

MILITARY RULES OF EVIDENCE SYMPOSIUM: AN INTRODUCTION

by Robinson O. Everett*

A decade ago, after a two-year effort initiated by the Department of Defense General Counsel, the President promulgated the Military Rules of Evidence. These rules have had an enormous impact on the military justice system and on the conduct of courts-martial. It seems especially propitious, therefore, that we celebrate the tenth anniversary of the Military Rules of Evidence with a review of some of the significant developments in the Military Rules over the past decade. This issue of the *Military Law Review* contains numerous insights concerning the origin of the Military Rules of Evidence and the key evidentiary issues facing military practitioners today.

The Military Rules have been instrumental in allowing the military to deal with the challenges of an evolving and changing legal system. The past decade has seen remarkable growth in the number and complexity of new evidentiary issues. For example, the number of child abuse cases being tried by courts-martial has grown at a remarkable rate. The inevitable result has been the proliferation of evidentiary issues concerning the scope of hearsay exceptions under Military Rules of Evidence 803 and 804: What is an "excited utterance" or a statement "made for purposes of medical diagnosis or treatment"?¹ What is the scope of residual hearsay?² When is a declarant "sufficiently unavailable" to comply with the requirements of Military Rule of Evidence 804 and to overcome the accused's right of confrontation?

Military judges frequently have the first and most extensive exposure to new evidentiary issues, especially those involving scientific evidence. Because courts-martial are the only courts in which evidence obtained by drug testing is regularly used in criminal pro-

*When he wrote this introduction, Robinson O. Everett was the Chief Judge of the United States Court of Military Appeals. Chief Judge Everett received a B.A. (magna cum laude) and a J.D. (magna cum laude) from Harvard University and an LL.M. from Duke University. In 1956 Chief Judge Everett joined the Duke Law School faculty on a part-time basis and since then has served continuously on that faculty, becoming a tenured member in 1967. In February 1980 Chief Judge Everett was appointed to the Court of Military Appeals, and he assumed this office on April 16, 1980. On 1 October 1990, Eugene R. Sullivan became Chief Judge of the Court of Military Appeals.

¹See Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 803(2) and (4) [hereinafter Mil. R. Evid.].

²See Mil. R. Evid. 803(24), 804(b)(5).

secutions, military judges have been the first to deal extensively with the admissibility of such evidence in the face of constitutional and other challenges. In determining the admissibility of exculpatory polygraph evidence, military judges have been required to decide an issue left open by both the Federal Rules of Evidence and the Military Rules of Evidence—whether the *Frye* test still controls the admissibility of scientific evidence. This issue requires careful consideration.

An understanding of the relationship between the Federal Rules and the Military Rules provides valuable insights into both sets of rules and allows informed and constructive comparison of the two systems. For the most part, the Military Rules conformed to the Federal Rules of Evidence, which had been issued five years earlier. In several respects, however, the Military Rules are an improvement on the Federal Rules. For example, Military Rule of Evidence 412, the rape shield rule, is much better drafted than its federal counterpart. Military Rule of Evidence 201A provides a useful treatment of judicial notice of law for which there is no parallel in the Federal Rules. The Military Rules grant specific “privileges,” while Federal Rule of Evidence 501—the rule that addresses privileges—merely refers to “the principles of the common law, as it may be interpreted by the courts of the United States in the light of reason and experience.”

Unlike the Federal Rules, the Military Rules contain a section on exclusionary rules and related matters concerning self-incrimination, search and seizure, and eyewitness identification.³ Arguably, the federal district courts have no need for such a section. Moreover, by attempting this codification, the draftsmen created the danger that conflict might develop between some of the Military Rules of Evidence and future decisions by the Supreme Court. Nonetheless, after a decade’s experience—during which some conflicts of this type did develop⁴—I would agree with the view of the draftsmen that it was

imperative to codify the material treated in Section III because of the large numbers of lay personnel who hold important roles within the military criminal legal system. Non-lawyer legal officers aboard ship, for example, do not have access to attorneys and law libraries. In all cases, the Rules represent a judgment that it would be impracticable to operate without them.⁵

³See Mil. R. Evid. sec. III analysis, app. 22, at A22-5.

⁴*E.g.*, the Military Rules of Evidence, as originally drafted, did not contain a “good faith exception.”

⁵See Mil. R. Evid. sec. III analysis at A22-5.

Indeed, I believe that those who are responsible for updating the Federal Rules might well consider the desirability of expanding those rules to deal with some of the matters covered by Section III of the Military Rules.⁶

In some instances, the Military Rules may not have been applied exactly as the draftsmen had contemplated. As was true under prior military law, Military Rule of Evidence 405(a) allowed character to be proved by reputation or opinion;⁷ but Military Rule of Evidence 404(a)(1) followed its federal counterpart by allowing only evidence “of a *pertinent trait of the character* of the accused.” Subsequent judicial decisions—which sought to be responsive to the needs and customs of the unique military society—essentially have obliterated this limitation. Now an accused’s general military character is admissible in almost any conceivable trial by court-martial.

This issue of the *Military Law Review* offers a great deal to the reader. The authors examine and critique the origin, development, and possible future of the Military Rules of Evidence. Only through such self-examination can the military justice system live up to its full potential and remain responsive to a constantly changing military society. The military practitioner—and many others—will benefit greatly from studying this issue of the *Military Law Review*.

⁶Fortunately, an excellent opportunity has existed for bringing the experience with the Military Rules of Evidence to the attention of those charged with amending the Federal Rules. Professor Stephen Saltzburg, a co-author of an authoritative textbook, S. Saltzburg, L. Schinasi & D. Schlueter, *The Military Rules of Evidence Manual* (1986), served for many years as Reporter on the Federal Rules of Evidence; he is currently a member of the Advisory Committee that deals with these rules. Professor David Schlueter, another co-author of this textbook, is currently the Reporter, and, at the present time, I am serving as a member of the Advisory Committee on the Rules.

⁷Dean Wigmore, a principal draftsman of the chapter on evidence in the *Manual for Courts-Martial*, had criticized as too restrictive the civilian practice whereunder only reputation evidence was admissible to prove character; Federal Rule of Evidence 405(a) remedied this defect.

