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JUDICIAL PRIVILEGE: DOES IT HAVE A ROLE IN MILITARY
COURTS-MARTIAL?

A Thesis

Presented to

The Judge Advocate General's School,
United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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40TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1992

Published: 138 Mil. L. Rev. 53 (1992)

JUDICIAL PRIVILEGE: DOES IT HAVE A ROLE IN MILITARY
COURTS-MARTIAL?

by Major Robert E. Nunley*

ABSTRACT: Both Article I and Article III judges are increasingly willing to invoke "judicial privilege" to prevent the disclosure of confidential information, yet few judges and practitioners understand the scope or bases of this testimonial and evidentiary privilege. Within military courts-martial, a claim of judicial privilege can, presently, effectively limit or preclude a full and fair voir dire of the military judge, thereby infringing upon both a party's ability to establish a basis for a challenge for cause and a party's constitutional right to a fair and impartial trial. To resolve the conflict between the interests protected by judicial privilege and the interests of the parties to a court-martial, the author proposes that the military services adopt a bright-line rule. The proposed rule would cover any claim of judicial privilege arising during voir dire of or challenges for cause against the military judge.

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American Bar Association; Mr. William Eldridge,
Director of Research, Federal Judicial Center; Ms.
Karen S. Heroy and Ms. Dixie Knoebel, Staff
Associates, The National Center for State Courts; and
Mr. V. Robert Payant, Dean, The National Judicial
College.

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**JUDICIAL PRIVILEGE: DOES IT HAVE A ROLE IN MILITARY
COURTS-MARTIAL?**

by Robert E. Nunley

I. Introduction

What is "judicial privilege"? Is it like pornography, evasive of any common definition but you know it when you see it?¹ Very few reported cases have mentioned the words "judicial privilege," and even fewer have addressed it in the context of a testimonial and discovery privilege.² Only a couple of legal scholars have attempted to define judicial privilege, and their articles have addressed it from an historical perspective, leaving the practicing attorney and judge to ponder its practical, day-to-day application.³

The purpose of this thesis is to define the scope of judicial privilege, identify its bases, and review its development as a testimonial and discovery privilege.⁴ Further, the thesis will examine the role of judicial privilege in courts-martial, focusing

on the role it plays in the military's unique trial procedure, which permits the voir dire of the military judge.⁵

The existence and scope of judicial privilege is important to all practitioners and judges, both military and civilian, in light of recent politicized struggles between the branches of government invoking the separation of powers doctrine.⁶ Further, both the military courts⁷ and the federal bar⁸ have recently experienced several publicized inquiries into alleged judicial misconduct. Investigations into such allegations necessarily involve the potential for and have resulted in the increased invocation of judicial privilege.⁹

When a military judge claims judicial privilege in a court-martial, an inherent friction arises. The conflict is between, on the one hand, the interests served by the protections of the privilege, and on the other hand, the interests of the parties in a criminal trial in securing a fair and impartial trier of fact through voir dire.¹⁰ Before practitioners and judges can appreciate this friction and, ultimately, resolve the conflict, they must understand the

development of judicial privilege and its bases.

An examination of the historical evolution of privileges, up through and including the adoption of the Federal Rules of Evidence in 1975,¹¹ is fundamental to the analysis of any privilege. Additionally, a review of the Military Rules of Evidence is necessary in this case because two rules provide potential bases for a judicial privilege.¹²

The Constitution and the federal common law are also sources of specific bases giving rise to judicial privilege. The Constitution expressly provides for a legislative privilege, and courts have recognized an implied executive privilege since the 1970s.¹³ Through an examination of the development of the legislative and executive privileges, the author analyzes court dicta and decisions leading to the ultimate recognition of a co-equal, implied judicial privilege. This constitutional judicial privilege is broad in scope, yet qualified, and it applies to Article I judges, including military judges, as well as to Article III judges.¹⁴ Finally, the author recognizes a federal common law "deliberative process" privilege for the judiciary through analogy to the

well-recognized "deliberative process" privilege held by the executive branch.¹⁵

Having established the development and bases of judicial privilege, the thesis next examines the history and purposes of voir dire, focusing on the interests served by voir dire of the military judge in a court-martial.¹⁶ Finally, the author discusses the conflicting interests created by a military judge's claim of judicial privilege and proposes the adoption of a bright-line rule to best protect the interests of both the judiciary and the parties to a court-martial.¹⁷

II. The Development of a Judicial Privilege

A. Historical Development of Privileges

To understand the purposes and scope of the specific privileges, including judicial privilege,¹⁸ one must first review the history and purposes of privileges in general.¹⁹ The earliest privileges arose in England during the sixteenth century in response to the imposition of compulsory process and the creation of the universal duty to testify when

called.²⁰ Unlike other rules of evidence designed to exclude unreliable evidence in the search for truth, privileges implement other societal interests and preclude the admission of otherwise reliable evidence. The effect of their use is to subordinate the truth-seeking goal to the particular societal interest giving rise to the privilege.²¹

1. Common Law and State Privileges.--The first privilege was created in the 1500s to protect the communications between an attorney and client.²² A second, broader privilege followed in the 1600s, developed to shield the communications between spouses.²³ The primary rationale for these first two privileges was to protect and foster private communications in the attorney-client and spousal relationships.²⁴ This purpose of protecting and fostering private communications is the basis upon which all privileges, including judicial privilege, are built.²⁵

By the 1800s, the "English courts had begun to develop a common law of evidentiary privileges, and American judges tentatively looked to this emerging

law to help them decide privilege questions."²⁶ This common law of privileges was the sole source of precedent and authority used by American courts until American dissatisfaction with the English common law system led to attempts at codification of the evidentiary privileges.²⁷ Starting with the creation of a statutory physician-patient privilege in New York in 1828, state legislatures began modifying the common law rules of evidence and eroded any uniform application of the rules of evidence.²⁸

As state codifications of the evidentiary rules became more divergent, individuals and organizations attempted to standardize the rules. The first national effort began in 1922,²⁹ yet the first code, the "Model Code of Evidence," was not completed until 1942.³⁰ By 1949, most states had not adopted the Model Code, and the National Conference of Commissioners on Uniform State Laws drafted the Uniform Rules of Evidence, approved in 1953.³¹ These rules initially failed to gain acceptance as well, and a substantial number of the states adopted them only after the National Conference revised the rules in 1974.³² The revised Uniform Rules of

Evidence served to reduce some, but not all, of "the discrepancies between state privilege laws."³³

2. Federal Court Privileges.--Prior to the enactment of the Federal Rules of Evidence³⁴ in 1975, it was not clear which evidentiary privileges applied in a particular case among the federal courts.³⁵ In an attempt to consolidate and identify the privileges applicable in the federal courts, Article V of the proposed Federal Rules of Evidence provided for nine specific privileges.³⁶ The proposed privileges generated some of the most heated controversy in the subsequent legislative hearings.³⁷ Congress ultimately dropped proposed Article V in its entirety and substituted in its place a general rule of privilege--Rule 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political

subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.³⁸

Adoption of Rule 501 resulted in two divergent bodies of privilege law in this nation's courts:

In state courts, and in federal cases applying state law, the law of evidentiary privilege is a diverse collection of rules, developed mostly by statute, sometimes by common law. . . . In federal cases in which state law is not binding, federal courts have begun to develop a federal common law of evidentiary privileges "in the light of

reason and experience."³⁹

Today, American federal civilian courts continue to interpret and develop the law of privileges on this two-tracked arrangement.⁴⁰ If there is a judicial privilege for federal question issues before federal courts, the privilege arises from one of three sources: the Constitution, federal statutes, or the federal common law.⁴¹

B. Privileges Under the Military Rules of Evidence

1. Adoption of the Military Rules of Evidence.--The President promulgated the Military Rules of Evidence⁴² in 1980.⁴³ Presently located in Part III, Section V of the Manual for Courts-Martial (the Manual),⁴⁴ the rules on privileges represented a combination of those privileges contained within the proposed Federal Rules of Evidence,⁴⁵ Rule 501 of the adopted Federal Rules of Evidence,⁴⁶ and the law of privileged and nonprivileged communications⁴⁷ then in effect within the military justice system.⁴⁸ Divided into twelve numbered rules, the military rules on privileges cover

not only oral testimony, but also situations in which a person claims a privilege not to testify at all or to decline to produce real evidence.⁴⁹

Rule 501 is the basic rule of privilege, and it restricts the scope of privileges that may be claimed:

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) The Constitution of the United States as applied to members of the armed forces;

(2) An Act of Congress applicable to trials by courts-martial;

(3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules,

or this Manual.⁵⁰

The language of Rule 501(a)(4) expressly permits the incorporation into courts-martial of federal common law privileges developed by the federal courts. The federal courts have flexibility to recognize federal common law privileges because of the "in the light of reason and experience" language found in Federal Rule of Evidence 501.⁵¹ Incorporation of federal common law privileges has its limitations--military courts may use them only to the extent they do not conflict with the practicalities of courts-martial practice and are not inconsistent with the Uniform Code of Military Justice,⁵² the Military Rules of Evidence, and the Manual for Courts-Martial.⁵³ Additionally, Military Rule of Evidence 1102 automatically incorporates any amendments to the Federal Rules of Evidence into the Military Rules of Evidence, absent contrary action by the President.⁵⁴ Given the plain language of Rule 501(a), any automatic incorporation of a rule of privilege would also be subject to the "conflict or inconsistent with" analysis applied to the federal common law privileges.

Rules 502 through 509, generally derived from the proposed Federal Rules of Evidence, provide eight specific privileges deemed necessary by the drafters of the rules to "provide the certainty and stability necessary for military justice."⁵⁵ Of the eight recognized privileges, only two may arguably constitute a basis for invocation of judicial privilege: the government information privilege (Rule 506) and the privilege for deliberations of courts and juries (Rule 509). If judicial privilege does not spring from these two military rules, then, to exist in courts-martial, the privilege must arise under either the Constitution or federal common law. These latter two sources will be discussed later.

2. Rule 506: Unclassified Government Information.-- Rule 506(a) sets forth the general statement of the privilege: "Except where disclosure is required by an Act of Congress, government information is privileged from disclosure if disclosure would be detrimental to the public interest."⁵⁶ By its language, the scope of the rule is broad, for it defines "government information" as

including unclassified "official communication and documents and other information within the custody or control of the Federal Government."⁵⁷ In practice, the rule is much more restricted than it may first appear. The circumstances in which the privilege may be claimed reduce its viability as a day-to-day source for a judicial privilege, and virtually eliminate its use as a privilege for the individual trial judge.

Rule 506(c) divides the information covered by the rule into two types: government information in general and investigations of the Inspector General.⁵⁸ While the subject matter of an Inspector General investigation may well be alleged judicial misconduct,⁵⁹ the privilege against disclosure of such an investigation's contents to members of the executive branch could not fairly be called "judicial privilege." Rather, it would be the claim of privilege by the subject of the investigation, a judge or a court, that would raise the specter of judicial privilege. The remainder of the focus on Rule 506, therefore, is directed towards the other type of information covered by the rule, the privilege for government information in general.

While apparently few cases exist interpreting Rule 506,⁶⁰ the drafters intended that it be narrower in scope than the broad-based privilege for classified information (Rule 505).⁶¹ Rule 506 is based in part on the privileges for military and state secrets⁶² and for the confidential evidence of Inspector General investigations,⁶³ both found in previous editions of the Manual.⁶⁴ Additionally, the drafters relied heavily on the language in proposed Federal Rule of Evidence 509 for the language used in Rule 506's sections concerning scope, who may claim the privilege, and the procedures to use in claiming the privilege.⁶⁵

Proposed Federal Rule of Evidence 509 was one of the most controversial of the proposed privileges.⁶⁶ Congress' ultimate rejection of the rule militates against any expansive interpretation of its coverage. That the rule requires the privilege to "be claimed by the head of the executive or military department or government agency concerned,"⁶⁷ further demonstrates an intent by the drafters that the privilege operate only in those "extraordinary cases"⁶⁸ where release of the information is "detrimental to the public

interest."⁶⁹ Little information exists at the local trial court or appellate court level, short of "deliberative process" information promulgated as judiciary-wide policy (similar to, but broader than, that covered by Military Rule of Evidence 509), that could meet such a high threshold.

Decisions on assignments of judges (either to positions in general or to specific cases), communications between judges on subjects that fail to implicate their deliberations on specific cases, and sentencing policies, should never rise to the level of being information, the release of which will be detrimental to the public interest. Nor should the release of information regarding acts of judicial misconduct ever be detrimental to the public interest. If Rule 506 gives rise to a privilege for the judiciary, it does so only for the highest levels where policy decisions are made, and not for the trial court or appellate court judges. Any specific basis for a judicial privilege, applicable to the trial or appellate courts in the military and arising from the Military Rules of Evidence, therefore, must exist, if at all, in Rule 509.

3. Rule 509: Deliberations of Courts and Juries.-- The "deliberations" privilege is set forth in Military Rule of Evidence 509:

Except as provided in Mil. R. Evid. 606, the deliberations of courts and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged.⁷⁰

This rule was taken from paragraph 151b(1) of the 1969 Manual for Courts-Martial, with a modification "to ensure conformity with Rule 606(b) which deals specifically with disclosure of deliberations in certain cases."⁷¹

The development of Rule 509 appears to be based upon two separate rationales. The first rationale is to encourage the members to have open discussions during deliberations without fear of their comments being later disclosed to military authorities,

including their military superiors. The second rationale is to promote the finality of verdicts.⁷² To those ends, the rule allows for disclosure of deliberations only in limited circumstances pursuant to Rule 606:

(b) Inquiry into validity of findings or sentence. Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly

brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.⁷³

When read in conjunction with the limitations of Rule 606(b), Rule 509 serves to insulate the finder of fact from harassment and second-guessing in the routine case. The rule thereby promotes the independence of military courts-martial,⁷⁴ while still providing a means to investigate and address extraneous prejudicial information, improper outside influences, and the occasional incident of unlawful command influence.⁷⁵

The plain language of the rule makes it applicable to deliberations of "courts." The term "courts" is not defined within the Manual for Courts-Martial, but the terms "court-martial," "member," and "military judge" are.⁷⁶ The terms "member" and "military judge" are used to denote

parties of a court-martial,⁷⁷ while the term "court-martial" has five meanings:

- (A) The military judge and members of a general or special court-martial;
- (B) The military judge when a session of a general or special court-martial is conducted without members under Article 39(a);
- (C) The military judge when a request for trial by military judge alone has been approved under R.C.M. 903;
- (D) The members of a special court-martial when a military judge has not been detailed; or
- (E) The summary court-martial officer.⁷⁸

The first and fourth contexts apply to situations where the members are the triers of fact, while the third context describes a court-martial composition where the military judge is the trier of fact. From these possible variations of courts-martial, the term "court," as used in Rule 509, should be understood to

mean a court composed either of members or a military judge alone.

Several points can be raised in argument against such an interpretation. First, the language in Rule 509 originated from versions of the Manual in effect before 1968, the year that Congress created the position of "military judge" in courts-martial and provided for the accused's option of being tried by military judge alone.⁷⁹ The term "courts" contained within the rule, therefore, refers only to courts-martial composed of members as the triers of fact. Second, the language of Rule 606(b) addresses the ability of "members" to testify about deliberations, and omits any reference to military judges testifying concerning their deliberations while sitting as a military judge alone court-martial. Finally, if a rationale for the rule is to encourage the members to have open discussions during deliberations, applying Rule 509 to military judges sitting as the triers of fact would have no effect, as they are the sole deliberators in that type of courts-martial.

The last argument is the most easily dismissed. The encouragement of open discussions is only one of

several rationales for Rule 509. Bringing the military judge's deliberations within the protection of Rule 509 would further the arguably more important rationale of insulating the trier of fact (in this case the military judge) from harassment and second-guessing of his decision by military authorities, thereby curbing the potential for unlawful command influence. Such protections under Rule 509 would also further the rationale of promoting finality in verdicts by preventing a military judge from later impeaching his verdicts, absent the existence of one of the exceptions found in Rule 606(b).

As to the argument that the language of Rule 509 refers to "courts" as the term was used in pre-military judge courts-martial, a counter-argument exists. The title of the rule is, "Deliberations of Courts and Juries,"⁸⁰ and at the time of the rule's adoption in 1980,⁸¹ the "court" could be either members or a military judge under Article 26 of the Code. The drafters of the rule, therefore, must have intended the term "courts" to have the common 1980's meaning, as opposed to the pre-1968 context.

Finally, while Rule 606(b) fails to refer to the

"military judge," this omission is easily explained by the historical development of the rule. Military Rule of Evidence 606(b) was derived from Rule 606(b) of the adopted Federal Rules of Evidence,⁸² with only one substantive change made to recognize unlawful command influence as a legitimate subject of inquiry into deliberations.⁸³ As noted in the introductory analysis to the Military Rules of Evidence, several changes were made to adapt the Federal Rules to military terminology. Two of those changes were to substitute "court members" for "jury" and "military judge" for "court."⁸⁴ Since the federal rule dealt with the competency of jurors as witnesses, the drafters of the military rules merely translated the heading and language of the rule to read "court member" and "member."

The failure to include military judges, when sitting as triers of fact, in the language of Rule 606(b) was most likely an oversight, and a military judge in such a situation is equally prohibited from impeaching his verdict. This position is supported by the decision of the Air Force Court of Military Review in United States v. Rice,⁸⁵ where the court held

military judges could not impeach their adjudged sentences unless they meet the exceptions of Rule 606(b).

Rule 509, therefore, provides for a "deliberations" privilege applicable to the deliberations of the trier of fact of a court-martial. To the extent the privilege belongs to the military judge sitting as the trier of fact, or to a military appellate court judge, it is a "judicial privilege."

Rule 509, through its express reference to Rule 606, defines the scope of this judicial privilege for court deliberations. Thus, the actual deliberations, impressions, emotional feelings, or mental processes used by the trier of fact to resolve an issue before him is privileged, absent the existence of one or more of the three exceptions in Rule 606(b).⁸⁶

In summary, under the Military Rules of Evidence, only one specific privilege, Rule 509, provides for a trial court or appellate court judicial privilege, and it is limited to the deliberations process as defined by the language of Rule 606(b). While Rule 506 may provide for a judicial privilege in the rarest of

situations involving a judiciary-wide policy decision, its potential application is almost too speculative to recognize it as a specific basis. Certainly, Rule 506 does not provide a military trial court or appellate court judge with a judicial privilege. If another form of judicial privilege exists in courts-martial, then under the language of Rule 501(a), it must be based upon either the Constitution or the federal common law.⁸⁷

C. The Constitution and Federal Common Law

1. Introduction.--The United States Constitution⁸⁸ does not expressly provide for a judicial privilege. Nor has Congress passed a statute that has created such a privilege. Yet, the courts have found an implied judicial privilege in the Constitution.⁸⁹

To understand the development of the judicial privilege implied in the Constitution, one must first analyze the development of the constitutional legislative and executive privileges. At the same time, a discussion of the recognition of a judicial privilege based on the federal common law is

necessary, since both types of judicial privilege are hopelessly intertwined in the relevant cases discussed below. The analysis of the executive privilege is especially important to any study of judicial privilege, because it is from the same constitutional underpinnings of the implied executive privilege that the courts have recognized the implied constitutional judicial privilege.

The text of the Constitution expressly grants a privilege to only one branch of government: the legislative branch. Article I of the Constitution contains the "Speech and Debate Clause" and states:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House,

they shall not be questioned in any other Place.⁹⁰

As noted by the Supreme Court in Gravel v. United States,⁹¹ the last sentence of the clause provides members of Congress with two distinct privileges. The first part of the sentence shields them from "civil" arrest⁹² in the course of their duties during a session of Congress,⁹³ while the last part shields them from being "questioned in any other place for any speech or debate in either House."⁹⁴

The purpose of these legislative privileges was "to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. They thus protect Members against prosecutions that directly impinge upon or threaten the legislative process."⁹⁵ As one federal court observed, "[t]he theory is that in a democracy a legislature must not be deterred from frank, uninhibited and complete discussion; since '[o]ne must not expect uncommon courage even in legislators,' . . ."⁹⁶

Initially interpreted very broadly,⁹⁷ these

legislative privileges have been more narrowly construed by the courts since 1972.⁹⁸ Yet, even with the courts limiting the conduct of legislators that falls within the privileges, the Supreme Court, in Gravel, reviewed the rationale for the privileges and extended the "Speech and Debate" privilege to an aide acting at the behest of a congressman.⁹⁹ The Court reasoned that:

[I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; . . . they [aides] must be treated as the latter's [Member's] alter egos; and that if they are not so recognized, the central role of the Speech and Debate Clause--to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary--will inevitably be diminished and

frustrated.¹⁰⁰

This reasoning by the Court, as well as the language from the Constitution, provides direct support for co-equal privileges for the executive and judicial branches of our government under the doctrine of separation of powers.¹⁰¹

The Constitution sets forth protections for the judiciary to ensure its independence. First, Article III judges receive life tenure and protection against their compensation being diminished during their time in office.¹⁰² Second, the Constitution provides for the removal of judges from office, but only by impeachment, and only for a limited number of reasons.¹⁰³ Finally, the Constitution sets forth a procedurally difficult mechanism for the impeachment process,¹⁰⁴ ensuring that it will not lightly be used by the legislative branch.¹⁰⁵

Certainly, the framers of the Constitution were aware of the dangers facing the independence of the judicial branch. They had the experiences of the English judiciary to draw from,¹⁰⁶ as well as known instances of judicial tampering by legislatures in the

colonies.¹⁰⁷ These protections should be viewed as an attempt to insulate and protect the independence of the judicial branch; an act in furtherance of the doctrine of separation of powers set up by the first three articles of the Constitution.¹⁰⁸

2. Dicta: Executive and Judicial Privilege.--During the first two hundred years of the United States, no court, to any significant degree, addressed the issue of whether an executive or judicial privilege, co-committant with the express legislative privileges in the Constitution, existed. Certainly, confrontations occurred between Congress and the executive branch, some of which undoubtedly caught the fancy of the media of the day.¹⁰⁹ Yet, courts managed to avoid the issue until the 1970s when, during the Nixon Administration, they were forced to define the scope and basis of the executive privilege.¹¹⁰ It was not until the mid-1980s that a federal court was finally in a position to address whether judicial privilege existed and to what extent.¹¹¹ This latter delay is even more significant given past attempts by the executive

branch to "stack" the courts to arrive at a Supreme Court more in step with the executive perspective.¹¹² As late as 1987, authors were describing "judicial privilege" as "an obscure doctrine of evidentiary law"¹¹³ that, prior to the Nixon administration, had "barely [received] a passing mention . . . in a court of law."¹¹⁴

The constitutional executive and judicial privileges are both implied privileges. They share the same constitutional underpinnings and supporting rationales. The earliest cases touching on executive and judicial privilege did so in the context of civil and criminal immunity. The concept of immunity from civil and criminal liability is not the context in which this thesis is analyzing judicial privilege. The courts, however, have historically mixed the two contexts together under the title of "judicial privilege."¹¹⁵ The law of judicial immunity has evolved to the point that judges enjoy immunity from civil liability for not only their actual decisions made in a case, but also for allegedly defamatory statements and other tortious conduct occurring during the course of the judicial proceedings.¹¹⁶ This

immunity from liability is extended to the parties in the proceedings and to officials exercising "quasi-judicial" authority.¹¹⁷ A judge's civil immunity is absolute as to his "judicial" conduct, however, his actions in a purely administrative capacity receive only qualified immunity.¹¹⁸ There is no immunity from criminal liability for judges.¹¹⁹

While this thesis does not discuss, in depth, the law of judicial immunity, the rationale cited for granting judges immunity is pertinent. Authors discussing immunity consistently offer "judicial independence" as the most important rationale.¹²⁰ That same desire to protect judicial independence supports a judicial privilege in the context of a testimonial and evidentiary privilege.¹²¹

The first modern situation in which judges asserted judicial privilege was in 1953. In response to a subpoena to testify before a House of Representatives subcommittee investigating the Department of Justice, the justices of the United States District Court for the Northern District of California wrote the Statement of the Judges.¹²² All seven judges in the district court signed the

statement, and District Judge Louis E. Goodman, the subpoenaed judge, appeared in person to deliver it to the subcommittee. The statement reminded the congressional investigators of the historical functions of the doctrine of separation of powers, and went on to declare:

In recognition of the fundamental soundness of this principle, we are unwilling that a Judge of this Court appear before your Committee and testify with respect to any Judicial proceedings.

The Constitution does not contemplate that such matters be reviewed by the Legislative Branch, but only by the appropriate appellate tribunals. The integrity of Federal Courts, upon which liberty and life depend, requires that such Courts be maintained inviolate against the changing moods of public opinion.¹²³

The statement concluded by stating that the judges had no objection to having Judge Goodman appear or to the

committee having him "make any statement or to answer any proper inquiries on matters other than Judicial proceedings."¹²⁴ The statement was evidently "sufficient" for the Congressional committee and the matter quietly went away.

Judicial privilege next reared its head in 1959 in a case involving then-Judge George C. Wallace of the Third Judicial Circuit of Alabama.¹²⁵ The Commission on Civil Rights sought to inspect voting and registration records of three counties in Alabama, but was refused access to the documents. Some of the records were impounded by Judge Wallace, who refused to relinquish them to the commission. The commission issued subpoenas duces tecum and the state officials filed suit to prevent their enforcement.¹²⁶

The district court did not decide the judicial privilege issue concerning Judge Wallace testifying regarding the impounded records. Instead, it held that "judicial status does not confer a privilege upon Judge Wallace to disregard the positive commands of the law"¹²⁷ While indicating that Judge Wallace need not deliver the records to the Commission in person, nor may he be required to testify under a

mere subpoena duces tecum,¹²⁸ the court, in dicta, stated:

This does not mean to say or imply that a judge is not immune from investigation or inquiry into his judicial acts; he is. For example, this Commission, nor indeed the Congress of the United States, could not inquire of Judge Wallace as to why he impounded these records or what factors he took into consideration when he impounded these records.¹²⁹

State officials produced the records and, again, the issue of judicial privilege escaped undecided.¹³⁰

3. The Federal Common Law's "Deliberative Process" Privilege.--While the courts continued to address judicial privilege only in dicta, they also avoided directly addressing the issue of a constitutional executive privilege. Instead, the courts recognized a federal common law privilege for the executive decisionmaking process. This

"deliberative process" privilege, as it became known, exists to protect the internal deliberations of government officials.¹³¹ Sweeping much broader than its close relatives, the executive privilege and the quasi-judicial privilege for deliberations of high executive officials,¹³² the "deliberative process" privilege protects the advice, opinions, and recommendations that are communicated during deliberations leading to the making of a decision within the executive branch.¹³³

The underlying rationale for the deliberative process privilege is that "disclosure of deliberative communications will chill future communications, thus diminishing the effectiveness of executive decisionmaking and injuring the public interest."¹³⁴ Though its historical roots trace back to England,¹³⁵ it really took hold in the federal courts following the decision in Kaiser Aluminum & Chemical Corp. v. United States,¹³⁶ a 1958 Court of Claims case.¹³⁷ Not clearly a constitutionally based privilege,¹³⁸ its bases are said to be built upon a combination of sovereign immunity, the separation of powers, the rule known in administrative

law as the Morgan doctrine, the Freedom of Information Act, and proposed (but rejected) Rule 509 of the Federal Rules of Evidence.¹³⁹ While the exact underpinnings of the privilege may be characterized as "murky at best," its widespread adoption by the federal courts makes it an accepted federal common law privilege.¹⁴⁰ The constitutional underpinnings of this "deliberative process" privilege, moreover, have been indirectly affirmed by the courts.¹⁴¹

The scope of the privilege, not surprisingly, is similar to the scope of Military Rule of Evidence 506, which the drafters took from proposed Federal Rule of Evidence 509.¹⁴² It covers both oral and written communications, but only when offered in the course of the decisionmaking process. It does not cover communications of fact, the actual "final" decision, or communications of a post-decisional nature.¹⁴³ The burden of proving that the privilege applies is on the government, and the procedural requirements (which among others contain a requirement that the head of the executive agency assert the privilege) ensure it is not recklessly invoked.¹⁴⁴ If the documents in question contain facts and/or unprivileged

communications that are comingled with privileged communications, the facts and unprivileged communications must still be released.¹⁴⁵ When the privilege does apply, it is qualified. The courts will engage in a balancing test to see whether, on the particular facts of the case, disclosure is required.¹⁴⁶

While the "deliberative process" privilege clearly exists in federal common law for the executive, its extension to the judiciary to create a similar privilege is not so clear. If, in fact, the privilege arises from the constitutional doctrine of separation of powers, as some courts have indicated,¹⁴⁷ then it should apply equally to the judiciary's decisionmaking processes. Such an application would go beyond the scope of the deliberations privilege discussed above under Military Rule of Evidence 509.

If viewed as a "judicial privilege," the scope of the privilege would not be tied to the deliberations of a specific case, as is the deliberations privilege, and it could be used to protect the advice, opinions, and recommendations between judges when offered on

mere administrative decisions of a judicial policy nature. As an example, the privilege would protect the input of subordinate judges on proposed changes to the rules of court, and even the Federal Rules of Evidence, Federal Rules of Criminal Procedure, or Federal Rules of Civil Procedure.

Would such a privilege be wise? Clearly, such input would be of a more frank, nonpolitical nature if the judge offering it knew it would never be disclosed. Few cases have addressed the application of the deliberative process privilege to the judiciary.¹⁴⁸ Yet, the rationales supporting the privilege for the executive exist as support for the judiciary having the same privilege. While the judicial branch engages in far less "policy making" than the executive branch, recognition of a federal common law decisionmaking process privilege for the judiciary, within the overall term of "judicial privilege," is appropriate.

4. Transition: Judicial Independence.--Two additional cases merit discussion before beginning an analysis of the executive privilege announced in the

Nixon Administration cases arising in 1973 and 1974. In 1970, the Supreme Court restated the "imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function."¹⁴⁹ In Chandler v. Judicial Council of the Tenth Circuit of the United States,¹⁵⁰ the Court was faced with a petition for a writ of mandamus. A district court judge sought relief from administrative controls imposed on his cases by the judicial council of his court of appeals.¹⁵¹

The Court declined to issue the writ, while stating that the need for enforcement of reasonable, proper, and necessary rules within the federal courts cannot be reasonably doubted.¹⁵² The majority viewed favorably the exercise of administrative oversight of the district court judge by the court of appeals,¹⁵³ rejecting the proposition that each federal judge is the "absolute ruler of his manner of conducting judicial business."¹⁵⁴ The dissent strenuously objected to the majority's dicta implying that judicial independence is not absolute.¹⁵⁵ Justice Douglas, reaffirming that each judge is independent of every other judge, stated in his

dissent: "There is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge."¹⁵⁶

On the one hand, the Chandler opinion reaffirmed the inviolate nature of the independence of the judiciary. With the other hand, it sanctioned the imposition of reasonable administrative controls on federal judges by other federal judges.

Finally, a case in the early 1970s hinted at the existence of an inherent judicial privilege, doing so in a footnote. In New York Times Co. v. United States,¹⁵⁷ the government sought to enjoin newspapers from publishing the contents of a classified study on Vietnam.¹⁵⁸ Addressing the power of the executive branch to classify documents and keep their contents confidential, Chief Justice Burger made an analogy to the Supreme Court, stating in his dissent:

No statute gives this Court express power to establish and enforce the utmost security

measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.¹⁵⁹

At the end of 1971, the issue of whether a constitutionally based executive or judicial privilege existed still remained. In dicta, the courts had reaffirmed the separation of powers doctrine and stressed the necessity for an independent judiciary. Yet, beyond the federal common law "deliberative process" privilege, no specific privilege for either the executive or judicial branches existed. The stage was now set for Watergate and the recognition of a constitutionally based executive privilege.

5. President Nixon and Executive Privilege.--In 1973, Nixon v. Sirica¹⁶⁰ offered a federal court of appeals the opportunity to decide the existence and scope of a constitutionally based executive privilege. Arising from a dispute over a subpoena duces tecum

directing the President to turn over certain tape recordings,¹⁶¹ the court held that Presidential communications are presumptively privileged.¹⁶² The court, however, rejected the executive branch's claim that the privilege was absolute. The court announced a balancing test for determining whether such presumptively privileged communications must, nevertheless, be disclosed.¹⁶³

The majority opinion in Sirica discussed the constitutional underpinnings of the privilege, citing to the need "to protect the effectiveness of the executive decision-making process."¹⁶⁴ In so doing, it analogized the privilege to: "[T]hat between a congressman and his aides under the Speech and Debate Clause; to that among judges, and between judges and their law clerks; and similar to that contained in the fifth exemption to the Freedom of Information Act."¹⁶⁵ While discussing the doctrine of separation of powers in the context of whether or not the privilege was absolute, the majority did not explicitly state that its new, qualified executive privilege arose out of that doctrine. Instead, the opinion cited to the long line of cases supporting the

federal common law's "deliberative process" privilege.¹⁶⁶ The court found that such a privilege was constitutionally based, arising from the inherent power of a branch of government to carry out its expressed duties under the Constitution.¹⁶⁷

The court held that the presumption in favor of maintaining the confidentiality of the communications failed in this case, "in the face of the uniquely powerful showing made by the Special Prosecutor"¹⁶⁸ The dissenting judges, in lengthy opinions, argued in favor of an absolute executive privilege.¹⁶⁹ They stated that such a privilege was specifically based upon the doctrine of separation of powers, in addition to the "inherent power" basis, and that any balancing test would constitute an unconstitutional infringement of the executive branch's authority.¹⁷⁰ Pointing out that both the legislative and judicial branches claimed an absolute privilege, the dissenting judges analyzed the historical invocation of privilege by each branch of government. They found that an implied executive privilege arose from custom and the use of privileges by the different branches.¹⁷¹

Sirica is significant in that a federal appellate court recognized a constitutionally based executive privilege. At a minimum, the majority opinion affirmed the constitutional basis of the federal common law's "deliberative process" privilege. Such a basis makes the argument for application of the "deliberative process" privilege to the judicial branch, discussed previously, all the more compelling.¹⁷² The Supreme Court soon resolved the issue of whether the constitutional basis was broader, strengthened by the support arising from the doctrine of separation of powers.

United States v. Nixon,¹⁷³ decided in 1974, was the Supreme Court's first opportunity to directly decide the issue of executive privilege. As in Sirica, the case involved a subpoena duces tecum directing President Nixon to turn over tape recordings, only this time the evidence was to be used in a criminal trial of former Nixon Administration officials, and not for a grand jury.¹⁷⁴ Before the Court, the President's counsel asserted two grounds for executive privilege. The first was a valid need to protect communications between high government

officials and those who advise and assist them in the performance of their official duties. The second was the doctrine of separation of powers.¹⁷⁵

The Court began its analysis by declaring that, without more:

[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications . . . can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. . . . [W]hen the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises.¹⁷⁶

The "more" that would be required for such an absolute privilege would be "a claim of need to protect military, diplomatic, or sensitive national security secrets."¹⁷⁷ Since the President had only made a generalized claim of privilege, the Court found that it was in conflict with and overridden by the

constitutional duty of the judicial branch to do justice in criminal prosecutions.¹⁷⁸

Addressing the constitutional basis of the privilege, the Court acknowledged the absence of an express provision for it in the Constitution. Using the rules of constitutional interpretation, however, the Court noted "that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant."¹⁷⁹ The Court then held that the executive privilege was constitutionally grounded in both the "deliberative process" privilege, as applied at the Presidential level, and the separation of powers.¹⁸⁰

The Supreme Court had recognized an executive privilege arising from two separate constitutional bases. The privilege was qualified, not absolute, and the Court adopted the balancing test from Sirica¹⁸¹ to use when determining if the privilege is overridden. The holding in Nixon also affirmed the strength of "the fundamental demands of due process of law in the fair administration of criminal justice."¹⁸² The importance of fundamental due

process, relative to claims of privilege, is a principle that will be discussed later when balancing the interests served by the voir dire process against the interests served by a claim of judicial privilege.¹⁸³

The Court's opinion in Nixon also clarified the constitutional parameters of the federal common law's "deliberative process" privilege. By confining the constitutional basis of the privilege to Presidential-level communications, it arguably created two separate "deliberative process" privileges. Executive branch officials below the Presidential level (i.e., those not directly advising or assisting the President in the performance of his duties) have a non-constitutional, federal common law privilege. Those executive officials at the Presidential level have a stronger, constitutionally based privilege.

With the issue of executive privilege resolved, what of the existence and scope of judicial privilege? The Court in Nixon gave us a preview when it analogized the expectations of a President in the confidentiality of his conversations and correspondence to "the claim of confidentiality of

judicial deliberations."¹⁸⁴ This dicta would appear to support a constitutionally based, qualified privilege for the judicial branch; a privilege rooted both in the federal common law's "deliberative process" privilege, as it was interpreted by the majority opinion in Sirica, and the doctrine of separation of powers.

III. Judicial Privilege

A. Transition from Executive to Judicial Privilege

After the Nixon decision in 1974, twelve more years passed before a federal appellate court ruled on the existence and scope of judicial privilege. In the meantime, during the late 1970s and the first half of the 1980s, investigations into judicial misconduct gave rise to several invocations of judicial privilege. Each incident, however, evaded reported judicial decision for one reason or another.

In 1979, the California Commission on Judicial Performance held unprecedented public hearings into allegations that the California Supreme Court, headed by Chief Justice Rose Bird, delayed key court

decisions.¹⁸⁵ The allegations were that key decisions were improperly delayed because the chief justice and two other justices on the court were facing reelection that term.¹⁸⁶ During the course of the hearings, Justice Newman, "refused to answer under oath most of the substantive questions . . . citing 'judicial privilege not to disclose confidential information.'" ¹⁸⁷ The commission rejected Justice Newman's assertion of the privilege, citing United States v. Nixon for the proposition that full disclosure was required to enable the commission to carry out its investigation.¹⁸⁸ Apparently, the commission took no further action to compel Justice Newman to answer the questions for which he claimed the privilege.¹⁸⁹

That same year, a claim of judicial privilege arose during an evidentiary hearing in a district court in Georgia.¹⁹⁰ The petitioner in the habeas proceeding was contesting a magistrate's ruling. The magistrate had earlier declined to compel the deposition or testimony of the Assistant to the Supreme Court of Georgia concerning that court's sentence review procedures.¹⁹¹ The magistrate

deemed the matters to be subject to judicial privilege.¹⁹² The district court held that it was "unnecessary to rule on whether or not the Magistrate correctly analyzed [Mr.] York's claim of judicial and/or attorney-client privilege, because . . . the sought-for testimony would not in any way have furthered Petitioner's claim"193

In 1984, a federal magistrate invoked judicial privilege in a challenge to more than twenty-five indictments from a grand jury in Connecticut.¹⁹⁴ A defense counsel claimed the magistrate failed to appoint a woman or black as the foreman of the grand jury investigating large-scale drug trafficking in the state, and sought to examine the magistrate on this subject.¹⁹⁵ While claiming judicial privilege, the magistrate nevertheless provided a two-page affidavit, in which he denied discriminating in the appointment of "grand jury forepersons."¹⁹⁶ Apparently, the affidavit was sufficient for the court and the defense did not challenge the claim of privilege on appeal.¹⁹⁷

In 1986, a committee of the Texas legislature investigated allegations of judicial misconduct by

members of the Texas Supreme Court. Allegations included illegal ex parte communications and leaks of information to private lawyers and parties to cases.¹⁹⁸ Two justices refused to honor subpoenas and testify before the committee, citing the doctrine of separation of powers, and were successful in winning a court order temporarily quashing the subpoenas.¹⁹⁹ Three of the employees of the justices were not so fortunate, and they testified under threat of contempt of the legislature following their invocation of judicial privilege.²⁰⁰ Evidently, the committee and the justices worked out a suitable arrangement because no reported court decision ensued.

The first half of the 1980s also saw Supreme Court nominees invoking a hybrid of judicial privilege in Senate confirmation hearings. Both Chief Justice William H. Rehnquist and Justice Antonin Scalia declined to answer questions from the senators "concerning cases in which they have already participated or concerning issues that might come before them in the future".²⁰¹ This practice frustrated senators and some observers, who perceived

it as inhibiting the Senate's ability to fully evaluate nominees' qualifications to sit on the Supreme Court.²⁰² Yet, it has continued through the most recent confirmation involving Justice Clarence Thomas.²⁰³

The stage was set. The Supreme Court had announced a constitutionally based executive privilege to cover the confidential communications of the executive branch. At the same time, judicial misconduct investigations were occurring with much greater frequency, leading to an increased invocation of "judicial privilege."²⁰⁴ It was time for a federal appellate court to address the issue of the existence and scope of judicial privilege.

B. The Case of Hastings II

Between 1981 and 1983, federal prosecutors pursued the indictment and trial of Judge Alcee L. Hastings, a federal district court judge of the United States District Court for the Southern District of Florida. Judge Hastings' trial ended with his acquittal on charges of conspiracy to solicit and accept a bribe in return for performing certain

official actions in his capacity as a federal judge.²⁰⁵ Following the trial, two district court judges filed a complaint with the Judicial Council of the Eleventh Circuit pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the Act).²⁰⁶ They alleged Judge Hastings "had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several canons of the Code of Judicial Conduct for United States Judges."²⁰⁷

Following the appointment of an investigating committee by the chief judge of the Eleventh Circuit, Judge Hastings mounted several of his many challenges to the investigation.²⁰⁸ Finally, in 1986, in response to the issuance of subpoenas by the investigating committee, Judge Hastings and members of his staff raised the issue of judicial privilege for an appellate court's consideration.²⁰⁹

In Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit (Hastings II),²¹⁰ Judge Hastings, his secretary (Betty Ann Williams), and three present and former law clerks

(Alan Ehrlich, Daniel Simons, and Jeffrey Miller) sought to have subpoenas issued by the investigating committee quashed, while the investigating committee was seeking their enforcement.²¹¹ The court analyzed the claims of judicial privilege in two parts: the claim of judicial privilege as it applied to the documents sought by a subpoena duces tecum and the claims of testimonial privilege by Simons and Miller, the two clerks who actually testified and claimed the privilege.²¹² The court did not decide the claims of testimonial privilege by Williams and Ehrlich on the basis that they were not ripe.²¹³ In the end, the court held:

We conclude, therefore, that there exists a privilege (albeit a qualified one, infra) protecting confidential communications among judges and their staffs in the performance of their judicial duties. But we do not think that this qualified privilege suffices to justify either Williams' noncompliance with the Committee's subpoena duces tecum, or Simon's and Miller's refusals to answer

the questions directed to them by the Committee.²¹⁴

In reaching its holding, the court acknowledged that it had "found no case in which a judicial privilege protecting the confidentiality of judicial communications has been applied, . . ."²¹⁵ The court, however, then proceeded to cite cases where "the probable existence of such a privilege was noted."²¹⁶

Citing the Supreme Court's reasoning for finding an executive privilege in United States v. Nixon,²¹⁷ the court quoted the passage concerning its constitutional foundation arising from the separation of powers and the nature of the President's constitutional duties.²¹⁸ The court found, by analogy, that the same constitutional underpinnings apply as well to the judiciary.²¹⁹ The court observed that, "[j]udges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties."²²⁰ The analysis concluded with the court noting, "[c]onfidentiality helps protect judges'

independent reasoning from improper outside influences."²²¹

Having found that judicial privilege exists, the court discussed its scope and the procedures to use when it is claimed. As to scope of judicial privilege, the court stated:

In the main, the privilege can extend only to communications among judges and others relating to official judicial business such as, for example, the framing and researching of opinions, orders, and rulings.²²²

The burden of demonstrating that matters fall within the scope of the privilege is on the party seeking to claim it.²²³ If the party asserting the privilege meets the threshold "scope" requirement, the matters then become "presumptively privileged and need not be disclosed unless the . . . party . . . [seeking access to the information] can demonstrate that its need for the materials is sufficiently great to overcome the privilege."²²⁴ Finally, a court will weigh the seeking "party's demonstrated need for the information

against the degree of intrusion upon the confidentiality of privileged communications necessary to satisfy that need."²²⁵

Applying the above procedures, the court first held that the descriptions of the documents sought from Williams under the subpoena duces tecum were insufficient to permit it to determine whether they fell within the privilege.²²⁶ The judges then assumed that the documents were within the privilege, and held that the privilege was defeated by the committee's need for them.²²⁷ The court then ruled that the judicial privilege asserted by Simons and Miller was overridden by the committee's need for their testimony to further its investigation.²²⁸ The judges analogized Judge Hastings' generalized interest in the confidentiality of his communications with his judicial staff to that of President Nixon in United States v. Nixon.²²⁹ The court further compared the committee's particular need for the testimony in an investigation of improper conduct within a judge's chamber to the need for relevant evidence in a criminal proceeding, such as existed in the Nixon case.²³⁰ When balanced, the committee had

met its burden of showing a sufficiently great need to overcome the presumption of privilege.²³¹

The court in Hastings II had managed to do what no other federal appellate court could in the first two hundred years of this nation: define the existence of judicial privilege. What of judicial privilege for the non-Article III courts? Does it apply to the military trial and appellate courts? Those questions remained to be answered.

C. Judicial Privilege in the Military Courts

Scholars and courts have raised the issue of the independence of the military courts, both at the trial and appellate levels, throughout the history of courts-martial in this country.²³² The greatest threat to this independence arises from all types of unlawful outside influences on court members and military judges. The Uniform Code of Military Justice (the Code)²³³ addresses this threat, which the military services refer to as "unlawful command influence."²³⁴ Congress, through Articles 26²³⁵ and 37²³⁶ of the Code, has sought to prevent it. At the same time, Congress has acted to reinforce the

independence of the judiciary and ensure a fair and impartial military justice system.²³⁷

The Court of Military Appeals, an appellate court in the military justice system,²³⁸ has also been very proactive in protecting the integrity and independence of the military justice system and preventing the exercise of unlawful command influence.²³⁹ In 1976, the court, in United States v. Ledbetter,²⁴⁰ announced its views on the independence of the military judiciary. Responding to allegations that an Air Force military trial judge had been "questioned" by military superiors concerning his lenient sentences in three cases,²⁴¹ the court recognized that: "Congress, in adopting Articles 26(c) and 37(a) of the Uniform Code, sought to insulate judges, as well as others involved in the court-martial process, from command interference with the deliberative process."²⁴² The court went on to address unlawful command influence from military superiors, including those within the military trial judiciaries, on the military trial judge:

The trial judge, as an integral part of the

court-martial, falls within the mandate of Article 37. If anything is clear in the Uniform Code of Military Justice, it is the congressional resolve that both actual and perceived unlawful command influence be eliminated from the military justice system. Article 26(c)'s provision for an independent trial judiciary responsible only to the Judge Advocate General certainly was not designed merely to structure a more complicated conduit for command influence. That is to say, the Judge Advocate General and his representatives should not function as a commander's alter ego but instead are obliged to assure that all judicial officers remain insulated from command influence before, during, and after trial.²⁴³

The court next noted that Congress had not prescribed a procedure for inquiring into the deliberative processes of military judges. It then stated:

[W]e deem it appropriate to bar official inquiries outside the adversary process which question or seek justification for a judge's decision, unless such inquiries are made by an independent judicial commission established in strict accordance with the guidelines contained in section 9.1(a) of the ABA Standards, The Function of the Trial Judge,²⁴⁴

The Ledbetter decision provided formal recognition of the independence of the military trial judge. It also, arguably, stated a qualified judicial "deliberations" privilege for all military judges, similar in scope to the deliberations privilege of Military Rule of Evidence 509, which was adopted four years later. Such deliberations were now protected from inquiry by all but established independent judicial commissions.

In 1986, at the time the Eleventh Circuit was issuing its Hastings II decision, military judges were without an established constitutionally based judicial privilege. Did the holding in Hastings II apply to

military courts as well? The answer to that question was not clear, especially since the military courts and judges were established by Congress under Article I, Section 8, Clause 14 of the Constitution.²⁴⁵ They are not Article III courts and judges, which were the focus of Hastings II.²⁴⁶

United States Navy-Marine Corps Court of Military Review v. Carlucci,²⁴⁷ decided in 1988, provided an opportunity to address the existence of judicial privilege in the military judicial system. Arising in the form of a petition for extraordinary relief, the judges of the Navy-Marine Corps Court of Military Review (NMCMR) asked the Court of Military Appeals to enjoin the Inspector General of the Department of Defense from interviewing the judges and their commissioners²⁴⁸ concerning their deliberations in the case of United States v. Billig.²⁴⁹

Before reaching the merits of the case, the court had to deal with issues of ripeness, its power to enforce compliance with its orders by civilians in the executive branch, such as the Inspector General, and, most importantly, its jurisdiction to hear the petition.²⁵⁰ It was in this latter area that the

court discerned Congress' delegation of responsibility to the military courts to maintain "the independence, integrity, and fairness of the military justice system."²⁵¹ Reviewing legislative acts and history, the court found that Congress had granted "an Article I court, . . . [and specifically it, the Court of Military Appeals], the power to prevent officials of the Executive Branch from interfering with the administration of military justice."²⁵² This language, and the analysis upon which the court found it to be based,²⁵³ invoked the separation of powers doctrine and corresponding constitutional ramifications.

The court next addressed the merits of the petition from the judges and held, "[the] [i]nvestigation of a court's deliberative process, . . . is limited by a judicial privilege protecting the confidentiality of judicial communications,"²⁵⁴ citing to Hastings II. It then explained that the "rationale for the privilege is the same as that which was articulated for executive privilege--namely, that confidentiality is important for the effective discharge of the duties of a judge."²⁵⁵

The court had found a judicial privilege for the military appellate courts by analogy to executive privilege and by using the same analysis performed by the courts in United States v. Nixon and Hastings II. While not expressly stating that the privilege was "constitutionally based," the court's discussion of the basis for the privilege, its reliance on Hastings II, and its reference to the powers of an Article I court to prohibit acts by the executive branch, when coupled with its analogy to executive privilege, by implication, made it constitutionally based.

Interestingly, the court did not rely on Military Rule of Evidence 509, nor on the federal common law "deliberative process" privilege (and its corollary in the military, Military Rule of Evidence 506), for a partial basis of the judicial privilege involving the confidentiality of communications between judges.²⁵⁶ Instead, it relegated its mention of a "deliberations" privilege to a footnote, stating that "[a] privilege has also been recognized with respect to the deliberative processes of a jury."²⁵⁷ There, it cited to Federal Rule of Evidence 606(b), Military Rule of Evidence 606(b), and Tanner v. United

States,²⁵⁸ omitting any reference to Rules 506 or 509.²⁵⁹

In applying judicial privilege to the facts before it, the court stated it was only a qualified privilege, like executive privilege,²⁶⁰ that "sometimes must yield to other considerations."²⁶¹ The court then engaged in a balancing test, as proposed by the Hastings II decision, and found that a mere anonymous tip was not a sufficient quantum of evidence necessary to overcome the privilege.²⁶²

The remainder of the opinion then set forth the remedy. Citing its earlier language in Ledbetter and the procedures for investigating judges in the federal courts through the judicial councils, the court designated itself, qua court, to be the independent judicial commission that would investigate any aspect of the deliberative processes of the NMCMR judges.²⁶³ It further appointed one of its three judges, Judge Walter T. Cox, III, as its special master to initially "function in the capacity of protecting the court [NMCMR], its judges, and staff from unlawful intrusions into the deliberative processes."²⁶⁴ Judge Cox was given sweeping powers

as the special master, however, they were to be triggered by the filing of a complaint with him that was accompanied by "information giving rise to a belief that judicial misconduct had occurred."²⁶⁵ The court then issued a protective order that prohibited the Inspector General from conducting the planned interviews with the NMCMR judges.²⁶⁶

The Carlucci court had found a constitutional judicial privilege, coextensive with and invoking the same implementing procedures as the privilege announced by Hastings II for the federal judiciary. But what of the military trial judges? Did they have the same privilege or was it limited to the military appellate courts? The trial level courts are as much Article I courts as are the courts of military review,²⁶⁷ so the same privilege arguably should apply to them.

These last two questions were raised in 1990 by the facts in Clarke v. Breckenridge.²⁶⁸ In Clarke, a new and inexperienced Marine Corps trial judge made an injudicious remark following an earlier, unrelated trial. That remark, "could be reasonably interpreted to mean that he may have somehow considered the race

of the accused in determining the sentence . . .
."269 The judiciary conducted an investigation,
resulting in a decision that the judge would remain on
the bench.²⁷⁰ Clarke was the first case in which
the judge sat as a military judge following the
investigation. At the court-martial's initial
session, counsel conducted extensive voir dire and
challenged the military judge for cause.²⁷¹ Upon
the judge's denial of the challenge, NMCMR heard the
case pursuant to a petition for extraordinary relief
in the nature of a writ of mandamus.²⁷²

During the course of the voir dire of the
military judge, the issue of judicial privilege arose
on several occasions. The military judge first
invoked the privilege in the form of "work product,"
when he read his answer to a question from counsel,
and then later refused to show the document to counsel
or attach it to the record of trial.²⁷³ He also
invoked judicial privilege to protect the case reports
from his prior trials.²⁷⁴ The judge further cited
judicial privilege as protecting his discussions with
the Chief Judge, Navy-Marine Corps Trial Judiciary,
during breaks in the voir dire. Counsel had argued

these discussions were especially relevant since the chief judge was a "defense" subpoenaed witness, he had sat in the courtroom throughout the voir dire process over defense counsel's objection, and he testified before and after these discussions took place.²⁷⁵ Finally, the military judge raised judicial privilege after he admitted showing his essential findings on the challenge to the chief judge prior to announcing them in open court, but would admit only that the chief judge had reviewed them for style purposes and that he (the judge) was proceeding "in accordance with the law."²⁷⁶

The NCMCMR panel ultimately concluded that the military judge had abused his discretion in failing to grant the challenge for cause based on the appearance of impropriety.²⁷⁷ In addressing the issue of judicial privilege, the court did not explicitly hold that it applied. Instead, it stated: "Even if, under these circumstances, a judicial privilege existed, the privilege is a qualified one, and if its proper exercise effectively restricts the defense in fully developing pertinent facts regarding the challenge, the restriction is a factor militating in favor of

granting the challenge."²⁷⁸

The court, in essence, assumed for the purposes of deciding the issue that the privilege did apply, but then failed to engage in the required balancing test to determine if the privilege must yield or be sustained. One interpretation of the court's opinion is that it lends support to the position that the privilege must yield to the due process interests of the accused in developing his facts for an intelligent exercise of his right to challenge the military judge. Yet, the opinion could also be interpreted as merely indicating the invocation of judicial privilege was one of many factors, albeit a factor in favor of the privilege yielding, to be considered in the balancing test. The court's opinion never resolved this conflict or explained why it chose not to balance the privilege against the interests of the accused. Perhaps it did not need to because the basis for finding an abuse of discretion was evident in the record without having to resolve the judicial privilege issue.²⁷⁹ Arguably, that the Clarke court "presumed" the existence of judicial privilege in its opinion supports the proposition that such a privilege

does apply to a military trial judge.

The most recent discussion of judicial privilege in the military courts also comes from a three-member panel of NCMR. In Wilson v. Ouellette,²⁸⁰ the court was faced with another petition for extraordinary relief in the nature of a writ of mandamus, which it ultimately denied.²⁸¹ An issue in this case was a claim of judicial privilege by a military judge, who had declined to be interviewed by a defense counsel seeking to corroborate information provided to him by a former military judge from the same circuit.²⁸² Noting it was "mindful of the potential existence of judicial privilege,"²⁸³ the court further stated in a footnote:

The law recognizes a qualified judicial privilege. Recognition of the judicial privilege is relatively recent. Thus far, the privilege extends to a court's deliberative processes and to communications relating to official business, such as the framing and researching of opinions, orders and rulings. We need not decide whether the

privilege extends to general academic discussions between trial judges or whether it applies in this case. Nor do we intimate that all communications concerning judicial business between one judge and another are always beyond discovery.²⁸⁴

This dicta appears to apply the judicial privilege to the military trial court judges to the same extent as it has been applied by the Carlucci court to military appellate judges, and by the Hastings II court to the federal judiciary.

Evaluating the language of the two NCMCMR opinions, the only military cases since Carlucci to address the issue of judicial privilege, the single reasonable conclusion that can be drawn is that the trial level military judges hold the privilege to the same extent and in the same situations as the judges sitting on the military appellate courts. Before analyzing the effect a claim of judicial privilege has in certain courts-martial situations, it is helpful to summarize the bases and scope of the various types of judicial privilege discussed up to this point.

D. The Bases and Scope of Judicial Privilege

1. The Constitutional Privilege.--Hastings II
was the first federal appellate court decision to find that a constitutional judicial privilege existed. That court's holding, and the subsequent interpretations of it by the military courts, define the scope of the constitutional privilege and the procedures for evaluating it when invoked.²⁸⁵

The constitutional privilege applies to all Article III judges, as well as to the military's Article I judges (from the trial level through the military appellate courts). That interpretation arises from the common interests they share, their similar duties and purposes, and express congressional intent.²⁸⁶ The constitutional underpinnings for the privilege are found in the doctrine of separation of powers and from the nature of their constitutional duties.²⁸⁷

The key constitutional theme arising from the separation of powers basis is the independence of the judiciary; a fair and impartial court system free from interference by the other two branches of government.²⁸⁸ The key constitutional point arising

from the nature of judicial duties is the supremacy of each branch of government within its own assigned areas of constitutional power and duties.²⁸⁹ To that end, a privilege protecting the confidentiality of communications between judges and others who assist them in the performance of their duties promotes the efficiency of the judiciary and collaterally protects their decisions from unwarranted and improper outside influences. Both the separation of powers and constitutional duties bases are mutually supporting and intertwined.²⁹⁰

As to the scope of this judicial privilege, it "extends only to communications among judges and others relating to official judicial business such as, for example, the framing and researching of opinions, orders, and rulings."²⁹¹ It therefore covers discussions between judges and their law clerks or commissioners concerning the conduct of deciding issues before the judge and/or court.²⁹² This privilege is analogous to the federal common law's "deliberative process" privilege. The differences are that the constitutional privilege is applied down to the lowest level of the individual judge and it is

not limited to predecisional, non-factually based opinions and recommendations. The constitutional privilege is also analogous to the "deliberations" privilege of Military Rule of Evidence 509, only more expansive in that it includes preliminary discussions and post-decisional reflections, and it is not limited to the precise deliberations leading up to a verdict or sentence in a particular case.

Does the scope of the privilege include day-to-day administration-oriented communications between judges, or general academic discussions? That issue is unresolved. To the extent such communications are in furtherance of specific judicial duties, they are arguably privileged. What of communications relating to judicial misconduct, such as the acceptance of a bribe? Since such communications would not be in furtherance of a judge's constitutional duties, they should not fall within the privilege.²⁹³

As to the procedures to be used when the judiciary invokes judicial privilege, the burden of proving that the matters fall within the scope of the privilege is on the party claiming it. Once the party

claiming the privilege meets the threshold "scope" requirement, the matters are "presumptively privileged."²⁹⁴ The burden then shifts to the party seeking access to the matters to "demonstrate that its need for the materials is sufficiently great to overcome the privilege."²⁹⁵ A court faced with deciding a claim of judicial privilege will balance the interests of the party seeking the information against the interests to be served by the claim of judicial privilege. If the scales favor the party seeking the information, the privilege must yield, for it is only a qualified privilege, and not absolute.²⁹⁶

What about the situations when the privilege must yield? From the holding in Hastings II, it is most likely that an investigation into alleged judicial misconduct by a judicial council will possess a sufficiently great need to overcome the privilege.²⁹⁷ Further, from Carlucci, it appears that merely having an anonymous tip is probably not a sufficient quantum of evidence to support the required "great need."²⁹⁸ The needs of criminal trials can certainly be sufficiently great, especially when the

interest to be served by disclosure is the due process of law, as in United States v. Nixon.²⁹⁹ But what of the needs of an accused in a court-martial who seeks to voir dire the military judge in order to lay a foundation for an adequate challenge for cause? Are the accused's needs and the interests to be served by disclosure sufficiently great? That issue will be addressed in the next two sections of this thesis.

2. The Federal Common Law Judicial Privilege.--The law is clear that a "deliberative process" privilege exists for the executive branch.³⁰⁰ For the reasons discussed earlier, that same privilege should be recognized as another form of judicial privilege and made applicable to the judiciary.³⁰¹

As another form of judicial privilege, this "deliberative process" privilege protects the advice, opinions, and recommendations made by subordinates. It covers these communications only when made during the deliberations stage that leads to the making of a major decision or policy within the judicial branch.³⁰² It would not, therefore, cover decisions

on local court rules in a single court, but would cover decisions made by more senior judges and administrators in the judicial branch. Since it does not protect facts used in making the decision, or any post-decisional communications, this privilege is narrower in scope than the constitutional privilege discussed above.³⁰³

Like the constitutional privilege, the common law privilege is not absolute, but qualified. The burden is on the party seeking to protect the communications to show they fall within the privilege. The courts will employ a balancing test to see whether, on the particular facts of the case, disclosure is required. As opposed to both the constitutional privilege and the deliberations privilege of Military Rule of Evidence 509, courts will frequently engage in in-camera review of the communications that are the subject of a claim of this privilege.³⁰⁴

3. The "Deliberations" Privilege of Military Rule of Evidence 509.--Applicable only to military judges and court members, this judicial privilege (when applied to the military judges sitting as

courts-martial composed of military judge alone) protects the actual deliberations, impressions, emotional feelings, or mental processes used in resolving an issue before the judges.³⁰⁵ Its scope is much narrower than the constitutional privilege since it is directed to the deliberations of a specific case or issue and would not protect more generalized communications.

Since the privilege arises from an executive order promulgated by the President, it is subject to modification at the pleasure of the executive branch. The first purpose served by the privilege is the insulation of judges (as triers of fact) from harassment or improper outside influences (including unlawful command influence), which thereby promotes the independence of the military judiciary.³⁰⁶ The second purpose is the interest in the finality of verdicts, which the rule promotes by preventing judges from impeaching their prior verdicts.³⁰⁷ As with the other two privileges above, this judicial privilege is also qualified. It may be forced to yield when the party seeking to disclose the privileged matters can show the existence of

extraneous prejudicial information, improper outside influence, or unlawful command influence.³⁰⁸

Before practitioners and judges can fully appreciate the scope and interaction of the three qualified judicial privileges, they need to understand the effect a claim of such a privilege has on the conduct of a court-martial. Most claims of judicial privilege in a court-martial will arise during voir dire of or a challenge for cause against the military judge. A court faced with a claim of judicial privilege that limits or prevents voir dire of the military judge, or which prevents development of a basis for a challenge for cause, must know the interests served by voir dire and the challenge process, in order to balance those interests against the interests served by the protections of judicial privilege. An examination of the historical and legal underpinnings of voir dire and challenges for cause, therefore, is necessary to determine those interests.

IV. Voir Dire and Challenges of the Military Judge

A. Historical Development of Voir Dire

Voir dire is defined by one legal dictionary as "to speak the truth," and denoting the examination "the court may make of one presented as a witness or juror, where his competency, interest, etc., is objected to."³⁰⁹ While the origins of the voir dire examination of prospective jurors has been described as "rather obscure,"³¹⁰ it developed under the common law "as the natural concomitant of the right to an impartial jury."³¹¹ The development of the law concerning voir dire in the federal and state courts has focused almost exclusively on jurors. It is only in the military that a litigant has the right to voir dire the judge in a particular case.³¹²

Cases and authors have offered numerous justifications for conducting voir dire,³¹³ however, the only universally recognized purpose for the inquiry is to disclose a basis for disqualification or actual bias of the juror.³¹⁴ Justice Harlan's comments in a 1895 Supreme Court case best explain this purpose:

It is quite true, as suggested by the accused, that he was entitled to be tried by an impartial jury; that is, by jurors who had no bias or prejudice that could prevent them from returning a verdict according to the law and evidence. It is equally true that suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried.³¹⁵

The language in the opinion clearly shows the link between the purposes of voir dire to disclose bias, opinions, and prejudice on the one hand, and the right to be tried by a fair and impartial jury on the other. The Judicial Conference of the United States stated in 1960: "The constitutional purpose of the voir dire examination is thus to make sure that the jury is 'impartial.'"³¹⁶

More recently, an additional purpose has been recognized--to question jurors so that a party may

intelligently form a basis for the exercise of its peremptory challenges.³¹⁷ Since the peremptory challenge may be exercised for any reason,³¹⁸ including matters discovered on voir dire concerning the juror's personal background and beliefs, "the scope of inquiry is naturally rather broad."³¹⁹

B. Development of Voir Dire in Courts-Martial

The development of voir dire in courts-martial has roughly paralleled its development in the common law and federal courts, at least to the extent it involves court members. At least as early as 1806, a court member could be challenged for cause by an accused.³²⁰ Eventually, the right to exercise peremptory challenges against members was also recognized in courts-martial.³²¹ Today, Rule for Courts-Martial 912 regulates the voir dire and challenges (both peremptory and "for cause") of court members.³²² The rule provides:

Examination of members. The military judge may permit the parties to conduct the examination of members or may personally

conduct the examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of other members when the military judge so directs.³²³

The discussion to this section of the rule states the purpose of voir dire of the members: "The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges; counsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case."³²⁴

The rule is based on Federal Rule of Criminal Procedure 24(a),³²⁵ thereby incorporating the constitutional purpose for voir dire stated for federal criminal trials--to ensure the members are

impartial.³²⁶ In addition to voir dire of the members, a party is also permitted to present evidence relating to whether grounds for a challenge for cause exist against a member.³²⁷ A military judge shall excuse a member if any of fourteen specific grounds under the rule are shown to exist.³²⁸ The last ground is the catch-all, and provides for removal if the member, "[s]hould not sit . . . in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."³²⁹

The interest served by permitting voir dire in courts-martial is, as in civilian trials, to ensure the selection of fair and impartial jurors, thereby permitting the accused to receive a fair and impartial trial. This fulfills the constitutional mandates of the Sixth Amendment's right to an impartial criminal jury trial and the Fifth Amendment's right to due process of laws.³³⁰ This same interest has been carried over to the voir dire of the military judge. That transition results, in part, from his role as trier of fact (in lieu of the members), which he fills when sitting as a court-martial composed of military judge alone.

Courts-martial have only had a "military judge" since 1968.³³¹ Prior to that time, the military judges were known as "law officers,"³³² or, even earlier, as "law members."³³³ The change in status from law member to law officer to military judge reflected the evolution towards a more independent military judiciary; a judiciary built around a military judge that was removed from the influences of commanders and more analogous to a civilian trial judge.³³⁴ While Congress was renaming the law officer a "military judge" to enhance his status, it was also providing an accused with the "right" to select trial by military judge alone.³³⁵

Placing military judges in the role of trier of fact gave voir dire of the military judges added significance. Whereas before the Manual limited the military judges' role to ruling on questions of law and interlocutory issues,³³⁶ now they could additionally decide the ultimate issues of guilt or innocence and, if needed, an appropriate sentence.³³⁷ This change increased the constitutional significance of their role in a fair and impartial trial, and, ultimately mandated new

rules concerning the basis upon which they could be challenged for cause.³³⁸

Rule for Courts-Martial 902 governs the disqualification of military judges and it provides: "(a) In general. Except as . . . [to waiver], a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned."³³⁹ It then goes on in the next section to describe the five "specific grounds" upon which the military judge shall disqualify himself.³⁴⁰ Since a military judge is not subject to a peremptory challenge,³⁴¹ the grounds for challenge under Rule 902(a) and (b) help to define the scope of permissible voir dire of the military judge.

C. Scope of Voir Dire of the Military Judge

An in-depth discussion of the case law regarding voir dire and the possible grounds for disqualification of a military judge is beyond the scope of this thesis. A brief review of the rules governing voir dire, however, will help in understanding the interests to be served by permitting

voir dire of military judges. Then, later, those interests can be balanced against the interests to be served by a claim of judicial privilege.

Voir dire of the military judge may occur at any stage of the court-martial and be conducted by either the prosecution or defense.³⁴² The military judge decides the issue of whether he is disqualified, and he is under a duty to raise the issue sua sponte should the facts warrant him to do so.³⁴³ Prior to the judge ruling on a challenge against him, each party is entitled to voir dire him and to present evidence regarding a possible ground for disqualification.³⁴⁴ A threshold requirement for any voir dire question or for the admissibility of any evidence during the voir dire/challenge phase of the court-martial is, therefore, that it be relevant to proving or disproving a ground for challenge of the military judge. On appeal, courts review the military judge's decision on the challenge using an abuse of discretion standard.³⁴⁵ Rule 902 states that "[t]he military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily."³⁴⁶

Addressing voir dire of the military judge, the Court of Military Appeals stated in United States v. Small,³⁴⁷ that counsel may question the military judge as to his ability to be fair and impartial, but they may not extract "commitments from the judge as to what he will ultimately decide."³⁴⁸ The court based this rule on the fact that "fairness and impartiality . . . have long been recognized as critical ingredients of military justice."³⁴⁹ Again, a reference to the underlying purpose of voir dire--to ensure a fair and impartial trial for an accused.

In United States v. Smith,³⁵⁰ NCMCR stated: "At the trial level, voir dire should expose a ground for challenge of a military judge, if one exists, and result either in assignment of a different military judge . . . or . . . create a record, which an appellate court may review to determine if an abuse of discretion has occurred."³⁵¹ To that end, a military judge can abuse his discretion by effectively limiting a counsel's development of a basis for a proper challenge.³⁵²

The military judge may not refuse to submit to any questions from counsel.³⁵³ As one court noted:

While some jurisdictions may not permit voir dire of the judge, our system under the UCMJ does. It is a right granted by executive order. An out of hand or arbitrary denial of that right is error. . . . [W]hile the nature and scope of voir dire remains within the control of the military judge, with the caveat that he should be liberal in allowing an accused to develop possible grounds for challenge, the right of an accused to conduct voir dire is not discretionary with the judge.³⁵⁴

Under the military's system of justice, a trial judge "is presumed to be qualified."³⁵⁵ Since the "party moving for disqualification bears the burden of establishing a reasonable factual basis"³⁵⁶ for disqualification, the invocation of a privilege impairs a party's ability to meet that burden. It does so by effectively denying him access to evidence to place before the court or to place in the record for review by appellate courts.

This impairment of a party's ability to meet its burden leads to disenchantment with the military justice system and to perceptions that the system is not fair.³⁵⁷ More importantly, the denial of an opportunity to establish a basis for a challenge against the military judge may amount to a denial of the accused's constitutional right to a fair and impartial trial.³⁵⁸ Presuming that the evidence sought (either communications or documents) is relevant to establishing a basis for a challenge, then the invocation of judicial privilege to prevent the disclosure of the evidence gives rise to conflict. To resolve that conflict, a court must balance the interests in maintaining the confidentiality of the communications or evidence against a party's right to a fair and impartial trial--the interests served by the voir dire process.³⁵⁹

V. Resolving the Conflict: Balancing Interests

A. Balancing the Interests Between Judicial Privilege and Voir Dire of the Military Judge

The resolution of the conflict arising from the

competing interests served by judicial privilege and voir dire of the military judge cannot be made without taking into consideration the unique facts of each particular case in which the conflict arises.³⁶⁰ There is, therefore, no single, standard answer applicable to all cases.

In each case, the resolution of the conflict will depend on several factors. The first factor will be the nature of the interest to be served by the invocation of judicial privilege. The more generalized the interest is in maintaining the confidentiality of the judicial matter concerned, the less likely the privilege is to prevail over the countervailing interests of voir dire.³⁶¹ An example of the distinction between a generalized interest versus a specific interest may be shown by comparing, on the one hand, the situation where a military judge refuses to answer questions concerning discussions he has had with other judges regarding any matters, against, on the other hand, the refusal of that same judge to disclose an aspect of his deliberations to explain why he gave a particular accused the sentence he did in a particular trial.

The first situation is an invocation of the constitutionally based judicial privilege and is analogous to the situations faced by the courts in United States v. Nixon, Hastings II, and Carlucci.³⁶² In Nixon and Hastings II, the courts found that the privilege must yield to the greater interests served by a criminal trial and a judicial misconduct investigation.³⁶³ In Carlucci, the court held the privilege would prevail because of an absence of reliable evidence to justify the intrusion that was sought into the deliberative process of a court.³⁶⁴

The second situation is an invocation of both the constitutionally based judicial privilege and the judicial privilege arising from Military Rule of Evidence 509.³⁶⁵ It involves the invocation of the privilege to protect the more sacred deliberations of a court in a particular case in the absence of an allegation of judicial misconduct. The privilege, therefore, will yield only when faced with the most compelling of competing interests, if at all.³⁶⁶

The second factor is the nature of the judicial privilege being claimed. The courts will balance the competing interests whenever the judicial privilege is

based upon either the federal common law's "deliberative process" privilege or the constitutionally based judicial privilege.³⁶⁷ That is not necessarily the case when the claim of judicial privilege is based upon Rule 509.³⁶⁸

All three variations of judicial privilege are qualified--there is no absolute judicial privilege.³⁶⁹ Yet under Rule 509, the qualified nature of the privilege is important only when the party seeking access to the information can prove that it meets one of the three exceptions arising from Military Rule of Evidence 606(b).³⁷⁰ A court may not engage in a balancing of competing interests, no matter how great the moving party's need is for the information, until after that party meets this requirement.³⁷¹ It is possible, therefore, for a party to be unable to even have its interests balanced against the privilege because it is unable to meet its burden in proving an exception.

The final factor is the nature of the competing interest. On the low end of the scale, militating against the claim of judicial privilege yielding, is the mere hunch, the "fishing expedition," and the

anonymous tip without substantive evidence.³⁷² On the other, higher end of the spectrum are the compelling interests, militating in favor of the privilege yielding, represented by the interests of an accused in receiving a fair and impartial trial, as guaranteed by the Constitution.³⁷³ Somewhere in between, but towards the higher end, is an allegation of judicial misconduct based upon substantial, credible evidence.³⁷⁴

A court must look at the three factors and resolve the issue based upon the facts in the case. To help understand how a court should resolve the conflict arising when judicial privilege is claimed in a court-martial during voir dire, consider these examples of situations that have arisen in the past:

1. Problem 1.--A military judge has had a complaint filed against him alleging that he made a comment from the bench that gave the listeners the perception he may have used the race of the accused as a factor in arriving at the sentence imposed. During voir dire, the defense counsel requests a copy of the statements made by the military judge as part of the

investigation that followed the allegation and preceded the trial. The investigation had found some improper conduct by the judge. The military judge denies the request on the basis that the investigation is covered by judicial privilege.³⁷⁵

To analyze this claim of judicial privilege, a court must look to the three balancing factors. The claim certainly involves the constitutionally based judicial privilege, and it may also involve the common law "deliberative process" judicial privilege to the extent the investigation was a part of the decisionmaking process of that service's chief judge (who used it in determining what action to take against the military judge).³⁷⁶ The claim is further "generalized" in so far as it seeks to prevent disclosure of the entire investigation. Finally, the interest of the accused against which the claim is to be balanced involves the constitutional right to a fair and impartial trial, a compelling countervailing interest.³⁷⁷

A court must balance the generalized interest in maintaining the confidentiality of an investigation concerning judicial misconduct against the

constitutional interests of an accused in having a fair and impartial criminal trial. By denying the accused access to the investigation, and specifically the requested statements, the military judge is impeding the accused's ability to develop a possible basis for a challenge for cause. Relying on the holdings in Nixon and Hastings II, the interests of the criminal accused will prevail and the claim of judicial privilege must yield.³⁷⁸ Certainly, if the President of the United States's privilege for maintaining the confidentiality of his communications must yield to the overriding constitutional interests arising from a criminal trial, so must the military judge's interest yield in this problem.³⁷⁹ Likewise, if the material sought is not available from any source other than the judiciary and the judge, the claim of privilege by the judge will have to yield, as it did in Hastings II.³⁸⁰

2. Problem 2.--A subordinate military trial judge alleges that his circuit military judge improperly influenced him to sentence certain accused to a term of confinement greater than what would

likely be in their pretrial agreements. In a subsequent trial, the circuit judge refuses to answer any questions from counsel regarding personal conflicts he had with the subordinate judge, including the adverse fitness report he prepared on that judge. The circuit judge also refuses a defense request to call present and former subordinate judges as witnesses, stating: "I am simply not going to create a precedent within this circuit whereby witnesses would be called saying whether they liked my performance or whether they interpreted or misinterpreted my comments. I answered the questions [asked so far] on voir dire. The witnesses will not be called. That is my final ruling."³⁸¹

Assume that the testimony of the other military judges and the questions concerning possible adverse retaliatory acts against the complaining subordinate judge would be "relevant" under the law to a possible challenge against the circuit judge. This problem highlights the situation where a military judge has effectively prevented the defense counsel from either establishing a basis for a challenge or from creating a record for review by the appellate courts. Further,

there is no express invocation of "judicial privilege," though the privilege is implicated by the denial of relevant information.

The interests protected by the claim of judicial privilege in these facts are two-fold: there is a generalized interest as to the denial of witnesses to corroborate what the complaining judge has alleged, while there is a specific interest as to not discussing the circuit judge's relationship with and action taken against that complaining judge. The competing interest, against which a court must balance the interests of the claim of privilege, is the same as in problem 1--the accused's constitutional right to receive a fair and impartial trial.³⁸²

The type of judicial privilege implied in the ruling of the military judge is the constitutionally based version of the privilege. The fact that an identifiable subordinate judge has made the allegation takes us out of the "anonymous tip" situation in Carlucci.³⁸³ Had the defense counsel merely desired to call the subordinate judges to find out if the circuit judge had ever made such a remark, without a credible basis as we have in this case, he would be

engaging in a "fishing expedition" that, as in Carlucci, would result in the judicial privilege prevailing.³⁸⁴ As in problem 1, however, the combination of the presence of a credible allegation of judicial impropriety with the compelling interests of a criminal accused in developing a basis for a challenge (to vindicate his fair and impartial trial rights), should result in the claim of privilege yielding to the competing interests.³⁸⁵

The above examples highlight only a few of the possible factual scenarios that can, and do, occur in courts-martial and criminal trials.³⁸⁶ Several common threads emerge from an analysis of factual scenarios involving the invocation of judicial privilege to curtail voir dire. The first is that the competing interest will always involve a party's constitutional right to a fair and impartial trial. That right is ensured, in part, through the opportunity, granted by executive order to parties in a court-martial, to voir dire the military judge.³⁸⁷ The other is that, so long as the voir dire is based on some credible evidence, such that the material

sought is "relevant" to a ground for challenge of the military judge, a generalized claim of judicial privilege will almost certainly have to yield to the competing interests of the party seeking disclosure of information under the holdings of Nixon, Hastings II, and Carlucci.³⁸⁸

B. Solution: A Bright-Line Rule

Resolving the conflict between the interests served by a claim of judicial privilege and the interests served by disclosure of the privileged matters is only half the battle. The remaining issue is what to do at trial when the claim of privilege is first made. As the analysis above shows, a party in a court-martial seeking access to material covered by a generalized claim of judicial privilege should, in the majority of cases, ultimately prevail. Is that any consolation for an accused who a judge or panel of members later convicts and sentences to confinement, who must then wait the many months for final resolution of his trial claims by an appellate court?

Military judges and parties in courts-martial deserve a readily discernible rule to guide them in

situations where a claim of judicial privilege arises concerning the challenging of a military judge. It is unacceptable to think that the above scenarios can be remedied by deleting the opportunity to voir dire the military judge. Such a change in courts-martial procedures would needlessly open up the military justice system for more criticism and the potential for undiscoverable unlawful command influence.³⁸⁹ Further, in as much as some mechanism must be in place to provide a criminal accused with a means of ensuring his constitutional right to a fair and impartial trial, someone would have to fashion an alternative to enable him to exercise those rights. Additionally, a need would exist for a means by which he would be able to meet his burden of establishing a basis for any challenges made against a military judge.

Implementation of peremptory challenges against military judges is also not an acceptable solution to this issue. Due to the nature of courts-martial and the limited numbers of judges available for any geographical area, a rule permitting the routine opportunity to excuse a military judge in any court-martial would work an undue hardship on the military

justice system and prevent the delivery of timely justice to the servicemembers and their commands.³⁹⁰

If the military services do nothing to change the system, then the parties to a court-martial are left with the normal appellate review procedures now in place, augmented by the potential for early resolution of a limited number of claims of judicial privilege via extraordinary writ to the appellate courts.³⁹¹

As pointed out earlier, the prejudice to an accused caused by having to wait the months or years it takes to be vindicated on appeal is too great. This prejudice is not too speculative given the great weight in favor of his interests prevailing under the current balancing process.³⁹² Additionally, should the invocation of judicial privilege prevent the full development of the underlying facts to support a challenge during the court-martial, an appellate court, months down the road, is ill-suited, even with its fact-finding powers, to resolve the conflict.

The extraordinary writ is also not an acceptable means to routinely dispose of claims of judicial privilege. The facts in Wilson v. Ouellette are representative of the dilemma facing an accused.³⁹³

When the military judge cuts short the voir dire and challenge process, he deprives a party not only of the opportunity to establish a ground for challenge, but also of the opportunity to create a suitable record that will prevail on review by the appellate courts, even a contemporaneous review under an extraordinary writ.

The author proposes a change to Rule for Courts-Martial 902 as the best solution to the dilemma of handling claims of judicial privilege in courts-martial. The substance of the proposed change arises from the adoption of a bright-line rule, which a party and the military judge invoke by the occurrence of two events. First, a military judge must decline to answer a question on voir dire and/or to produce evidence sought by a party that relates to a ground for challenge for cause against the military judge. The basis for the military judge's action must rest upon a claim, either expressed or de facto, of judicial privilege. Second, the party seeking the evidence or asking the question must demonstrate to the court, in writing or orally on the record, the "relevance" of the answer or evidence sought. To meet

this burden, the party must articulate a reasonable factual basis or allegation that, if true, could give rise to a challenge for cause against the military judge,³⁹⁴ and which is "relevant" to the question asked or the evidence sought under the liberal definition of that term found in Military Rule of Evidence 401.³⁹⁵

If both of these requirements are met, the bright-line rule applies and the military judge must make one of three choices:

(1). If the matters sought by a party to the court-martial fall within the deliberations privilege of Military Rule of Evidence 509, the military judge must refuse to disclose the evidence (unless one of the three exceptions of Military Rule of Evidence 606(b) are met). In such case, there is no need for him to recuse himself under the bright-line rule. The scope of Rule 509 is sufficiently narrow--limited to specific deliberations as to guilt or innocence and an appropriate sentence in specific trials--as to not unconstitutionally infringe upon a party's right to a fair and impartial trial. Should disclosure be

permissive, because one of the three exceptions to Rule 606(b) exist, then the military judge must make his decision based on the remaining options below.

(2). If the matters sought by a party to the court-martial are covered by the deliberations privilege, but not prohibited from disclosure under Rule 509, or if they fall within either the constitutionally based judicial privilege or the federal common law "deliberative process" judicial privilege, then the military judge may either:

(a). Invoke judicial privilege and refuse to disclose the matters sought, followed by his immediate recusal from the particular case. This option will permit the military judge to preserve the interests served by maintaining the confidential nature of the implicated communications or evidence, at least as it concerns the particular court-martial, while at the same time preserving the rights of the parties to the court-martial in receiving a fair and impartial trial; or

(b). Disclose the matters sought and then make an appropriate ruling on any subsequent challenge for cause, if one is made.

The only way to avoid the bright-line rule's procedures is for a military appellate court to specifically rule on a claim of judicial privilege as to the particular matters sought to be disclosed. The author intends that this escape provision represent a shift in the burden of pursuing extraordinary writs. The burden will no longer fall on the party seeking the information, but on the party (including military judges) that seeks to protect the information from disclosure.³⁹⁶ Once either the Court of Military Appeals or a court of military review has engaged in the balancing of interests and determined that a specific invocation of judicial privilege need not yield, then the matters covered by that ruling need not be disclosed and the military judge need not recuse himself from a court-martial in which the privilege is invoked, as to those matters. This escape clause from the general bright-line rule is limited to only those matters previously determined to

be privileged by the appellate courts. As to any additional matters also sought, a military judge must apply the general rule.

This three-option, bright-line rule accommodates both the interests of the judiciary in maintaining the confidentiality of privileged matters and the interests of the parties to a court-martial in receiving a fair and impartial trial. To the extent the rule favors the interests of the parties to the trial and potentially burdens the judiciary through its recusal mechanism, the author believes that result is in keeping with the Constitution and the overall structure of the court systems in this country and in the military.

The proposed bright-line rule is not without its faults. There is the potential for one defense counsel after another to ask the same question on voir dire or to request disclosure of the same privileged evidence, thereby placing a military judge in a position of having to repeatedly elect one of the options under the rule. Is there a way of letting the military judge off the hook? There is, through the escape clause of having an appellate court make a

specific ruling as to the claim of privilege for the particular matters sought. But, that is the only means to avoid the bright-line rule.

There is also the potential that the bright-line rule will cause military judges to not say the magic words, "judicial privilege," when denying a party access to evidence or in refusing to answer a question. Similarly, military judges may seek to avoid the coverage of the rule by claiming the matters sought are not "relevant." As to the use of magic words, it should not matter how the military judge words his ruling or claim; if the effect of his ruling or claim is to prevent disclosure of relevant matters within either his or the judiciary's possession (a de facto claim of the privilege), then a "claim of judicial privilege" is being made. Further, the threshold requirement of relevance will always need to be met for any evidence sought or voir dire question asked.³⁹⁷ No rule can be devised to more clearly delineate the situations when a matter is relevant than those in existence now. The author's bright-line rule, therefore, does not attempt to further define "relevance" or to invade the sound

exercise of discretion by the military judge.

The bright-line rule will not end the use of extraordinary writs to resolve claims of judicial privilege. There may well be those cases where either the military judge abuses his discretion in ruling on relevance or a counsel goes on an unwarranted "fishing expedition." The rule does, however, provide a clearer procedure for disposing of such claims while at the same time seeking to accommodate, within the bounds dictated by the Constitution, the interests of both the judiciary and the parties to a court-martial.

VI. Conclusion

Through an examination of the historical development of privileges, and by analogy to both legislative and executive privileges, this thesis has examined the development of judicial privilege.³⁹⁸ Three variations of judicial privilege available to the judiciary in the military justice system currently exist: the constitutionally based judicial privilege, as recognized by Hastings II and Carlucci;³⁹⁹ the federal common law "deliberative process" judicial

privilege, arising by analogy from the same privilege held by the executive branch and based upon its constitutional underpinnings;⁴⁰⁰ and the deliberations privilege that is found in Military Rule of Evidence 509.⁴⁰¹

An invocation of judicial privilege requires the courts to balance the interest to be protected by maintaining the confidentiality of the matters sought by a party against the interests served by disclosure of the communications or evidence.⁴⁰² When a claim of judicial privilege prevents or inhibits the ability of a party during voir dire to meet its burden of establishing a ground for challenge of the military judge, the courts must factor into their balancing test the interests of that party in receiving a fair and impartial trial.⁴⁰³ The Sixth and Fifth Amendments of the Constitution guarantee the right to a fair and impartial trial. The interests served by voir dire, therefore, are compelling and will usually prevail over the interests served by the claim of judicial privilege.⁴⁰⁴

In recognition of the compelling interests served by voir dire, and in an attempt to provide both the

military judge and parties to a court-martial with a clear rule for resolving claims of judicial privilege, the author proposes adoption of a bright-line rule.⁴⁰⁵ The proposed rule is the best alternative to the inadequate procedures currently in effect, and it will best serve both the interests of the judiciary in maintaining confidentiality and the interests of a party in a court-martial to a fair and impartial trial.

1. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.").
2. See infra notes 122-30, 157-59, 185-284 and accompanying text. The term "judicial privilege" has many contexts, and most authors and cases use the term to describe other than the testimonial and discovery privilege covered by this thesis. Another context of the term is to generally describe all judicially created (as opposed to legislatively created) evidentiary privileges. See, e.g., *Boyd v. Gullett*, 64 F.R.D. 169 (D. Md. 1974); Gerald Wetlaufer, Justifying Secrecy: An Objection to the General Deliberative Privilege, 65 Ind. L.J. 845, 845 (1990). Frequently the term is used to describe a form of immunity from liability for statements made in the course of judicial proceedings. See, e.g., *Silver v. Mendel*, 894 F.2d 598 (3d Cir.), cert. denied, 110 S. Ct. 2620 (1990); *Owen v. Kronheim*, 304 F.2d 957 (D.C. Cir. 1962). Others use the term to describe a court's

right to summarize or comment on a matter before it. See, e.g., In re Application of Wilbur H. McKellin, 529 F.2d 1324, 1332 (C.C.P.A. 1976) (Markey, J., concurring) ("[Exercising] the judicial privilege of additional comment, I append these few remarks."); Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957), cert. denied, 356 U.S. 961 (1958) (dealing with a distortion of the evidence in an instruction to the jury that was "beyond the judicial privilege of summary or comment"). Still others use it to describe the actions of a court to label a cause of action. See, e.g., Gumz v. Morrisette, 772 F.2d 1395, 1405-06 (7th Cir. 1985), cert. denied, 475 U.S. 1123 (1986) ("Substantive due process is a shorthand for a judicial privilege to condemn things the judges do not like or cannot understand."). For more on the distinction between judicial privilege and judicial immunity, see infra notes 115-21 and accompanying text.

3. See Robert S. Catz & Jill J. Lange, Judicial Privilege, 22 Ga. L. Rev. 89 (1987); Kevin C. Milne, The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting a Privilege for

the Federal Judiciary, 44 Wash. & Lee L. Rev. 213 (1987).

4. See infra notes 18-308 and accompanying text.

5. See infra notes 309-88 and accompanying text.

6. See, e.g., United States v. Nixon, 418 U.S. 683, 708 (1974) (discussing "executive privilege" and analogizing the President's expectation of confidentiality of his conversations to the "claim of confidentiality of judicial deliberations"); New York Times v. United States, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting) ("Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations"); Nixon v. Sirica, 487 F.2d 700, 740 (D.C. Cir. 1973) (MacKinnon, J., concurring in part, dissenting in part) ("The judicial branch of our government claims a similar privilege, grounded on an assertion of independence from the other branches.").

7. Three recent cases involving the Navy-Marine Corps Court of Military Review (NMCMR) have arisen since 1988. See United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988); Wilson v. Ouellette, No. 913025M (N.M.C.M.R. 9

Dec. 1991), pet. denied, No. 92-07/MC (C.M.A. 17 Jan. 1992); Clarke v. Breckenridge, No. 893618C (N.M.C.M.R. 10 Jan. 1991) (per curiam) (unpub.). These cases are discussed in depth later in the thesis. See infra notes 247-84 and accompanying text.

8. No federal judges were impeached by the United States Senate from 1936 through 1985. Since 1986, the Senate has impeached three federal district court judges: Nevada District Judge Harry E. Claiborne for failure to pay income tax (1986); Mississippi District Judge Walter L. Nixon for perjury (1989); and Florida District Judge Alcee L. Hastings for conspiracy to solicit a bribe (1989). Deborah Pines, Disciplinary Rules Revised for U.S. Judges; Changes in 2d Circuit Part of Uniform Process, N.Y. L.J., Jan. 6, 1992, at 1. More recently, California District Judge Robert Aguilar was convicted of obstruction of justice in August 1990, and Louisiana District Judge Robert F. Collins was found guilty of bribery, conspiracy, and obstruction of justice in June 1991. These cases raise the possibility of yet more impeachment proceedings. Jack Brooks et al., Lessons of Judicial Impeachment, The Recorder, May 17, 1991, at 4; Henry

J. Reske, Collins Guilty of Bribery, ABA J., Sept. 1991, at 32.

9. See, e.g., Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488 (11th Cir.) (Hastings II), cert. denied sub nom. Hastings v. Godbold, 477 U.S. 904 (1986) (suit objecting to the enforcement of subpoenas seeking testimony and documents from present and former staff members of the Honorable Alcee L. Hastings, United States District Judge); Clarke v. Breckenridge, No. 893618C (N.M.C.M.R. 10 Jan. 1991) (per curiam) (unpub.) (repeated invocation of judicial privilege by a military judge to avoid answering questions by counsel during voir dire); see also Reid H. Weingarten, Judicial Misconduct: A View from the Department of Justice, 76 Ky. L.J. 799, 800-04 (1987-88) (describing the procedures used by the Department of Justice to "get inside the chambers" during judicial misconduct investigations).

10. See infra notes 269-84, 375-88 and accompanying text.

11. See infra notes 20-41 and accompanying text.

12. See infra notes 42-87 and accompanying text.

13. See infra notes 90-101, 160-83 and accompanying text.

14. See infra notes 205-99 and accompanying text.

15. See infra notes 131-48, 172, 180, 300-04 and accompanying text.

16. See infra notes 309-59 and accompanying text.

17. See infra notes 360-97 and accompanying text.

18. For purposes of this thesis, the author uses the term "privileges" to refer to testimonial and evidentiary privileges available to a participant in a judicial proceeding. The testimonial privileges, or "privileged communications," encompass "statements made by certain persons within a protected relationship . . . the like of which the law protects from forced disclosure on the witness stand. . . ." Black's Law Dictionary 1078 (5th ed. 1979). Evidentiary privileges include governmental secrets or records, identity of informants, grand jury proceedings, certain accident reports, and attorney work product. Id. ("privileged evidence").

19. For more complete coverage of the historical development of privileges, see Developments in the Law--Privileged Communications, 98 Harv. L. Rev. 1450,

1455-71 (1985) [hereinafter Developments in the Law];

Catz & Lange, supra note 3, at 91-100.

20. Developments in the Law, supra note 19, at 1455 (citing I J. Wigmore, Evidence in Trials at Common Law §§ 6, 8, 8a (P. Tillers rev. ed. 1983); 21 C. Wright & K. Graham, Federal Practice and Procedure: Evidence §§ 5001-05 (1977)). Most authors and courts cite to Dean Wigmore's summation of the duty. See, e.g., United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting Wigmore, Evidence § 2192 (3d ed.)). Dean Wigmore stated:

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. . . . [W]e start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

·Id. (quoting Wigmore, Evidence § 2192 (3d ed.) (citing to 12 Parl. Hist. Eng. 693 (1812) (speech of Lord Chancellor Hardwicke on May 25, 1742, in the House of Lords))).

21. Developments in the Law, supra note 19, at 1454. There is no single theory or justification for all privileges. Over time, authors and courts have tried cost-benefit balancing, cited to a privacy rationale, and explained privileges from a political power or image theory. See id. at 1471-1500 (discussing the various theories and justifications). An in-depth discussion of these theories and justifications is beyond the scope of this thesis.

22. Id. at 1456; Catz & Lange, supra note 3, at 93 (the earliest recorded recognition of the privilege by a court was in 1557).

23. Catz & Lange, supra note 3, at 94. Also during the 1600s, the English courts recognized a short-lived "obligation of honor among gentlemen." Id. (citing Wigmore, Evidence in Trials at Common Law § 2286, at 530-31 (J. McNaughton rev. ed. 1961) (citing Countess of Shrewsbury's case, 12 Coke 94 (1613))). This "point of honor" privilege gradually disappeared as other privileges began to emerge. Id.

24. Id. at 95 n.25.
25. See id. at 112-15.
26. Developments in the Law, supra note 19, at 1457.
27. Id. at 1458-59.
28. Id. at 1460.
29. Id. at 1461 & n.58 (the Committee to Propose Specific Reforms in the Law of Evidence).
30. Id. at 1462 (produced by the American Law Institute and comprised of 806 rules).
31. Id.
32. Id.
33. Id. at 1463. A detailed analysis of state court privileges is beyond the scope of this thesis. Such an analysis would be an enormous undertaking in its own right due to the large number of variations of state-legislated privileges.
34. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at 28 U.S.C. app. (1988)).
35. Developments in the Law, supra note 19, at 1463 & n.74.
36. The proposed Federal Rules of Evidence

contained 13 rules on privileges, all located in Article V, "Privileges." Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 230-61 (1972). Only nine of the proposed rules addressed specific privileges: Required reports privileged by statute (Rule 502); Lawyer-client privilege (Rule 503); Psychotherapist-patient privilege (Rule 504); Husband-wife privilege (Rule 505); Communications to clergymen (Rule 506); Political vote (Rule 507); Trade secrets (Rule 508); Secrets of state and other official information (Rule 509); and Identity of informer (Rule 510). Id. at 234-57. The remaining four proposed rules addressed the scope of privileges recognized (Rule 501), waiver by voluntary disclosure (Rule 511), disclosure under compulsion or without opportunity to claim privilege (Rule 512), and commenting upon a claim of privilege (Rule 513). Id. at 230-33, 258-61.

37. Developments in the Law, supra note 19, at 1465-70; see also Thomas G. Krattenmaker, Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence, 62 Geo. L.J. 61 (1973) (a critical assessment of the Supreme Court's

involvement in the promulgation of the rules and of the substance of the proposed privilege rules); Joseph A. Woodruff, Privileges Under the Military Rules of Evidence, 92 Mil. L. Rev. 5, 6-7 (1981).

38. Fed. R. Evid. 501.

39. Developments in the Law, supra note 19, at 1471.

40. Id.

41. See id. at 1470.

42. Manual for Courts-Martial, United States, 1984, Mil. R. Evid. [hereinafter Mil. R. Evid.].

43. Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980).

44. Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

45. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 230-61 (1972).

46. Fed. R. Evid. 501.

47. Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 151 [hereinafter MCM, 1969].

48. See Mil. R. Evid. 501 analysis at A22-35; Stephen A. Saltzburg et al., Military Rules of Evidence Manual 535-36 (3d ed. 1991); Woodruff, supra note 37, at 5-7.

49. Mil. R. Evid. 501(b); Saltzburg et al., supra note 48, at 536.

50. Mil. R. Evid. 501(a).

51. See supra note 38 and accompanying text.

52. 10 U.S.C. §§ 801-940 (1988) [hereinafter UCMJ].

53. Mil. R. Evid. 501 analysis at A22-35; Saltzburg et al., supra note 48, at 536.

54. Mil. R. Evid. 1102. Such incorporation is automatic 180 days after the effective date of such an amendment. Id.

55. Mil. R. Evid. 501 analysis at A22-35. The exception is Rule 509, "Deliberations of Courts and Juries," which had no equivalent in the proposed Federal Rules of Evidence. The privileges explicitly recognized are the lawyer-client privilege (Rule 502), the privilege for communications to clergy (Rule 503), the husband-wife privilege (Rule 504), a classified information privilege (Rule 505), a privilege for government information other than classified information (Rule 506), a privilege protecting the identity of informants (Rule 507), a political vote privilege (Rule 508), and a privilege for deliberations of courts and juries (Rule 509). Mil.

R. Evid. 502-09. The physician-patient privilege is specifically rejected. Mil. R. Evid. 501(d). Rule 501(d) provides that, "information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." Id. Such a privilege has traditionally been considered incompatible with the services' interests "in ensuring the health and fitness for duty of [their] personnel." Id. at 501 analysis at A22-35; see also MCM, 1969, para. 151c(2).

56. Mil. R. Evid. 506(a). For an in-depth discussion of Mil. R. Evid. 505 and 506, see Stephen A.J. Eisenberg, Graymail and Grayhairs: The Classified and Official Information Privileges Under the Military Rules of Evidence, The Army Lawyer, Mar. 1991, at 9.

57. Mil. R. Evid. 506(b).

58. Mil. R. Evid. 506(c).

59. See, e.g., United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988) (involving attempts by the Inspector General of the Department of Defense to question

members of the court concerning anonymous allegations of misconduct).

60. See Saltzburg et al., supra note 48, at 594.
61. Mil. R. Evid. 506 analysis at A22-38.
62. MCM, 1969, para. 151b(1).
63. Id. at para. 151b(3).
64. MCM, 1969, para. 151; Manual for Courts-Martial, United States, 1951, para. 151 [hereinafter MCM, 1951].
65. Compare Mil. R. Evid. 506 with Proposed Fed. R. Evid. 509, 56 F.R.D. 184, 251-52 (1972). For a more thorough analysis of the procedures required under the rule, see Woodruff, supra note 37, at 39-52.
66. Krattenmaker, supra note 37, at 76-82. The author described this proposed rule as, "by far the most amazing of all the privilege provisions," with "[t]he only apparent purpose of . . . [permitting] the federal government to obstruct the ordered process of litigation when it has such an interest and is so inclined." Id. at 76-77.
67. Mil. R. Evid. 506(c).
68. Mil. R. Evid. 506 analysis at A22-38.
69. Mil. R. Evid. 506(a).
70. Mil. R. Evid. 509.

71. MCM, 1969, para. 151b(1). The language found in the 1969 Manual comes verbatim from the language found in the 1951 Manual, the first service-wide manual for courts-martial following the enactment of the Uniform Code of Military Justice in 1950. Compare MCM, 1951, para. 151b(1) with MCM, 1969, para. 151b(1).

72. See Saltzburg et al., supra note 48, at 633; Larry R. Dean, The Deliberative Privilege under M.R.E. 509, The Army Lawyer, Nov. 1981, at 3.

73. Mil. R. Evid. 606(b).

74. Cf. Tanner v. United States, 483 U.S. 107, 119-20 (1987) (discussing the policy considerations for the rule prohibiting jurors from impeaching their verdict and the necessity to shield their deliberations from public scrutiny).

75. Mil. R. Evid. 606(b) analysis at A22-41; Saltzburg et al., supra note 48, at 633. The three exceptions to the sanctity of deliberations are extraneous prejudicial information, unlawful command influence, and improper outside influences. Dean, supra note 72, at 4. "Extraneous prejudicial information" is prejudicial information brought to the

court's attention. Id. The thrust of the "improper outside influences" exception is to prevent jury tampering--a problem rarely occurring in courts-martial. Id. at 5. The exception for "unlawful command influence" applies whether it is exerted from inside or outside the deliberations room. Id. at 4. Unlawful command influence is an evil that has continually shadowed the military justice system. Article 37 of the Uniform Code of Military Justice, entitled, "Unlawfully influencing action of court," prohibits all attempts to coerce or wrongfully "influence the actions of a court-martial or any other military tribunal or any member thereof." UCMJ art. 37(a). An in-depth discussion of unlawful command influence is beyond the scope of this thesis. For additional information on unlawful command influence, see Homer E. Moyer, Justice and the Military § 3 (1972); Samuel J. Rob, From Treakle to Thomas: The Evolution of the Law of Unlawful Command Influence, The Army Lawyer, Nov. 1987, at 36; James B. Thwing, An Appearance of Evil, The Army Lawyer, Dec. 1985, at 13; see also infra notes 232, 234, 236 (discussing the independence of military courts, unlawful command influence, and the text of Article 37).

76. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 103(8), (14), (15) [hereinafter R.C.M.].
77. R.C.M. 103(14), (15).
78. R.C.M. 103(8).
79. See Military Justice Act of 1968, Pub. L. No. 90-632, § 2(3), (9) (arts. 16, 26), 82 Stat. 1335, 1335-37 (codified as amended at 10 U.S.C. §§ 816, 826). Article 16 provides an accused the option of selecting trial by military judge only. UCMJ art. 16(1)(B). Article 26 provides for military judges in trials by courts-martial. UCMJ art. 26(a).
80. Mil. R. Evid. 509 (emphasis added).
81. See supra note 43 and accompanying text.
82. Compare Mil. R. Evid. 606(b) with Fed. R. Evid. 606(b); see also Mil. R. Evid. 606 analysis at A22-41; Saltzburg et al., supra note 48, at 631.
83. Mil. R. Evid. 606 analysis at A22-41.
84. Mil. R. Evid. analysis at A22-1.
85. 20 M.J. 764 (A.F.C.M.R. 1985), aff'd, 25 M.J. 35 (C.M.A. 1987), cert. denied, 484 U.S. 1027 (1988); cf. Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (en banc), rev'd on other grounds, 466 U.S. 668

(1984) (impermissible for trial judge to testify in habeas proceeding that his sentence would not have been different had the defense offered mitigation evidence).

86. See Saltzburg et al., supra note 48, at 632.

87. See supra note 50 and accompanying text.

88. U.S. Const.

89. See infra notes 214, 218-21 and accompanying text.

90. U.S. Const. art. I, § 6, cl. 1. For a complete history on the development of the legislative privileges arising from this clause, see Richard D. Batchelder, Note, Chastain v. Sundquist: A Narrow Reading of the Doctrine of Legislative Immunity, 75 Cornell L. Rev. 384 (1990).

91. 408 U.S. 606 (1972).

92. Id. at 614. "When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies." Id. (quoting Long v. Ansell, 293 U.S. 76, 83 (1934)). This language in the clause does not exempt members of Congress from either "service of process as a defendant in civil matters, . . . [or]

from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members." Id. at 614-15 (citing Ansell, 293 U.S. at 82-83; Williamson v. United States, 207 U.S. 425, 446 (1908)).

93. Id. at 614.

94. Id. at 615.

95. Id. at 616.

96. McGovern v. Martz, 182 F. Supp. 343, 346 (D.D.C. 1960) (quoting Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (Frankfurter, J.)).

97. See, e.g., id. at 346 ("Thus the privilege is absolute: purpose, motive or the reasonableness of the conduct is irrelevant.").

98. Batchelder, supra note 90, at 387-91.

99. 408 U.S. at 616-17 (Dr. Rodberg, an aide to Senator Gravel, had assisted the Senator in disclosing the Pentagon Papers during a congressional committee hearing).

100. 408 U.S. at 616-17 (citation omitted).

101. See infra notes 180, 218-21 and accompanying text.

102. "The Judges, both of the supreme and inferior

Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.

103. "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4.

104. The Constitution gives the House of Representatives the sole province on making the decision whether to impeach: "The House of Representatives shall chuse their Speaker and other officers; and shall have the sole Power of Impeachment." U.S. Const. art. I, § 2. It grants the Senate the sole power to try all impeachments: "The Senate shall have the sole Power to try all Impeachments. . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present." U.S. Const. art. I, § 3.

105. See Stephen B. Burbank, Alternative Career Resolution: An Essay on the Removal of Federal Judges, 76 Ky. L.J. 643, 651 (1987-88).

106. See Milne, supra note 3, at 214-16 & nn.6-9.

107. Id. at 216 (citing Trevett v. Weeden (Providence 1787), as cited in R. Pound, The Spirit of the Common Law 61-62 (1921)). In Trevett, the judges hearing a defendant's challenge to the constitutionality of a Rhode Island statute sustained the challenge. Thereafter, the Rhode Island General Assembly summoned the judges to appear before the Assembly to explain the judges' basis for the holding. When the judges appeared, but objected to answering questions, the Assembly attempted to remove them from office. This attempt ultimately failed. Id. at 216-17.

108. See U.S. Const. arts. I-III.

109. See Nixon v. Sirica, 487 F.2d 700, 731-37 (D.C. Cir. 1973) (per curiam) (MacKinnon, J., concurring in part, dissenting in part) (a detailed listing of the disputes between Congress and specific Presidents from George Washington (in 1796) through Harry Truman in (1947)). For a more thorough discussion of Sirica, see infra notes 160-72 and accompanying text.

110. See United States v. Nixon, 418 U.S. 683, 708 (1974) (finding a qualified Presidential privilege).

For a more thorough discussion of Nixon, see infra notes 173-84 and accompanying text.

111. Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488, 1520-21 (11th Cir.) (Hastings II), cert. denied sub nom. Hastings v. Godbold, 477 U.S. 904 (1986) (finding a qualified judicial privilege for federal judges). For a thorough discussion of Hastings II, see infra notes 205-31 and accompanying text. The United States Supreme Court has yet to hear a case where it has had to specifically address the existence and scope of judicial privilege.

112. See, e.g., 29 The New Encyclopaedia Britannica 257 (15th ed. 1985) (discussing President Roosevelt's 1937 court-packing plan and his confrontations with the Supreme Court over New Deal legislation).

113. Milne, supra note 3, at 213.

114. Catz & Lange, supra note 3, at 121. In fact, very few of the modern treatises on privileges even have a section acknowledging a "judicial privilege." Those that do cite to only the Hastings II decision, or confuse the privilege with judicial immunity. See,

e.g., Scott N. Stone & Ronald S. Liebman, Testimonial Privileges § 9.06A (Supp. 1990).

115. See, e.g., McGovern v. Martz, 182 F. Supp. 343, 348 (D.D.C. 1960); see also supra note 2 (for other cases using judicial privilege in this context).

Authors have done little better. See, e.g., Batchelder, supra note 90, at 392.

116. See Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 14.01 (1990); Batchelder, supra note 90, at 392.

117. See Shaman et al., supra note 116, § 14.02; see also Jones v. Mirgon, No. 88-7001, 1989 U.S. App. LEXIS 13197 (D.C. Cir. Aug. 31, 1989) (per curiam) (extending the doctrine to quasi-judicial action of FCC licensing board). A party's actions during a judicial proceeding are protected so long as the act has "some relation--a standard broader than legal relevance--to the proceeding." Jones, No. 88-7001, at *4-5 (quoting Sturdivant v. Seaboard Serv. Sys., Ltd., 459 A.2d 1058, 1059 (D.C. 1983) (quoting Brown v. Collins, 402 F.2d 209, 212 (1968))).

118. See Shaman et al., supra note 116, §§ 14.02-.04; see also Nixon v. Fitzgerald, 457 U.S. 731,

755-56 (1982) (citing *Stump v. Sparkman*, 435 U.S. 349, 363 & n.12 (1978), and finding by analogy an absolute Presidential immunity); McGovern, 182 F. Supp. at 348 ("While a judge has an absolute privilege for the official publication of a judicial statement . . . there is only a qualified privilege for the unofficial circulation of copies of a defamatory opinion.").

119. See *Shaman et al.*, supra note 116, § 14.11.

"The judicial title does not render its holder immune from criminal responsibility even when committed behind the shield of judicial office." Id. § 14.11 at 456. Judges do enjoy limited immunity from criminal liability "for malfeasance or misfeasance in the performance of their judicial tasks undertaken in good faith." Id. § 14.11 at 457.

120. See, e.g., id. § 14.01 at 442; Batchelder, supra note 90, at 392. As Judge Learned Hand observed: "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . ." Id. at 404 (quoting *Gregoire v.*

Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.),
cert. denied, 339 U.S. 949 (1950)).

121. See infra notes 221, 251-52 and accompanying
text.

122. 14 F.R.D. 335 (N.D. Cal. 1953).

123. Id. at 335-36.

124. Id. at 336.

125. See In re Wallace, 170 F. Supp. 63 (M.D. Ala.
1959).

126. Id. at 65-67.

127. Id. at 67-68.

128. Id. at 68-69.

129. Id. at 69.

130. While the order directing release of the
records may appear to the reader to be a decision on
the documentary evidence portion of judicial
privilege, such was not the case. The records were
not "judicial" records, but merely the res of the
suit. The court decided the disposition of the
records based upon the Heyman principle. Id. (citing
Covell v. Heyman, 111 U.S. 176 (1984)).

131. See Russell L. Weaver & James T. R. Jones, The
Deliberative Process Privilege, 54 Mo. L. Rev. 279,

279 (1989); Wetlaufer, supra note 2, at 846-47. Both articles provide an exhaustive list of cases demonstrating the development of the privilege.

132. Wetlaufer, supra note 2, at 847. The quasi-judicial privilege is not well known, however, its existence is acknowledged within the administrative law field and its basis arises from a 1938 Supreme Court decision. Id. at 846 n.4 (citing *Morgan v. United States*, 304 U.S. 1 (1938)).

133. Id. at 846-47.

134. Id. at 847. As a court of appeals recently noted, the deliberative process privilege:

[P]rotects the deliberative and decisionmaking processes of the executive branch, [and] rests most fundamentally on the belief that were agencies forced to operate in a fishbowl, . . . the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.

Weaver & Jones, supra note 131, at 279 n.1 (quoting *Dudman Communications Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987)).

135. See Weaver & Jones, supra note 131, at 283-85 & nn.24-36; Wetlaufer, supra note 2, at 856-60 & nn.39-45.
136. 157 F. Supp. 939 (Ct. Cl. 1958).
137. Weaver & Jones, supra note 131, at 287-88; Wetlaufer, supra note 2, at 848.
138. See Weaver & Jones, supra note 131, at 288-89 & nn.43-48 (discussing the controversy regarding the constitutional basis, if any, of the privilege).
139. Wetlaufer, supra note 2, at 850-51.
140. Id. at 848; Weaver & Jones, supra note 131, at 289.
141. See infra notes 172, 180 and accompanying text.
142. See supra note 65 and accompanying text.
143. See Weaver & Jones, supra note 131, at 290-98; Wetlaufer, supra note 2, at 851-52.
144. See Weaver & Jones, supra note 131, at 300-12; Wetlaufer, supra note 2, at 852-53.
145. See Weaver & Jones, supra note 131, at 298.
146. Id. at 312-20. Today, most courts will grant the party seeking the communications an in-camera review, which aids the court in determining the validity of the claim under the balancing test. Id. at 313.

147. See infra notes 167, 180 and accompanying text.

148. A federal appellate court recently upheld a claim of privilege involving a judiciary's use of the "deliberative process" privilege. See Centifanti v. Nix, 865 F.2d 1422, 1432 (3d Cir. 1989) (upholding a district court's decision that letters from the chairman of the Pennsylvania Disciplinary Board to the chief justice of the Pennsylvania Supreme Court were privileged). In Nix, the disciplined attorney sought discovery of documents "concerning the decision to provide for the right of oral argument and briefing before the Pennsylvania Supreme Court in reinstatement proceedings." Id. Since the letter from the chairman of the Disciplinary Board contained "recommendations and deliberations regarding the development of rules and policy governing regulation of attorneys . . . it reflects the deliberative process of government policymakers, [and] it is protected by the predecisional governmental privilege." Id.

149. Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74, 84 (1970).

150. 398 U.S. 74 (1970).

151. Id. at 74-82.

152. Id. at 85.

153. Id.
154. Id. at 84.
155. See id. at 136 (Douglas, J., dissenting); id. at 141 (Black, J., dissenting).
156. Id. at 136-37 (Douglas, J., dissenting).
157. 403 U.S. 713 (1971) (per curiam).
158. Id. at 714.
159. Id. at 752 n.3 (Burger, C.J., dissenting).
160. 487 F.2d 700 (D.C. Cir. 1973) (per curiam).
161. Id. at 704-05. Both President Nixon and the Watergate Special Prosecutor, Archibald Cox, challenged the enforcement order issued by Chief Judge John Sirica of the District Court for the District of Columbia. Id. at 704. Judge Sirica had ordered the tapes produced for his in-camera review so he could see what evidence he would order disclosed to an empanelled grand jury. Id.
162. Id. at 717.
163. Id. at 712-17. The test required "a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case. Id. at 716.
164. Id. at 717.
165. Id. (citations omitted).

166. Id. at 713-17.
167. Id. at 717; cf. id. at 750 (MacKinnon, J., concurring in part, dissenting in part).
168. Id. at 717.
169. Id. at 730 (MacKinnon, J., concurring in part, dissenting in part); id. at 773-74, 799 (Wilkey, J., dissenting). As noted at the beginning of Judge Wilkey's dissent, he and Judge MacKinnon concurred in the results reached in each other's written dissent. Id. at 762.
170. Id. at 750 (MacKinnon, J., concurring in part, dissenting in part); id. at 763 (Wilkey, J., dissenting).
171. Id. at 729-37 (MacKinnon, J., concurring in part, dissenting in part); cf. id. at 768-74 (Wilkey, J., dissenting).
172. See supra notes 147-48 and accompanying text.
173. 418 U.S. 683 (1974).
174. Id. at 686-88.
175. Id. at 705-06.
176. Id. at 706.
177. Id.
178. Id. at 707, 713. The Court went on to observe

that in "allocating the sovereign power among the three co-equal branches, the Framers . . . sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." Id. at 707.

179. Id. at 705 n.16 (quoting *Marshall v. Gordon*, 243 U.S. 521, 537 (1917)).

180. Id. at 708.

181. 487 F.2d at 716; see 418 U.S. at 711-12 ("[W]e must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice.").

182. 418 U.S. at 713.

183. See infra notes 373-87 and accompanying text.

184. 418 U.S. at 708.

185. See Lou Cannon, California Justice Saw No Stalling; Witness Says He Doesn't Think Politics Held Up Court Opinions, Wash. Post, June 20, 1979, at A13; California Hearings Open In Probe of State High Court, Wash. Post, June 11, 1979, at A7 [hereinafter California Hearings].

186. California Hearings, supra note 185, at A7.

187. Id. (quoting the background report of the commission special counsel, Seth M. Hufstedler, presented to the commission on 11 June 1979).

188. Cannon, supra note 185, at A13.

189. See id.; California Hearings, supra note 185, at A7.

190. McCorquodale v. Balkcom, 525 F. Supp. 431, 432-33 (N.D. Ga. 1981).

191. Id. at 432. Mr. York, the assistant, had been deposed in an earlier case and had stated one of his duties was to review transcripts of capital felony cases and to prepare for the supreme court a "card summary" on each case, which he kept on file for use by the justices. Id. at 432-33. Additionally, he would provide written reports on the cases when requested to do so. Id. at 433. Mr. York analogized his duties "to those of a law clerk or those of an attorney acting for a client" in his assertion of judicial privilege in the earlier case. Id.

192. Id. at 432.

193. Id. at 433. The court also upheld the magistrate's decision not to compel the testimony of the then-Chief Justice of the Georgia Supreme Court,

H. E. Nichols. While the chief justice had not invoked judicial privilege, the magistrate had accepted his statements made at a press conference as true for purposes of deciding petitioner's claim. Id. at 433-34.

194. Federal Judge May Testify in Drug Case, UPI, May 3, 1984, available in LEXIS, Nexis Library, UPI file.

195. Id.

196. Id. (quoting the affidavit of United States Magistrate Thomas P. Smith, date unknown).

197. See id.

198. Supreme Court Justice Implicated in Improper Communication, UPI, June 18, 1986, available in LEXIS, Nexis Library, UPI file.

199. Id. The article does not indicate which court issued the order or the ultimate result concerning the testimony of the justices.

200. Id.

201. Austin Sarat, Court Nominees Cannot Plead Judicial Privilege, N.Y. Times, Aug. 24, 1986, § 4, at 20 (editorial).

202. See, e.g., id.

203. See David A. Kaplan & Bob Cohn, Court Charade,

Newsweek, Sept. 23, 1991, at 18, 19 (discussing Justice Thomas' evasiveness in answering certain questions asked during his confirmation hearings held by the Senate).

204. See supra note 8 (detailing the federal judges who were investigated, tried, and ultimately impeached in the 1980s); infra notes 209-13 and accompanying text (discussing the claims of judicial privilege raised by Judge Hastings and his staff).

205. *Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 95 (D.C. Cir. 1987) (Hastings III), cert. denied, 485 U.S. 1014 (1988).

206. Act of Oct. 15, 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 331, 332, 372 (1988)).

207. Hastings III, 829 F.2d at 95.

208. Id. The investigating committee appointed by Chief Judge John C. Godbold consisted of himself, two circuit judges, and two district judges. Judge Hastings' first attempt to derail the investigation occurred when he objected to the release of the files of the grand jury that had indicted him to the investigating committee. Id. Judge Hastings lost

that challenge and the files were released. Id. at 93 n.4, 95 (citing In re Petition to Inspect and Copy Grand Jury Materials, 576 F. Supp. 1275 (S.D. Fla. 1983), aff'd, 735 F.2d 1261 (11th Cir.), cert. denied sub nom. Hastings v. Investigating Committee for the Judicial Council of the Eleventh Circuit, 469 U.S. 884 (1984)). Judge Hastings also filed a challenge to the constitutionality of the Act in the District Court for the District of Columbia. Id. at 93 n.4, 96 (citing Hastings v. Judicial Conference of the United States, 593 F. Supp. 1371 (D.D.C. 1984) (Hastings I), aff'd in part and vacated in part, 770 F.2d 1093 (D.C. Cir. 1985), cert. denied, 477 U.S. 904 (1986)). The Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of Judge Hastings' challenge, but for different reasons. Id. at 96. Judge Hastings renewed his constitutional attack on the Act following the filing of the investigating committee's report with the Judicial Council of the United States in 1986. That attack was also unsuccessful. See id. (Hastings III).

209. See Matter of Certain Complaints Under Investigation by an Investigating Committee of the

Judicial Council of the Eleventh Circuit, 783 F.2d 1488, 1492 (11th Cir.) (Hastings II), cert. denied sub nom. Hastings v. Godbold, 477 U.S. 904 (1986).

210. Id. Because all the judges of the Eleventh Circuit recused themselves, a three-judge panel was designated to sit and hear this case. The panel consisted of Chief Judge Levin H. Campbell (Chief Judge, U.S. Court of Appeals for the First Circuit and author of the court's opinion), Circuit Judge Amalya Lyle Kearse (U.S. Circuit Judge for the Second Circuit), and Senior Judge Wilbur F. Pell (Senior U.S. Circuit Judge for the Seventh Circuit). Id. at 1491.

211. Id. at 1491-92. The committee had issued a subpoena duces tecum to Williams requiring her to produce appointment diaries, daily schedules, sign-in sheets, telephone message books, etc. Additionally, she was subpoenaed to testify, as were the three law clerks. Id. at 1492-93. Williams neither produced the required documents nor appeared to testify, and Ehrlich likewise did not appear to testify. Both filed notices of objection to the subpoenas with the Eleventh Circuit. Id. at 1493. Simons and Miller both appeared and testified, with Simons also filing a

notice of objection with the court. Simons and Miller "both refused to testify, on grounds of privilege, about communications among Judge Hastings and his staff." Id. Judge Hastings was ultimately removed from office when the United States Senate voted to impeach him in 1989. See Pines, supra note 8, at 1. 212. 783 F.2d at 1518-25. The court began its opinion by addressing its jurisdiction to hear the case, challenges to the subpoena power of the investigating committee, and several constitutional attacks on the Act itself. Id. at 1493-1517. The court decided all issues against Judge Hastings' position, with the exception of several the court chose not to rule on. Id.

213. Id. at 1518. The court stated: "It is well settled that a witness cannot simply refuse to appear altogether on grounds of privilege, but rather must appear, testify, and invoke the privilege in response to particular questions." Id.

214. Id. at 1520.

215. Id. at 1518.

216. Id. at 1518-20. The court began by discussing Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) and

Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). 783 F.2d at 1518 (citations omitted). The court quoted Judge MacKinnon's statement concerning the lack of authority on judicial privilege: "Express authorities sustaining this position are minimal, undoubtedly because its existence and validity has been so universally recognized. Its source is rooted in history and gains added force from the constitutional separation of powers of the three departments of government." Id. at 1519 (quoting Senate Select Committee on Presidential Campaign Activities, 498 F.2d at 740 (MacKinnon, J., dissenting)). The court then discussed the tripartite decisionmaking process privilege from Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), followed by cites to Statement of the Judges, 14 F.R.D. 335 (N.D. Cal. 1953) and a law review comment on the law clerk's duty of confidentiality. 783 F.2d at 1519 (citations omitted). The court concluded its review of cases by citing Justice Burger's quote from New York Times v. United States, 403 U.S. 713 (1971), and with a

discussion of *United States v. Nixon*, 418 U.S. 683 (1974). 783 F.2d at 1519 (citations omitted).

217. 418 U.S. 683 (1974).

218. 783 F.2d at 1519. The quote reads: "[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." *Id.* (quoting *Nixon*, 418 U.S. at 705-06).

219. *Id.*

220. *Id.*

221. *Id.* at 1520.

222. *Id.*

223. *Id.*

224. *Id.* at 1522. The court offered three methods by which the party seeking the information could demonstrate its need for it: "[T]he investigating party can attempt to show the importance of the inquiry for which the privileged information is sought; the relevance of that information to its

inquiry; and the difficulty of obtaining the desired information through alternative means." Id.

225. Id.

226. Id. at 1520.

227. Id. The court drew an analogy between the documents held by Williams and the limits on the scope of the attorney-client privilege, noting that the privilege applies only to the content of communications, not to dates, places, or times of meetings. Id. (citing In re Grand Jury Proceedings, 689 F.2d 1351, 1352 (11th Cir. 1982)).

228. Id.

229. Id. at 1524 (quoting Nixon, 418 U.S. at 712-13).

230. Id. at 1523-24.

231. Id. at 1524-25. The court added that they would have enforced "the subpoenas upon a lesser showing of relevance so long as a reasonable degree of materiality could be discerned." Id. at 1525. The court went on to state:

Where, as here, a judicial council investigation concerns allegations of unquestionable seriousness, we believe that,

given the make-up of judicial councils and the secrecy surrounding their investigations under the Act, any subpoena for material protected only by an asserted generalized need for confidentiality should be enforceable so long as the information sought does not on its face seem irrelevant to the investigation. The issuance of such a subpoena means that Article III judges already have satisfied themselves of the relevance of, and need for, the information sought and the existence of probable cause for the investigation itself.

Id. Such a broad, sweeping assertion, though only dicta in this case, would appear to make any claim of generalized interest in confidential judicial communications automatically overridden by the needs of a judicial misconduct investigating body composed of Article III judges.

232. See, e.g., United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976) (asserting the independence of the military judiciary); United States v. Graf, 32 M.J.

809 (N.M.C.M.R. 1990) (unsuccessful motion to disqualify appellate court panel because military appellate court judges lack institutional independence); Walter T. Cox, The Army, the Courts, and the Constitution: The Evolution of Military Justice, 118 Mil. L. Rev. 1 (1987) (discussing the evolution of military justice and the independence of courts-martial); Eugene R. Fidell, Military Judges and Military Justice: The Path to Judicial Independence, 37 Fed. B. News & J. 346 (1990) (challenging whether military judges are really independent in the present system of military justice); Francis A. Gilligan & Frederic I. Lederer, Court-Martial Procedure §§ 1-40.00 to -47.00, 14-10.00 (1991) (discussing the evolution of military justice and the history of military judges); see also infra note 334 (discussing judicial independence and the civilianization of the military judiciaries).

233. 10 U.S.C. §§ 801-940 (1988).

234. See UCMJ art. 37. While the title of the article is, "Unlawfully influencing action of court," the actions proscribed have come to be known in the military community by the term of art, "unlawful

'command influence." See, e.g., United States v. Ledbetter, 2 M.J. 37, 42 (C.M.A. 1976); see also supra note 75 (discussing unlawful command influence).

235. UCMJ art. 26. Article 26 is divided into five subparts. The first subpart mandates the detailing of a military judge to general courts-martial, the level of court used for the most serious offenses (and analogous to federal felony courts). It permits the detailing of a military judge to special courts-martial (a court analogous to federal magistrate courts). Id. at 26(a). The second and fourth subparts set forth qualifications of the military judge. Id. at 26(b), (d). The third subpart is the basis for the creation of the independent trial judiciaries within the services, and it states:

The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned,

neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. . . .

Id. at 26(c). The remainder of that subpart prohibits an officer from performing duties as a military judge unless detailed pursuant to service regulations. It also establishes his duties as a military judge to be his primary duty when so detailed. Id. The last subpart prohibits the military judge from consulting with court members ex parte, or from voting with the members. Id. at 26(e).

236. UCMJ art. 37. Article 37 has two subparts. The first subpart provides:

No authority convening a . . . court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with

respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. . . .

Id. at 37(a). The remainder of that subpart provides two exceptions to the above rule, one for general courses in military justice and the other for statements and instructions given in open court by participants in the trial. Id. The second subpart deals with the preparation of effectiveness, fitness, or efficiency reports on military participants in trials. It insulates the military participant from all evaluations of duties as members, or from adverse evaluations resulting from duties as a defense counsel. Id. at 37(b).

237. See United States v. Mabe, 33 M.J. 200, 204 n.3

(C.M.A. 1991) (quoting legislative history regarding the implementation of independent trial judiciaries within the services); Gilligan & Lederer, supra note 232, § 1-47.00 (discussing Congress' post-1951 amendments to the Code).

238. The military justice system is divided into six levels as it applies to courts-martial. The first and third levels are composed of the convening authorities, those officers in command authorized by the Code to create a court-martial, to refer charges to it, and to take final action on it after the trial is complete. See UCMJ arts. 22-24, 60. The second level, or trial level, consists of the various forms of courts-martial. The three types are general, special, and summary, in decreasing order of their power to punish accused and the seriousness of the charges they hear. See id. at arts. 16-20. The fourth level consists of the first level of review of the convening authority's action. The review is done by either the appropriate court of military review (id. at art. 66), the office of the Judge Advocate General of the appropriate service (id. at art. 69), or locally by a judge advocate (id. at art. 64),

depending on the nature of the court-martial, the charges and punishment involved, and whether the accused waives appellate review. The fifth level consists of review by the Court of Military Appeals (COMA) under specific conditions. Id. at art. 67. The final level of review is by the Supreme Court of the United States, limited to direct review of decisions of COMA through a writ of certiorari. The direct appeal to the Supreme Court is not available if COMA refuses to grant a petition for review. Id. at art. 67a.

239. See, e.g., United States v. Mabe, 28 M.J. 326 (C.M.A. 1989), decision reaffirmed on remand, 30 M.J. 1254 (N.M.C.M.R. 1990), aff'd, 33 M.J. 200 (C.M.A. 1991) (unlawful command influence exercised by the Chief Judge, Navy-Marine Corps Trial Judiciary); United States v. Allen, 33 M.J. 209 (C.M.A. 1991) (command influence exercised to alter the assignment of a military judge to a national security court-martial); United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976) (questioning of a military judge regarding lenient sentences by his military superiors); United States v. Littrice, 13 C.M.R. 43

(C.M.A. 1953) (reading "retention of thieves" policy letter to members immediately before they convened to hear court-martial involving charges of larceny); see also supra note 75 and accompanying text (discussing unlawful command influence).

240. 2 M.J. 37 (C.M.A. 1976).

241. Id. at 41, app.

242. Id. at 42.

243. Id. (footnote omitted).

244. Id. at 43.

245. U.S. Const. art. I, § 8, cl. 14 provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States:

. . . .

To make Rules for the Government and Regulation of the land and naval Forces:

.

Id.

246. See supra note 209-22 and accompanying text.

247. 26 M.J. 328 (C.M.A. 1988). Carlucci was described by former Chief Justice Robinson O. Everett as, "perhaps the most unique case that has ever reached the court." Robinson O. Everett, The United States Court of Military Appeals: New Issues, New Initiatives, 36 Fed. B. News & J. 182, 182 (1989). For all of the facts leading up to and following Carlucci, including many not detailed in the reported opinion, see Joseph H. Baum & Kevin J. Barry, United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence, 36 Fed. B. News & J. 242 (1989).

248. 26 M.J. at 329. There was some urgency in the request by the NMCMR judges, since their commissioners had been scheduled for interviews the next morning and the Judge Advocate General of the Navy had personally ordered Chief Judge Byrne of NMCMR to make them available. Baum & Barry, supra note 247, at 244. In fact, the NMCMR judges had sought a protective order from the court five days earlier after meetings with

representatives of the Inspector General failed to arrive at a solution that would have avoided questions concerning NCMCMR's deliberations. That sealed petition had been denied by the court. Id. at 243.

249. 26 M.J. 744 (N.M.C.M.R. 1988) (en banc).

Commander Billig, a Navy surgeon, had been convicted of involuntary manslaughter, negligent homicide, and dereliction of duty, and sentenced to dismissal from the Navy, four years confinement, and total forfeitures of all pay and allowances. The NCMCMR decision reversed his conviction and dismissed the charges, precluding any retrial. See id. at 761; Carlucci, 26 M.J. at 329 & n.1.

250. See Carlucci, 26 M.J. at 330-36. The court found two distinct evils, either of which justified their finding jurisdiction to resolve the matter before them. The first was the evil of having the judges placed in the position of choosing between their duty to keep their deliberations protected from outside scrutiny (judicial integrity and independence) and having to obey an order from a superior officer that would cause them to violate the first duty. Id. at 333-36. The second evil was the threat to future

judicial deliberations and decisionmaking should the investigation defeat judicial independence. Id. at 333-34; see also Baum & Barry, supra note 247, at 244.

251. Carlucci, 26 M.J. at 330.

252. Id. at 330; see generally id. at 330-36 (the court's analysis of the jurisdiction issue and its interpretation of past congressional action).

253. Id. at 330-36. In discussing the 1968 amendments to the Code, then-Chief Judge Quinn testified before Congress that:

[T]his bill . . . establishes the U.S. Court of Military Appeals as a judicial tribunal in every sense of the word. . . . This bill removes any doubt about its full stature as a U.S. court. It increases its standing and prestige in the judicial hierarchy and, by implication, gives it the full powers of a U.S. court.

Id. at 331 (quoting H.R. Rep. 1480, 90th Cong., 2d Sess. 3 (1968), reprinted in 1968 U.S.C.C.A.N. 2053, 2055 (emphasis omitted) (statement of Chief Judge Robert E. Quinn)). The House of Representatives

report further stated that: "The bill makes it clear that the Court of Military Appeals is a court and does have the power to question . . . any executive regulation or action as freely as though it were a court constituted under article III of the Constitution." Id. (quoting H.R. Rep. 1480, 90th Cong., 2d Sess. 2 (1968), reprinted in 1968 U.S.C.C.A.N. 2053, 2054 (emphasis omitted) (statement of Judge Kilday)).

254. Id. at 337 (citing to Hastings II, 783 F.2d at 1518-22).

255. Id.

256. See supra notes 70-86 and accompanying text (for a discussion of Mil. R. Evid. 509).

257. Carlucci, 26 M.J. at 337 n.12.

258. 483 U.S. 107 (1987). Tanner involved an attempt by jurors and counsel to impeach a verdict through evidence submitted posttrial concerning alcohol and drug use by the jurors during the course of the trial. The Court affirmed the inadmissibility of the evidence under Fed. R. Evid. 606(b)'s prohibition against impeachment of a verdict, determining that such use would be an "internal"

influence, and not the required "external influence" on the jury necessary to permit an attack on the verdict rendered. Id. at 113-27.

259. Carlucci, 26 M.J. at 337 n.12.

260. Id. at 337 (citing Nixon, 418 U.S. at 706-07).

261. Id. (citing Hastings II, 783 F.2d at 1518-22).

262. Id. at 338. The court balanced the authority of the Inspector General to investigate against the qualified judicial privilege of NCMR, recognizing that the Inspector General was only in possession of an anonymous tip, and no other substantive evidence indicating judicial misconduct. Id.; see Baum & Barry, supra note 247, at 245.

263. Carlucci, 26 M.J. at 338-40.

264. Id. at 342. Judge Cox was a state trial judge prior to being appointed to the Court of Military Appeals and had worked with various judicial commissions inquiring into allegations of judicial misconduct at the state level. Id. at 341.

265. Id. at 342.

266. As an interesting epilogue, Judge Cox, as the special master, wrote to the Inspector General requesting a brief concerning her investigation so

that he could independently determine if further investigation into the deliberations of NMCMR was warranted. The Inspector General neither responded, nor acknowledged receipt of the letter. Judge Cox eventually reported back to the court that he could find no "information that causes me to believe judicial misconduct occurred." Baum & Barry, supra note 247, at 245 (quoting Interim Report of Special Master, NMCMR v. Carlucci, 27 M.J. 407, 408 (C.M.A. 1988)). As late as 1989, no further evidence had come to light justifying a further investigation into the NMCMR judges or their commissioners. See Walter T. Cox, Professional Conduct and the Trial of a Case, 36 Fed. B. News & J. 187, 187 (1989).

267. See supra note 238 (discussing the types of courts-martial and the levels of the military justice system, all arising from the Code and enacted by Congress pursuant to their powers under art. I, § 8, cl. 14 of the Constitution).

268. No. 893618C (N.M.C.M.R. 10 Jan. 1991) (per curiam) (unpub.). The author admits an interest in this case, having been the individual military counsel who conducted the voir dire of the judge at the trial

level. The unanswered questions regarding judicial privilege, arising from his involvement in Clarke, gave the author the desire to write this thesis. Clarke was an unpublished opinion by a three-member panel of NCMR. The panel consisted of Senior Judge Albertson, Judge Landen, and Judge Lawrence. The panel initially issued an opinion granting the writ on 6 December 1990, however, the Government sought reconsideration by the court en banc. Following denial of the reconsideration motion on 4 January 1991, the panel sua sponte reconsidered its earlier decision and issued the 10 January 1991 opinion. This latter, final opinion, while still granting the writ, addressed the issues raised in the Government's motion for reconsideration. See id., slip op. at 1, 6, 8; Government's Motion for Reconsideration En Banc, Clarke (No. 893618C). 269. Clarke, No. 893618C, slip op. at 1. The military judge had been assigned to the trial judiciary for only two months before he made the injudicious remark following his eleventh trial as a special courts-martial judge. Record at app. ex. VI, at 1-4 (Colonel Ouellette's investigation into,

"Allegations of Impropriety Against a Military Judge,"
22 Aug. 1990).

270. Clarke, No. 893618C, slip op. at 2-3. The initial investigation was conducted by the circuit military judge. His report was sent to the Chief Judge, Navy-Marine Corps Trial Judiciary for action. The chief judge made the decision that the military judge could continue to sit as a military judge, and he issued him a nonpunitive letter of caution for making an injudicious remark that created an appearance of impropriety. Id.; Record at app. ex. VII (letter of caution). The court compared the investigation to the independent judicial commission contemplated by the Court of Military Appeals in Ledbetter, stating: "The investigations that took place under the circumstances of this case, however, do not constitute such an independent judicial inquiry board or commission." Clarke, No. 893618C, slip op. at 3 n.2 (citations omitted).

271. Clarke, No. 893618C, slip op. at 4-5; Record at 14-123.

272. Clarke, No. 893618C, slip op. at 1. The extraordinary writ was initially filed with the Court

of Military Appeals, which granted the petition and remanded the case to NMCMR for resolution of factual and legal issues. Id.

273. Record at 22-23, 135-36.

274. Id. at 6-15, 17-18.

275. Id. at 90-92.

276. Id. at 136-37; Clarke, No. 893618C, slip op. at 5 & n.6.

277. Clarke, No. 893618C, slip op. at 8.

278. Id. at 5 n.6 (citations omitted).

279. See id. at 2-8.

280. No. 913025M (N.M.C.M.R. 9 Dec. 1991), pet. denied, No. 92-07/MC (C.M.A. 17 Jan. 1992). The panel of NMCMR that decided this case consisted of Senior Judge Fryer, Judge Mollison (author of the opinion), and Judge Holder. Id., slip op. at 1.

281. Id., slip op. at 5.

282. Id. at 4. The former judge had alleged that the circuit judge, who was presiding over Wilson's trial, had previously indicated to him, in so many words, that his sentences should exceed the terms of the pretrial agreements. See id. at 3; Record at 380.

283. Wilson, No. 913025M, slip op. at 4.

284. Id. at 6 n.5. (citations omitted) (the footnote cites principally to Carlucci and Hastings II for the nature of judicial privilege, and Clarke, along with several other cases, for the point regarding the discovery of communications concerning judicial business between judges).

285. See supra notes 205-84 and accompanying text.

286. See supra notes 214-84 and accompanying text.

287. See supra notes 217-21, 251-55 and accompanying text.

288. See supra notes 167, 179-80, 218, 252 and accompanying text.

289. See supra notes 220-21, 251-53 and accompanying text.

290. See supra notes 217-21, 251-55 and accompanying text.

291. Hastings II, 783 F.2d at 1520.

292. See supra notes 222, 254-55 and accompanying text; see also Comment, The Law Clerk's Duty of Confidentiality, 129 U. Pa. L. Rev. 1230 (1981) (arguing for a rule of confidentiality and containing a survey of federal judges that supports such a rule).

293. In this regard, a case can be made for the

proposition that judicial privilege should give way in the presence of judicial misconduct, just as the attorney-client privilege yields when the client attempts to perpetrate a fraud on the court or commit other similar misconduct. See Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, rule 3.3(a)(2), (4) & comment, at 26-27. Additionally, the concept of "waiver" of judicial privilege may be raised when a judge discusses otherwise privileged communications or deliberations with someone not contemplated by the purpose of the privilege (e.g., an acquaintance during a game of golf). See Mil. R. Evid. 510(a) ("Waiver of privilege by voluntary disclosure").

294. Hastings II, 783 F.2d at 1522; see supra notes 223-24 and accompanying text.

295. 783 F.2d at 1522; see supra notes 224, 260-61 and accompanying text.

296. See supra notes 225-31, 260-62 and accompanying text.

297. See supra notes 226-31 and accompanying text.

298. See supra notes 260-62 and accompanying text.

299. See supra notes 174-82 and accompanying text.

300. See supra notes 131-41 and accompanying text

(describing the numerous bases for this privilege).

301. See supra notes 147-48 and accompanying text.

302. See supra notes 142-45 and accompanying text.

303. See supra notes 222, 254 and accompanying text.

304. See supra note 146 and accompanying text.

305. See supra note 86 and accompanying text.

306. See supra notes 73-75 and accompanying text.

307. See supra notes 72-73, 85 and accompanying text.

308. See supra notes 70, 73, 85 and accompanying text.

309. Black's Law Dictionary 1412 (5th ed. 1979).

310. Ronald M. Holdaway, Voir Dire--A Neglected Tool of Advocacy, 40 Mil. L. Rev. 1, 2 (1968).

311. Id. at 2. Originally, under the common law, voir dire took place only after a challenge for cause against a juror had been made. Today, it occurs before the challenge. Lester B. Orfield, Trial Jurors in Federal Criminal Cases, 29 F.R.D. 43, 66 (1962). For a history of the various voir dire practices used by federal courts, see Romualdo P. Eclavea, Annotation, Voir Dire Examination of Prospective Jurors Under Rule 24(a) of Federal Rules of Criminal

Procedure, 28 A.L.R. Fed. 26 (1976 & Supp. 1990) (federal cases discussing voir dire of prospective jurors); The Judicial Conference of the United States, The Jury System in the Federal Courts, 26 F.R.D. 409, 465-67 (1960); Orfield, supra, at 66-75.

312. In an attempt to determine whether any federal or state jurisdictions permitted voir dire of a trial or appellate judge, the author contacted numerous organizations involved with judges and courts nationwide. None of the organizations were aware of the existence of such a procedure. Telephone Interview with William Eldridge, Director of Research, Federal Judicial Center, Washington, D.C. (22 Oct. 1991); Telephone Interview with Dixie Knoebel, Staff Associate, The National Center for State Courts, Williamsburg, Va. (22 Oct. 1991); Telephone Interview with V. Robert Payant, Dean, The National Judicial College, Reno, Nev. (22 Oct. 1991); Telephone Interview with Wantland L. Sandel, Jr., Director, Division of Judicial Services, American Bar Association, Chicago, Ill. (10 Oct. 1991). The author's search for a case involving voir dire of a federal or state trial judge revealed only one

reported case, and it involved only a motion entitled, "Demand for Special Hearing to Voir Dire Judge Korner," which the court denied. See Paulson v. Commissioner, 48 T.C.M. (CCH) 869 (1984) (mem.).

313. See, e.g., Holdaway, supra note 310, at 2 (suggesting the additional purposes of aiding in the exercise of peremptory challenges and as a tactical device to indoctrinate the jury); but see Standards for Criminal Justice § 3, Standard 3-5.3(c) at 76 (1979) (The Prosecution Function) (questioning jurors "should be used solely to obtain information for the intelligent exercise of challenges," and not to argue prosecution's case); id. § 4 , Standard 4-7.2 commentary at 83 (1979) (The Defense Function) (the defense must limit its questions to those needed "to lay a basis for the lawyer's challenges," and rejecting view that they may be used to influence the jury's view of the case--an "improper use of the right of reasonable inquiry to ensure a fair and impartial jury").

314. Holdaway, supra note 310, at 2.

315. Connors v. United States, 158 U.S. 408. 413 (1895).

316. Judicial Conference of the United States, supra note 311, at 465 (emphasis added). The Conference noted that voir dire examination in federal criminal cases was governed by Federal Rule of Criminal Procedure 24(a), and that the constitutional basis for the rule rests both in the Sixth Amendment's provision for an impartial jury in all criminal prosecutions, and in the Fifth Amendment's due process of law requirement. Id. The Supreme Court has further held this particular right applicable to state court criminal proceedings through the Fourteenth Amendment. See Ristaino v. Ross, 424 U.S. 589, 595 n.6 (1976).

317. Holdaway, supra note 310, at 2; Orfield, supra note 311, at 69; Standards for Criminal Justice § 15, Standard 15-2.4 at 51 (1978) (Trial by Jury) ("Voir dire examination should disclose grounds for challenge for cause and facilitate intelligent exercise of peremptory challenges."). As noted by one author, historically, "it was held that there could be no questioning for the purposes of peremptory challenges." Orfield, supra note 311, at 69 (citing Browne v. United States, 145 F. 1, 7 (2d Cir. 1905)). Subsequent cases allowed the use of voir dire

concerning peremptory challenges. Id. (citing *Murphy v. United States*, 7 F.2d 85 (1st Cir. 1925); *Kurczak v. United States*, 14 F.2d 109, 110 (6th Cir. 1926); *Beatty v. United States*, 27 F.2d 323, 324 (6th Cir. 1928)); see also *United States v. Barnes*, 604 F.2d 121, 138 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980) (noting that the Supreme Court, in *Swain v. Alabama*, 380 U.S. 202 (1965), "recognized the importance of the peremptory challenge, and approved questioning of potential jurors to form the basis for such challenges").

318. Subject, of course, to the unique requirements imposed by the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986).

319. Holdaway, supra note 310, at 2, 17 ("[T]he rule has evolved to a point that the wide discretion vested in the law officer has largely been dissipated by emphasizing the accused's right to an impartial court"); see Barnes, 604 F.2d at 138 n.9 (citing *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973), as a case where the court approved broad, but not limitless voir dire); Orfield, supra note 311, at 69 (quoting *United*

.States v. Daily, 139 F.2d 7, 9 (7th Cir. 1943) for the proposition that the range of jury voir dire "should be liberal").

320. William Winthrop, Military Law and Precedents 205 (2d ed. 1920) (citing to the Articles of War art. 71).

321. See MCM, 1951, para. 62e. Peremptory challenges against members are still permitted today, with each party in the court-martial having one such challenge. R.C.M. 912(g).

322. See R.C.M. 912.

323. R.C.M. 912(d).

324. R.C.M. 912(d) discussion.

325. R.C.M. 912(d) analysis at A21-54. The military courts have held that the procedures of Rule 24(a) are applicable to the military. Id. (citing United States v. Slubowski, 7 M.J. 461 (C.M.A.), reconsideration not granted by equally divided court, 9 M.J. 264 (C.M.A. 1980)).

326. See supra note 316 and accompanying text.

327. R.C.M. 912(e).

328. R.C.M. 912(f).

329. R.C.M. 912(f)(1)(N). Examples of bases for

challenge under the last ground include: "[A] direct personal interest in the result . . . ; . . . [participation in] a closely related case; . . . a decidedly friendly or hostile attitude toward a party; or . . . an inelastic opinion concerning an appropriate sentence for the offense charged." R.C.M. 912(f) discussion.

330. See supra notes 315-16 and accompanying text.

331. See Military Justice Act of 1968, Pub. L. No. 90-632, §§ 2(9), 3(a), 82 Stat. 1335, 1336-37, 1343 (codified as amended at 10 U.S.C. §§ 801-940 (1988)). "Whenever the term law officer is used, . . . such term shall be deemed to mean military judge." Id. at § 3(a), 82 Stat. at 1343; see George B. Powell, Standards of Conduct and the Military Trial Judge 30-31 (1971) (unpublished thesis, The Judge Advocate General's School, U.S. Army).

332. Powell, supra note 331, at 17-19. Under the Uniform Code of Military Justice Act of 1950, Pub. L. No. 506, 64 Stat. 107 (codified as amended at 10 U.S.C. §§ 801-940 (1988)), Congress established the position of "law officer" in courts-martial, a position which has evolved into the "military judge" of today. Id. at art. 26, 64 Stat. at 117.

333. Prior to the Uniform Code of Military Justice Act of 1950, the closest thing to a trial judge in courts-martial was the "law member," a combination of juror (court member) and legal advisor. Powell, supra note 331, at 19. Such law members existed in Army courts-martial under the Articles of War beginning in the 1920s, while no such member existed in Navy courts-martial. Id. (citing to the Army Reorganization Act § 1, ch. 2, 41 Stat. 787 (1920), as amended by the Act of 24 June 1948 (Public Law 759, 80th Cong.) art. 8). These law members would retire to the deliberations room with the other members and vote as an equal member on the verdicts and sentences. The law member, however, could not be challenged for cause. See War Dep't Document No. 1053, Courts-Martial Procedure 147 (U.S. Infantry Ass'n 1921) (citing to Articles of War art. 18).

334. See UCMJ arts. 26(c), 37(a) (providing for independent trial judiciaries in each service and insulating military judges from unlawful command influence); S. Rep. No. 1601, 90th Cong., 2d Sess. 3 (1968), reprinted in 1968 U.S.C.C.A.N. 4501, 4503-04 (One purpose of the 1968 amendments to the Code was

"to redesignate the law officer . . . as a 'military judge' and give him functions and powers more closely allied to those of Federal district judges."); see generally Gilligan & Lederer, supra note 232, §§ 1-30.00, 14-10.00 (discussing the civilianization of military law and the evolution of the military judge into "a true judge"); but see Fidell, supra note 232, at 346-51 (criticizing the level of judicial independence in military courts).

335. UCMJ art. 16(1)(B). An accused does not have an absolute right to be tried by military judge alone; the military judge must approve his request for such a court-martial. Id. While the military judge has discretion to approve or disapprove the request for trial by military judge alone, "[a] timely request for trial by military judge alone should be granted unless there is substantial reason why, in the interest of justice, the military judge should not sit as factfinder." R.C.M. 903(c)(2)(B) & discussion. A trial judge may not arbitrarily withhold the opportunity for trial by military judge alone. "[W]hile trial by military judge alone may not be an absolute right, it is a right nevertheless." *United States v. Sherrod*, 26 M.J. 30, 32 (C.M.A. 1988).

336. MCM, 1951, para. 39b(1). The law officer's rulings on interlocutory questions were final, except for his rulings on motions for findings of not guilty or the question of the accused's sanity. The law officer also did not rule on any challenges, which were decided by the court members. Id.; Gilligan & Lederer, supra note 232, § 14-10.00, at 515 (discussing the role of law officer).

337. MCM, 1969, para. 39b(5).

338. See, e.g., R.C.M. 902(a). The 1984 Manual added the appearance of impropriety ("proceedings in which the military judge's impartiality might reasonably be questioned") language to the rules governing disqualification of the military judge. Under the prior rules, the general language of paragraph 62f(13) provided the only grounds for addressing a generalized appearance of impropriety. Compare R.C.M. 902(a), (b) with MCM, 1969, para. 62f. The language of R.C.M. 902(a), specifically, and R.C.M. 902, generally, results from a combination of the old rules, under paragraph 62 of the 1969 Manual, and the federal statutes regarding the disqualification of Article III judges, now found in

.28 U.S.C. § 455 (1988). R.C.M. 902 analysis at A21-45. The integration of the rules governing federal judges arguably further emphasizes the move to make military judges more like civilian judges. See supra note 334 and accompanying text.

339. R.C.M. 902(a). The quoted language is also known by the term of art, "appearance of impropriety." See Clarke, No. 893618C, slip op. at 5. The statutes governing federal judges, as well as the American Bar Association's trial standards for judges, have similar provisions. See 28 U.S.C. § 455(a) (1988) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."); Standards for Criminal Justice § 6, Standard 6-1.7 at 19 (1978) (Special Functions of the Trial Judge) ("The trial judge should recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially in a criminal case or whenever the judge believes his or her impartiality can reasonably be questioned."). The purpose of R.C.M. 902(a) and 28 U.S.C. § 455(a) is to protect "the integrity and dignity of the judicial process from any hint or

appearance of bias." United States v. Allen, 31 M.J. 572, 601 (N.M.C.M.R. 1990), aff'd, 33 M.J. 209 (C.M.A. 1991) (quoting Potashnick v. Port City Construction Company, 609 F.2d 1101, 1111 (5th Cir. 1980)). "The test a military judge must apply in determining whether to recuse himself is 'whether the objective, reasonable man with knowledge of all the circumstances would conclude that the trial judge's impartiality might reasonably be questioned.'" Id. at 605 (citing R.C.M. 902(a); Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983); Markus v. United States, 545 F. Supp. 998 (S.D.N.Y. 1982)). The test is "an objective test that assumes the facts as alleged are true and then looks into the mind of a reasonable man rather than the mind of the judge or the parties." Id. (citing United States v. Sherrod, 22 M.J. 917, 920 (A.C.M.R. 1986), rev'd on other grounds, 26 M.J. 30 (C.M.A. 1988) (citations omitted)). An in-depth review of the cases addressing recusal of judges is beyond the scope of this thesis. For additional material in this area, see id. at 600-10 (an exhaustive list of relevant cases); Marcia G. Robeson, Annotation, Construction and Application of 28 U.S.C.

§ 455(a) Providing for Disqualification of Justice, Judge, Magistrate, or Referee in Bankruptcy in Any Proceeding in Which His Impartiality Might Reasonably Be Questioned, 40 A.L.R. Fed. 954 (1978 & Supp. 1990) (analysis of federal cases construing 28 U.S.C. § 455(a)); Paul Tyrrell, Piercing the Judicial Veil: Judicial Disqualification in the Federal and Military Systems, The Army Lawyer, Apr. 1989, at 46 (discussing disqualification of judges under 28 U.S.C. §§ 144, 455(a), and under R.C.M. 902).

340. R.C.M. 902(b). The rule provides:

(b) Specific grounds. A military judge shall also disqualify himself or herself in the following circumstances:

(1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

(2) Where the military judge has acted as counsel, investigating officer, legal officer, staff judge advocate, or convening

authority as to any offense charged or in the same case generally.

(3) Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as a military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

(4) Where the military judge is not eligible to act because the military judge is not qualified under R.C.M. 502(c) or not detailed under R.C.M. 503(b).

(5) Where the military judge, the military judge's spouse, or a person within the third degree of relationship to either of them or a spouse of such person:

- (A) Is a party to the proceeding;
- (B) Is known by the military judge to

have an interest, financial or otherwise,
that could be substantially affected by the
outcome of the proceeding; or

(C) Is to the military judge's
knowledge likely to be a material witness
in the proceeding.

Id.

341. R.C.M. 902(d)(1) discussion; see also infra
note 390 (discussing peremptory challenges of judges).

342. Id. (the rule encourages raising any possible
grounds for disqualification "at the earliest
reasonable opportunity").

343. R.C.M. 902(d)(1).

344. R.C.M. 902(d)(2).

345. United States v. Smith, 30 M.J. 631, 634
(N.M.C.M.R. 1990) (per curiam).

346. R.C.M. 902(d)(1) discussion.

347. 21 M.J. 218 (C.M.A. 1986).

348. Id. at 219.

349. Id.

350. 30 M.J. 631 (N.M.C.M.R. 1990) (per curiam).

351. Id. at 633-34 (citing United States v. Jarvis,
46 C.M.R. 260 (C.M.A. 1973)).

352. See, e.g., Smith, 30 M.J. at 634 (military judge abused discretion by "effectively limiting scope" through his misleading responses and failure to disclose information to counsel).

353. United States v. Schauer, No. NCM 76-2574 (N.C.M.R. 9 June 1976) (unpub.), reprinted in United States v. Small, 21 M.J. 218, 223 (C.M.A. 1986).

354. Schauer, No. NCM 76-2574, reprinted in 21 M.J. at 221.

355. United States v. Allen, 31 M.J. 572, 601 (N.M.C.M.R. 1990), aff'd, 33 M.J. 209 (C.M.A. 1991) (citing State of Idaho v. Freeman, 478 F. Supp. 33 (D.C. Idaho 1979); United States v. Baker, 441 F. Supp. 612 (M.D. Tenn. 1977)).

356. Id. at 605 (citing United States v. Cepeda Penes, 577 F.2d 754 (1st Cir. 1978)).

357. The military justice system is "[a] justice-based system [that] seeks accurate determination of individual responsibility and proportional punishment. It is based upon fairness and to be functional, must be so perceived by the personnel operating under it." Gilligan & Lederer, supra note 232, § 1-30.00, at 7.

358. See supra notes 314-16 and accompanying text.

359. See supra notes 223-31, 260-62 and accompanying

text.

360. See, e.g., supra notes 223-31 and accompanying text.

361. See supra notes 229-31 and accompanying text.

362. See supra notes 176-78, 214-31, 260-62 and accompanying text.

363. See Nixon, 418 U.S. at 707, 713; Hastings II, 783 F.2d at 1520-25; see also supra notes 176-78, 226-31 and accompanying text.

364. Carlucci, 26 M.J. at 338; see also supra notes 247-62 and accompanying text.

365. See supra notes 70-85 and accompanying text.

366. See supra notes 70, 73, 86 and accompanying text.

367. See supra notes 296, 304 and accompanying text.

368. See supra text accompanying note 308.

369. See supra text accompanying notes 296, 304, 308.

370. See supra note 86 and accompanying text.

371. See supra notes 70, 73 and accompanying text.

372. See supra notes 260-62 and accompanying text.

373. See supra notes 178, 316 and accompanying text.

374. See supra notes 226-31 and accompanying text.

375. This problem is based on the facts arising in *Clarke v. Breckenridge*, No. 893618C (N.M.C.M.R. 10 Jan. 1991) (per curiam) (unpub.). Ultimately, the military judge in *Clarke* released a copy of the investigation, including his two statements (but not including the opinions, recommendations, and the trial report summaries submitted by the investigating officer), to the parties during voir dire. Record at 6-14.

376. See supra notes 291-93, 302 and accompanying text.

377. See supra notes 314-16 and accompanying text.

378. See supra notes 178, 226-31 and accompanying text.

379. See supra notes 176-78 and accompanying text.

380. See supra notes 228-31 and accompanying text.

381. This problem is based on the facts arising during the voir dire phase of *Wilson v. Ouellette*, No. 913025M (N.M.C.M.R. 9 Dec. 1991), pet. denied, No. 92-07/MC (C.M.A. 17 Jan. 1992). The circuit military judge persisted in his denial of the defense counsel's request to cover certain matters on voir dire or to call subordinate judges as witnesses. Record at

357-89. The cited quote is from Wilson. Id. at 380. NMCMR upheld the military judges ruling on the basis of "relevance" in denying a petition for a writ of mandamus. Wilson, No. 913025M, slip op. at 4-5.

382. See supra text accompanying note 377.

383. See supra note 262 and accompanying text.

384. See supra notes 260-62 and accompanying text.

385. See supra text accompanying notes 378-79.

386. See supra notes 273-76 and accompanying text.

387. See supra note 354 and accompanying text.

388. See supra notes 176-78, 228-31, 260-62 and accompanying text.

389. See supra notes 75, 232-37 and accompanying text.

390. As previously discussed, no civilian jurisdictions routinely permit the voir dire of a judge by counsel. See supra note 312. Numerous jurisdictions, however, have implemented procedures permitting peremptory challenges of judges in civil and/or criminal trials. See Alan J. Chaset, Disqualification of Federal Judges by Peremptory Challenge (Federal Judicial Center 1981); Larry Berkson & Sally Dorfmann, Judicial Peremptory

Challenges: The Controversy, St. Ct. J., Summer 1985, at 12, 12 & n.1 (noting that, as of 1985, 16 states permitted peremptory challenges of trial judges). Congress has also considered several bills proposing adoption of peremptory challenges against federal judges, none of which it passed into law. Berkson & Dorfmann, supra, at 12 & n.7. The military services have never permitted peremptory challenges of military judges, and the Code and the Manual specifically reject such a procedure. See UCMJ art. 41 (" . . . [B]ut the military judge may not be challenged except for cause."); MCM, 1984, R.C.M. 902(d)(1) discussion ("There is no peremptory challenge against a military judge."); MCM, 1969, para. 62a ("Each accused and the trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause (Art. 41)."); MCM, 1951, para. 62e ("It [peremptory challenges] cannot be used against the law officer.").

391. See supra note 238 and accompanying text (discussing the various levels of appellate review). The Court of Military Appeals and the courts of military review have authority to grant relief under

the All Writs Act, 28 U.S.C. § 1651(a), to ensure the integrity of the judicial process. See, e.g., Carlucci, 26 M.J. at 330-36; United States v. Thomas, 33 M.J. 768, 770-71 (N.M.C.M.R. 1991). For a review of the evolution of extraordinary writs in the military courts, see Carlucci, 26 M.J. at 330-36 (extensive case citations and a discussion of the purposes served by the writs); Gary F. Thorne, Extraordinary Writs in the Military, The Army Lawyer, Aug. 1977, at 8 (discussing the development of writs in the military courts from the first case to grant a writ, in 1966, through cases in 1977).

392. See supra text accompanying note 387-88.

393. See supra notes 281-82 and accompanying text.

394. A party must, obviously, act in good faith in articulating the reasonable factual basis or allegation. The court, in turn, must accept this factual basis or allegation as true, and is not permitted to deny the allegation and, thereby, dismiss the question asked or evidence sought as not being legally relevant. The author specifically adopts this procedure from the requirements in place in the federal courts for alleging the bias or prejudice of

judges. See 28 U.S.C. § 144 (1988) (requiring a party to file a sufficient affidavit that sets forth the bias or prejudice of the judge). As to what is a "reasonable factual basis or allegation," NMCMR's exhaustive and comprehensive discussion of that subject in United States v. Allen should be the guide used by military judges and practitioners. See United States v. Allen, 31 M.J. 572, 604-07 & n.14 (N.M.C.M.R. 1990), aff'd, 33 M.J. 209 (C.M.A. 1991). Adoption of this requirement enables the appellate courts to properly judge the relevance of the question asked or evidence sought, presuming the factual basis or allegation is true, thereby fulfilling the role of the neutral judge who would rule on the affidavit in the federal courts. See 28 U.S.C. § 144 (1988) ("[B]ut another judge shall be assigned to hear such proceeding."); Allen, 31 M.J. at 606-07 ("Another judge is assigned to hear the motion for disqualification. The judge ruling on the motion must take the facts as provided in the affidavit as true . . ."). For more information concerning bases for disqualification of a judge under 28 U.S.C. § 144, see Romualdo P. Eclavea, Annotation, Pretrial Comments

Indicating Fixed View as to Proper Punishment for
Particular Type of Crime as Basis for Judge's
Disqualification Under 28 U.S.C. § 144, 29 A.L.R. Fed.
588 (1976 & Supp. 1990).

395. Mil. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

396. As seen in Carlucci, the military courts have jurisdiction to hear extraordinary writs filed by judges, in addition to the more traditional writs filed by "parties." See supra note 248 and accompanying text. The author rejects, as unacceptable, the proposition that an independent judicial investigation conducted by one of the services' trial judiciaries is sufficient to resolve the issue of whether the information covered by the privilege must be disclosed. The trial judiciaries are ill-equipped to perform the impartial balancing of interests required for the qualified judicial privilege. That is a role more appropriately performed by the courts of military review and the

Court of Military Appeals. See Clarke, No. 893618C, slip op. at 3 n.2 (investigation by trial judiciary in that case held not to constitute an "independent judicial inquiry board or commission"). Nor would the adoption of the proposed changes to R.C.M. 109 (providing for the investigation of judges using a procedure similar to that employed by the federal courts under 28 U.S.C. § 372) transform the trial judiciaries into proper balancers of the competing interests. See Memorandum from Samuel T. Brick, Jr., Director, Legislative Reference Service, Office of General Counsel, Dep't of Defense to multiple addressees within the Dep't of Defense (4 Oct. 1991) (on file with author) (containing proposed revisions to the Manual for Courts-Martial being staffed for comment). In fact, as in Hastings II, it might well be one of the investigating bodies from the trial judiciaries against whom a claim of judicial privilege is raised. See supra note 209 and accompanying text.

397. See Mil. R. Evid. 401, 402.

398. See supra notes 18-308 and accompanying text.

399. See supra notes 205-99 and accompanying text.

400. See supra notes 131-48, 172, 180, 300-04 and

accompanying text.

401. See supra notes 70-86, 305-08 and accompanying text.

402. See supra notes 146, 225-31 and accompanying text.

403. See supra notes 146, 225, 358-59 and accompanying text.

404. See supra text accompanying notes 358-59, 375-88.

405. See supra notes 389-97 and accompanying text.

PROPOSED CHANGES TO R.C.M. 902

The author submits the following proposed changes to R.C.M. 902 of the Manual for Courts-Martial. The changes incorporate the author's proposed bright-line rule and other implementing modifications of the Rule as discussed in Section V of the thesis. An "*" preceding a paragraph indicates a change or addition to the present text of Rule 902:

Rule 902. Disqualification of military judge

(a) In general. Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

(b) Specific grounds. A military judge shall also disqualify himself or herself in the following circumstances:

. . .

(c) Definitions. For the purposes of this rule the following words or phrases shall have the meaning indicated--

(1) "Proceeding" includes

(2) The "degree of relationship" is

(3) "Military judge" does

*(4) "Judicial privilege" includes matters covered by confidential communications between judges and their staffs, deliberations of judges and courts, and other matters in the possession or control of a military judge or a military trial judiciary, all as determined by M.R.E. 509, and any constitutional or common law judicial privileges made applicable to trials by courts-martial under M.R.E. 501(a). A military judge "invokes" judicial privilege:

*(A) When the military judge expressly claims the privilege; or

*(B) When the military judge's words or conduct amount to a de facto claim of the privilege under the totality of the circumstances.

(d) Procedure.

(1) The military judge shall, upon motion of any party or sua sponte, decide whether the military judge is disqualified.

(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

*(A) When a military judge invokes judicial privilege to avoid answering a question or producing evidence sought under this rule, the following procedures apply. Either before or following the invocation of judicial privilege, the party asking the question or requesting the evidence must state for the record, orally or in writing, a reasonable factual basis or allegation that, if true, could give rise to

a challenge for cause under subsections (a) or (b) of this rule. Once the party meets this requirement and proffers the relevance of the matters sought, the military judge shall:

*(i) If the claim of privilege is based in whole or part on the protections of M.R.E. 509 and disclosure is not permissive under M.R.E. 606(b), decline to answer the question or produce the evidence. The military judge need not recuse himself or herself in this situation.

*(ii) If the claim of privilege rests upon any other basis, or if disclosure of matters protected by M.R.E. 509 is permissive under M.R.E. 606(b), either:

*(a) Decline to answer the question or produce the evidence, thereby maintaining the confidentiality of the matters sought, in which case the military judge shall recuse himself or herself; or

*(b) Answer the question or produce, or order produced, the evidence, in which case the military judge need not recuse himself or herself solely based upon this election.

*(B) None of the procedures of paragraph (A) of this subsection shall apply when an appellate court has previously adjudged the matters sought by a party to be privileged and protected from disclosure in a military proceeding.

(3) Except as provided

(e) Waiver. No military judge

UNITED STATES NAVY-MARINE CORPS COURT OF MILITARY REVIEW

| | | |
|------------------------------|---|----------------------------|
| Anthony CLARKE |) | NMCM No. 893618C |
| 011 58 7280 |) | |
| Private First Class |) | |
| (E-2) |) | |
| U. S. Marine Corps, |) | PETITION FOR EXTRAORDINARY |
| Petitioner |) | RELIEF IN THE NATURE OF A |
| |) | WRIT OF MANDAMUS |
| v. |) | |
| |) | |
| Robert E. BRECKENRIDGE |) | |
| Captain, U. S. Marine Corps, |) | |
| Military Judge |) | Decided 10 January 1991 |
| Respondent |) | |

Capt DWIGHT H. SULLIVAN, USMC, Appellate Defense Counsel
 LCDR LAWRENCE W. MUSCHAMP, JAGC, USN, Appellate Government Counsel

PER CURIAM:

The petitioner requested the United States Court of Military Appeals to grant extraordinary relief in the nature of a writ of mandamus to compel the military judge detailed to preside in this case to grant the petitioner's challenge for cause against him. The Court of Military Appeals granted the petition and returned the record of trial to the Judge Advocate General of the Navy for submission to this Court for resolution of the factual and legal issues. The Government opposed the petition. On 6 December 1990, in an unpublished order, this Court granted the petition. The Government subsequently filed a Motion for Reconsideration En Banc. That motion was denied on 4 January 1991. The Panel, on its own motion, however, has decided to reconsider its decision. We deny the Government's Motion to File the affidavit of the Chief Judge of the Navy-Marine Corps Trial Judiciary. Having reconsidered its written order of 6 December 1990, we reaffirm our authority to consider the petition, see Order, USMA MISC. Dkt. No. 91-03/MC dated 30 October 1990; United States v. Balistrieri, 779 F.2d 1191, 1204-5 (7th Cir. 1985), and we issue the following order.

We will briefly summarize the facts gleaned from the record of the Article 39(a), Uniform Code of Military Justice, session relating to the petitioner's challenge for cause against the military judge presiding at his court-martial. Two months prior to petitioner's court-martial, on 10 August 1990, the military judge in petitioner's case tried two special courts-martial in which he presided as a military judge sitting alone. Both accused were represented by the same defense counsel, but not petitioner's defense counsel. The cases involved unauthorized absence offenses. The accused were each of a different race. One accused received a sentence substantially more severe than the other for an unauthorized absence of a period less than that committed by the other. After completion of the two cases, the military judge, in an informal post-trial discussion with the trial and defense counsel, indicated generally his reasons for awarding the more severe sentence. Although the memories of the parties are somewhat vague and do not entirely agree, it is clear that the military judge's explanation could be reasonably interpreted to mean that he may have somehow considered the race of the accused in determining the sentence in the case resulting in the more severe punishment.

It is obvious from the record established by the parties before us that the disparity in sentences and the unfortunately ambiguous comments of the military judge that immediately followed became common knowledge among the military judges of the circuit, local counsel, and accused later tried before the military judge. The record also reveals that a convening authority who became aware of the remarks voiced concern about the treatment Marines he referred to trial might receive were they to be tried by the military judge in question.

In examining the evidence set forth in the record before us concerning the two special courts-martial which are the subject of the incident, we find the reasons for the disparity between the two sentences not readily apparent. More significantly, we find that the military judge's attempt to explain the disparity by using language that suggested, or at the very least could be reasonably interpreted to suggest, that race may have been a factor in his sentencing decision might reasonably raise the question as to the military judge's impartiality in the mind of an objective person cognizant of the facts. 1/ This finding is reinforced when it is considered in conjunction with the events that occurred subsequent to the incident.

After learning of the incident, the Circuit Military Judge conducted a personal inquiry into the matter and concluded that the disparity in sentences in the two cases was justified and that the military judge was not racially prejudiced. He informed the Chief Judge, Navy-Marine Corps Trial Judiciary, of the

1/ Looking at the various statements of the defense counsel, trial counsel, and the military judge concerning the military judge's challenged remarks and the factual circumstances of the Article 39(a) session dealing with the challenge for cause, the issue this Court decides is whether an objective person cognizant of all of these facts would reasonably doubt or question the impartiality of the military judge. United States v. Sherrod, 22 M.J. 917, 920 (A.C.M.R. 1986), rev'd on other grounds, 26 M.J. 30 (C.M.A. 1988). See also Lillieberg v. Health Services Acquisition Corporation, 486 U.S. 487, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988); In re Beard, 811 F.2d 1191 (7th Cir. 1985); Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir. 1980). See also United States v. Allen, 31 M.J. 572 (N.M.C.M.R. 1990) (en banc).

matter, who made further informal inquiry into the military judge's conduct. 2/ The Chief Judge also concluded that the military judge was not racially biased and that he had not considered race as a factor in arriving at his sentences in the two cases in question. He did, however, conclude that the military judge used careless language in explaining his sentences and that such carelessness amounted to injudicious conduct. To correct that injudicious conduct, the Chief Judge issued the military judge a nonpunitive letter of caution. 3/ The military judge was thereafter detailed to preside over the case at bar as well as other cases that were tried after the case at bar was continued to permit the filing of this extraordinary writ.

2/ We do not decide whether a fair and thorough investigation by an independent judicial inquiry board or commission as contemplated in United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976), might dispel any reasonable doubt as to the military judge's impartiality in the case at bar. The investigations that took place under the circumstances of this case, however, do not constitute such an independent judicial inquiry board or commission, and therefore do not possess such a compelling remedial quality. We also do not decide that a military judge can be disqualified or forced to recuse himself based solely on comments and rulings made in previous cases. Each challenge must be decided on its own merits. Phillips v. Joint Legislative Committee, 637 F.2d. 1014 (5th Cir. 1981). But, as was stated in Liljeberg v. Health Services Acquisition Corporation, 486 U.S. 847, 108 S.Ct. 2194, 2204, 100 L.Ed.2d 855 (1988), quoted in United States v. Allen, 31 M.J. at 606, it is appropriate for an appellate court, in reviewing for an abuse of judicial discretion for denial of a challenge for cause under R.C.M. 902,

. . . to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" (Citation omitted.)

3/ The findings and conclusions of these nonjudicial inquiries are not binding upon this Court in our judicial determination of the facts or issues of law regarding this writ; however, we do consider the results of these inquiries as to their effect, if any, in dispelling the doubt that would otherwise continue to exist regarding the military judge's impartiality in this case. See United States v. Rojas, 17 M.J. 154 (C.M.A. 1984); Union Carbide Corporation v. U. S. Cutting Service, Inc., 782 F.2d. 710, 715 (7th Cir. 1986).

The record of trial in this case contains a lengthy and tense voir dire of the military judge by both the individual military counsel and the trial counsel. Also attached to this record is a letter written by the military judge to the Circuit Military Judge shortly after the defense counsel's allegation of racial bias/prejudice in sentencing came to light. This letter was made part of the Circuit Military Judge's report of investigation and establishes the military judge's strong emotional reaction to the defense counsel's allegation and his deep concern for the effect such an allegation might have on his judicial and military career. Affidavit of Captain Breckenridge dated 23 August 1990. Additionally, the verbatim transcript of the voir dire proceedings reveals that the military judge committed improprieties that reflect adversely on his ability to preside impartially in petitioner's case. 4/ He failed to comply with the mandatory, not subject to interpretation, language of Military Rule of Evidence 615, when he refused to grant the defense request to sequester from the voir dire proceedings defense subpoenaed witnesses who were witnesses on matters being addressed on the voir dire; 5/ and, he had several ex parte communications with one of those witnesses

4/ During the Article 39(a), UCMJ, session the military judge answered some of the defense voir dire questions using notes apparently prepared prior to the in-court session and refused to disclose them to the defense or attach them as appellate exhibits, indicating that they were his "work product."

5/ The Chief Judge, Navy-Marine Corps Trial Judiciary, was present as a spectator. The individual military counsel told the military judge that the Chief Judge was a witness in the case and requested his exclusion pursuant to Military Rule of Evidence 615. Inexplicably, the military judge refused to exclude the witness, who did, in fact, later testify regarding the issues relating to the challenge. This refusal to grant the request to sequester was plain error.

concerning the appropriate manner of proceeding during the session. Additionally, prior to his in-court announcement of his essential findings, the military judge allowed the witness, whom he had refused to sequester and who had testified in the proceedings, to review those essential findings for "style purposes." 6/ At the conclusion of voir dire, the defense counsel challenged the military judge for cause based on actual racial bias as well as an appearance of impropriety. The military judge denied the challenge after finding that the "Judge Advocate General of the United States Navy has examined the investigation and supported the action

6/ The military judge acknowledged having several conversations with the Chief Judge prior to trial and during recesses taken during the trial proceedings. He refused, however, to divulge the exact content of those conversations on the basis of judicial privilege.

Canon 3B(7) of the recently approved American Bar Association Model Code of Judicial Conduct (1990) states in part:

A judge shall not initiate, permit, or consider ex parte communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that;

. . . .

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with . . . other judges.

A similar provision was found in American Bar Association Code of Judicial Conduct Canon 3B(4) (1972). The status of a "disinterested expert on the law applicable to a proceeding before the judge" or a judicial consultant is distinct from, and entirely subordinate to, the status of a witness who testifies in the case. It has long been recognized that a fact-finder's ex parte discussion with a witness is absolutely forbidden, United States v. Allen, 31 M.J. at 602 and cases cited therein, most particularly when the testimony and credibility of that witness pertains to the issues then pending before the military judge. The fact that this occurred in an Article 39(a), UCMJ, session is irrelevant. See United States v. Dean, 13 M.J. 676 (A.F.C.M.R. 1982).

Even if, under these circumstances, a judicial privilege existed, the privilege is a qualified one, and if its proper exercise effectively restricts the defense in fully developing pertinent facts regarding the challenge, the restriction is a factor militating in favor of granting the challenge. See United States v. Smith, 30 M.J. 631 (N.M.C.M.R. 1990); see also United States v. Allen, 31 M.J. at 604; In the Matter of Certain Complaints v. Mercer, 783 F.2d 1488, 1517-25 (11th Cir. 1986).

of the Chief Trial Judge," 7/ and as a result determined that an appearance of "impropriety" no longer existed. The military judge then found that his "impropriety" could not now reasonably be questioned. 8/ We find that the improprieties occurring during the Article 39(a) session do nothing to dispel the already existing question of the military judge's impartiality in petitioner's case.

In addition to the record of trial, several affidavits have been attached to the record as well as a partial transcript of a special court-martial in which the same military judge's disqualification on the same grounds is also an issue. 9/ We have again carefully examined and considered the record, the documents attached to the record, the excellent original briefs and oral arguments of the parties, and the briefs submitted in conjunction with the motion for reconsideration in deciding the matter before us. We have also considered and reiterate some basic and fundamental legal concepts upon which the military justice system is grounded. Courts-martial are fundamental in reinforcing the good order and discipline that is essential to

7/ We find insufficient support in the record for the military judge's essential finding that the Judge Advocate General supported the action of the Chief Judge. R. 112-120.

8/ Whatever deference is normally given a trial judge's findings of fact and conclusions of law by an appellate court in reviewing a denial of a challenge for cause under R.C.M. 902(a), whether considered by writ of mandamus or during ordinary appellate review, we find that deference inappropriate herein. The sensitive nature of the allegation that forms the basis of this challenge, the military judge's emotional reaction to the allegation illustrating his strong personal interest in the outcome of the investigations into it and the ultimate resolution of the challenge, and his overall conduct at the Article 39(a) session in which the challenge was decided compellingly militate against granting that deference in this case. Thus, the rationale in Balistrieri for reviewing de novo decisions against disqualification under 28 U.S.C. 455(b)(1) dealing with actual bias or prejudice applies equally to this denial of a challenge for cause under R.C.M. 902(a) based on a reasonable question of the military judge's impartiality due to an appearance of personal bias or prejudice. See United States v. Balistrieri, 779 F.2d 1191, 1202-03 (7th Cir. 1985).

9/ That special court-martial, tried after the case at bar, which is not before us and upon which we pass no judgment, does illustrate, however, the impact a judge's alleged lack of impartiality in one case may have on the public's perception of his impartiality in other cases, i.e., the appearance of lack of impartiality. The accused in that case questioned whether the judge would practice "reverse discrimination" in sentencing in an attempt to "equalize" his sentencing record. Such alleged perceptions are exactly what resolution of a challenge pursuant to R.C.M. 902(a) is meant to address. Cf. United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985).

our Naval forces. If confidence in the fairness and impartiality of courts-martial diminishes, even in the slightest degree, not only does respect for military judges and counsel decrease, but more importantly, so does our servicemembers' morale, dedication to duty, and overall confidence in their leaders. Such a result directly undermines the good order and discipline that the courts are established to promote. For this and other reasons, there has long been a liberal policy in favor of granting challenges for cause against military judges and court members. 10/

In our multi-racial force, a military judge must be extremely sensitive to words or actions that may suggest a lack of impartiality in a case or a class of cases due to racial prejudice, even if his intent is to dispel such a notion. The judge must ensure that any comments regarding a subject so sensitive as race be made in the clearest, most unambiguous terms and under circumstances in which the content of the statements cannot reasonably be disputed or misinterpreted. Unfortunately, this rule of judicial conduct and common sense was not followed in this case. 11/ As a result, we find that a substantial question as to the impartiality of the military judge would continue to exist in the mind of an

10/ See United States v. Conley, 4 M.J. 327 (C.M.A. 1978); Paragraph 62(h), Manual for Courts-Martial, United States, 1969 (Rev.); Rule for Courts-Martial 912, Manual for Courts-Martial, United States, 1984.

11/ We agree with the Government that judicial integrity and impartiality include self-examination in judicial decisions-making because, in the circumstances recognized by this military judge, "the danger posed . . . [may] not be bias but unexamined bias, as no judge who simply assumes his complete freedom from bias can honestly proclaim it." Appellate Government Brief at 19. Although integrity and impartiality require introspection by the challenged judge, a military judge must ensure by that introspection that the interests of justice and fairness to the parties are not made subordinate, or perceived to be made subordinate, to the judge's self-interest. See Affidavit of Captain Breckenridge, 23 August 1990; see generally United States v. Balistreri, 779 F.2d 1191, 1203 (7th Cir. 1985). Judicial temperament and good judgment require caution when a military judge discusses his deliberative processes.

objective person who was aware of all the pertinent facts should the currently detailed military judge continue to preside in petitioner's case. In making this finding, we do not conclude that the military judge is, in fact, racially biased or prejudiced; rather, we only conclude that as to this case a reasonable person would harbor a doubt about his impartiality based on the evidence of record and the actions taken by the military judge himself and others subsequent to the military judge's unfortunate statements. His denial of the defense challenge for cause against him was, therefore, an abuse of discretion.

We repeat the statement in our previous Court order: the question whether the military judge should remain on the bench in light of the facts and circumstances surrounding and following this incident and the potential impact these issues might have on any case tried subsequent to the two courts-martial that immediately preceded the military judge's injudicious comment is not before us. This Court, however, will not hesitate to use its Article 66(c), Uniform Code of Military Justice, authority 12/ in applying the law to guarantee that no judicial action before this Court is tainted by racism, lack of impartiality, or any appearance thereof.

Accordingly, it is hereby ordered by the Court, this 10th day of January 1991, that the petition, upon reconsideration, is granted.

E. M. ALBERTSON, Senior Judge

WALTER J. LANDEN, SR., Judge

T. A. LAWRENCE, Judge

12/ United States v. Coles, 31 M.J. 270 (C.M.A. 1990).

UNITED STATES NAVY-MARINE CORPS COURT OF MILITARY REVIEW

Dickie L. Wilson
309 52 7968
Gunnery Sergeant (E-7)
U.S. Marine Corps,
Petitioner

v.

R. E. OUELETTE
Colonel, U.S. Marines Corps
Military Judge,
Respondent

) NCM No. 913025 M

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DECISION ON

PETITION FOR EXTRAORDINARY RELIEF

IN THE NATURE OF A WRIT OF MANDAMUS

PUBLISH

9 December 1991

MOLLISON, Judge:

The petitioner moves this Court under the All Writs Act, 28 U.S.C. § 1651(a), to issue a writ of mandamus directing the respondent to permit the petitioner to introduce evidence in support of a challenge for cause against the respondent or, in the alternative, to disqualify himself from petitioner's court-martial. More particularly, petitioner seeks to call as witnesses a former military judge (Lieutenant Colonel Stevens) and a sitting junior military judge (Major Anderson) within the respondent's circuit. The petitioner also seeks a stay in the trial proceedings pending a determination of the matter. 1/

"The writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations." United States v. LaBella, 15 M.J. 228, 229 (C.M.A. 1983). In special circumstances mandamus is available to review a trial judge's ruling on disqualification. See United States v. Gregory, 656 F.2d 1132, 1136 (5th Cir. Unit B 1981); Arnot., 56 A.L.R. Fed. 494 (1982). The accused has the burden of demonstrating his right to mandamus is clear and undisputable. United States v. Thomas, 33 M.J. 768 (N.M.C.M.R. 1991). The question before us, therefore, is whether the petitioner has clearly and indisputably demonstrated that this situation is truly extraordinary and that he is entitled to this drastic remedy.

A military judge must disqualify himself from presiding at a court-martial if either "general" or "specific" grounds for disqualification exist. Rule for Courts-Martial (R.C.M.) 902, Manual for Courts-Martial, United States, 1984. As to the general ground for disqualification, a military judge must disqualify himself in any proceeding in which that military judge's impartiality might reasonably be questioned. R.C.M. 902(a).

"A judge is presumed to be qualified and so the burden placed upon the party seeking disqualification is substantial in proving otherwise." United States v. Allen, 31 M.J. 572, 601 (N.M.C.M.R. 1990), affirmed 33 M.J. 209 (C.M.A. 1991). Claims of partiality must have a factual basis. The moving party has the burden of establishing a reasonable factual basis for disqualification. More than mere surmise or conjecture is required. Id. at 605. The parties are permitted to question the military judge and present evidence regarding a possible ground for disqualification before the military judge decides the matter. R.C.M. 902(d)(2).

The moving party can shoulder its burden of proving disqualification, for example, by filing affidavits, offering documentary evidence, entering into stipulations of fact or expected testimony, or calling witnesses, to establish the facts and reasons in support of its challenge for cause. 2/ Id. at 607. The military judge's ruling on a challenge for cause is reviewable on appeal for abuse of discretion. United States v. Elzy, 25 M.J. 416, 417 (C.M.A. 1988).

The test for disqualification is not actual partiality but the existence of a reasonable question about impartiality. United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986). 3/ The test for the appearance of partiality is "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985); Allen, 31 M.J. at 601, 604, 605.

Personal, not judicial, bias is a proper basis for disqualification. Allen, 31 M.J. at 607; United States v. Thompson, 483 F.2d 527 (3d Cir. 1973); Annot., 40 A.L.R. Fed. 954 (1978). "[It] must stem from personal, extrajudicial sources, although there is an exception where pervasive bias and prejudice is shown by otherwise judicial conduct." Gregory, 656 F.2d at 1137 (judge's intemperate remark when furnishing financial disclosure information to counsel not disqualifying). "A judge's inappropriate comments in one case do not necessarily preclude his fairly presiding over other trials." United States v. Roldan-Zapata, 916 F.2d 795, 802 (2d Cir. 1990) (judge's disparaging remarks concerning Columbians in unrelated trial not disqualifying). Nor does the fact that a judge has strong feelings about a particular crime automatically disqualify him from sentencing those who commit that crime. United States v. Borrero-Isaza, 887 F.2d 1349, 1357 (9th Cir. 1989) (trial judge's consideration of defendant's South American origin required remand for re-sentencing, but same judge could sit). Usually, the bias must focus on a particular party, however, when a judge's remarks in a judicial context demonstrate a pervasive bias and prejudice, it may constitute bias against the party. United States v. Monaco, 852 F.2d 1143, 1147 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1988) (in sentencing defendant judge's expressions of enormity of crime and defendant's failure to take responsibility not disqualifying); Hamm v. Members of the Board of Regents of the State of Florida, 708 F.2d 647, 651 (11th Cir. 1983) (friction with counsel did not constitute pervasive bias); see also Davis v. Board of School Commissioners of Mobile County, 517 F.2d 1044, 1050-52 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); In re Muller, 72 B.R. 280, 288 (C.D. Ill. 1987), aff'd, 851 F.2d 916 (7th Cir. 1988), reh'g and cert. denied, 490 U.S. 1007 (1989). If bias is directed against a class, the accused is in the class, and the bias is of such a nature and intensity that it prevents the accused from obtaining a sentence uninfluenced by the judge's prejudgment, the judge should disqualify himself. Thompson, 483 F.2d at 529 (judge's policy stated in camera in an unrelated case that Selective Service Act violators would receive 30 months if they were good people was disqualifying). Additionally, a fixed view as to sentencing is inconsistent with the discretion vested in a trial judge to fulfill his mandate to tailor the sentence to the offense and the offender. Id. The scope of the voir dire of the military judge as to his disqualification on grounds of partiality is determined by the specific inquiry's relevance to the military judge's impartiality in the case before him.

In the case at bar, petitioner's counsel conducted extensive voir dire of the circuit military judge. 4/ The voir dire lasted three hours and filled 73 pages of single-spaced transcript. No specific grounds for disqualification (e.g., personal bias or prejudice concerning a party, etc.) were raised. R.C.M. 902(b). Instead, counsel inquired inter alia into personnel matters pertaining to a former judge named Lieutenant Colonel Stevens, the respondent's supervision of Lieutenant Colonel Stevens, the respondent's investigation of judicial misconduct by another junior judge in an unrelated case, the respondent's evaluation of the performance of military counsel appearing before him, the respondent's recommendation for clemency in an unrelated case, and a comment by the respondent to Lieutenant Colonel Stevens concerning the value of sentences that exceed pretrial agreement limitations. From these matters the petitioner asserted the respondent had engaged in "judicial misconduct" in the past and was, therefore, generally unqualified to sit as a trial judge in the petitioner's case now at trial. Record at 391. Now the petitioner asserts only one of the matters raised at trial as a basis for the petition.

Citing appellate exhibits and Lieutenant Colonel Stevens' recent affidavit, the petitioner asserts that Lieutenant Colonel Stevens was assigned as a military judge in the Piedmont Judicial Circuit from August 1989 through November 1990; that the respondent was the circuit military judge and Lieutenant Colonel Stevens' superior; that Lieutenant Colonel Stevens was first certified as a general court-martial judge in April of 1990; that his first general court-martial was a guilty-plea, judge-alone case, unrelated to the petitioner's; that Lieutenant Colonel Stevens awarded the accused in that case 18 months confinement, which exceeded the pretrial agreement by three months; that Lieutenant Colonel Stevens afterward learned that the respondent had expressed satisfaction with the sentence because Lieutenant Colonel Stevens' sentence had exceeded the pretrial agreement; that the next day Lieutenant Colonel Stevens and the respondent spoke about the case; that the respondent stated that it was good the sentence was higher than the pretrial agreement; that the respondent further stated, "I think, at a minimum, that we should strive to be above the pretrial" or words to that effect; that another judge, named Major Anderson, was in the area at the time of the conversation and Lieutenant Colonel Stevens and he discussed the statement immediately after it was made. Lieutenant Colonel Stevens further states that the respondent never told him directly what to do in a given case or counseled him concerning any decision that Lieutenant Colonel Stevens had made. Appellate Exhibit XXII. Nonetheless, from the aforementioned discussion between Lieutenant Colonel Stevens and the respondent, the petitioner now asserts the respondent harbors an inappropriate sentencing philosophy, viz., the respondent will strive to award sentences that exceed sentence limitations agreed to in pretrial agreements, presumably to provide the convening authority a quantum of punishment to suspend over the head of the accused. Since pretrial agreement sentence limitations are ordinarily not known by the military judge before sentence is announced (R.C.M. 910(f)(3)), petitioner surmises the respondent is of the opinion that in a pretrial agreement case the military judge should award a greater sentence than what the judge otherwise thought appropriate. Thus, the petitioner suggests that because of the respondent's comments to Lieutenant Colonel Stevens in early 1990 after an unrelated case, he should today be disqualified from presiding at the petitioner's court-martial.

The respondent denied saying a judge should make an effort to exceed the pretrial agreement. He did, however, acknowledge that when Lieutenant Colonel Stevens reported to him that one of his sentences exceeded the pretrial agreement, the respondent stated that it would give the convening authority some options to provide clemency and that was always good to have happen. The respondent also explained that he meant that it would provide something for the convening authority to suspend over the head of the confinee who might otherwise be inclined to be a bother. Record at 351-52, 354, 389. The respondent also expressly disclaimed having consulted pretrial agreements in related cases to determine what sentence should be awarded. Record at 363. He did state that he had reviewed a pretrial agreement in a previous case because it contained unique provisions that were also included in the case then before him. Appellate Exhibit XXIII; record at 366. Neither of those cases concerns the petitioner's.

Petitioner represented at trial that he wished to call Lieutenant Colonel Stevens and Judge Anderson. Petitioner also represented that he attempted to interview Judge Anderson and that Judge Anderson declined to be interviewed on grounds of judicial privilege. Record at 387-90; Appellate Exhibit XXV. The respondent declined to order Lieutenant Colonel Stevens or Judge Anderson to be called to testify on grounds of relevancy. Record at 390, 393-94. In denying the petitioner's challenge for cause against him, the respondent observed that the issue was whether or not the military judge should remain on the bench to try this individual, that the matters raised by the petitioner concerned a general assessment of the respondent's performance as a military judge, that these matters were not relevant as to the respondent's qualification to sit in the petitioner's case, and that the respondent had no bias or prejudice toward the petitioner. Record at 393-94, 401.

The record contains Appellate Exhibits, the aforementioned affidavit, and the transcript of the voir dire. They inform the Court of the matters in the possession of Lieutenant Colonel Stevens and the respondent. The petitioner states he yet desires to call Judge Anderson to corroborate the respondent's remarks to Lieutenant Colonel Stevens concerning the value of sentences that exceed pretrial agreement limitations. Petition at 5. In light of the absence of an affidavit or offer of proof respecting Judge Anderson, and being mindful of the potential existence of judicial privilege, 5/ this Court ordered six interrogatories to be propounded to Judge Anderson. Judge Anderson has filed his sworn responses. They do not support petitioner's intimation that the respondent expressed an opinion or policy to the effect that he or his subordinate judges should award sentences which exceed the sentence limitations in pretrial agreement cases. Additionally, Judge Anderson disclaims knowledge that the respondent has communicated to him or to anyone else statements or a policy that military judges should award sentences that are in excess of that which the judges otherwise thought appropriate in order to provide the convening authority a quantum of punishment to suspend over the head of the accused or that judges should sentence the accused in reliance upon possible mitigating action by convening or higher authorities.

The respondent's philosophy, past or present, as to the relative benefits of sentences that exceed pretrial agreement limitations is not germane. For that matter the record does not suggest that there is a pretrial agreement in this case, nor does it reflect the petitioner's preference as to forum. What is relevant is whether the respondent presently has an inelastic predisposition as to forms of punishment in this case or intends to award a sentence in this case in reliance upon possible mitigating action by the convening or higher authority. See United

States v. Small, 21 M.J. 218 (C.M.A. 1986); United States v. Heriot, 21 M.J. 11 (C.M.A. 1985); United States v. Stiner, 30 M.J. 860, 862-63 (N.M.C.M.R. 1990); R.C.M. 1002, 1005(e)(3); Thompson; Annot., 29 A.L.R. Fed. 588 (1976). We note the petitioner did not make these inquiries directly of the respondent at trial but rather chooses to demonstrate the respondent's partiality inferentially and through surmise.

The conversation petitioner asserts as the foundation for his challenge was made a year and one-half ago. It was unrelated to the petitioner or to his case. Contrary to the petitioner's assertion, it is not supported by Major Anderson. The respondent's own explanation of his statements and intent and his lack of personal bias toward the petitioner are entitled to great weight. Allen, 31 M.J. at 604. The credible interpretation of the respondent's discussion with Lieutenant Colonel Stevens does not evince partiality, a bias toward the petitioner or any particular class, a pervasive or intense bias, a fixed view as to sentence, or an intent to award a punishment in excess of that the respondent otherwise deems appropriate. We may not engage in surmise to conjure up a possible basis for disqualification. We require a reasonable basis in fact. Applying an objective standard, we find nothing in the matters presented to us to question the impartiality of the respondent. Nor do we have reason to believe that he would award the petitioner a punishment in excess of that which is appropriate, that he would sentence the petitioner in reliance upon possible mitigating action by the convening or higher authorities, or that he harbors an inelastic predisposition to forms of punishment or fixed views inconsistent with his duty to tailor the punishment to the offense and the offender. We find the respondent did not abuse his discretion in not calling Lieutenant Colonel Stevens inasmuch as petitioner has failed to demonstrate that Lieutenant Stevens had anything to add beyond the matters already before the court. In light of Judge Anderson's responses to this Court's interrogatories, we also find that Judge Anderson, if called as a witness, would not have supported the petitioner's assertions. Finally, we find the respondent did not abuse his discretion in declining to disqualify himself.

In summary, the petitioner has not sustained his burden in establishing a reasonable factual basis for disqualification, nor has he shown that his right to mandamus is clear and undisputable. Accordingly, the petition for extraordinary relief in the nature of mandamus is denied, and the stay, granted by this Court on 29 November 1991, is dissolved.

R. M. MOLLISON

Senior Judge FREYER and Judge HOLDER concur.

J. A. FREYER

F. D. HOLDER

FOOTNOTES

1/ By order dated 29 November 1991, the Court stayed the petitioner's court-martial until 6 December 1991.

2/ Assuming *arguendo*, the production of witnesses on the issue of disqualification is governed by the same rules that concern the production of witnesses on other interlocutory issues, the moving party bears the burden of showing the requested witnesses' testimony on the issue of the trial judge's disqualification is relevant and necessary, and the military judges' ruling on the production of the witnesses would be subject to review for abuse of discretion. Articles 36, 46, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 836, 846; R.C.M. 703(b)(1), 905(b)(4), (c), 906(b)(7); *e.g.*, United States v. Roberts, 10 M.J. 308 (C.M.A. 1981).

3/ R.C.M. 902 is based on the statutory standards applicable to federal civilian proceedings. 28 U.S.C. § 455; *Analysis*, R.C.M. 902, M.C.M. App. 21-45.

4/ Grounds for disqualification should be raised at the earliest reasonable opportunity. *Discussion*, R.C.M. 902(d)(1). Here, *voir dire* of the respondent occurred after the accused had submitted a suppression motion and received an adverse ruling. The basis for the subsequent challenge of the respondent did not concern the ruling on the motion. Adverse rulings alone do not themselves constitute a basis for disqualification. Allen, 31 M.J. at 603.

5/ The law recognizes a qualified judicial privilege. See Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988); Matter of Certain Complaints Under Investigation By An Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488, 1517 (11th Cir. 1986), cert. denied, 477 U.S. 904 (1986). Recognition of the judicial privilege is relatively recent. Thus far, the privilege extends to a court's deliberative processes and to communications relating to official business, such as the framing and researching of opinions, orders and rulings. *Id.* We need not decide whether the privilege extends to general academic discussions between trial judges or whether it applies in this case. Nor do we intimate that all communications concerning judicial business between one judge and another are always beyond discovery. See United States v. Allen, 33 M.J. 209 (C.M.A. 1991); United States v. Mabe, 33 M.J. 200 (C.M.A. 1991); Clarke v. Breckenridge, No. 893618C, slip op. (N.M.C.M.R. 1991).