



Photos of the chief judges of what is now called the U.S. Army Court of Criminal Appeals adorn a wall inside a meeting room at the court located at Fort Belvoir, Virginia. (Credit: Chris Tyree)

No. 3

Independent but Invested

The Army's Trial Judiciary Turns Fifty

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The implementation of the Military Justice Act of 2016 on 1 January 2019 ushered in the most revolutionary changes in military justice practice since the Military Justice Act of 1968 (MJA 1968). As we look forward to the fiftieth anniversary of MJA 1968, which had an effective date of 1 August 1969, it is worthwhile to examine the role and responsibilities of the U.S. Army Trial Judiciary, which effectively came into being with the passage of that Act. While MJA 1968 authorized an independent judiciary, and our judges should and do scrupulously guard their independence, the Army's Trial Judiciary remains an integral part of The Judge Advocate General's Corps. Trial judges have a vested interest in, if not shared responsibility for, the training of counsel and outreach to the community for the betterment of our justice system and our Corps.

When MJA 1968 was enacted, it was applauded for taking a "major step toward providing judges who are both legally trained and free from influence by the local military 'brass' to preside over both general and special courts-martial," and because it "raised the standard of due process within the military justice system."¹ In fact, MJA 1968 created the title "military judge," replacing the previously identified law officer,² and provided that a commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial "may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee."³ Some of the more paradigm-shifting and

far-reaching procedural changes borne out of MJA 1968 included the option for an accused to be tried and sentenced by a judge alone, the authority for a judge to call the court into session without the panel members, and judicial determination on challenges for cause.⁴ By far the most significant cultural change was the separation of the military judge from the local command and their assignment and responsibility to The Judge Advocate General, or their designee, to protect and guarantee the judge's independence.⁵ This independence is fiercely guarded by trial judges, as it should be. However, this independence comes with an opportunity—if not mandate—to participate in the training of counsel and outreach to the community from the unique perspective of the bench. This is an opportunity that judges should embrace and advocates on both sides of the aisle and in the greater community should solicit.

The approximately twenty-five active duty lieutenant colonels and colonels that form today's Trial Judiciary are assigned to the U.S. Army Legal Services Agency (USALSA) and senior rated by the USALSA Commander as The Judge Advocate General's designee.⁶ The USALSA Commander also serves as the Chief Judge of the Army Court of Criminal Appeals. As such, all trial judges are rated only by other judges. Unlike the federal courts that are established by Article III of the United States Constitution,⁷ military judges do not have lifetime tenure. They are selected as part of the normal assignment cycle and many frequently leave the bench after a three-year assignment to take another assignment within



Judges of the U.S. Army Court of Criminal Appeals participate in a mock hearing at Fort Belvoir, Virginia. (Credit: Chris Tyree)

the Corps.⁸ In that sense, while judges enjoy and exercise judicial independence while on the trial bench, they remain invested in the Army and The Judge Advocate General's

Corps. Trial judges have a personal and a professional interest in both the organization they serve and its people. Make no mistake, this interest has no bearing

whatsoever on what happens between an arraignment and an adjournment, where the only focus is a fair trial for all parties. But the individual trial judge, and the judiciary as a whole, understandably feels a sense of duty to see the players in the system improve. When the players improve, the system improves—both in perception and reality. This is no different from a National Football League referee explaining to a pass rusher why he was called for a personal foul for roughing the passer. The referee is not trying to help the pass rusher or the quarterback, he is trying to enforce the rules, ensure they are applied fairly, and explain them to the outside audience.

To that end, in celebration of fifty years as an independent judiciary, we propose that staff judge advocates and senior and regional defense counsel take a more proactive approach to inviting their local military judges into their counsel and paralegal training programs. Likewise, we encourage military judges to seek out such opportunities to train counsel and paralegals. While some training can and does happen during trial, as we often learn best by doing, more nuanced issues and broader topics are best taught outside of court. While many judges continue to conduct “bridging the gap” sessions with counsel at the conclusion of a court-martial, those sessions only benefit the counsel involved unless the information is shared, and the judge is limited by what they can disclose with respect to a particular case.⁹ A precipitous decline in the number of courts-martial over the years means there are even fewer opportunities for on-the-job training of counsel in court or in bridging the gap sessions, making out of court training sessions even more valuable.

In contrast to bridging the gap sessions, regular training sessions for all counsel benefit the entire local military justice bar, and issues and trends can be identified and corrected without reference to any particular case. We have found that a quarterly training session is ideal for ensuring new counsel receive training early in their tours and for reinforcing key points with more seasoned counsel. These sessions are best docketed by the judge outside of the Office of the Staff Judge Advocate and Trial Defense Service training calendars.

Presence on the docket ensures maximum attendance for counsel, and all attorneys and paralegals should be encouraged to attend. The emphasis in this training is a review of the Army Rules of Practice, as well as a discussion of the types of issues that have come up in recent cases that bear discussion and training, without reference to any specific case, issue, or counsel. More significant topics such as discovery practice, motions practice, or trial advocacy are best trained in additional sessions which can be coordinated in advance with both sides and placed on the local leadership development program training calendar or on the training calendars of the military justice and trial defense offices. The effective use of both types of training sessions, along with responsive bridging the gap feedback when offered and appropriate, provides a solid and deliberate judicial focus on military justice training to complement, not replace, regularly conducted unit-level training.

Although military justice is the first priority, a military judge's role in professional development and outreach need not be limited to this area. Much like our Article III civilian counterparts, military judges should be coveted speakers at local bar association meetings, professional organizations, and in schools and universities, as standard practice and to mark special events. For example, the American Bar Association oversees a recurring National Judicial Outreach Week, which presents an opportunity for judges nationwide, including military judges, to educate the public on the theme of "Preserving the Rule of Law."¹⁰ To that end, the 2nd Judicial Circuit recently invited a local county judge to present an informational brief on the local Veteran's Treatment Court to an audience of judge advocates and paralegals from throughout the Fort Bragg community. Judges in other circuits have participated in mock trials and reading programs. The 4th Judicial Circuit invited a 3L at the University of Washington Law School to participate in a fourteen-credit judicial externship in the fall of 2018. Military judges can support a broad array of similar training and outreach to develop military justice professionals which, in the end, enhances recruiting efforts, raises the profile of the Corps and the Trial Judiciary, and

most importantly, improves the quality of our military justice practice. Independence need not mean isolation. On 1 August 2019, as our Corps strives to improve its efficiency and effectiveness with initiatives like the Military Justice Pilot Program, and as senior leaders continue to develop and train our counsel and paralegals, may the Trial Judiciary not only celebrate fifty years of independence but also make a new commitment to engagement. Through training, outreach, and education dedicated to raising the level of practice in Army trial courts while advancing the professionalism and prestige of our service and our Corps, the Army's trial judges can be both independent and invested. **TAL**

COL Hayes currently serves as the Chief Circuit Judge for the 4th Judicial Circuit. He was recently selected to serve as the Army's next Chief Trial Judge. LTC Martin currently serves as a Circuit Judge in the 2nd Judicial Circuit at Fort Bragg, North Carolina.

Notes

1. Francis T. McCoy, *Due Process for Servicemen – The Military Justice Act of 1968*, 11 WM. & MARY L. REV. 66, 70 (1969), <http://scholarship.law.wm.edu/wmlr/vol11/iss1/3>.
2. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).
3. *Id.*
4. Fred L. Borch, *A Court-Martial Revolution: How the Military Justice Act of 1968 Turned Military Criminal Law Upside Down*, ARMY LAW., Sept./Oct. 2018, at 8.
5. *Id.*
6. The active duty judges are also ably supported by approximately the same number of U.S. Army Reserve military judges that are assigned to the 150th Legal Operations Detachment (LOD) but supervised and rated by active duty chief circuit judges. From the authors' perspective, nowhere in the Army is the Active Component/Reserve Component integration more fully and successfully realized than in the Trial Judiciary and the 150th LOD.
7. U.S. CONST. art. III, § 1.
8. Prior to their current judiciary assignments, the authors had the pleasure of concurrently serving as the 2d Infantry Division Staff Judge Advocate and Deputy Staff Judge Advocate. The consensus among those that have served as both judges and staff judge advocates (SJAs) is that, while being an SJA may not necessarily make you a better judge, being a judge certainly makes you a better SJA when it comes to training counsel and advising convening authorities. While some officers may be well-suited to perform either role, a healthy stable of long-term judges is also desirable and necessary for continuity and expertise. This article endorses

both of those assignment strategies working in tandem for an experienced and well-rounded judiciary.

9. Bridging the gap sessions are a "hot wash" between the judge and counsel immediately after a trial concludes, with the goal of improving advocacy. However, a judge must be circumspect in his or her information sharing if they decide to conduct bridging the gap sessions, as any substantive information shared could be the subject of appellate litigation. *See, e.g., U.S. v. McNutt*, 59 M.J. 629 (A. Ct. Crim. App. 2003). A judge should never disclose his or her deliberative process.

10. *See National Judicial Outreach Week*, ABA, https://www.americanbar.org/groups/judicial/committees/judicial_outreach_network/njow/ (last visited Nov. 21, 2018).