance as a Judge with that of Frank Johnson, one might find the comparison depressing. But is it the performance or the opportunity that is different? Most cases simply do not rise to the level of drama and historical importance as those addressed by Frank Johnson. Thus, when I am considering him as a role model, I prefer to ask this question: Would a judge like Frank Johnson handle this case in a different way?

As a judge, I have returned time and again to my role models like Jack Downey, not as a guide to how to decide a question of evidence, or the application of the fourth amendment, but how to act with dignity and grace, or at least try to; to take the high road in the face of collegial indignity and the petty politics that can sometimes ensnare judges. And whenever I am tempted to feel sorry for myself because I must read yet another brief or record of trial, I think of Jack Downey again. For twenty-one years he was imprisoned in Mao's China. Many of those years were spent in solitary confinement. For Downey, a good day was a day with pigeon in the soup. If one keeps that in mind, it is petty indeed to sweat the small things or the necessity of spending Sunday reading case law.

*C. Think of Yourself as an Ambassador of the Law
and the Rule of Law*

Judges represent the law. Thus, the law's strengths and weaknesses will fairly or unfairly be reflected in how a judge acts in and out of court. If a judge is fair and magnanimous in how he treats others, regardless of circumstance, those who observe the judge's conduct will think the same of the law. Similarly, if a judge is imperious in his personal conduct, yelling at sports referees or demanding special treatment for his family and friends, observers may well think less of the law, and wonder whether the judge is fair and impartial in his dealings in

threats, but helped to change the face of the segregationist South in the 1950's and 1960's," pointing out that he was instrumental in desegregating "schools, parks, depots, airports, museums, libraries, restaurants, restrooms and other public places and services" throughout Alabama and the wider South. Robert D. McFadden, *Frank M. Johnson, Judge Whose Rulings Helped Desegregate the South, Dies at 80*, N.Y. TIMES, July 28, 1999, at A12.

court. Thus, judges must be conscious that “they are always on duty.”

As ambassadors of the law, judges should also go out of their way to represent the law to others. They have unusual standing to do so. Judges should give speeches. Courts should hear argument at law schools. School children should attend appropriate sessions of court. The judicial canons expressly invite judges to do these things. And, their being done is very much part of the development of a culture that respects and abides by the rule of law. Finally, it gets judges out of court, out of chambers, and into the real world. That too is a good thing.

Judges are also literally ambassadors of the law when it comes to rule-of-law functions at home and abroad. One of the functions of a chief judge is to represent a court in domestic and international settings, at least to the extent one views this as part of a judge’s ancillary duties. In this context, I have met judges and lawyers from around the world. This provides insight into what “rule of law” means beyond the quintessential aphorisms familiar to an American audience, allowing me to access the perspective of different systems of law, including common law, civil law, and foreign military justice systems, which often combine elements of both.

Primary among the aspects of the American system of justice that other legal communities especially value, and in some cases envy, is our independent and impartial federal judiciary. Peel this back further, and one learns that what observers are really talking about is not life tenure, but judges who are free from external influence as well as outright corruption, or the appearances and pressures that come with such possibilities. Without such a judiciary, it is understood, some of the other hallmarks of American justice like habeas corpus, equal protection, and due process would lose much of their meaning. Observers from outside the United States understand that all people are not equal before the law if the judges charged with upholding that law distinguish between their voices. That sort of independence is promoted by life tenure, of course, but many countries use long and fixed terms.⁵⁵

55. Many foreign states have turned to tenure for military judges as a source of structural independence and expertise. This is certainly the trending norm although it is not the practice in the United States. See, e.g., Jamal Green, *Revisiting the Constitution: We*

There is something more to independence and impartiality than life tenure.

An “independent and impartial judiciary” also means a judiciary that has the resources, time, and commitment to uphold the law. In some countries, the backlog in appeals covers tens of thousands of cases stretching back for decades. And I have been told that in at least one of these countries the norm is for criminal defendants (including violent offenders) to remain out on bail until their appeal is final, which can take years and even decades to occur, the defendants doing all they can to slow an already laborious and backlogged appellate system.

Peel the concept back even further and it is apparent that what foreign observers really respect about the United States system of justice is not the structure of the judiciary, but its cultural commitment to upholding the law.⁵⁶ Judges live to uphold the law. They may in the opinion of the audience get it right or get it wrong, but there is rarely doubt about the mission. It is to uphold the law, and most fundamentally in the criminal context the first, fourth, fifth, and sixth amendments to the Constitution.

1. Learn from Others' Perspectives

Comparative perspective also allows one to focus on those virtues that are more clearly seen from a distance than from the immediacy of one's desk. We take a lot for granted in the United States about law, such as the peaceful electoral transition of power and an independent judiciary. How much we take for

Need Term Limits for Federal Judges, N.Y. TIMES, Room for Debate, <http://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-we-need-term-limits-for-federal-judges> (July 8, 2012, 10:00 p.m.) (noting that “Germany and France use fixed terms of office for their high courts,” and that “[c]ountries like Australia, Canada and Israel have mandatory retirement ages”) (accessed May 1, 2015; copy on file with Journal of Appellate Practice and Process). Of course, some places take their judicial independence to a comfortable extreme. I know that in one country, the law literally requires that judges travel in business class!

56. This point was made clear to me on a visit to a counterpart overseas whose sole interest in the visit was to compare benefits and privileges, rather than dockets and laws. I was asked while there to make a presentation about the U.S. military justice system, its constitutional underpinnings, and its strengths and weaknesses. However, the only questions I received from my counterpart were about perks. What was my salary? Did I receive housing? And, most importantly, did I have a car and a driver. “No,” I said. To which my host exclaimed, “Our system is better! I have a car with a light and a siren!”

granted was brought home to me during a conference I attended with judge advocates from Africa. As an exercise, we started a list of the greatest challenges military lawyers face in meaningfully applying the law. We then made a parallel list of ethical ways to address those challenges. I got the process started by listing some of the challenges a United States national-security lawyer might encounter, like commanders who don't follow advice; the pressure to "get to yes;" the frequent disparity in experience as well as grade between lawyers and the officials they advise; and obnoxious personalities—the lawyer's and the client's. I then invited additions: What was missing from the list?

While the audience concurred with the way I began the list, there were some interesting additions. "My greatest challenge," one participant said, "is figuring out what to do if there is a coup. Is the law worth dying for?"⁵⁷ Another participant said, "It is challenging to uphold the law when you haven't been paid and you need to feed your family." On another occasion a foreign judge advocate noted that without a law school in the country, there were only a handful of trained lawyers, by which she meant less than five. "It is hard to build a system of law without lawyers," to paraphrase her further comment, "especially when outside groups are promoting a tiered system of appellate review and an adversarial process."

Point taken. Sometimes we don't know just how good we have it and we assume that what works well for us will work well elsewhere, without accounting for the predicate conditions. Nor do I take it for granted that our model is the right model or the best model in all circumstances. For example, the military justice system that works for the United States, which is designed to provide for worldwide and deployable justice handling thousands of courts-martial per year, would be unnecessary and dysfunctional for New Zealand, with

57. Here one might think of a role model like Nelson Mandela, who stated at the Rivonia Trial that "if needs be," he was "prepared to die" for "the ideal of a democratic and free society." Nelson Mandela, Leader, African Nat'l Cong., *I Am Prepared to Die* (Apr. 20, 1964), http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS010&txtstr=prepared%20to%20die (statement from the dock at the opening of the defense case in the Rivonia Trial) (accessed Apr. 14, 2015; copy on file with Journal of Appellate Practice and Process). One needn't presume to be a Nelson Mandela to find inspiration and courage in his example.

approximately ten courts-martial per year.⁵⁸ And yet New Zealand's commitment to law is no less sincere.

There can also be too much focus on the big picture—the constitutional underpinnings of government—when comparable attention to detail is needed. Stability and continuity are also essential to the law, as I learned when I asked a group of visiting judges from Afghanistan what they could most use in terms of assistance. I thought that they would ask to work with law professors or government lawyers who could help draft laws and constitutional articles, or demonstrate procedure. But the answer was helicopters, so that the judges could fly to regional courts with less risk. This is not surprising in the context of a combat theater, but it is not ordinarily a topic addressed in the context of rule-of-law training and programs.

On another occasion, I anticipated an interesting comparative discussion of constitutional structure at a meeting of another country's supreme court, appellate, and trial judges. Instead, we spent most of the time talking about clerks, office supplies, and electricity. One participant noted that it was hard to conduct trials because it was tiring to write and to rule on questions of evidence at the same time. What, I asked, was she writing? The answer: the verbatim record of trial, as there were no court reporters and the technical means to record the proceedings were unreliable because power sources and generators were often unavailable or unreliable.

These visits are not one-way streets; they are exchanges. There is always something to be learned in either direction. For example, it is ingrained in United States legal culture that “no man is above the law.” In some countries, they have as well the phrase that “no man is below the law,” recognizing that without affordable access to a lawyer and the courts, the law and its benefits may be beyond the reach of the average person. Some systems, therefore, place emphasis on providing affordable

58. Most military justice matters in New Zealand are handled by summary disposal. See Attorney-General of New Zealand, *Armed Forces Law Reform Bill: Consistency with the New Zealand Bill of Rights Act 1990*, <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/armed-forces-law-reform-bill> (describing New Zealand's military justice system and assessing consistency of 2007 reforms with Bill of Rights Act) (accessed Apr. 14, 2015; copy on file with Journal of Appellate Practice and Process).

access to lawyers and courts at almost every level of process as an essential ingredient to the rule of law.⁵⁹ Point made again.

2. Consider the Essentials

The rule of law entails both substance and process, but ultimately it is a question of culture. And that culture will vary from court to court and system to system. In the military context, for example, rule of law in substance includes at least four key elements.⁶⁰

First, it must appropriately address what is commonly known as civil-military relations, including civilian command and control of the military in which the military is subordinate to elected officials and eschews involvement in politics; a process of recruitment that draws from all elements of society, and then returns service members to society as better citizens, thus linking civil and military life and society; and clarity and agreement on when, if ever, the military will be used for the purposes of homeland defense or civil law enforcement.

Second, rule of law means a military that adheres to international humanitarian law in times of conflict, and human rights law and domestic law at other times. In short, a military bound by law and the standards of conduct and discipline expected of professional military organizations.

Third, rule of law requires a credible justice system that will enforce standards in cases of deviation and that is capable of providing for good order and discipline as well as for justice. Such a system is based on law, not command. It adheres to the principle that all ranks are judged based on their conduct rather

59. This is one of the strengths of the U.S. military's legal system. No soldier is below the law, because the services provide not only defense counsel to military members if needed, but also basic legal assistance for the ordinary events of life that may seem daunting and out of reach without a lawyer: loans, wills, divorces, taxes. But this is not the norm, elsewhere in our system, as lawyers are provided free of charge only in criminal trials involving indigent defendants.

60. I draw these key elements from the best article I have seen on the meaning of the rule of law in military context: James Dapper, Benes Aldana & Jeremy Greenwood, *Moving from the Rule of Personality to the Rule of Law*, 21 PUBLIC LAW. 3, 5 (2013). I can also recommend Rachel Kleinfeld, *How to Advance the Rule of Law Abroad*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 4, 2013), <http://carnegieendowment.org/2013/09/04/how-to-advance-rule-of-law-abroad> (accessed Apr. 14, 2015; copy on file with Journal of Appellate Practice and Process).

than their rank. A credible system is also one that clearly states its jurisdiction, to include jurisdiction over civilians, if any, rather than appearing to pick and choose when to exercise or avoid jurisdiction with impunity.

Fourth, rule of law in the military context also means the prevention of corruption. This may be particularly important in those countries in which the military itself is engaged in profit-making industry and business. Of course, as I often hear, if the civilian sectors of society do not have comparable and credible systems to prevent corruption, it will undermine efforts to have such a system in the military context.

3. Pay Attention to the Logistics

In the United States we tend to focus on the substantive elements to the rule of law, perhaps because we can take the logistics and culture of the law for granted. But law logistics are just as important as the substance of the law. By logistics, I mean the capacity to provide for law—law schools, lawyers, security, confinement facilities, a professional bar—and the existence of a culture of law, from which arises an expectation that people will act in accordance with law and suffer sanction if they do not.

The constitutional text is a start. But it is an independent judiciary and a professional bar that give the Constitution life and meaning, defining their primary professional role as upholding the Constitution. The fact that most federal judges define their role as stewards of the law is not legal; it is cultural. By counter-example: I know of a country in which the attorney general's office recruits prosecutors straight out of law school rather than waiting to hire prosecutors with more experience, as is usually done in the United States. Why? Because it might be too late to hire the lawyers later, as they would already have been exposed to, and become embedded in, a culture of corruption. Here, in contrast, even our television shows illustrate the significance of culture as the foundation for law: It is hard to imagine anyone above the age of five in the United States who would not know from watching television that an arrestee is entitled to Miranda warnings. And yet, although the rule of law and the role of law are in many ways this country's greatest virtue, there is no discernible strategic policy for their

advancement, no interagency process for supporting them, and no one person or entity in charge of seeing to their dissemination. This results in stovepipes of expertise and capacity, but not always a greater whole.

Additionally, the United States tends to focus on substantive rather than procedural or cultural outcomes, which can be more lasting and in many cases more critical. I have observed that if a society is transitioning to rule of law, a copy of the Constitution or a model law is helpful. But so too are law logistics, like ABA accreditation and assistance at law schools, scholarships to law schools in the United States and elsewhere, and assistance to civil-society organizations like local bar associations.

This is not the article in which to fully explore culture in defining and embedding the rule of law. I do think it would be a lot harder to teach the meaning of impartiality and independence to a judge who had not grown up reading about Atticus Finch or learning about John Adams and the Boston Massacre trials. My point is just to emphasize that in addition to espousing the substance and process of the law, we should place equal emphasis on the logistics and culture of law. This means visiting grade schools, high schools, and law schools—not just judges and prosecutors—when we engage in judicial outreach at home or abroad.

D. Maximize the Benefit and Joy of Working with Law Clerks

Without question the two greatest substantive joys of working as a judge have been, first, playing a part in the greater fabric that is the rule of law and constitutional government, and second, working with law clerks. The first is abstract. You hope that it is happening, but you cannot really tell. The second experience is concrete. Working with law clerks is a joy. I say substantive joy, because the greatest personal joy of working as a judge is to have a job that is meaningful, helps others, and allows you to grow with your children and your family.

1. Appreciate your Clerks

It is the opportunity to work with law clerks that I will likely miss the most when I retire. And who wouldn't? As a

judge, you get to hire the smartest people you can find from a pool of hundreds of outstanding candidates knocking on your door. These clerks then do as much or as little of your work as you wish. As an added bonus, clerks generally laugh at your jokes. But here is the serious part: As a judge, you get to test ideas and concepts in what amounts to a three- or four-person legal seminar. Moreover, as an appellate judge at least, you tend to have the time to do so.

Some clerks may be too modest to appreciate that the conversation runs both ways. One hopes that the judge will know something more about the law than the clerk, and in the case of our court, one might add the hope that he or she knows more about the military too. But even so, clerks perform five important functions in the chambers of their judges.

First, clerks provide specialized knowledge. For example, clerks will generally have greater familiarity and comfort with technology and social media than judges. I don't mind admitting that; it's true. This is generational as well as personal.⁶¹ At a court like ours, which hears many search-and-seizure cases, knowledge like this makes a difference.

Second, clerks are a source of vitality. There is repetition to what judges do, especially on specialized courts or those with life or extended tenure. Yet judges must not focus only on the intrinsically most important or interesting cases. To a judge, the most important case is the one that he or she is working on at the moment. Clerks help make this so. While I might have seen one-hundred variations of the same fourth amendment or due process question, a one-year clerk will treat the case as the most important and interesting fourth amendment issue she has ever seen. It is. And clerks must learn the issue new, bringing fresh insight and energy to the chamber's deliberation. In addition, while I would like to think I have an open mind when it comes to reading my own opinions, law clerks are far more likely to spot inconsistencies or errors in my opinions than I am. I also like to keep one clerk out of the discussion of each case I am writing so that I can share the draft opinion with the "cold clerk" and ask: What does the opinion say? Is it clear? This gives me a

61. I like to joke that if I want to know the law, I look it up. If I want to know how the law and technology intersect on social media, I ask my law clerks. But if I want to find the cutting edge of technology, or latest social-media forum, I ask my teenage children.

sense of how the larger audience will perceive the opinion and whether they will derive from it the legal points that I imagine I am making.

Third, clerks bring diverse perspectives to the closed world of the court and the judge's chambers. By definition clerks will bring a perspective that is distinct from that of their judge. Depending on the judge's selection practice, they may also bring a range of diversity in background, experience, race, age, gender, religion, education, and means. In the context of an implied bias challenge, for example, in which the court is asked to decide whether the public would perceive the outcome as fair, a diverse set of views is helpful. Varied generational, gender, and perhaps ethnic and religious views are also helpful in addressing evolving societal expectations and norms involving sex, privacy, and in the context of the USCAAF, perhaps also the sorts of behavior that do or do not constitute service-discrediting conduct.

Fourth, clerks do a lot of work. There are competing schools of thought on whether clerks should help to draft opinions. On the one hand, important democratic principles suggest that the persons nominated, confirmed, and appointed to serve as judges should do the work themselves, as a matter of expertise and accountability. On the other hand, one of the functions of clerkships is to provide young lawyers with mentors and training. Sharing in the court's tasks under the supervision of a senior lawyer—in this case, the judge—provides clerks with both. And sharing work with their clerks also helps to keep judges fresh, which is a good thing if we expect judges to provide reasoned judgments and not just to record hours reading records of trial. Clerks allow judges to focus their attention and diligence on those aspects of the work that are most specific to judging: reading and determining which petitions will be granted; asking questions at oral argument that will identify critical legal or factual aspects of the case; deciding the case in both outcome and theory; and expressing the voice with which the court's opinion is ultimately conveyed.

Finally, clerks make judging more interesting and help to ground their judges. Judging can be isolating: Judges wait for cases to come to them, rather than reaching out and spotting issues and questions of law to resolve. And judging involves a

minimum of ordinary human contact, laughter, and exchange. Certainly when it comes to talking about cases, judges must keep it in chambers. Clerks allow judges to talk through their work without diminishing the dignity of the office or violating the judicial canons. Clerks can also be a vibrant source of friendship and, if allowed to do so, can keep their judges humble.⁶²

2. *Don't Hesitate to Give Your Clerks Advice*

With this background in mind, what advice would I give—and do I give—to law clerks? First, the basics: Read quickly, write well, and never get the facts or case law wrong. If you don't know, say so. Don't guess.

But if you want to be a great clerk: Challenge your judge's views on the law. This is the most important role a clerk can play. In fact, although I wanted this challenge from my first day on the bench, I was when I began skeptical that my law clerks were being as critical of my work as they should be. So I started a game. I would embed fake facts and case citations in my draft opinions and see if they were caught. Further, I stopped asking questions like: "What should I improve?" Or "Is this clear?" Instead, I asked "What are the three best things about this opinion *and* what are the three worst things?" This unlocked the door to critical analysis, so much so that I had to tell one set of clerks that the question was "three worst things," not seventeen. (The judicial ego can only suffer so many slings and arrows.⁶³)

62. It bears noting here that one of the smarter things I did as a judge was hiring a career law clerk. In my case, this filled an important gap in my own legal experience. I hired a retired Marine Corps judge advocate who had served as a trial judge, prosecutor, and defense counsel. His background complements mine, and we also bring diverse life experiences to the round table around which we discuss and debate cases. Most importantly, I hired a friend. This was not an act of nepotism. It was an act of common sense. I knew that I could count on him to call it as he saw it, whether it was a question of law or a question of my conduct and demeanor as a judge. I know that I will always get an honest answer, which reduces the risk that this emperor will walk around without clothes and not know it.

63. Challenge your judge's views, but don't challenge his or her ego. Parodies like *Appointed Forever* by the Bar and Grill Singers are funny, but only because they are rooted in the truth. We have all met judges for whom a song like this (including lines like "I'm a federal judge and I'm smarter than you . . . for all my life!") rings a little too true.

Don't sell yourself short. This starts with applying to the judges you might like to work for and not self-selecting yourself out. Clerkships are tough to get, but they are even harder to get if you do not apply. Who knows? You may connect with a judge in a way no other candidate does.

Finally, keep in mind that, like some other valuable experiences in life, not all clerkships are fun. But one year is not long. Like the judges for whom they work, clerks would do well to remember that they are part of a greater whole upholding constitutional law. Look up at the big picture, rather than down at trouble. A military lesson is valuable here: Even when there is no down time and you are always on the move, there arrive little moments that allow for reflection or thought, when you see something beautiful in an unexpected place, or take a mental trip to New Zealand. There is beauty in the law, in the ideals of the law, and sometimes in the result of your work in the law when the ideals and the reality become one. Find this moment, think about this moment, live this moment, if only for a moment before the next task comes along.

IV. CONCLUSION

If you leave this article remembering only one piece of my advice, let it be this: When you can build a fire, build a fire. There are plenty of opportunities to be miserable in life and in the law, so when you have the chance, build a fire. Its warmth will hold you in good stead when the weather gets cold.

What does that metaphor mean for a lawyer? Don't turn your position into a ninety-hour-a-week job, except, of course, when the job merits such treatment. (In that case you should work 100 hours.) What does it mean for a judge? Stay warm, because it will make you a better judge. Find a hobby. Teach. Write. Read. Laugh with your clerks. Have dinner with your family. Have lunch too. And breakfast. Why? Because you can, and because, in the long run and likely in the short run as well, it will make you a better judge.

If, for example, your court hears nothing but criminal cases, taking time to have a life outside the law will mean that not every minute of every day will be taken up reading, writing, or thinking about rape, murder, or child pornography. That is a

good thing. In spending less time buried in the details of your work, you will spend more time thinking about fair trials, due process, and evidence. You will come to each case fresh, and be ready to review the law with an even hand.

Having a life outside the law will also mean that you will not always be swaddled in a blanket of judicial deference, which can smother the last vestiges of humility. Girl Scouts don't care if you are a judge, and neither do Little Leaguers. A child's smile will make minor differences between judges, which can become collegial burs under the judicial saddle, blow away like trail dust.

I like to comment that when I was at the National Security Council, I did not and could not rub two sticks together for warmth, but since I have been an appellate judge, I have kept a bonfire going in my office. The trick, of course, is to know when to set the fire and when to douse it, and then to have the self-confidence or the courage required to implement that knowledge . . . when you can. If you don't learn this trick, you will get burned, or you will stay cold. Neither is good for your performance as a judge. And neither is good for those you lead or teach, or those who watch you as an Ambassador of the Law.

