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THE GRAVITY OF ADMINISTRATIVE DISCHARGES: A LEGAL AND EMPIRICAL EVALUATION*

By Major Bradley K. Jones**

The consequences of the general and undesirable discharges are frequently little considered by their recipients. Similarly they are little understood by the JAG officers asked to "counsel" the recipients. The author examines the consequences of the administrative discharge from the standpoint of governmental benefits lost and civilian opportunities prejudiced. A survey of employers, unions, colleges, and professional examiners reveals some of the difficulties facing the serviceman discharged under other than honorable conditions.

I. INTRODUCTION

> There can be no doubt that [an undesirable] discharge . . . is punitive in nature, since it stigmatizes the serviceman's reputation, impedes his ability to gain employment and is in life, if not in law, prima facie evidence against the serviceman's character, patriotism or loyalty.[1]

This federal district court statement aptly describes the present view of military administrative discharges thought to be held by most Americans. The undersirable discharge is the object of great concern and has evoked increasing Congressional interest in changing the procedural framework under which it is administered.

This article will attempt to determine whether the administrative discharges, although not designated punitive actions at law, do, in reality, have pragmatic consequences equally or more deleterious than punitive discharges. The legal background and consequences of administrative discharges will be discussed first

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[1] *Stapp* v. *Resor*, 314 F. Supp. 475, 478 (S.D.N.Y. 1970).

to present the factual background of the present stigma argument. Empirical data will then be used to test and evaulate the stigma argument. It should be noted that punitive discharges are discussed only for purposes of comparison, since this article deals primarily with administrative discharges and their pragmatic effects.

II. THE LAW OF ADMINISTRATIVE DISCHARGES

A. *HISTORY AND PRACTICE*

With broad enabling authority granted by Congress as the basis, the power to discharge enlisted men has been almost totally left to the discretion of the Secretaries of the Military Services.[2] Therefore, the law of administrative discharges is embodied largely in regulations published by the appropriate Secretary or his agents and is enforced by the sanctions delineated therein.[3] The Secretarys' discretionary power is limited only by the Department of Defense directive prescribing uniform minimum guidelines for the several armed services.[4]

Administrative discharges were originally characterized as honorable and without honor, whereas the only punitive discharge was labeled dishonorable. The "unclassified" discharge was added in 1913, becoming the third administrative discharge, but it and the without honor discharge were supplanted in 1916 by the "blue" discharge. In 1947, the blue discharge was split into the general and undesirable discharges as a result of the Veteran's Administration pressure for an increase in the definitive classifications of discharges to insure more categories of eligibility for benefits among discharged servicemen.[5] The general discharge was under honorable conditions whereas the undesirable was termed as under conditions other than honorable. Thus,

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[2] *See* 10 U.S.C. § 1169 (1970); Universal Military Training & Service Act § 4(b), 50 U.S.C. App. § 454(b) (1970). For parallel discussion, *see* Lane, *Evidence and the Administrative Discharge Board*, 55 MIL L. REV. 95–100 (1972).

[3] The current Army regulatory provisions are found in Army Reg. No. 635–200 (15 Jul. 1966), Army Reg. No. 635–206 (15 Jul. 1966), and Army Reg. No. 635–212 (15 Jul. 1966). Special provisions concerning conscientious objectors are found in Army Reg. No. 635–20 (31 Jul. 1970).

[4] Dep't of Defense Directive No. 1332.14 (Dec. 20, 1965).

[5] U.S. CODE CONG., AND ADMIN. NEWS, 2643 (1967); *Hearings on Constitutional Rights of Military Personnel Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 108 (1962) (testimony of Alfred B. Fitt, Deputy Under Secretary of the Army [hereinafter cited as *1962 Hearings*] Offer, *Administrative Discharges—What It's All About*, 25 ARMY DIGEST No. 9, p. 5 (1970).

today there are three administrative discharges and two punitive discharges in the following order: honorable, general, undesirable, bad conduct, and dishonorable.[6]

The administrative discharge system in the Army is implemented with the honorable discharge used as the measuring parameter. This discharge is awarded when there has been proper military behavior including proficient performance of duty.[7] When a serviceman's in-service record seems undeserving of an honorable discharge, one of the two remaining administrative discharges, the general or the undesirable, may be awarded if his behavior and duty performance are sufficiently below the standards for an honorable discharge so as to warrant one of these lesser discharges. The four categories of grounds for these discharges are unsuitability, unfitness, misconduct, and request for discharge for the good of the service. Discharge by reason of unsuitability will normally result in the issuance of a general discharge when the serviceman is unsuitable for further military service because of inaptitude, character and behavior disorders, apathy, defective attitudes, inability to ex pend effort constructively, enuresis, alcoholism, in-service homosexuality, and financial irresponsibility.[8] Discharge by reason of unfitness will normally result in the award of an undesirable discharge when a serviceman's military service record in his current period of service includes one or more of the following: frequent involvements of a discreditable nature with civil or military authorities; sexual perversion to include lewd and lascivious acts, homosexual acts, and sodomy; drug abuse; established pattern for shirking; established pattern showing dishonorable failure to pay just debts; dishonorable failure to support dependents; and unsanitary habits.[9] Discharge by reason of misconduct will normally result in an undesirable discharge when one or more of the following conditions exist: conviction by civil authorities of an offense for which the maximum penalty is confinement in excess of one year or of an offense involving moral turpitude, procurement of a fraudulent enlistment or induction, and prolonged unauthorized absence of one year or more.[10] Discharge by reason of a request for discharge for the good of the service will normally result in an undesirable dis-

[6] Army Reg. No. 635–200, para. 1–5 (15 Jul. 1966).
[7] DOD Dir., *supra* note 4, para VI–A.
[8] *Id.* para VII–G; Army Reg. 635–212, *supra* note 3, para 6*b*.
[9] DOD Dir., *supra* note 4, para VII–I; Army Reg. 635–212, *supra* note 3, para 6*a*.
[10] DOD Dir., *supra* note 4, para VII–J; Army Reg. 635–206, *supra* note 3.

charge where a serviceman's conduct rendered him triable by court-martial under circumstances which could lead to a punitive discharge.[11] After studying the grounds within each of the categories, it should be noticed that unsuitability is a word of art concerning matters and problems which are beyond the serviceman's control whereas unfitness and misconduct are words of art for acts which are voluntarily performed. Additionally, although the customary discharge awarded for each of the categories is as mentioned above, the convening authority has the power to upgrade any of the discharges to a more favorable classification when the particular circumstances in a given case warrant such action.[12]

All the armed services utilize the four categories of grounds for administrative discharges aforementioned. All have nearly identical guidelines [13] in their individual regulations for issuing these discharges.[14] There are, however, some minor deviations from the Army system in procedure and grounds for issuance. The Coast Guard, Marine Corps, and Navy have one additional unfitness ground, "for other good and sufficient reasons," [15] whereas the Air Force has three additional grounds for unfitness: habits and traits of character tending towards antisocial immoral trends, conviction by a court-martial with sentence of confinement greater than six months, and established unauthorized absence of less than one year but court-martial is deemed inadvisable.[16] Another difference is in the interpretation of what constitutes a conviction by a civil court for determining misconduct sufficient for discharge. The Coast Guard, Marine Corps, and Navy do not spell out what offenses involve moral turpitude,[17] whereas the Air Force and Army have narrowed moral turpitude to include only offenses involving narcotics violation

[11] DOD Dir., *supra* note 4, para VII-K; Army Reg. 635-200, *supra* note 3, Ch. 10; JAGA 1969/3538, 25 Mar. 1969.

[12] Army Reg. 635-200, *supra* note 3, para 10-8; Army Reg. 635-206, *supra* note 3, para 30; Army Reg. 635-212, *supra* note 3, para 4*a* & *b*.

[13] *Supra*, note 3; Air Force Reg. Nos. 39-10 & 39-12; Coast Guard Reg. Nos. 12-B-6; 12-B-10, 12-B-12, 12-B-13, 12-B-15; Marine Corps Sep. Man. 6012 & 6016-6019; Navy BuPersMan 3420180, 3420220, 3420240, 3840080, 3850120, 3850220, 3850300, 3860140; Dougherty & Lynch, *The Administrative Discharge: Military Justice?*, 33 GEO. WASH. L. REV. 498, 501 (1964).

[14] DOD Dir., *supra* note 4. The specific requirements of the Directive, of course, control.

[15] Coast Guard Reg. No. 12-B-12; Marine Corps Sep. Man. 6017; Navy BuPersMan 3420220.

[16] Air Force Reg. No. 39-12.

[17] Coast Guard Reg. No. 12-B-13, Marine Corps Sep. Man. 6018; Navy BuPersMan 3420240 & 3860140.

or sexual perversion.[18] Generally, all services consider convictions to attach at the termination of the trial even though an appeal is pending. However, the Air Force holds any administrative discharge procedure in abeyance until the appeal is finally reviewed. If the appeal results in the sentence being set aside, then no discharge procedure is initiated. The Army starts the discharge procedure immediately but no discharge is issued until the appeal is finally denied or the serviceman has waived his right to await final review.[19] Finally, the Air Force and Army prohibit the issuance of a discharge less favorable than that recommended by an administrative board whereas the Coast Guard, Marine Corps, and Navy permit the reviewing authority to change the board's recommendation to the detriment of the serviceman.[20]

B. *REVIEW AND REMEDIES*

The administrative discharge appellate system consists of local convening authority review and two administrative review boards. The local judge advocate normally reviews the legal sufficiency of the findings and recommended disposition of the board of officers.[21] Reversible error is rarely found and the convening authority customarily issues a discharge in accordance with the board's recommendation.

Subsequent to the discharge, the individual, now a civilian, has the right to have his case reviewed by the Army Discharge Review Board (ADRB).[22] If the ADRB denies the request for change and issuance of a new discharge, the individual may petition the Army Board for Correction of Military Records (ABCMR).[23] The scope of inquiry of the ADRB is limited to determining whether the type of discharge received was equitably and properly given under the specific facts presented. It does not review all the merits or the facts of each individual's career. The ABCMR provides review of service records in order to

[18] Army Reg. No. 635–206 para 3*g*; Air Force Reg. No. 39–12.

[19] *Id.*; Dougherty & Lynch, *supra* note 13, at 504; Lerner, *Effect of Character of Discharge and Length of Service on Eligibility To Veteran's Benefits*, 13 MIL. L. REV. 121, 133 (1961).

[20] Dougherty & Lynch, *supra* note 13, at 515.

[21] Review by a Judge Advocate is required prior to the issuance of an undesirable discharge under Army Reg. No. 635–212, para. 19*a* (15 Jul. 1966).

[22] Army Reg. No. 15–180 (9 Feb. 1965).

[23] Army Reg. No. 15–185 (8 Jan. 1962). There is no right to a hearing at the ABCMR, in fact petitions are often denied for failure to state a cause for relief or for failure to exhaust other administrative remedies. *See* AR 15–185, para 8.

correct errors or remove an injustice and thus has a broader scope of review and remedial power than does the ADRB.

Several problem areas in the review system exist. Most noteworthy is the time perspective and attitude within which administrative discharge appeals occur. The review occurs post-discharge at a time when the individual is a civilian. Thus, he no longer has free military counsel provided for his appeal as he would in the case of a punitive discharge. Additionally, unlike punitive discharges, there is virtually no review after approval and prior to execution of discharge. Thus, the petitioner is challenging a *fait accompli.*

An inadequate solution to the lack of counsel problem is offered by the American Legion, American Red Cross, Disabled American Veterans, and Veterans of Foreign Wars, who provide free advocates for the petitioner before the ADRB and ABCMR.[24] The counsel provided by these organizations are very experienced in practicing before these boards but are not legally qualified counsel. They will accept all cases, however, and advocate them throughout the approximately one year period needed for complete appellate review. However, the individual's hopes should not be set high. Since the inception of the ADRB in 1944, there have been 94,700 cases considered, but only 8,900 changed to honorable and 5,960 changed to general discharges. Thus, the 14,860 changes indicate that the individual has a 15.7% chance of upgrading his discharge.[25]

An inadequate alternative to the military appellate system would be for the individual to bring suit directly before the United States Court of Claims or a federal district court. These courts will review the discharge solely to determine whether the requirements of due process have been fulfilled and will not peer into the merits of the discharge decision. Thus, the individual must present a justiciable violation of individual rights tantamount to a denial of due process or establish that the service agency involved did not follow its own regulations.[26] Obviously, this avenue is rarely utilized because of the prohibitive expense.

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[24] Telephone interview with Mr. Campbell, American Red Cross Counsel, in Washington, D.C., 29 Dec. 1971.

[25] Engelhardt, *Many Learn—Too Late*, ARMY DIGEST p. 66 (May 1969); Comment, *Little Chance of Getting Undesirable Discharge Reversed*, ARMY DIGEST p. 2 (June 1971); Telephone interview with Col. Richard F. Seibert, Chief Counsel Army Council of Review Boards, in Washington, D.C., 5 Jan. 1972.

[26] *Beard* v. *Stahr*, 370 US 41 (1962); *Harmon* v. *Brucker*, 355 U.S. 579 (1958); *Roberts* v. *Vance*, 343 F. 2d 236 (D.C. Cir. 1964).

Other partial remedies exist, but are merely laudatory in nature and do not alter the discharge. The Department of Labor, upon individual request and documentation, will issue an Exemplary Rehabilitation Certificate [27] to aid discharged servicemen in combating the effects of a less than honorable discharge. The certificate, issued by the Secretary of Labor, is a remedy for that express purpose, but in no way alters the less than honorable discharge received. The certificate states that the individual has been rehabilitated as an exemplary citizen as judged by his performance during the preceding three year period and that he is entitled to special job counseling and job placement services. To obtain the certificate, the individual must have been an exemplary citizen for a minimum of three years subsequent to discharge and complete an application with recommendations from the chief law enforcement agency in his community, present and past employers, and five character references. He accrues no benefits from the certificate except those to which he was already entitled when he received his discharge.[28] The inadequacy of the certificate is illustrated by the fact that since 1966, there have been 3,500 requests for the application, only 566 returned completed, and of those, only 460 certificates actually issued.[29] The program seems to be unpublicized, unknown, and of doubtful help.

C. PROPOSALS FOR CHANGE

Criticism of administrative discharge procedures seemed to snowball after Chief Judge Robert E. Quinn of the Court of Military Appeals stated that he was aware of occasions on which the administrative discharge was being used by the services to circumvent the judicial safeguards of the *Uniform Code of Military Justice*.[30] The fallout ignited Congressional investigation of the administrative discharge system during the 1962 military justice hearings [31] and the introduction of legislation by Senator

[27] 29 U.S.C. §§ 601–607 (1970).
[28] 29 U.S.C. § 604 (1970).
[29] Engelhardt, *Many Learn—Too Late*, ARMY DIGEST p. 66, 67 (May 1969).
[30] *United States* v. *Phipps*, 12 U.S.C.M.A. 14, 30 C.M.R. 14 (1960). Judge Quinn stated:

> I am also aware of circumstances tending to indicate that the undesirable discharge has been used as a substitute for a court-martial, even in deprivation of an accused's rights under the Uniform Code of Military Justice. However, the remedy for this troublesome situation rests in the hands of Congress.

Id., at 16. Judge Quinn reiterated his opinion during his testimony at the Senate committee hearings in 1962. *1962 Hearings* 179.
[31] *1962 Hearings* 2.

Sam J. Ervin (D–NC).[32] The Secretary of Defense was swayed by the criticism and issued a new directive which increased the rights of servicemen in discharge proceedings and enlarged previously skimpy procedural guidelines.[33] Additional Congressional hearings dealing with the rights of servicemen were held in 1966 [34] and gave birth to a new, more detailed bill offered by Senator Ervin the next year.[35]

Such Congressional activity stirred considerable discussion of the administrative discharge system [36] and the American Bar Association's Special Committee on Military Justice issued recommendations for minimum standards in 1968.[37] These recommendations later formed the substance of legislation submitted by Representative Charles E. Bennett (D–Fla).[38] The bill and ABA recommendations are general in purview and place few limitations on the particular service Secretary's discretion.[39] In 1971 a more drastic Ervin bill [40] was introduced, followed shortly

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[32] Senator Ervin's proposals for legislative changes in the discharge system were contained in several of the eighteen bills he introduced concerning military justice. S.2002–19, 88th Cong., 1st Sess. (1963).

[33] *Compare* Department of Defense Directive 1332.14 (Dec. 20, 1965) *with* Department of Defense Directive 1332.14 (Jan. 14, 1959) The new directive made representation by lawyer-counsel mandatory, with several exceptions, whereas the previous regulation was very permissive as to this requirement. The sections of board procedures, former jeopardy, and review action were greatly expanded with increased limitations placed on commanders.

[34] *Joint Hearings on S.745 (and other bills) Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and the Special Subcomm. of the Senate Comm. on Armed Services*, 89th Cong., 2d Sess. (1966) [hereinafter cited as *1966 Hearings*].

[35] S.2009, 90th Cong., 1st Sess. (1967); reintroduced as S.1266, 91st Cong., 1st Sess. (1969); reintroduced as S.2247, 92d Cong., 1st Sess. (1971). Senator Ervin's bill proposes a new chapter to Title 10, United States Code, containing twenty-six sections and covering twenty-seven pages. The bill would establish an entire statutory discharge system from jurisdiction through final review, with little discretion vested in the Secretary.

[36] *See* Lynch, *The Administrative Discharge: Changes Needed?* 22 MAINE L. REV. 141 (1970); Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L. J. 41; Dougherty and Lynch, *Administrative Discharges: Military Justice?*, 33 GEO. WASH. L. REV. 498 (1964).

[37] *Report of the Special Committee on Military Justice*, 93 A.B.A. REP. 577 (1968). The recommendations included the power to issue process, greater discovery rights, and findings based on a preponderance of the evidence.

[38] H.R. 19697, 90th Cong., 2d Sess. (1968), reintroduced as H.R. 523, 92d Cong., 1st Sess. (1971).

[39] The Bennett bill proposes to amend 10 U.S.C. § 1161 alone, and covers only three pages. The bill follows the ABA committee's philosophy that the detailed provisions in Senator Ervin's bill would improperly invade the service secretaries' administrative discretion and that only policy guidance is needed. 93 A.B.A. REP. 577, 580 (1968).

[40] S.2247, 92d Cong., 1st Sess. (1971).

by a stronger Bennett bill [41] which incorporated some of the provisions of the previously introduced Ervin bill. The Bennett bill has Department of Defense backing and in fact, is that Department's substitute bill.[42]

These bills are intended to increase the rights of servicemen to ensure due process at administrative discharge proceedings. Normally, a serviceman may not be less than honorably discharged except upon the recommendation of a board of officers. However, the decisional procedures of the board are administrative in nature and most of the safeguards found in criminal judicial proceedings are lacking. Respondents are generally entitled to the following rights: a hearing, notice, statement of allegations, names of adverse witnesses, presence of available witnesses, counsel, and cross-examination of witnesses present.[43] On the other hand, practically anything is admissible as evidence and there are no rights of mandatory attendance of witnesses or in-hearing confrontation and cross-examination. The Bennett and Ervin bills attempt to cure these particular problems of the present system by an overhaul which results in additional rights for the servicemen. The Ervin bill would prohibit issuance of an undesirable discharge unless the serviceman is represented by legally trained counsel at the proceeding. Also, a serviceman would be entitled to the right of confrontation and cross-examination of witnesses while the administrative board would have concomitant subpoena powers over witnesses.[44] In contrast, the first Bennett bill added little to the current Department of Defense Directive except to grant subpoena power to the board of officers and require board decisions to be based on a preponderance of the evidence.[45] The new Bennett bill [46] would allow an undesirable discharge to be given a serviceman without board action for: 1) AWOL for one year or more, 2) conviction by a civil court for an offense which under the UCMJ carries confinement in excess of one year, and 3) an aggregate of three separate courts-martial or civilian convictions within a

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[41] H.R. 10422, 92d Cong., 1st Sess. (1971).

[42] Dep't of Defense Substitute Bill, *Hearings on H.R. 523 (H.R. 10422) Before the Subcomm. to Limit the Separation of Members of the Armed Forces Under Conditions Other Than Honorable of the House Comm. on Armed Services*, 92d Cong., 1st Sess., at 5846–8 (1971) [hereinafter cited as *1971 Hearings*]; H.R. 10422, *1971 Hearings* 6034–7.

[43] Army Reg. 15–6 para 8, *supra* note 21; Army Regs. 635–200, 206, 212, *supra* note 3.

[44] S.2247, 92d Cong., 1st Sess. (1971).

[45] H.R. 10422, 92d Cong., 1st Sess. (1971).

[46] *Id.*

three year period. Additionally, no undesirable discharges could be awarded unless the respondent were defended by a legally qualified attorney and the board of officers would have subpoena powers over witnesses. Board decisions would be based upon the preponderance of the evidence rule and a Department of Army review board would be established to enable respondents to appeal an adverse officers board decision prior to his discharge into civilian status. Thus, the new Bennett bill provides, in moderation, many of the proposed safeguards of the more drastic Ervin bill.

III. THE PUNITIVE ASPECTS OF THE ADMINISTRATIVE DISCHARGE

Spurring the various proposals for new administrative discharge legislation is the belief that any less than honorable discharge [47] may substantially hinder the post-service life of its recipient. Clearly the military itself promotes this belief.[48] Scholarly comment,[49] testimony before leglislative bodies [50] and court opinions [51] also mention a stigma attaching to administrative discharge recipients. The exact nature and extent of the stigma, however, are rarely discussed. Often hearsay substitutes for legal knowledge, and personal experience suffices in view of the lack of empirical data.

A. *GOVERNMENT BENEFITS LOST*

The tangible detriment to the administratively discharged serviceman involves his eligibility for the multitude of post-service benefits provided by federal and state agencies.

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[47] The term "less than honorable discharge" is used to denominate the general, undesirable, bad conduct, and dishonorable discharges. The term "administrative discharge" is used to refer to the general and undesirable discharges.

[48] Army Reg. 635-206, fig. 1 (15 Jul. 1966); Army Reg. 635-212, fig. 1 (15 Jul. 1966). A soldier being discharged from the Army is advised that an undesirable discharge results in the loss of many or all veteran's benefits and causes substantial prejudice in civilian life. *See* Lynch, *The Administrative Discharge: Changes Needed?*, 22 MAINE L. REV. 3 (1970).

[49] *See generally* Dougherty & Lynch, *supra* note 13; Susskind, *Military Administrative Discharge Boards: The Right to Confrontation and Cross-Examination*, 44 MICH. STATE BAR J. 25 (1965); Creech, *Congress Looks to the Serviceman's Rights*, 49 ABAJ 1070 (1963); Bednar, *Discharge and Dismissal as Punishment in the Armed Forces*, 16 MIL. L. REV. 1 (1962); Metsch, *Stigmatic Military Discharges*, 57 A.B.A.J. 1068 (1971).

[50] *See* footnotes 64-71 *infra*.

[51] *See* text and cases cited at footnotes 72-76 *infra*.

The greatest economic impact of the undesirable discharge in causing lost government benefits is in the area administered by the Veterans Administration (VA). Confusion exists in the public mind as to which discharges bar the ex-serviceman from which benefits. A good deal of this riddle can be solved when it is understood that only "veterans" are eligible to receive VA benefits and a "veteran" is defined as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom *under conditions other than dishonorable.*" [52] Thus, a veteran, in VA terminology, may receive a discharge worse than honorable but better than the dishonorable and still qualify for VA benefits. Congress obviously intended to make the maximum number of servicemen eligible without including incorrigibles when it defined veteran in such broad terms. The question is then reached as to where the general and undesirable discharges fall. The very terms of the general discharge, under honorable conditions, and the statutory language qualify the recipient for all federal benefits, whether administered by the VA or other federal agency. It is the undesirable discharge which creates the difficulty. The determination of who is a veteran qualifying for benefits in the case of the undesirable discharge is an administrative determination within the discretionary power of the Veterans Administrator pursuant to the guidelines established by statute and agency regulations.[53] The Administrator's determination is final and conclusive without being subject to review by other agencies or the courts.[54] He has authority to promulgate regulations controlling the nature and extent of evidentiary proof necessary before the VA Board and to establish the procedures for collecting and furnishing this evidence to the Board to aid it in reaching its decision.[55] Examples of benefits which hang on the discretion of the VA Board are the payment of dependency and indemnity compensation, Servicemen's Group Life Insurance, educational assistance under the GI Bill, home and other loans, and funeral and burial expenses.

Guidelines utilized for the exercise of VA discretion are fairly broad, but they specifically deny certain grounds for the issuance of an undesirable discharge from qualifying as other than dishonorable. A discharge received for any of the following

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[52] 38 U.S.C. § 101 (2) (1970) (emphasis added).
[53] 38 C.F.R. § 3.12 (1971).
[54] 38 U.S.C. § 211*a* (1970).
[55] 38 U.S.C. § 210*c* (1970).

reasons is considered to have been issued under dishonorable conditions:

1. acceptance of undesirable discharge in lieu of a general court-martial,
2. mutiny or spying,
3. conviction of an offense involving moral turpitude (felony)
4. willful and persistent misconduct (This includes a discharge under other than honorable conditions, if it is issued because of willful and persistent misconduct. A minor offense discharge will not be considered willful and persistent if the individual's service was otherwise honest, faithful, and meritorious.), and
5. homosexual acts.[56]

Additionally, a discharged serviceman who was a conscientious objector who refused to perform military duty, wear a uniform, comply with lawful orders of military authorities, or who was a deserter, is totally barred from receiving any VA benefits regardless of the type discharge received.[57]

Certain benefits administered by the military services are denied the recipient of an undesirable discharge. These include payment for accrued leave, transportation of dependents and household goods, and burial in a national cemetery. Similarly, benefits administered by other federal agencies such as the five point veteran federal civil service preference and reemployment rights which assure restoration to a job if application for reemployment is made within 90 days subsequent to discharge are lost. If a serviceman is improperly awarded an other than honorable discharge which is later upgraded by a review board, he can claim back pay to a maximum of $10,000 by entering the Court of Claims. However, he has lost a property right to any back pay in excess of the court's jurisdictional limit.[58]

There are no statutory bars precluding the employment of administratively discharged individuals for Federal Government jobs. However, in the case of the undesirable discharge and the absence of any extenuating circumstances, the individual may not be accepted until the lapse of one year subsequent to his discharge. Further, he is subject to appropriate investigation to ensure that the grounds for the discharge do not raise a serious

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[56] 38 C.F.R. § 3.12*d* (1971).
[57] 38 C.F.R. § 3.12*c* (1&4) (1971).
[58] 28 U.S.C. § 1491 (1970); Voira, *Extraordinary Relief of Punitive and Administrative Discharges from The Armed Forces*, 7 DUQ. L. REV. 384 (1968–69).

question as to fitness for employment such as criminal convictions or immorality.[59] Thus, the administrative discharge would rarely be the sole basis for inability to acquire federal employment; inability to acquire a security clearance is a contributing factor. Additionally, federal agencies look askance at the hiring of individuals discharged from other federal agencies. The inability to obtain a security clearance also creates employment difficulties with private firms performing under Federal Government contracts. There are no statutory bars nor mandatory contract clauses which preclude the employment of administratively discharged individuals by the prime or sub-contractors.[60] Again, however, the inability to obtain a security clearance creates the same effect as with federal employment.

State veterans benefits may also be denied. For example, in New York a general discharge bars the individual from receiving state veteran benefits similar to those he is simultaneously eligible for under federal law since a prerequisite for the state benefits is an honorable discharge.[61] Also, if state law interprets a "conviction" to include an undesirable discharge, the individual would lose additional benefits and property rights as well as acquire damaging civil disabilities.[62] Thus, it is arguable that an undesirable discharge might result in the same lost rights, under state statute, as would a criminal conviction.[63]

B. *CIVILIAN COMMUNITY EFFECTS*

While an undesirably discharged serviceman may never care to use VA benefits or take a job requiring a security clearance, he will almost certainly be wanting to work or go to school

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[59] F.P.M. 731-7 (Inst. 85, 27 Jan. 1967), para 2-3*a*; F.P.M. Supp. 337-72.

[60] 32 C.F.R. parts 1-39 (ASPR) (1971). *See* "clauses" in part 7 therein.

[61] *Schustack* v. *Herren*, 234 F. 2d 134 (2d Cir. 1956).

[62] Special Project—*The Collateral Consequences of a Criminal Conviction: Civil Disabilities*, 23 VAND. L. REV. 929 (1970). Examples are disfranchisement, loss of right to hold public office, and loss of employment, judicial, domestic, and property rights.

[63] A profitable followup study might examine the policies of state employment boards and state licensing agencies regarding less than honorable discharges. The Virginia Employment Commission indicated that its policy is to ignore discharge classifications and provide its employment services to all individuals. Interview with Virginia Employment Commission, Charlottesville, Virginia, 28 December 1971. A similar check with the Virginia Alcoholic Beverage Control Board indicated that an administrative discharge in no way tainted an ex-serviceman's application for a liquor sales license. Virginia prohibits the issuance of the license when the applicant has been convicted of a felony involving moral turpitude. Interview with Local Director, Virginia Alcoholic Beverage Control Board, Charlottesville, Virginia, 28 December 1971.

somewhere. In this area the effects of the administrative discharge may be most serious and are least known.

The consensus of opinion among witnesses at various Congressional hearings, which have produced many outspoken critics of the severity of administrative discharges, has been that a stigma does attach.[64] However, their opinions have never been verified by an empirical study or other collected data. Major General Kenneth J. Hodson testified that he had no evidence to refute the stigma allegation.[65] In testimony concerning the undesirable discharge, former Chief Judge Quinn of the Court of Military Appeals testified:

> I think, generally speaking, Mr. Chairman, it is worse than a bad conduct discharge, as far as its implications are concerned, and the results are also quite severe. You cannot get a job in a bank, or in a trust company or for the government . . . or any of the places where there is any confidential requirement. They will not give work to a man with an undesirable discharge. It is a very severe penalty.[66]

Chief Judge Quinn's rationale for this statement is that while people may overlook one act of bad conduct, they are not so prone to overlook undesirability.[67] In a similar vein, Congressman Clyde Doyle stated that the results of a quick poll of industry indicated that a man with an undesirable discharge would generally not be granted an interview,[68] and in discussing why an undesirable discharge creates a life stigma, he stated:

> I think it is, because with the ordinary person you will say a man is an undesirable citizen in civilian life, that is a life stigma. He is an undesirable. You don't want to have anything to do with him.

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[64] *1962 Hearings* 5, 315–28, 335–36 (testimony of Senator Kenneth Keating (R–NH), Representative Clyde Doyle (D–Cal), and Charles H. Mayer). In the Senate report it was stated that the subcommittee had received letters from many ex-servicemen who accepted undesirable discharges without a full understanding of the stigma and the difficulty it created in obtaining employment. *Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess., *Summary Report of Hearings on Constitutional Rights of Military Personnel Pursuant to S. Res. 58* 2 (1963); *1971 Hearings* 5825–5938.

[65] *1966 Hearings* 381 (testimony of Brigadier General Kenneth J. Hodson, Assistant Judge Advocate General). General Hodson was appointed The Judge Advocate General of the Army later that year and promoted to Major General. At subsequent hearings, he testified that the undesirable discharge tags a man and has an adverse effect upon gaining civilian employment. *1971 Hearings* 5916.

[66] *1962 Hearings* 188.

[67] *Id.* Not many people outside the military realize that the bad conduct discharge is the result of a criminal conviction. The natural tendency is to suppose that a man found undesirable by the military is also undesirable for civilian society, while bad conduct is only a one-time mistake. *1962 Hearings* 328 (testimony of Representative Clyde Doyle (D–Cal)).

[68] *1962 Hearings* 315 (testimony of Representative Clyde Doyle (D–Cal)).

> You don't go into detail to find out what makes him undesirable. You think he may be a thief, he may be a homosexual, he may not be supporting his children, his family, in the minds of some people, but he is undesirable, you don't want him around. . . .[69] It is a liability and a heavy one.

The Congressional hearings are replete with similar criticism by witnesses.[70] Thus, there are many who believe that an undesirable discharge is tantamount to or even worse than a punitive bad conduct discharge. Similar, but less severe stigma has been said to attach to the general discharge.[71]

Many civilian courts have felt that any discharge other than honorable carries with it some degree of stigma and deprivations.[72]

> [A]ny discharge characterized as less than honorable will result in serious injury. It not only means the loss of numerous benefits in both the federal and state systems, but it also results in an unmistakable social stigma which greatly limits the opportunities for both public and private civilian employment.[73]

Since most soldiers are discharged from the service with honorable discharges, an undesirable discharge places great stigma on the ex-serviceman.[74] Some courts have been more forceful in clearly stating that undesirable discharges carry the same stigma as punitive discharges.[75]

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[69] *Id.* at 328.

[70] *1962 Hearings* 15–18, 354–64 (BCD and undesirable discharges produce very similar stigma and hardships); 1966 Hearings 834–35 (undesirable discharge is a flagrant act of character assassination); *1966 Hearings* 335 (undesirable discharge carries with it the suspicion of homosexuality); *1971 Hearings* 5825, 5900 (BCD is better than an undesirable discharge since the undesirable cannot be explained away—testimony of Representative Charles E. Bennett); *id.* at 5856 (Bennett—an undesirable discharge carries the connotation of being penal in nature); *1971 Hearings* 5855.

[71] *1962 Hearings* at 328, 330–41 (a general discharge carries an implied stigma in the eyes of prospective employers since the overwhelming number of discharges are honorable); *1971 Hearings* 6000 (testimony of Karpatkin, ACLU General Counsel—the public equates anything other than honorable with undesirable).

[72] *Beard* v. *Stahr*, 370 U.S. 41 (1962), J. Douglas dissent at 42–45; *Nelson* v. *Miller*, 373 F. 2d 474 (3d Cir. 1967); *Van Bourg* v. *Nitze*, 388 F. 2d 557 (D.C. Cir. 1967); *Bland* v. *Connally*, 293 F. 2d 852 (D.C. Cir. 1961); *Unglesby* v. *Zimny*, 250 F. Supp. 714, 716 (N.D. Cal. 1965); *Conn* v. *United States*, 376 F. 2d 878, 881 (Ct. Cl. 1967); *Sofranoff* v. *United States*, 165 Ct. Cl. 470 (1964); *Murray* v. *United States*, 154 Ct. Cl. 185 (1961); *Clackum* v. *United States*, 148 Ct. Cl. 404 (1960); *Stapp* v. *Resor*, 314 F. Supp. 475, 478 (S.D.N.Y. 1970).

[73] *Bland* v. *Connally*, 293 F. 2d 852 (D.C. Cir. 1961).

[74] *Id.* at 858.

[75] *Van Bourg* v. *Nitze*, 388 F. 2d 557 (D.C. Cir. 1967); *Stapp* v. *Resor*, 314 F. Supp. 475, 478 (S.D.N.Y. 1970); *Glidden* v. *United States*, 185 Ct. Cl. 515 (1966).

In contrast, some courts have disagreed with the claims of severity concerning the general discharge, stating that it is not severe nor punitive in nature.[16] These courts maintain there is no connotation of dishonor in a general discharge, that it does not deprive service personnel of any of the inherent rights provided by honorable discharges, and that there certainly is a lesser stigma attached to a general discharge.

IV. AN EMPIRICAL VIEW OF THE STIGMA

A. *SURVEY OBJECTIVES*

Much of the commentary regarding the effect of the administrative discharge is based on sheer speculation.[17] To remedy this defect, a survey was conducted of employers, educators and professional licensing authorities to determine their understanding of and reaction to various forms of less than honorable discharge.[18] The survey sought answers to the following questions: 1) To what extent is there awareness of the distinctions between the various types of discharges? 2) Is a man's discharge characterization considered in a hiring or acceptance decision? 3) If so, what investigation of the discharge is made and to what extent do the various types of less than honorable discharges disqualify or retard the serviceman?

B. *THE TECHNIQUE*

One thousand subjects were selected from each of six regions within the United States.[19] The actual selection of subjects was

[16] *McCurdy* v. *Zuckert*, 359 F. 2d 491 (5th Cir. 1966); *Ives* v. *Franke*, 271 F. 2d 469 (D.C. Cir. 1959); *Grant* v. *United States*, 162 Ct. Cl. 600 (1963).

[17] One exception is a survey of the Amarillo, Texas, area completed by Leonard J. Hippchen in 1962 which attempts to establish the impact that other than honorable discharges have on nine business classifications of both large and medium size firms. Hippchen's efforts seem to be directed towards ascertaining which job types were most available to these individuals. He used the term, dishonorable as synonymous with other than honorable since it was his assumption that civilian employers would be unable to differentiate and were only cognizant of dishonorable vis-a-vis honorable. Therefore, his results are less than discriminating when it comes to analyzing the relative position of administrative discharges vis-a-vis punitive discharge. Hippchen, *Employer Attitudes Toward Hiring Dishonorably Discharged Servicemen*, THE MILITARY PRISON, p. 170 (1970).

[18] A copy of the questionnaire appears as appendix A. The "Yes-No" format was utilized to encourage ease of answering for the respondents and ease of compilation for the author. Respondents were promised anonymity in their responses.

[19] The regional divisions were (1) Northeast (Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont); (2) Southeast (Alabama, District of Columbia, Florida, Georgia, Kentucky, Maryland, Mississippi, South Carolina,

made from national directories. Various types of businesses, large and small, were selected to ensure that a cross-section of typical employers were represented. Large businesses were separately defined as having annual income of over $1,000,000. Unions were selected so as to gain representation for blue collar trades. Medical and bar examiners were canvassed to cover professional employment. Large (over 5,000 students) and small colleges were selected to measure any educational difficulties that discharged servicemen encounter.

Each of these seven types of activities, representing a cross-section of American employment, were canvassed in each of six regions. The two business categories were further broken down into large (over 250,000 population) and small cities so the impact of both business and city size could be measured. Thus, there were six possible combinations of each activity being evaluated except in the two business categories which had twelve. The number of questionnaires sent to each activity was determined by the probable impact that activity would exert upon the ex-serviceman. Thus, traditional businesses received 600 of the total 1,000 surveys. Large colleges, small colleges, and unions received 100 questionnaires each with the remainder going to the professional examiners. Of the 1,000 questionnaires sent, 547 were returned in usable form and in time to be analyzed.[50]

North Carolina, Tennessee, Virginia, and West Virginia); (3) North Central (Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin); (4) South Central (Arkansas, Colorado, Kansas, Louisiana, Missouri, New Mexico, Oklahoma, and Texas); (5) Northwest (Alaska, Idaho, Montana, Oregon, Washington, and Wyoming); (6) Southwest (Arizona, California, Hawaii, Nevada, and Utah). The number of respondents per region was proportionately established by overall population to equalize a nationwide representation of responses and to insure a more accurate depiction of the attitudes within a particular region. There was a conscious effort made to select respondents such as the automobile manufacturers in Detroit who had the greatest probability of being an employment target of the discharged individual and would thus exert a more realistic influence on the survey.

[50] The survey seemed valid based upon the 60% response and the appropriateness of answers. Nearly all questions were answered with logic and a degree of understanding. This could be judged since subsequent questions were generally dependent upon the response to previous questions.

There were several survey limitations worth noting. First, it was impossible to tabulate each region by activity; that is, to indicate what activity within the region had the most impact on the overall regional percentage. Region-by-activity samples would have been too small for meaningful survey purposes. Second, the data for the unions is probably of limited value due to the 25% response received, a figure far lower than any other return rate. Also, the questionnaire was sent to national or intermediate union headquarters who may have had little to do with union employment policies. A valuable future study might contact local union hiring halls. Finally, the

To determine the significance of the variables of activity, region, and city size, the "chi square" method was used. In brief summary, this statistical technique expresses the likelihood that a tested variable (here activity, region, or city size) rather than mere chance was responsible for differing results.[51]

A measured confidence level (C.L.) equal to or greater than 95% would indicate that the tested variable was significant in influencing the responses. A C.L. below 95% would tend to indicate no influence or a limited influence was exerted by the tested variable. Although the C.L. is not an absolute indication that the tested variable was the controlling factor which others were dependent on, it does add credence to the suggestion that a tested variable is the controlling factor in the responses.

C. *RESULTS*

Considered as a whole [52] the results showed considerable knowledge of military discharge practices, significant use of the discharge as an employment or admission qualification and a rather sophisticated distinction among the less than honorable discharges. Virtually all respondents (98%) indicated a familiarity with court-martial discharge powers. Eighty percent indicated a general awareness of the existence of other than dishonorable and honorable discharges. Sixty percent specifically knew of the existence of the administrative general or undesirable discharge.

Approximately two-thirds (65.6%) of all respondents did make inquiry as to an ex-serviceman's discharge. The majority of those inquiring (60.1%) simply accepted the man's word as to the character of discharge. One-third required a showing of the discharge certificate and only six percent made inquiry to the appropriate armed service.

A less than honorable discharge obviously hampered an ex-serviceman's employment or acceptance prospects. The majority of respondents admitted that their policies were "influenced" by any type of discharge other than honorable. A smaller per-

survey did not adequately cover cities under 10,000 population nor one-man stores in larger cities. Again, further study could provide additional valuable data.

[51] The "Chi Square" computer program was selected from among several choices since it performed the greatest number of operations desired at the lowest cost, yet with great efficiency in producing usable, intelligent data. The decision to run three chi square programs was based on the author's pre-survey hypothesis that activity, region, and city size might all be critical variables in determining the reaction to less than honorable discharges

[52] The overall results may be obtained from the Total column of the Activity Survey, appendix B.

centage, ranging as high as one-third for dishonorable discharges, *automatically disqualified* such applicants. The majority of respondents not automatically disqualifying an applicant did look behind the discharge and based their hiring or acceptance decision on the particular facts of the case. Only about one respondent in ten indicated that a hired or accepted ex-serviceman would be placed on probation or given a lower level position because of the character of his discharge.

Significant distinctions arise according to the type of discharge awarded.[88] The respondents discriminated against the discharged serviceman according to the severity of the discharge. For example, while 77% were influenced by a dishonorable discharge and 75% by a BCD, only 69% were influenced by an undesirable discharge and 51% by a general discharge. Similarly, 34% automatically rejected the dishonorably discharged applicant; 27% the BCD recipient; 20% the undesirably discharged; and 8% the generally discharged. The results rebut the contention that the civilian world does not distinguish between types of less than honorable discharges and the contrary pronouncement that the judicial bad conduct discharge is less stigmatizing than the administratively issued undesirable discharge. The results further indicate that the general discharge under honorable conditions cannot be equated with the honorable discharge. While it is per se disqualifying in eight per cent of the cases overall, that figure rises to about twelve percent when only the business categories are examined. Further, in half of all cases the general discharge will "influence" employment or acceptance decisions. Even though the Government is willing to credit the generally discharged serviceman with the full benefits of "honorable" service, a considerable part of the civilian world is not willing to accord him such treatment.

Examination of the data according to type, region, and city size revealed several interesting patterns. The C.L. for activity was significant for all critical questions (see appendix B) indicating that activity may be a controlling factor for any difficulties the individual encounters. A number of factors stood out. College officials showed a greater awareness of the administrative discharge system than did the businesses. Conversely, businesses were more likely to inquire into the serviceman's discharge, more likely to be influenced by it, and much more likely to automatically reject than the colleges. Within the two groups size worked in different ways. Big businesses were more likely to inquire, be in-

[88] A summary of these results appears in appendix C.

fluenced by, and disqualify than small businesses. Big colleges, however, were less likely to inquire, be influenced by, and disqualify than their smaller counterparts. Despite minor discrepancies all types of respondents followed the general pattern of discriminating with increasing severity from general to undesirable to bad conduct to dishonorable discharge.

Not surprisingly the bar and medical examiners were markedly more interested in the character of an applicant's discharge. Nearly three-quarters made some inquiry and then either required a look at the discharge certificate or verification from the armed forces. Over seventy percent stated that even a general discharge "influenced" their licensure decision. The more severe discharge classifications influenced decisions in between eighty and eighty-six percent of all cases. These figures were substantially ahead of the other categories. However, it is noteworthy that while the professional examiners were influenced by discharges they nonetheless had the lowest automatic rejection average. Apparently, the examiners had the investigative resources and desire to look behind discharge characterizations and avoid snap judgments. By contrast small businesses were least likely to look into the facts in the individual's case.

The C.L. for region was significant in only two of twenty-three questions. Since these involved the little used probationary or lower starting level criteria it appears safe to conclude that a surprising regional homogeneity exists. Based on these questions and these regional breakdowns, conclusions about regional pro or anti military feeling are not justified.

Considered by city size the majority of responses (15 of 23) showed a statistically significant confidence level. Generally, however, the variances were not large. Small city respondents were more likely to automatically disqualify applicants or to employ a probationary or lower level criterion than their larger counterparts. Large city respondents were slightly more likely to look behind the discharge certificate prior to making an acceptability decision.

V. CONCLUSIONS

When the stigma argument is dissected, it is seen to consist of two elements, statutory and attitudinal stigma. The statutory stigma is generally under the control of Congress and the Veterans Administration. The amount of stigma is a function of the bars these bodies place on veterans benefits and employment opportunity. Congress can alter the degree of actual harmfulness by

changing the statutory denials of benefits. Thus, military procedures do not create the onerous overtones of administrative discharges and should not be the subject of such criticism.

The attitudinal stigma, the subject of the empirical survey, is personal in nature and is a creation of our society. The survey establishes that some stigma does attach from receipt of an administrative discharge, but not to the extent of being tantamount to the consequences of punitive discharges as some Congressional leaders, judges, and literary critics seem to believe. In fact, the civilian population understands and distinguishes between the various discharges fairly well, contrary to Congressional presumption. Thus, it seems that insufficient credit has been given the civilian population in Congressional assessment of the severity of administrative discharges. Certainly, general or undesirable discharge is something with which to be reckoned by its recipient, but is is not as severe as it is often presumed to be and does not reach the stigma level of a punitive discharge.

This study does not answer the questions: 1) Should the military continue the practice of characterizing discharges? and 2) If so, are further procedural reforms needed to assure that such characterizations are factual and fair? Much additional legislative and administrative study is needed to provide the answers to these questions. If nothing else, however, this study of discharge consequences emphasizes the fact that many popular notions regarding the administrative discharge have no basis in fact. In adopting new laws and regulations, it is hoped that hard facts and not fine rhetoric will serve as the guideposts.

APPENDIX A

QUESTIONNAIRE ON THE PRACTICAL EFFECTS OF THE LESS THAN HONORABLE DISCHARGE

1. Prior to this inquiry, were you aware that there existed types of less than honorable discharges other than the Dishonorable Discharge?
YES NO

2. Were you aware that a soldier could receive a General or Undesirable Discharge as the result of an administrative separation?
YES NO

3. Were you aware that a soldier could receive a Bad Conduct or Dishonorable Discharge as the result of a court-martial conviction?
YES NO

4. Prior to accepting a former serviceman into your organization, do you inquire into the type of discharge he received? YES NO

In any inquiry you might make, do you:

5. Accept the man's word as to his discharge? YES NO

6. Require him to show his discharge certificate? YES NO

7. Make an inquiry to the armed service concerned? YES NO

Are your personnel, admission, or licensing policies influenced by any of the following less than honorable discharges:

8. General Discharge? YES NO
9. Undesirable Discharge? YES NO
10. Bad Conduct Discharge? YES NO
11. Dishonorable Discharge? YES NO

Do you automatically reject the application of any person who has received one of the following less than honorable discharges:

12. General Discharge? YES NO
13. Undesirable Discharge? YES NO
14. Bad Conduct Discharge? YES NO
15. Dishonorable Discharge? YES NO

Do you look behind the discharge certificate to determine the grounds (e.g., homosexuality, alcoholism, misconduct, etc.) for the discharge and make your decision as to the applicant's acceptability based upon those findings when he has received any of the following discharges:

16. General Discharge? YES NO
17. Undesirable Discharge? YES NO
18. Bad Conduct Discharge? YES NO
19. Dishonorable Discharge? YES NO

Do you place on probationary status or in a lower level position than he otherwise would have been given an accepted applicant who received any of the following discharges:

20. General Discharge? YES NO
21. Undesirable Discharge? YES NO
22. Bad Conduct Discharge? YES NO
23. Dishonorable Discharge? YES NO

APPENDIX B

FREQUENCY BY ACTIVITY SAMPLE (IN PERCENT)

Ques. No.	Big Business	Small Business	Big Colleges	Small Colleges	Union	Bar Examiners	Medical Examiners	Total	Chi Sq C.L.*	Type Significant
1	81.8	78.9	88.4	73.5	95.8	82.9	75.8	81.1	87	no
2	55.9	51.4	81.2	61.8	62.5	74.3	69.7	61.0	99.9	yes
3	99.4	96.5	97.1	98.5	100	97.1	97.0	98.0	39	no
4	79.4	62.0	40.6	61.8	50	74.3	72.7	65.6	100	yes
5	67.1	70.4	58.0	55.9	54.2	28.6	30.3	60.1	100	yes
6	28.2	24.6	29.0	44.1	37.5	51.4	57.6	33.1	99.9	yes
7	5.9	2.8	0	5.9	0	20	18.2	5.7	100	yes
8	54.1	44.4	34.8	54.4	50.0	71.4	72.7	51.2	99.9	yes
9	77.6	64.1	49.3	72.1	50	82.9	81.8	69.1	100	yes
10	84.1	69.7	55.1	77.9	66.7	85.7	81.8	75.0	100	yes
11	87.1	73.2	56.5	79.4	66.7	85.7	84.8	77.4	100	yes
12	11.8	12.7	1.4	2.9	8.3	0	3.0	8.1	99.7	yes
13	31.2	28.2	4.3	8.8	8.3	2.9	12.1	20.1	100	yes
14	42.9	34.5	5.8	10.3	20.8	5.7	15.2	26.8	100	yes
15	51.8	47.2	11.6	8.8	25.0	8.6	15.2	33.8	100	yes
16	49.4	37.3	34.8	52.9	45.8	71.4	72.7	47.5	100	yes
17	43.5	33.1	44.9	63.2	45.8	80.0	69.7	47.5	100	yes
18	40.0	32.4	49.3	69.1	37.5	80.0	66.7	47.0	100	yes
19	34.7	27.5	44.9	69.1	37.5	77.1	69.7	43.4	100	yes

*C.L.—Confidence level

Ques. No.	Big Business	Small Business	Big Colleges	Small Colleges	Union	Bar Examiners	Medical Examiners	Total	Chi Sq C.L.*	Type Significant
20	14.7	13.4	8.7	5.9	4.2	8.6	18.2	11.8	100	yes
21	11.2	10.6	15.9	8.8	4.2	8.6	18.2	11.3	100	yes
22	8.8	10.6	14.5	11.8	12.5	8.6	15.2	10.9	100	yes
23	6.5	8.5	11.6	11.8	12.5	5.7	15.2	9.1	100	yes

*C.L. Confidence level

APPENDIX C

COMPARISON OF DISCHARGE EFFECTS BY TYPES OF DISCHARGE*

A. Discharge Inquiries (questions 4–7):

Inquire into Discharge	*Accept word*	*Look at Discharge*	*Write armed forces*
65.6%	51.8%	46.8%	8.6%

B. Acceptance Policies (questions 8–23):

	Policy Influenced by	*Reject Automatically*	*Look Behind*	*Probation*
I.	General			
	51.2%	15.1%	77.1%	17.9%
II.	Undesirable			
	69.1%	28.8%	66.7%	15.6%
III.	BCD			
	75.0%	35.4%	62.2%	14.4%
IV.	Dishonorable			
	77.4%	43.3%	56.3%	11.6%

*Percentages on left of vertical line are total affirmative responses of which those on the right are a *portion*.

ATTITUDES OF US ARMY WAR COLLEGE STUDENTS TOWARD THE ADMINISTRATION OF MILITARY JUSTICE*

by
Colonel Joseph N. Tenhet**
and
Colonel Robert B. Clarke***

It has become a virtual truism that military justice must not only be good but appear to be good. Among the important users of the military justice system are senior field grade officers. The authors' survey of approximately 200 United States Army War College students provides interesting insight into contemporary perceptions of military justice.

I. INTRODUCTION

In the fall of 1969 the military justice system was substantially revised by the Military Justice Act of 1968, which introduced trial by judge alone and military lawyers and judges in special courts-martial. Despite these changes, public controversy over the system continues. Because of this controversy and the recent changes in the law, this study was undertaken to determine the attitudes of Army War College students toward the present system of military justice as administered by Army lawyers.

The attitudes of War College students on military justice are of particular interest for four reasons. First, the age and length of service of the students is such that their military careers have been almost exclusively served under the Uniform Code of Military Justice. Second, the Military Justice Act of 1968, which substantially changed the military justice system, was implemented in the late summer of 1969—some two years before the present class matriculated. During this two year period, many of the students were commanders having direct responsibility for discipline and

* This article is adapted from a research paper presented by the authors to the United States Army War College, Carlisle Barracks, Pennsylvania, on 31 March 1972. The opinions expressed are those of the authors and not necessarily representative of the views of any governmental agency.

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court-martial actions under both combat and noncombat situations. Third, there appears to be significant and widespread criticisms of the present system of military justice from both liberal and regressive viewpoints. Finally, the Class of 1972 represents the future leadership of the Army, and their attitudes toward the military justice system should suggest areas for improvement.

II. BACKGROUND TO THE STUDY

A. *THE UNIFORM CODE OF MILITARY JUSTICE*

Since 1951 the armed forces have been governed by the Uniform Code of Military Justice.[1] This basic statute with its several amendments is implemented by the Manual for Courts-Martial (a Presidential Executive Order; current edition, 1969 revised) and various regulations issued by the military departments.[2] The 1951 Code was intended by Congress to provide a modern, uniform criminal law system for the armed forces which would provide greater individual rights and protection for the serviceman than was provided by the 1927 Code and manual which were in effect during World War II.

Military officers are generally familiar with the Uniform Code and the Manual for Courts-Martial, and no useful purpose would be served in describing their contents in detail. Briefly, however, the Code contains some 59 punitive articles describing military and civilian type offenses and provides for trial by summary, special, and general courts-martial. Pursuant to Article 15, commanders are also authorized to impose limited punishments for minor offenses without trial. Rules of evidence roughly parallel those used by federal courts, and maximum punishments for various offenses are set by the President. Among the safeguards provided by the Code are the following: the requirement for extensive pretrial investigation of serious charges before referral to a general court-martial, the right of an enlisted accused to have enlisted members (at least one-third) on special and general courts-martial; appellate review to include, depending on the circumstances, review by the Court of Military Review and the Court of Military Appeals (composed of three civilian judges appointed by the President); in trials by general court-martial, requirements for legally trained and certified military judge and trial and defense counsel.

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[1] 10 U.S.C. §§ 801–940 (1970).

[2] Army Reg. No. 27–10: Legal Services, Military Justice (26 Nov. 1968, as changed), App. C [hereafter referred to as AR 27–10].

The Military Justice Act of 1968 [3] made significant changes in the military legal system. While some of its provisions became effective upon enactment, the Act was not fully implemented until the fall of 1969. As it pertained to the Army, the Act made three principal changes: (1) legally qualified defense counsel and military judges were assigned to special courts-martial; (2) an accused could refuse Article 15 punishment and trial by summary court-martial, thus requiring the commander to terminate the proceedings or refer the case to a higher court (with military judge and legally qualified defense counsel); and (3) in special and general courts-martial, the accused could elect trial by military judge alone (i.e., without court members).[4] These changes had far-reaching effect on Army court-martial practice. Trial by military judge alone without court members became almost routine—probably in excess of 90 percent of all cases today are tried by judge alone. Thus, under these new procedures, a Judge Advocate, rather than a panel of officers, determined guilt or innocence and imposed the punishment. Moreover, because of personnel shortages and rapid promotions during the Vietnam war, the military judges detailed to special courts-martial (including those empowered to adjudge a bad conduct discharge) were, in the main, relatively young and inexperienced (captains and majors with less than five years of commissioned service).

In addition to trial by military judge alone, the new Act resulted in the revival of trial by special court-martial empowered to adjudge a bad conduct discharge. Under the Uniform Code of Military Justice (prior to the 1968 Act) a special court-martial was authorized to impose a bad conduct discharge if a verbatim transcript of the proceedings was made. From an early date, however, the Army blocked the giving of bad conduct discharges by special courts-martial through the simple expedient of not authorizing preparation of a verbatim record of trial in such a case.[5] The Military Justice Act of 1968 by detailing a military judge and qualified defense counsel to special courts removed the primary reason for the Army's objection, and by the fall of

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[3] Public Law 90-632, 82 Stat. 1335 (1968).

[4] In general court-martial cases, the election for trial by military judge alone is limited to noncapital cases. Other important provisions of the Act were: (1) "military bail," *i.e.*, release of an accused from confinement after trial pending appeal; and (2) upon petition of the accused, appellate review at Department of the Army of any case not previously reviewed by the Court of Military Review (primarily summary and special courts-martial).

[5] R. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES, 158 (1956). The Navy and Air Force did not oppose trial by special court-martial empowered to adjudge a bad conduct discharge.

1969 trial by special court-martial empowered to adjudge a bad conduct discharge was in common use.[6]

Implementation of the Military Justice Act of 1968 prevented the commander from imposing any nonjudicial punishment whatsoever upon an enlisted member of his command unless the offender consented. If he refused to accept punishment voluntarily, the commander had the alternative of eating humble pie or referring the case to a special court-martial complete with military judge and qualified defense counsel. In effect then, except in the most serious offenses, the standards of disciplinary punishment throughout the Army were set and enforced by the young Judge Advocates who were assigned as military judges.[7]

By giving more rights and legal protection to the individual soldier, the new Act thus removed the commander's authority to impose immediate disciplinary action for minor offenses unless, of course, the soldier consented. Moreover, Army regulations have since been changed to provide the right to consult a military lawyer prior to accepting nonjudicial punishment.[8]

Implementation of the new Act also aggravated the problem of excessive delays in processing court-martial cases. To be effective, disciplinary punishment must be imposed in a timely fashion. Lawyers by nature and training, however, are cautious and deliberate, and they are singularly characterized by a reluctance to enter the courtroom until the case is researched and prepared for trial to their satisfaction. This build-in attitudinal delay coupled with a shortage of military lawyers, judges, court reporters, and legal clerks materially increased the time required to dispose of a special court-martial case. For example, in 1971 in Europe even the simplest case was seldom tried within 30 days of the commission

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[6] Based upon the authors' personal experience, the use of BCD special courts was more popular in Europe than in Vietnam.

[7] For example, based on one of the author's experiences as Staff Judge Advocate, V Corps, Europe, from June 1970 to July 1971, about 95 per cent of all cases were tried by military judge alone; of these only about 10 per cent of the most serious cases (all general courts and some BCD special courts) were tried by a senior experienced military judge, the remaining 90 per cent being tried by a captain or major with less than four years of service as a Judge Advocate. The determination of guilt (or innocence) and the punishment imposed by these young military judges was common knowledge and set the disciplinary tone or standard within the command. To a large extent these standards also controlled nonjudicial punishment (Art. 15) because a commander was reluctant to attempt to impose punishment unless he believed the military judge would support him in the event trial was demanded. This attitude was particularly prevalent in situations involving command relationships (*e.g.*, disrespect to or failure to obey an NCO) or searches and seizures (*e.g.*, drug offenses).

[8] AR 27–10, para. 3–12.

of the alleged offense. From the commander's viewpoint such delays were understandably frustrating and the result was virtual universal condemnation of the new system of military justice and the Army lawyers who administered it.[9]

B. *CRITICISM OF THE SYSTEM*

Both before and after the passage of the 1968 Act, military justice has been the recipient of often virulent attacks in the public forum. While the intensity of feeling toward the Vietnam War has stimulated much criticism, it would be probably incorrect to assume the criticism will end with the final withdrawal of American troops. As the Second World War experience indicated, pressure for military justice reform may coalesce in postwar periods.

Attacks on military justice have come from both those who feel the system is insufficiently protective of servicemen's rights and from those who feel that overprotection has threatened the very functioning of the military.

The United States Supreme Court, speaking through Mr. Justice Douglas, stated in *O'Callahan* v. *Parker:*

> A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote. The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but by a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from these differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.
>
> A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved. . . .
>
> While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. . . . A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while the military trial is marked by the age-old manifest destiny of retributive justice.[10]

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[9] US Department of the Army, *Report to General William C. Westmoreland, Chief of Staff, by the Committee for Evaluation of the Effectiveness of the Administration of Military Justice* (1 Jun. 1971), 13 [hereafter referred to as the Matheson Report].

[10] *O'Callahan* v. *Parker*, 375 U.S. 258 (1969) (footnotes omitted).

Former Attorney General Ramsey Clark commented on use of troops in urban riots:

> Generals resent civilian presence and legal guidance. Their business is war. War knows few rules and forgets them when need arises. Attorneys from Justice concerned about civil liberties, excessive force and the rights of civilian populations and prisoners find it hard to influence military commanders. . . .[11]

Robert Sherrill summarized his attitudes in his title "Military Justice Is to Justice as Military Music Is to Music":

> One must understand the purpose of military justice. It is not even remotely related to protecting the innocent. The comforting old saw, "Better a hundred guilty escape than one innocent man be punished unjustly," has no place in the military even as a myth. Only in recent years, in fact, has the military establishment even bothered to pretend from time to time that courts-martial result in justice.[12]

Before turning to widely circulated (among Army officers) statements in rebuttal to the above, it seems appropriate to consider past comments on military law by two of our more famous generals.

General William T. Sherman:

> It will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.
>
> The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies . . . so as to be capable of exercising the largest measure of force at the will of the nation.[13]

General Dwight David Eisenhower:

> I know that groups of lawyers in examining the legal procedures in the Army have believed that it would be very wise to observe . . . that great distinction that is made in our Governmental organization, of a division of power . . . . But I should like to call your attention to one fact about the Army . . . . It was never set up to insure justice.[14]

Different opponents of present military justice practice contend present reforms have stripped the commander of his legitimate powers, produced a set of hypertechnical legalities to the

[11] R. CLARK, CRIME IN AMERICA, 261 (1970).
[12] R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC, 62–67 (1970).
[13] Sherman, *Justice in the Military* in CONSCIENCE AND COMMAND (J. Finn ed. 1971), 23.
[14] *Id.* at 27.

injury of military discipline and, in consequence, threatened America's defense posture.

Lieutenant Colonel Albert N. Garland:

> [The Calley court-martial demonstrated] . . . what little regard the military judiciary has for the military commander, and proved quite convincingly how much power the military judge under the present military justice system has been given or assumed. . . . [The Articles of War] . . . require no interpretation from a JAG officer nor from a civilian jurist. Military commanders have been and are now capable of determining when an article has been violated and what punishment should be meted out. . . .[15]

General Hamilton H. Howze:

> . . . . I believe the military forces of the United States face a disciplinary situation which, if not already critical, is at least one of rapidly growing proportions. . . .
>
> The requirements of military law are now so ponderous and obtuse that a unit commander cannot possibly have the time or the means to apply the system to a situation in which, say, a substantial portion of the men of his command openly take narcotics, or refuse to execute a mission in any but a reluctant and desultory way. . . .
>
> The point is that our military leaders should determine . . . what is required to return our forces to an acceptable standard of discipline, and put that policy into practice, despite all the dead cats which will fly.[16]

From the public controversy or testing of the adequacy of the present court-martial system, it is clear that there are two competing views about the administration of criminal law in the armed forces. One view holds that military justice ought to be exclusively a responsibility of command and employed for the purpose of enforcing discipline. The contending view is that military justice should not simply be a tool of the commander to enforce discipline, but a system of law which recognizes the rights of the individual soldier and, to the extent possible, provides him the constitutional protections enjoyed by civilian defendants. Under this view, it is argued that the commander is an interested party and should not be responsible for the court-martial process; a system of justice administered by one of the interested parties is inherently unfair and that the commander's personal judgment adversely influences the outcome of a trial.[17]

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[15] Garland, *Military Justice Before the Bar*, ARMY (Jan. 1972), 28–29.

[16] HOWZE, *Military Discipline and National Security*, ARMY (Jan. 1971), 11–15.

[17] William S. Fulton, Jr., Command Authority in Selected Aspects of the Court-Martial Process (unpublished Army War College thesis, 18 Mar. 1971), 1–2.

The merits of these contending views have been debated since at least the end of World War I. That the debate continues is evident from the legislative proposals recently introduced in Congress by Senators Birch Bayh and Mark Hatfield. These proposals adopt the latter view and would relieve commanders of judicial functions, replacing them with "trial commands" supervised by military lawyers.[18]

C. *PRIOR STUDIES*

In addition to the legislative investigation preceding creation and reform of the Code and the private comments of interested parties, several official or semiofficial Army studies have considered the role of justice in the military.

1. *The Powell Report*

On 7 October 1959, the Secretary of the Army appointed a board of officers to study the administration of military justice.[19] The board consisted of eight general officers under the chairmanship of Lieutenant General Herbert B. Powell. Among the members were Major Generals William C. Westmoreland and Hugh P. Harris. The letter of instructions appointing the board directed the committee to—

> . . . undertake a searching study on the effectiveness and operation of the Uniform Code of Military Justice and its bearing on good order and discipline within the Army. The committee should inquire into any improvements that should be made in the Code, either by legislation or otherwise. The committee's survey should analyze any inequities or injustices that accrue to the Government or to the individuals that exist in the practical application of the Code or the judicial decisions stemming therefrom.[20]

In preparing its report, the committee considered, among other sources of information, recommendations from 96 senior commanders exercising general court-martial jurisdiction, 150 Judge Advocates, 50 military defense counsel, and a survey of the attitudes and opinions of 100 commanders and 2,000 enlisted men.

Among the recommendations in the Powell Report subsequently adopted were increased punishment authority under Article 15 (nonjudicial punishment); trial by military judge alone; the convening of courts-martial without the presence of members to per-

[18] *Id.* at 5–8.

[19] US Department of the Army, *Report to Honorable Wilber M. Brucker, Secretary of the Army, by the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army* (18 Jan. 1960) [hereafter referred to as the Powell Report].

[20] *Id.* at 249.

mit decisions on legal questions; allowing the military judge to rule finally on all questions of law and interlocutory questions, other than the factual determination of the mental responsibility of the accused; automatic reduction in grade upon approval by the convening authority of a sentence including punitive discharge, confinement, or hard labor without confinement; preparation of summarized records of trial in cases resulting in acquittal; authorizing the Judge Advocate General to review court-martial cases which have not been reviewed by the Court of Military Review; and addition of a new punitive article proscribing bad check offenses (Art. 123a).

Among the recommendations in the Powell Report which have not been adopted are relaxation of the restrictive rules of evidence pertaining to searches and seizures (probable cause) and admissibility of incriminating statements (Art. 31 warning); authorizing trial counsel to conduct pretrial investigations (Art. 32); use of indeterminate sentences to confinement; and expansion of the Court of Military Appeals from three to five members "who have had recent military-legal experience."

2. *The Matheson Report*

On 16 March 1971, General William C. Westmoreland, Chief of Staff of the Army, established a Committee for Evaluation of the Administration of Military Justice.[21] He took this action in response to complaints, particularly from junior officers, that the administration of military justice was contributing to an apparent loosening of discipline at the small unit level. Major General S. H. Matheson was appointed chairman of the committee which was tasked

> . . . to assess the role of the administration of the military justice system as it pertains to the maintenance of morale and discipline at the small unit level, identify problem areas encountered by the small unit commander, and suggest means of resolving or diminishing them.[22]

In accomplishing its work, the committee conducted a survey of over 1,000 commissioned and noncommissioned officers. Teams used written questionnaires supplemented by personal interviews to determine attitudes and collect data. Additionally, the committee visited various Army installations in the United States, and held informal discussions with commanders, Judge Advocates, military police officers, and service school officials. On 1 June 1971, General Matheson submitted his formal report.

[21] *See* note 9, *supra*.
[22] Matheson Report at 3.

The Matheson committee concluded that the administration of military justice plays a major role in the maintenance of the morale and discipline. Concurrently, they found that many commanders believed that "military justice as presently administered, has a deleterious effect on morale and discipline in the Army." [23] However, the committee found no widespread discontent with the military justice system, *per se*, and no strong desire for fundamental change. Complaints by junior officers were divided into four general categories: (a) dissatisfaction with the law itself; (b) excessive administrative delays in processing disciplinary and administrative actions; (c) apparent leniency by military judges; and (d) lack of education and training in military justice.

Among the findings reached by the committee were:

(1) Article 15 provided commanders with an adequate range of punishment authority for minor offenses, notwithstanding complaints to the contrary. However, the committee felt that insufficient use was being made of correctional custody, an authorized punishment involving physical restraint.

(2) It was not realistic to attempt to relax the legal requirement for probable cause as a prerequisite for search and seizure. The solution to this problem, according to the committee, lay in education and training and the use of search warrants.

(3) There was need for improvement at every level to expedite the processing of military justice and administrative separation actions. The committee called for more centralized operations, such as those conducted by legal centers, at brigade or comparable level.

(4) Complaints about military judges being too lenient in sentencing were, in fact, unfounded.

(5) There was a pressing need for additional military justice training at all levels.

(6) Pretrial confinement policies were not susceptible to a single, uniform policy established by Department of the Army, but were best left for determination by the officer exercising general court-martial jurisdiction.

Based upon its findings, the committee made a series of recommendations, principal among which were—

(1) The administration of nonjudicial punishment should be simplified.

(2) Department of the Army should encourage the use of correctional custody as Article 15 punishment.

[23] *Id.* at 54.

(3) Department of the Army should devise a search warrant form for general use throughout the Army.

(4) Action should be taken at all levels to avoid administrative processing time delays. Among actions proposed were expanded facilities for the chemical analysis of drugs, better records control to expedite the trials of absentees, discharge in absentia for long term absentees, and pilot programs for permanent legal centers.

(5) A "massive concerted effort" should be made to improve and increase military justice training. Included was a proposal to have a designated Judge Advocate readily available to assist battalion or higher commanders.

(6) Prisoners sentenced to confinement should be required to perform strenuous, meaningful hard labor.

3. *The Army War College Leadership Study*

Beginning in January 1971, the Army War College conducted an extensive study into leadership problems the Army would face in the 1970's.[24] Although the main thrust of this effort was not directed toward the administration of military justice, this subject repeatedly arose during interviews with officers and enlisted men. It was concluded that one of the problems underlying effective leadership was the leaders' own perception of the current system of military justice as impeding their ability to enforce standards. The report contains the following in amplification:

> Particularly at the lower enlisted grade levels, there was strong and pervasive animosity toward what some individuals referred to as "those long-haired junior JAG officers." Leaders at company commander level felt that their range of options for handling leadership problems was restricted severely by current developments in the application of military justice. Many NCO's saw this condition as a lack of downward loyalty by the chain of command.[25]

III. THE DESIGN OF THE STUDY

A. THE SUBJECT GROUP

The research which formed the basis for this report was conducted at the Army War College, Carlisle Barracks, Pennsylvania, between 1 November 1971 and 28 February 1972. The subject group consisted of 215 officers assigned to the college as students for the 1972 academic year. Research efforts were focused on

[24] US Department of the Army, *USAWC Study of Leadership for the Professional Soldier* (1 Jul. 1971) [hereafter referred to as the Leadership Study].

[25] *Id.* at 37.

the 183 Army officers in attendance. However, 32 Navy, Marine, and Air Force student-officers were also included in the survey, so that comparative and contrasting attitudes could be determined.

In terms of personal background and general experience, the total subject group reflected a high degree of homogeneity. All Army students were in the grades of colonel or lieutenant colonel. They averaged 41 years of age and 20 years of active federal service. Over 98 percent had baccalaureate degrees, and almost 60 percent had masters or higher degrees; 85 percent had previously held command positions at the battalion or higher levels. Selection for attendance at the War College is considered highly competitive and is limited to approximately five percent of those eligible. Officers are chosen on the basis of merit by a formal selection board convened at Department of the Army. Similar procedures obtain for students of the other services.

Recent studies concerning the administration of military justice have examined the views of a broad range of Army personnel, with particular emphasis on the opinions of junior commissioned and noncommissioned officers.[26] However, this study was specifically limited to determining the attitudes of Army War College students. In accordance with the stated mission of the college, the students are being prepared "for senior command and staff positions within the Army and throughout the defense establishment. . . ." [27] Their views were felt to be especially meaningful in analyzing the problem area. In summary, the subject group—situated in an academic atmosphere and freed from day-to-day operational requirements—offered a unique opportunity to conduct significant, in-depth research.

B. THE QUESTIONNAIRE

A number of investigative techniques were considered to test the attitudes, opinions, beliefs, and knowledge of the subject group. The possibility of personal interviews with all or a portion of the student body was explored. However, because of the advantages of standardization, coverage, and simplicity, a structured

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[26] *See* notes 9 and 24, *supra*, the Matheson Report and the Leadership Study. The demographic composition of officers completing questionnaires for the Matheson Committee is of particular interest. Over 60 per cent were commissioned through OCS programs; 47 per cent had not served above platoon leader level; and 43 per cent had no military education beyond the basic branch course. Matheson Report, at 65.

[27] US Department of the Army, US Army War College, USAWC Curriculum Pamphlet A.Y. 1972 (23 Aug. 1971), 1.

questionnaire was determined to be the most suitable research vehicle.[28]

As finally designed, the questionnaire (app 1) contained both biographical and substantive (attitudinal) sections. The biographical section was divided into two parts. The first contained items of general application, such as age, length of service, and education. The second contained questions concerning time spent in command, both before and after the implementation of the Military Justice Act of 1968. Specific data was sought as to the type of organization commanded, location, and period of time involved. Biographical information was selected, in part, for relevance to the attitudinal measures used in the substantive section. Appendix 1 contains a summary of the biographical data obtained.

The substantive section of the questionnaire contained a series of items designed to determine attitudes toward the three primary areas of concern: the law itself (the system), the administration of the law, and The Judge Advocate General's Corps. Questions were standardized with fixed-alternative responses. Most required a simple choice between a negative and positive reply, e.g., "approve/disapprove." Some multiple answer and multiple choice questions were included. When possible and appropropriate, rating scales were employed to determine intensity of response.[29] Options such as "no opinion" or "I do not know" were used sparingly, as the known background of the subject group indicated that there would be slight, if any, problem with "forced" answers.

The questionnaire also contained two optional, free-response questions. One dealt with opinion regarding the effect of racial discrimination in disciplinary proceedings; the other was contained on a separate page at the end of the questionnaire and asked for comments on any aspect of the administration of military justice or the Judge Advocate General's Corps. Free-response comments were made by 84 percent of those participating in the survey. Narrative replies were categorized when possible and analyzed qualitatively.

Prior to distribution, a draft of the questionnaire was coordinated with the Department of Research and Study (USAWC) to insure compatability with coding and other requirements for automatic data processing. The draft questionnaire was then

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[28] A concise discussion of the advantages and disadvantages of structured and unstructured questions is contained in C. BACKSTROM & G. HURSH, SURVEY RESEARCH 72-81 (1963).

[29] C. SELLITZ, ET AL., RESEARCH METHODS IN SOCIAL RELATIONS 345-56 (rev. ed. 1959).

pretested by a small group of students. The responses and recommendations of the pretest group resulted in minor changes in content, terminology, and format. The final product was reproduced and distributed to 212 members of the class. The authors and one other Judge Advocate student were not, of course, included in the distribution. Responses from the students who participated in the pretest were considered, as the final questionnaire did not vary in substance from that used in the pretest.

Of the 212 questionnaires distributed, 180 or 85 percent were returned for analysis. All information was then converted to computer data cards. In conjunction with the Department of Research and Studies, a computer program was designed to assist in analysis and permit cross-correlation of biographical and substantive responses.

A final phase of investigation involved interview of subjects who indicated that they desired an opportunity for individual discussion. Although the subjects were not required to identify themselves on the questionnaire, the great majority did so on an optional basis. Of these, 16 requested a personal interview. These followup sessions provided valuable insights into several areas of concern.

IV. FINDINGS, ANALYSES, AND DISCUSSION

A. GENERAL

The questionnaire contains 52 substantive questions which were designed to determine the attitudes of the subject group toward the Uniform Code of Military Justice, the administration of the Code, and the Judge Advocate General's Corps. For purposes of convenience and clarity of presentation, the substantive questions were divided into 11 areas of concern, each of which is addressed separately.[30] In addition, the final section of this

[30] The following is a list of the 52 substantive questions by area of concern:
a. *Military Justice and Discipline:* Questions 12, 39, 40, 59, 60, 61, 73, 74, and 77.
b. *Judge Advocate Job Performance:* Questions 23, 24, 25–27, 28–30, 33, 56, 57, and 58.
c. *Innovations Introduced by the Military Justice Act of 1968:* Questions 43, 44, 45, 46, and 76.
d. *Search and Seizure:* Questions 47, 63, and 64.
e. *Article 15 Punishment:* Questions 41, 42, 70, 71, 72, and 75.
f. *Administrative Delays:* Questions 48, 49, 50–51, 52, 53, 54, and 55.
g. *Selection of Court Members:* Question 62.
h. *Military Justice Training:* Questions 68 and 69.
i. *Race:* Questions 65, 66, 67, and 78.
j. *Legal Assistance and Claims:* Questions 31 and 32.

chapter discusses differences in attitudes held by certain categories of officers based upon branch of service and positions held.

B. MILITARY JUSTICE AND DISCIPLINE

Probably the most important question in the survey is Question 12, which was designed to determine the overall attitude of the Class toward military justice.

What is your overall attitude toward the present system of military justice?

1.	Highly disapprove	2	(1.1%)
2.	Disapprove	5	(2.8%)
3.	Slightly disapprove	31	(17.5%)
4.	Slightly approve	18	(10.2%)
5.	Approve	105	(59.3%)
6.	Highly approve	16	(9.0%)

As can be seen, the overall attitude of the Class toward the system is a positive one. For example, 78.5 percent indicate some degree of approval (responses 4, 5, and 6), while only 21.4 percent indicate some degree of disapproval (responses 1, 2, and 3). Considering only the two highest responses ("approve" and "highly approve"), 68.3 percent register strong affirmative opinions.

Viewed alone, the responses of the subject group to Question 12 are so positive in nature one could conclude that there are no fundamental faults with the system, *per se*. However, Question 12 must be considered in connection with Questions 39 and 40. Question 39 was designed to determine the attitude of the Class toward the state of Army discipline.

What is your attitude toward the state of discipline in the Army today?

1.	Highly disapprove	22	(12.3%)
2.	Disapprove	64	(35.8%)
3.	Slightly disapprove	56	(31.3%)
4.	Slightly approve	24	(13.4%)
5.	Approve	9	(5.0%)
6.	Highly approve	0	.....
7.	No opinion	4	(2.2%)

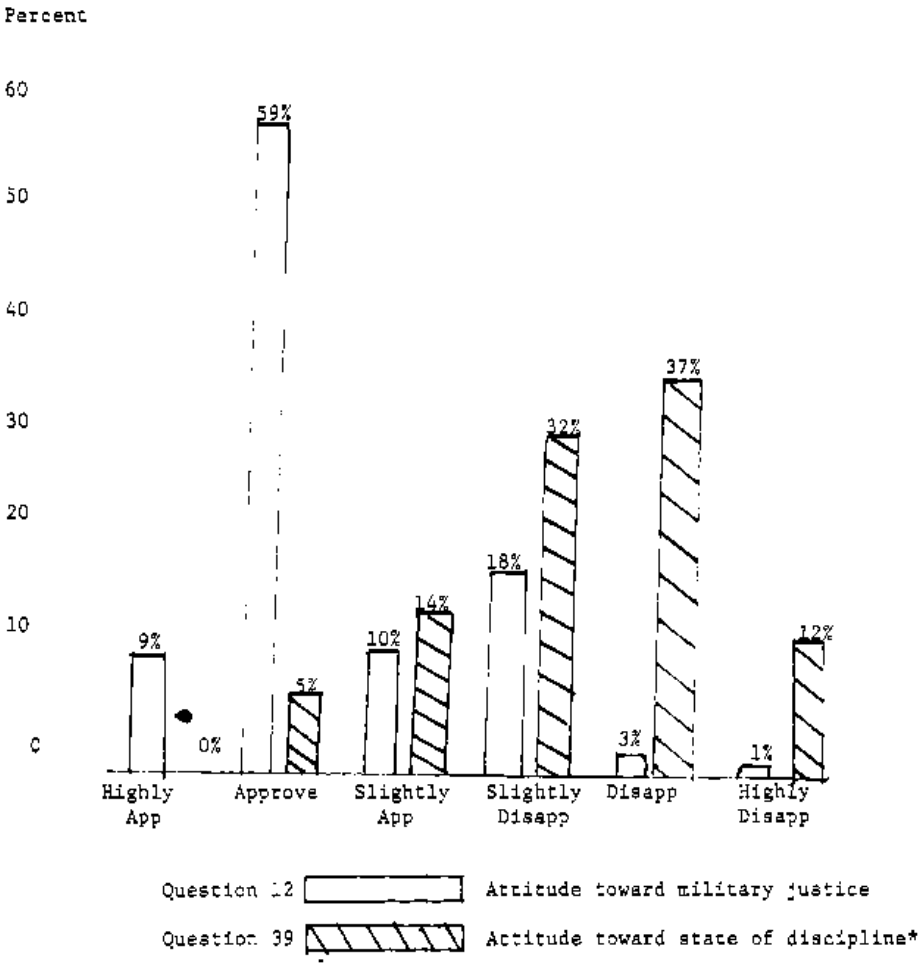
A comparison of the attitudes expressed in the responses to Questions 12 and 39 is shown on the following table:

Question 40 asks whether the state of discipline is sufficient to accomplish the Army's combat mission. Over 41 percent state that today's soldiers are not sufficiently disciplined to fight. Con-

k. *Knowledge of the Judge Advocate General's Corps:* Questions 34, 35, 36, 37, and 38.

TABLE I

Attitude Toward Military Justice
Constrasted With
Attitude Toward State of Discipline



*No opinion expressed by 2.2 percent.

sidering only Army officers, as opposed to those of other services, the responses to Questions 12, 39, and 40 remain essentially the same. Taking these three questions together, the results may be summarized as follows: the Class of 1972 strongly supports the system of military justice, but by approximately the same percentages (78–79%) strongly disapproves the state of discipline. Less than 60 percent believe that the discipline is sufficient to accomplish the Army's combat mission. The apparent disparate

attitudes expressed by the students can be reconciled by acknowledging that military discipline does not depend solely upon the military justice system, but more directly results from good leadership.

As previously noted, the great majority of court-martial cases today are tried by military judge alone without court members. To a large extent, then, whatever relation exists between discipline and the military justice system, depends upon sentences imposed by the military judge. In this regard, the Matheson Committee acknowledged that many commanders believe the military judge—especially the more junior judge—is too lenient in adjudging an appropriate sentence. The Matheson Report concluded, however, "that at the present time the allegations of excessive leniency are unfounded." [31]

Four questions were designed to test the attitudes of the Class on the subject of military judges. Questions 59 and 60 concern the adequacy of sentences by young military judges (captains and majors), as opposed to senior military judges. Question 61 concerns the issue of whether military judges, both junior and senior, are more lenient than court members, and Question 73 poses the problem of whether young Judge Advocates are competent to serve as military judges. The following table depicts the responses to these four questions.

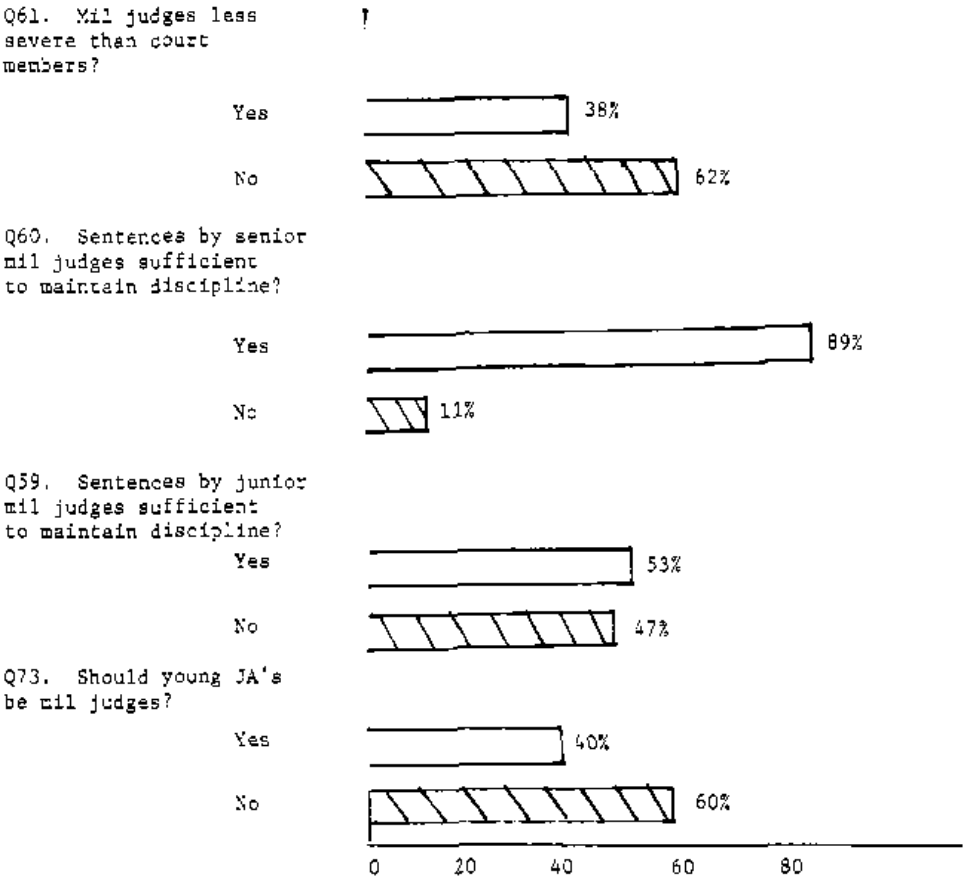
An unusually large number of students express no opinion on each of the four questions pertaining to military judges. For example, about 50 percent express no opinion on young military judges; about 40 percent express no opinion as to senior military judges or whether judges were less severe than court members; and about 25 percent have no opinion as to whether young Judge Advocates should be detailed as military judges. No explanation is given for this high rate of "no opinion" responses. It is suggested, however, that it may result from a combination of lack of knowledge and an attitude of indifference toward the important issues raised by these questions.

Of those expressing opinions, 89.3 percent believe that senior military judges' sentences are sufficient to maintain discipline, and 61.5 percent think that judges generally are less severe than court members. On the other hand, slight confidence (52.7%) is given to the adequacy of young military judges' sentences, and 60.3 percent question whether young Judge Advocates have sufficient training and understanding of military problems to serve as military judges.

[31] Matheson Report at 48.

TABLE II

Attitude Toward Military Judges*



*In each instance the percentages shown omit those expressing no opinion.

In view of the essentially negative attitude toward the use of young Judge Advocates as military judges, consideration should be given to detailing only colonels and lieutenant colonels to serve in these positions. While the present personnel shortage of Judge Advocates is recognized, the declining authorized strength of the Army may release more senior Judge Advocates for assignments as military judges. In any event, captains and majors should not be detailed as military judges when senior Judge Advocates are available. In this regard, within the Judge Advocate General's Corps, the junior judge program is commonly

viewed as a device to improve career attractiveness and, hopefully, personnel retention rates. The use of the junior judge program for these purposes may, however, elevate the needs of the Judge Advocate General's Corps over the needs of the Army as a whole. To this extent, this policy must be weighed against the adverse impact on line officers and their acceptance of the changes introduced by the Military Justice Act of 1968.

The attitude of the subject group toward military justice and discipline includes two remaining areas of concern, the *O'Callahan* decision [32] and pretrial confinement policies. Question 77 addresses the O'Callahan case:

In 1969 the U.S. Supreme Court ruled (O'Callahan case) that off-post offenses in the U.S. could not be tried by court-martial unless the offense had a direct connection to military service. Has this decision substantially affected unit discipline in the U.S.?

1.	Yes	35	(19.4%)
2.	No	55	(30.6%)
3.	No opinion	90	(50.0%)

Over two years have passed since the *O'Callahan* decision was announced by the Supreme Court. At the time the decision was rendered, it was generally agreed within the Judge Advocate General's Corps that this holding would have far-reaching consequences for Army discipline. With the passage of time, however, these fears have lessened. Similarly, based on responses to Question 77, it seems clear the *O'Callahan* decision has had a slight impact on the subject group. Exactly one half of the students express no opinion whatever on this question, and, of those responding, 61.1 percent state that *O'Callahan* has not substantially affected unit discipline.

The Matheson Report found that pretrial confinement policies were viewed by commanders as a major area of concern in the administration of military justice. The most common criticism of pretrial confinement is that applicable policies unnecessarily restrict the commander and that the level at which the decision is made to impose pretrial confinement is too high. Question 74 addresses pretrial confinement:

Do you feel pretrial confinement policies are overly restrictive?

1.	Yes	94	(52.8%)
2.	No	84	(47.2%)

The underlying law and Army regulations governing pretrial confinement have not changed in the past few years. However,

[32] *O'Callahan* v. *Parker*, 395 U.S. 258 (1969).

in the authors' opinion, the pressures of the Vietnam War resulted in a stricter interpretation of the rules and more rigid control of pretrial confinement. Stringent policies reflect not only crowded stockades, but also a recognition that soldiers should not be punished before trial. In addition, dramatic and well-publicized cases, such as the Presidio mutiny trials, have further eroded the authority of commanders in this area. Consequently, the authors anticipated that the overwhelming response to Question 74 would reflect the rigid restrictions that have been imposed on company and battalion commanders. In fact, however, the response to Question 74 is equivocal, with only a slight majority (52.8%) expressing an adverse attitude. Considering only Army officers, the adverse response is marginally higher (57.0%).

C. JUDGE ADVOCATE JOB PERFORMANCE

Within the Army, the Uniform Code of Military Justice is administered by the Judge Advocate General's Corps. Consequently, the job performance of Judge Advocate officers has considerable influence in the formation of attitudes toward military justice. Four questions in the survey were included to determine Class attitudes about Judge Advocate job performance. Questions 23 and 24 attempt to obtain a direct comparison between Judge Advocate company and field grade officers, with the following results:

What is your overall attitude toward the manner in which JAGC officers perform their duties?

	Company grade		*Field grade*	
1. Highly disapprove	2	(1.1%)	0	(.....)
2. Disapprove	12	(6.7%)	3	(1.7%)
3. Slightly disapprove	22	(12.2%)	3	(1.7%)
4. Slightly approve	27	(15.0%)	15	(8.3%)
5. Approve	94	(52.2%)	96	(53.3%)
6. Highly approve	8	(4.4%)	52	(28.9%)
7. No opinion	15	(8.3%)	11	(6.1%)

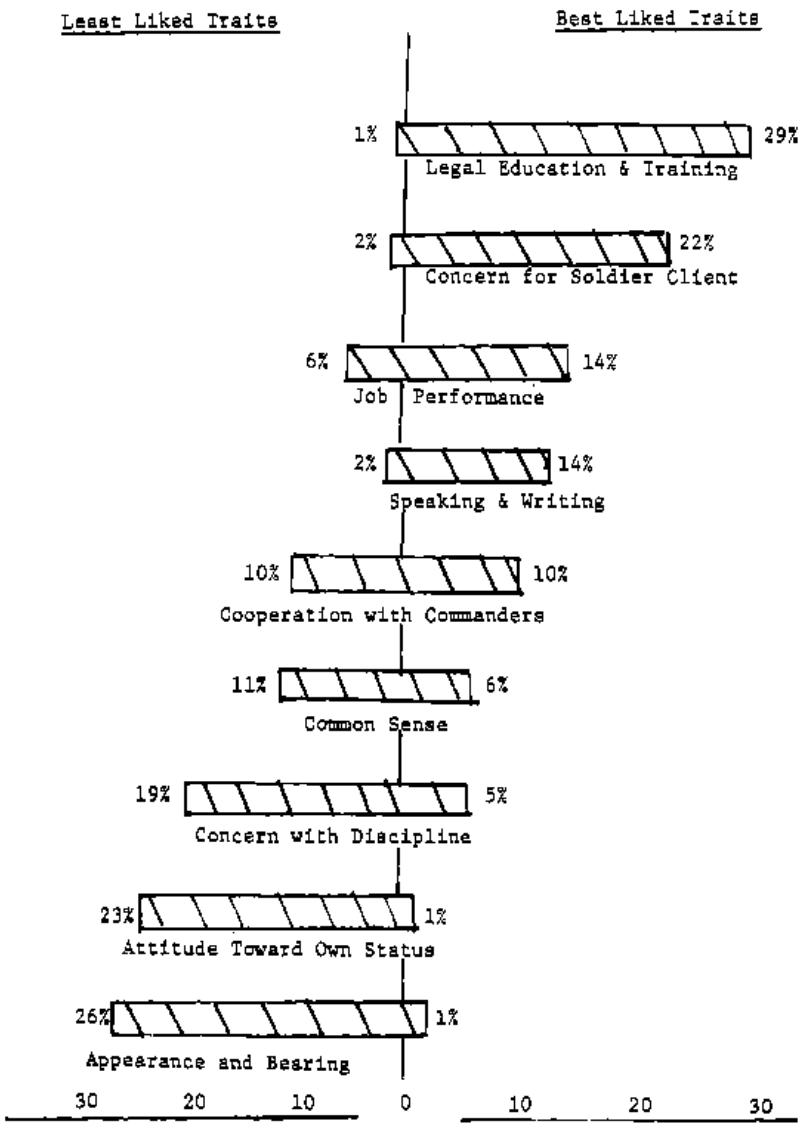
From the above, it is readily apparent that only 3.4 percent register some degree of disapproval toward field grade officers, while 20.0 percent indicate some degree of disapproval toward company grade officers. Omitting the "no opinion" responses, and stated positively, 96.4 percent approve field grade officers, while only 78.2 percent approve company grade. Comparing only the category of "highly approve," the ratio between field and company grade officers is about six to one. It should be noted, however, that the overall Class attitude toward the manner of

performance of company grade officers is by no means unfavorable.

Recognizing that Class reaction would probably be less favorable toward company grade officers, Questions 25–27 and 28–30 were inserted for the purpose of pinpointing specific traits, qualities, and attributes liked best or least about company grade Judge Advocates. The responses to these questions are indicated on the following table:

TABLE III

TRAITS OF JUDGE ADVOCATE COMPANY GRADE OFFICERS



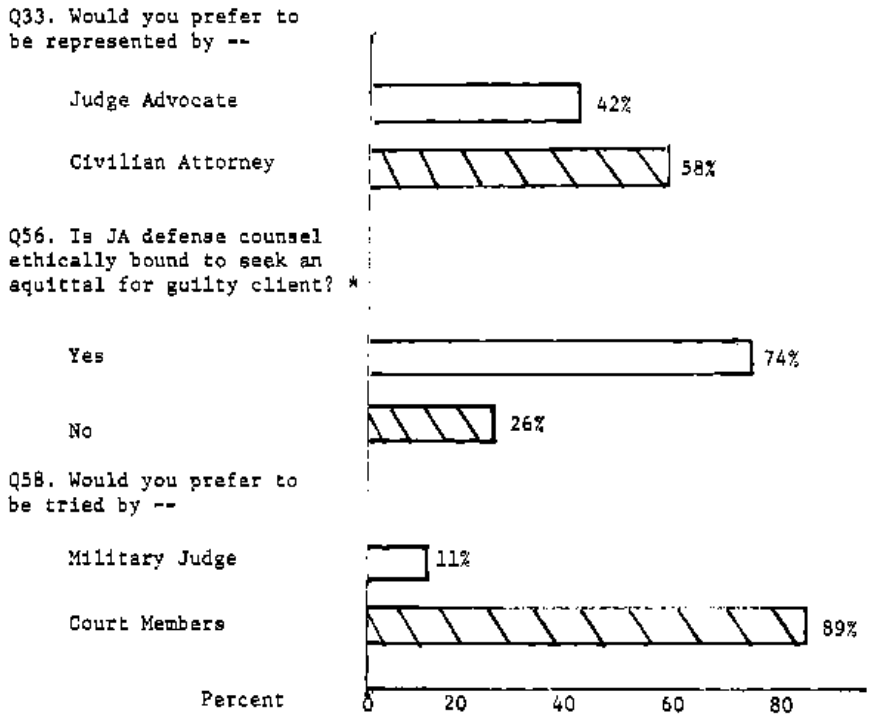
The qualities and traits selected are believed to accord with the attitudes of senior Judge Advocates toward their juniors. It is encouraging that the Class selected concern for the soldier client and job performance as the second and third qualities most admired. On the other hand, the first and second qualities least admired (appearance and bearing and attitude) may suggest areas for improvement. Young Judge Advocates are almost exclusively noncareer oriented and to a large extent deficiencies in attitude and appearance may stem from this fact. Interestingly, the same number of respondents (44) select "cooperation with commanders" as both the best liked and the least liked trait. In each instance, this is the fifth ranked item. In evaluating the "least liked" traits item it should be remembered that company grade officers generally received 78 percent approval and that questions 28–30 offered no "no opinion" or "don't dislike any traits" response. The depth of feeling on the "least liked traits" is, therefore, uncertain.

Perhaps a Judge Advocate's job performance has its most crucial impact when he is serving as defense counsel or military judge. When serving as counsel or judge, it is imperative that the Army as a whole view the Judge Advocate as being above suspicion with regard to his ethics and conduct. No system of military justice can attain wide acceptance unless the judges are viewed as being fair and defense counsel wholeheartedly supportive of the accused's cause. These ethical attributes directly relate to job performance and to a large extent govern the manner in which the Judge Advocate General's Corps is accepted by the Army.

Questions 33, 56, and 58 address these areas. In response to Questions 33 and 58, the Class indicates that, if accused of a serious offense, they would prefer to be defended by a civilian attorney (58% of those responding) as opposed to a Judge Advocate (42%) and tried by a court with members (89%) as opposed to a military judge (11%). Moreover, in Question 56, 22.2 percent opine that a Judge Advocate is not ethically bound to do his utmost to obtain an acquittal for a guilty client. Significantly, 14.4 percent state "I do not know" in answer to this same question. Within the context of Question 56, the response of "I do not know" can only be viewed as casting serious doubt on the perception of defense counsel's loyalty to his client. Responses to these three questions are displayed on the following tables.

TABLE IV

Are Judge Advocates Trustworthy?



* Of those expressing an opinion

If the responses to Question 56 question whether a Judge Advocate defense counsel is ethically bound to support his client, the responses to Question 57 clearly indicate that, in the opinion of the Class, there should be no difference in the ethical standards between Judge Advocates and civilian attorneys, i.e., both should be exclusively client oriented. In answer to Question 57, 81.5 percent of the Class (86.3% excluding "I do not know") state that there should be no difference in ethical standards.

No adequate explanation is given for the Class' preference for civilian attorneys over Judge Advocates and court members over military judges. These attitudes do not seem to accord with the Class approval of the military justice system and the job performance of Judge Advocates, and can be only partially attributed

to the minority that question the complete loyalty of the Judge Advocate defense counsel. Perhaps the explanation lies in the public image of television "Perry Masons" and the flamboyant style of some civilian attorneys who have appeared in widely publicized military cases in the last few years. In any event, the responses to Questions 33, 56, and 58 raise serious issues of the perception of Judge Advocate trustworthiness and acceptability which may pose continuing areas of concern for the Judge Advocate General's Corps.

D. *INNOVATIONS INTRODUCED BY THE MILITARY JUSTICE ACT OF 1968*

As previously stated, one of the reasons for undertaking this study was the substantial changes to the military justice system introduced by the Military Justice Act of 1968. Among the innovations introduced by the 1968 Act were assignment of military judges and qualified defense counsel to special courts-martial and, at the election of the accused, trial by military judge alone without court members. The following three questions were designed to determine attitudes toward these changes:

Q 43. *Recent UCMJ changes require that defense counsel before special court-martial be a judge advocate (or a lawyer). Do you—*

1. Approve 149 (83.7%)
2. Disapprove 29 (16.3%)

Q 44. *Recent UCMJ changes require, in effect, that military judges be assigned to special courts-martial. Do you—*

1. Approve 149 (83.2%)
2. Disapprove 30 (16.8%)

Q 45. *Recent UCMJ changes provide that an accused may be tried by a military judge alone (without court members). Do you—*

1. Approve 149 (83.2%)
2. Disapprove 30 (16.8%)

The responses to these three questions are remarkably uniform and evidence a surprising acceptance of these substantial changes in the military justice system. Over 80 percent indicate that trials by special courts-martial should be conducted by lawyers (military judge and qualified defense counsel) as opposed to line officers with little or no legal training. The same high percentage indicate that there is no need for line officers to serve as court members unless the accused requests, and inferentially, that as a matter of principle there is no good reason why sentences

should not be determined by a Judge Advocate (military judge) rather than line officers (court members). The attitudes reflected in the responses to these three questions are even more surprising when it is considered that probably in excess of 90 percent of all special and general courts-martial today are tried by military judge alone, and that an accused may, after consultation with a lawyer, refuse Article 15 punishment and opt for a special court with qualified defense counsel and military judge. Taken together then, the responses indicate strong approval on the part of the subject group for removing line officers from courts-martial and replacing them with Judge Advocates.

While the Class attitude is one of approval toward increased participation by lawyers in the court-martial system and (whether recognized as such or not) a vote for "civilianization" of military justice, this in no way indicates approval of the sentences or decisions made by military judges. As a matter of fact, the responses to Questions 59, 61, and 73 (see section B) reflect considerable reservation as to the adequacy of sentences imposed by young military judges and, indeed, whether they have sufficient training or understanding of military problems to serve as military judges. In other words, the vote of confidence indicated by the responses to Questions 43, 44, and 45 is limited to the innovations introduced by the 1968 Act and does not necessarily extend to the results obtained by these innovations in particular cases, especially as determined by young military judges.

Two remaining issues are posed by the innovations introduced by the 1968 Act: to what extent has the increased use of Judge Advocates released other officers for the performance of their primary duties, and at what level of command should Judge Advocates be assigned. The following questions are pertinent:

Q 46. *Under recent UCMJ changes, Judge Advocates serve as trial and defense counsel, and the great majority of cases are tried by a military judge without court members. To what extent has this released troop officers for the performance of other duties?*

1.	Insignificantly	18	(10.0%)
2.	Some	56	(31.1%)
3.	Substantially	54	(30.0%)
4.	Greatly	10	(5.6%)
5.	No Opinion	42	(23.3%)

Q 76. *At what level of command should JAGC officers be assigned?*

1.	Company	1	(0.6%)
2.	Battalion	37	(20.9%)
3.	Brigade	106	(59.9%)
4.	Division	33	(18.6%)

Without doubt the increased use of Judge Advocates and trial by military judge alone has released line officers for the performance of their primary duties. The question is how much. The responses to Question 46 signify that the answer lies midway between "some" and "substantially." As it relates to Questions 43, 44, and 45, this means that line officers' overwhelming approval of trial by judge alone and assignment of Judge Advocates to special courts-martial is not based primarily on time-saving considerations. The release of line officers for the performance of other duties is viewed as a bonus or added benefit.

It seems apparent that if special courts-martial, which are typically convened by battalion or brigade commanders, are to be tried by Judge Advocates, additional technical legal advice must be made available at the battalion and brigade level. Prior to the 1968 Act, Judge Advocates were essentially limited to trials by general courts-martial which were convened at division or higher levels. Consequently, Judge Advocates were concentrated at division (or higher) headquarters and seldom assigned below that level. This policy has continued, probably for reasons of economy and centralization of legal effort, despite the increased mission. Implementation of the 1968 Act required substantial increases in Judge Advocate strength, but this augmentation was largely assigned to existing legal offices or sections. The responses to Question 76 suggest that this may not have been the optimum solution, and that Judge Advocates should be assigned below division levels. No matter what the attitudes of the Class are with respect to the military justice system and military lawyers *per se*, over 80 percent express the view that Judge Advocates should be assigned at brigade or lower levels of command. In other words, they may not particularly like them, but they want readily available legal advice, and this means the assignment of Judge Advocates to smaller units than has heretofore been the policy.

E. *EVIDENTIARY RULES*

Question 47 asked the subject group whether today's soldiers living in troop billets should have substantially the same rights as civilians with respect to searches and seizures. Of the 180 responses to this question, 130 (72.2%) indicate that soldiers should not have the same rights as civilians. While not expressly stated in Question 47, it seems reasonable to interpret these responses as indicating that 72.2 percent of the Class are of the view that a commander should, under military law, be permitted

to search a soldier or a barracks at any time without regard to the technical rule of probable cause.

Prior to 1959 it was generally accepted military law that a commander could order the search of a member of his command at any time even though he might not be suspected of having committed an offense. However, in 1959 the Court of Military Appeals held in *United States* v. *Brown* [33] that such a search was unlawful unless based upon reasonable or probable cause; i.e., the commanding officer ordering the search must be apprised of and act upon a sufficiency of information which would lead a prudent person to conclude that contraband or evidence of a crime is at that time in possession of the person or is on the premises to be searched.[34] The evidence obtained from an unlawful search is not admissible in a subsequent trial by court-martial. The determination of the admissibility of evidence obtained by search is a function for the military judge and, in the event of a ruling against the Government, is not subject to appeal or review by higher authority.

The legal rules concerning searches and the admissibility of evidence are highly technical and contain many exceptions and subsets. Moreover, the rules are to some degree ambiguous and subject to change by the courts. In such a dynamic area of law, commanders cannot be expected to have knowledge of or apply all the rules, exceptions, and nuances. While this has been a problem for commanders for the last decade, the advent of widespread drug use in the past two or three years has made it acute.

There is an underlying issue involved: as the "penalty" for unlawful search is the inadmissibility of the contraband or evidence, the accused is usually acquitted even though the commander, military judge, and trial and defense counsel know that the accused did in fact possess the marihuana or other prohibited item. This poses a philosophical or moralistic issue which causes the commander to question the "justice" dispensed by military courts, much less its wisdom. In other words, the issue of guilt or innocence is not determined by precepts of right or wrong but by legal technicalities.

Questions 63 and 64 of the questionnaire are also germane in assessing the attitudes of the subject group on these issues.

Q 63. *Do you believe that the rules of evidence prescribed for military courts are overly technical and legalistic?*

1.	Yes	48	(26.7%)
2.	No	132	(73.3%)

[33] *United States* v. *Brown*, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).
[34] McNeill, *Recent Trends in Search and Seizure*, 54 MIL. L. REV. 83 (1971).

Q 64. *Do you believe that military judges are overly technical and legalistic in applying the rules of evidence?*

1.	Yes	32	(18.0%)
2.	No	146	(82.0%)

Considered together, the possibly contradictory responses to Questions 47, 63, and 64 reveal an overwhelming attitude that military rules of evidence as applied by military judges are not overly technical or legalistic; however, the military rule with respect to searches and seizures, which gives soldiers essentially the same rights as civilians, is inappropriate.

Speaking as Judge Advocates, the responses to Questions 63 and 64 indicate solid support for the military justice system and are welcomed if somewhat unexcepted. The responses to Question 47 are not surprising and merely reflect the well-known attitude of most Army officers toward the problems of search and seizure. In this regard, the Powell Report in 1960 found that "judicial interpretations concerning commanders' authority to order searches are unclear and do not appear to satisfy the needs of the military service"; and recommended an amendment to the Uniform Code of Military Justice "to define authority for searches in a military community." [35] The Code has not been amended and the problem is more critical today. In 1971, however, the Matheson Report concluded that the "requirement for probable cause, rooted as it is in the Constitution, is here to stay," and the solution "is to be found in education and training" of commanders.[36] The Matheson Report also implied that the authority to conduct inspections (as opposed to searches) is relatively clear and constitutes a "valuable tool" in preserving good order and discipline, and concluded that "commanders must be aware of their authority to conduct administrative inspections, which are clearly distinguishable from searches." [37] With due respect to the authors of the Matheson Report, it is suggested that the authority to conduct inspections is at best uncertain or unclear.[38] Moreover, many young military judges are reluctant to convict an accused with evidence obtained from an "inspection," [39] and, as previously stated, the prosecution cannot appeal a decision to exclude such evidence.

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[35] Powell Report at 91–92.
[36] Matheson Report at 44.
[37] *Id.* at 13, 44.
[38] Hunt, *Inspections*, 54 MIL. L. REV. 225 (1971).
[39] Based on one of the author's personal experience as Staff Judge Advocate, V Corps, Europe, from June 1970 to July 1971.

In summary, it seems clear that the Class of 1972 generally finds little fault with military rules of evidence or their application by military judges. An exception is made to the rules pertaining to searches and seizures and the admissibility of evidence obtained therefrom. These are clearly objectionable and the findings of the Powell Report are generally supported by this study. While legislation to remove the requirement for probable cause as recommended by the Powell Report may not, perhaps, be politically or legally possible, these problems cannot be solved through education and training or use of inspections as suggest by the Matheson Report.

Two avenues for improvement are suggested, however. First, the legal rules should be clear to all. Education and training will materially assist, particularly with respect to the legal requirements for conducting searches. The rules regarding inspections, on the other hand, are equivocal and an effort should be made to make them clear and understandable through a change to the Manual for Courts-Martial or definitive court decisions. Second, the Code should be changed to permit the Government to appeal unfavorable rulings of military judges. Such appeals are permitted in Federal courts,[40] and adoption of a similar rule for courts-martial would do much to restore uniformity and credibility to military law.

F. *ARTICLE 15 PUNISHMENT*

Nonjudicial punishment imposed under Article 15 is, in concept, a simple, expeditious method of disposing of minor offenses without resort to trial by court-martial. It is at the Article 15 punishment level that the typical enlisted member receives direct exposure to the military justice system. For example, based on the 1971 experience in Europe, it is estimated that the ratio between nonjudical punishments and courts-martial is at least 14 to one.[41] The sheer number of Article 15 punishments is such that court-martial is not a realistic alternative. Consequently, nonjudicial punishment assumes added significance as the only practical, expeditious way to discipline soldiers for minor infractions and because, to a large extent, the fairness of the entire military justice system as applied to enlisted men is judged by the Article 15 experience.

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[40] 18 U.S.C. § 1404 (1970).

[41] Based on the experience of one of the authors as Staff Judge Advocate, V Corps, Europe, from June 1970 to July 1971.

The 1960 Powell Report fully considered nonjudicial punishment as then administered under the Uniform Code of Military Justice and compared it with the types of summary punishments used by the "armies of other civilized countries, particularly our NATO allies".[42] The Powell committee found that the then limited nonjudicial punishment authority actually encouraged trial by summary and special courts-martial. As a result, the Powell study recommended legislation to increase the commander's authority under Article 15 and to eliminate summary and special courts-martial. These recommendations were not adopted by the Congress in toto; however, effective in 1963 Article 15 was amended to substantially increase the range of authorized punishments. As implemented by the Army, the 1963 scheme provided that a soldier could refuse to accept nonjudicial punishment (with the commander's increased authority) thus terminating the proceedings or forcing the commander to refer the case to a summary or special court-martial. If the commander referred the case to a summary court, the accused was confronted by a one officer court (not a Judge Advocate) who was both judge, jury, prosecutor, and defense counsel. If referred to a special court-martial, the accused was given the protection of a three officer court and a defense counsel; however, he was not entitled to a military judge, and the defense counsel was not an attorney. Moreover, the accused was subjected to the threat of a substantially increased range of punishments in the event of conviction.

The Military Justice Act of 1968 changed this scheme in two ways. First, an accused could refuse trial by summary court-martial, even though he had previously refused nonjudicial punishment. Second, military judges and Judge Advocate defense counsel were detailed to special courts-martial. As previously stated in Chapter I, by the fall of 1969 an offender could not be punished below the special court-martial level without his consent. Moreover, the administrative procedures for imposing nonjudicial punishment have become increasingly complex. For example, Army regulations have recently been changed to provide the right to consult a military lawyer prior to accepting nonjudicial punishment and to require a face to face "hearing" between the commander and the offender.[43]

One additional development in Article 15 punishment should be noted. Pursuant to a change in the 1969 Manual for Courts-

[42] Powell Report at 25–33.
[43] AR 27–10, paras 3–12 and 3–13.

Martial, records of nonjudicial punishments are accepted in evidence in subsequent trials by court-martial in a manner previously reserved for prior convictions.[44] The effect of this change has been to intensify the significance of an Article 15 punishment in situations where the individual is later convicted by a court-martial.

With respect to Article 15, the 1971 Matheson Report determined that a significant number of junior "commanders felt that Article 15 of the Code should be changed to provide for less paperwork and for an increase in the authorized punishment." [45] The Matheson Report concluded that the range of punishments authorized under Article 15 was adequate, but recommended that the Department of the Army "provide the required resources and encourage the increased use of correctional custody." [46]

To determine attitudes of the Class of 1972 on selected aspects of nonjudicial punishment, the questionnaire contained six questions relating to Article 15 procedures, range of punishments, and correctional custody. The following questions pertain to procedures for imposing Article 15 punishments:

Q 41. *In your opinion, should a soldier have the right to consult with a judge advocate prior to accepting Article 15 nonjudicial punishment?*

1. Yes	124	(68.9%)
2. No	56	(31.1%)

Q 42. *As a battalion commander imposing Article 15 punishment, would you object to participation by a judge advocate defense counsel in the proceedings held before you?*

1. Yes	85	(47.2%)
2. No	95	(52.8%)

Quite surprisingly, almost 70 percent of the subject group approved the regulatory change granting the right to confer with a military lawyer prior to accepting nonjudicial punishment. This is surprising because, from the commander's viewpoint, the result of this provision is increased refusals to accept Article 15 punishments and administrative delays. The responses to Question 41 are attributed to a sense of fairness and the

[44] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION) para 75*d*.

[45] Matheson Report at 43.

[46] *Id.* at 56. This survey was prepared and analyzed prior to the Supreme Court decision in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), forbidding the imprisoning of a defendant not accorded access to counsel. The effect of Argersinger on military practice is presently unclear.

realization that the delays involved in administering Article 15 punishments are not, in fact, excessive. In response to Question 48, 75.4 percent indicate these delays are not excessive. While the responses to Question 42 are equivocal, it is interesting that slightly over 50 percent of the Class would not object to turning the nonjudicial proceeding into something like a summary court-martial with the accused represented by a qualified attorney.

Questions 71 and 72 pertain to the issue of correctional custody:

Q 71. *Have you ever served with a unit in which correctional custody (a form of "confinement" imposed under Article 15) was an authorized punishment?*

1. Yes	58	(32.8%)
2. No	119	(67.2%)

Q 72. *Would you favor an expended use of correctional custody as a punishment under Article 15?*

1. Yes	93	(52.5%)
2. No	84	(47.5%)

The Matheson Report concluded that correctional custody, while an authorized form of punishment, was not being used "to any significant degree." [41] This conclusion is generally supported by the responses to Question 71 (although it can certainly be argued that a 32.8 percent affirmative response indicates "significant" use). On the other hand, the slight preference for increased use of correctional custody (52.5%) casts doubt on the recommendation that use of this form of punishment be encouraged by the Department of the Army. (Only 49.7 percent of the Army officers favor expanded use.) Moreover, regular and routine use of correctional custody will inevitably result in more refusals to accept nonjudicial punishments, and thus indirectly increase the number of cases that must be disposed of by courts-martial.

The following questions concern the range of Article 15 punishment:

Q 70. *In your opinion, is the range of punishments authorized under Article 15 sufficient to solve the unit commander's day-to-day disciplinary problems?*

1. Yes	158	(88.3%)
2. No	21	(11.7%)

Q 75. *Under current Army policies enlisted personnel in grades E–7 through E–9 may not be reduced in grade under Article*

[41] Matheson Report at 10.

15 by field commanders. Do you approve or disapprove of this policy?

1.	Approve	109	(60.6%)
2.	Disapprove	71	(39.4%)

The responses to these questions clearly reflect approval of the range of punishments authorized by Article 15 and support the Matheson Report conclusion that commanders have adequate nonjudicial punishment authority. The fact that 47.5 percent of the Class do not favor expanded use of correctional custody (Q 72) and that 67.2 percent have never served in a unit employing correctional custody (Q 71), also indicate that the range of Article 15 punishments is sufficient without regard to correctional custody.

Article 15 does not expressly preclude the reduction of noncommissioned officers serving in grades E–7, E–8, and E–9; however, centralization at Department of the Army of promotions to these grades had the effect of withdrawing reduction authority from field commanders. Over 60 percent of the Class approve this policy, and this response probably reflects an attitude that senior noncommissioned officers should have tenure similar to that provided for commissioned officers. It is suggested, however, that this policy may encourage increased use of courts-martial and thus in some instances prove to be a detriment rather than a benefit.

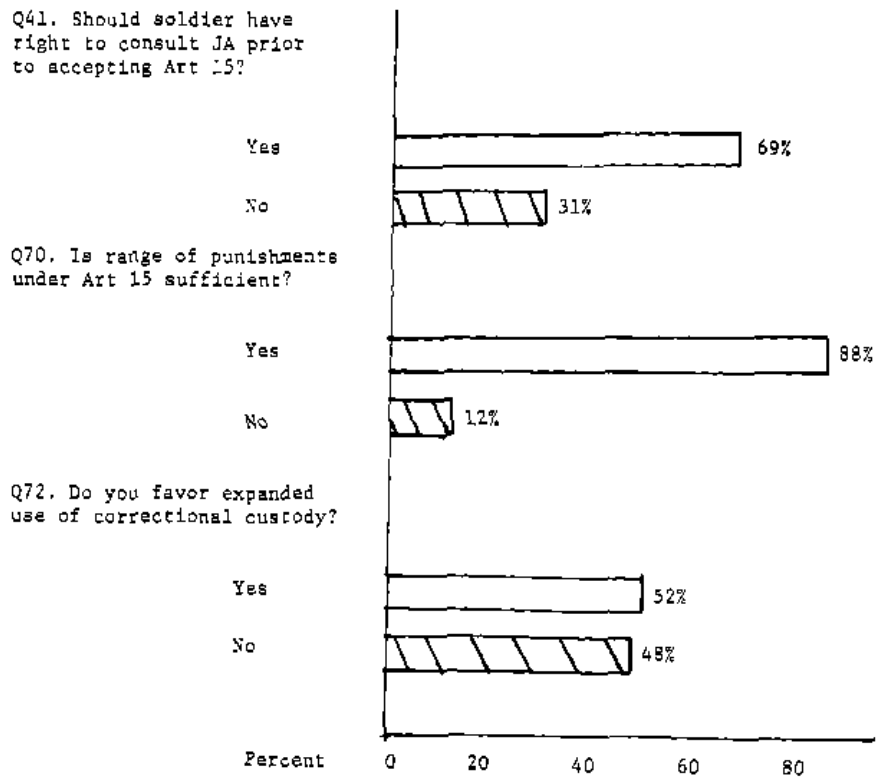
The following table compares the attitudes of the Class with respect to Judge Advocate advice prior to accepting Article 15 (Q 41), the range of nonjudicial punishments (Q 70), and expanded use of correctional custody (Q 71):

G. *ADMINISTRATIVE DELAYS*

It is axiomatic that effective justice must be administered in a timely fashion. The deterrent, corrective, and rehabilitative benefits of punishment are all too often diluted by the passage of time and by inaction within the legal system. There is almost universal agreement that both society and the accused would benefit from a more expeditious processing of criminal cases, yet little concrete progress seems to be made. The problems of delay in the administration of military justice are in a large measure a reflection of similar problems which beset the civilian criminal law system. In both systems, the ever increasing complexity of the law, particularly in the area of procedural safeguards, makes improvement difficult.

TABLE V

Article 15



The Matheson committee reported that administrative delays received "virtually universal condemnation" from commanders, and needed improvement at almost every level of responsibility.[45] The results of the current survey are consistent with these conclusions. Question 49 asks the subject group whether they thought processing time delays in special and general courts-martial were excessive. Eighty percent answered in the Affirmative—the results were not unexpected.

The Class was then asked (Q 50–51) to identify the two factors primarily responsible for delays in the processing of

[45] *Id.* at 13–14.

court-martial cases. Eight common factors (plus "other factors") were provided for choice. The results are—

Delay Factor		
Lack of trained clerical and administrative personnel at unit level	92	(26.7%)
Completion of CID investigation and report	61	(17.7%)
Lack of procedural knowledge on the part of commanders	42	(12.2%)
Administrative delays in the SJA Office	40	(11.6%)
Requirements imposed by law and regulations	37	(10.7%)
Unavailability of military judge	29	(8.4%)
Delays caused by defense counsel	27	(7.8%)
Other factors	14	(4.1%)
Lack of commitment and dedication on the part of JAGC officers	3	(0.9%)

The first factor, lack of trained clerks at unit level, reflects a common complaint. In the Matheson survey, 27 percent of the respondents listed "inadequately trained personnel" as the major cause for delay.[48] Much of this problem involves personnel authorizations. Until recently, legal clerks were not authorized on the standard battalion Table of Organization and Equipment (TOE). As a result, a commander had to "make-do" with whomever he could spare for the job. Legal clerks were largely untrained and subject to a high rate of turnover. The consequences of this policy were what might have been expected. However, in 1970 after years of urging by The Judge Advocate General, the battalion TOE was modified to include an authorized position for a legal clerk.[50] In time, this action should improve the situation; although there will always be a need for trained personnel at levels below battalion.

The second factor, completion of the CID report of investigation, has long vexed both commanders and Judge Advocates. Under paragraph 32 of the Manual for Courts-Martial, a commander is charged with making an investigation when he has reason to believe a member of his command has committed an offense. In many cases, the CID has a concurrent investigative responsibility. There is, however, no requirement that the commander await the results of the CID investigation before pre-

[48] *Id.* at 67.
[50] *See, e.g.*, Army Reg. No. 570–2, para 10–5 (Ch. 2, 4 Mar. 1971).

ferring charges or before initiating his own action. In most cases the CID will provide the commander with the results of their investigation as it progresses, and a coordinated effort can be made. However, notwithstanding policy directives to the contrary, there is an unfortunate tendency on the part of commanders to await action until receipt of the formal CID report. This often results in substantial delay while the CID report is formalized, reviewed, approved, and distributed.

It is interesting to note that none of the three delay factors which rank first in order of importance directly involves Judge Advocate operations. They are surely mattters of vital concern to the Judge Advocate, but their solution would seem to call for personnel and training programs requiring a high degree of command action.

As to those factors which directly involve Judge Advocates, it is heartening to note that few respondents found a lack of commitment and dedication on the part of Judge Advocates. However, the response concerning administrative delays in the Staff Judge Advocate's Office indicates a belief that there is room for internal improvement in this area. Perhaps most surprising is the relatively low response concerning delays caused by defense counsel; this would seem to belie counsel's stereotyped image as a "foot dragger," at least as far as War College students are concerned.

Four questions were designed to determine how the subject group perceived the extent of the delay problem in relation to specific processing times and the standards which should be achieved in practice. Thus, Question 52 asks:

> *Based on your experience, how many days does it take to process a typical special court-martial case from knowledge of the commission of the offense to completion of the record of trial and action by the convening authority?*
>
> 1. 1–14 days
> 2. 15–29 days
> 3. 30–44 days
> 4. 45–59 days
> 5. 60–89 days
> 6. 90–119 days
> 7. 120–180 days
> 8. Over 180 days

Question 53 provides the same range of processing times and asks:

> *Considering the requirements of military discipline and the rights of the accused, how long should it take, in your judgement, to process such a typical special court-martial case?*

Shown below are comparative results for the two questions:

Days	*Now Takes*		*Should Take*	
1–14	6	(3.5%)	48	(27.0%)
15–29	28	(16.3%)	91	(51.1%)
30–44	51	(29.7%)	28	(15.7%)
45–59	32	(18.6%)	6	(3.4%)
60–89	33	(19.2%)	4	(2.2%)
90–119	12	(7.0%)	1	(.6%)
120–180	7	(4.1%)	0	-----
Over 180	3	(1.7%)	0	-----

Similar questions (Q 54 and 55) were then posed for general courts-martial processing times, with the following comparative results:

Days	*Now Takes*		*Should Take*	
15–29	2	(1.3%)	25	(14.3%)
30–44	3	(1.9%)	46	(26.3%)
45–59	21	(13.5%)	43	(24.6%)
60–89	39	(25.0%)	37	(21.1%)
90–119	34	(21.8%)	12	(6.9%)
120–179	31	(19.9%)	11	(6.3%)
180–219	18	(11.5%)	1	(.6%)
220–365	5	(3.2%)	0	(-----)
Over 365	3	(1.9%)	0	(-----)

Several interesting conclusions can be drawn. First, in their perception of current processing time experience, the subject group covered a broad range of possibilities. There is, in fact, no real consensus, with about two thirds of the students indicating that special courts were ranging between 30 and 90 days and general courts between 60 and 180 days. These results are not completely unexpected as the "typical" case was purposely not defined. However, the responses show at best a mixed reaction concerning current actual experience.

Turning to the second aspect of the problem, how long should it take to process cases, there is a higher degree of agreement. Over 93 percent of the respondents believe that a typical special court-martial should be processed in less than 45 days; over 86 percent believe that a general court should be processed in less than 90 days. In part, this is merely a reflection of the attitude expressed in Question 49, where 80 percent agreed that processing time delays were excessive. However, the results may also indicate an expectation which is totally unrealistic under the circumstances. Analysis of the more extreme responses shows that over 27 percent of the students consider that special courts-

martial should be processed in less than 15 days and over 40 percent agree that general courts-martial should be processed in less than 45 days.

It is difficult to determine what realistic processing times would be for "typical" cases. The Department of the Army does not maintain statistics for special courts-martial, so averages are not available. However, during the last six months of 1971, it took an average of 167 days to process a general court-martial case from the date of charges to the time the record of trial was received for appellate review.[51] It is the opinion of the authors that the 45 and 90 day standards suggested by the subject group will be difficult to attain. The reasons for this are many and complex, but it is apparent from the survey that line officers are not fully cognizant of the problems involved.

In summary, there is a strong attitude among War College students that there are excessive delays in the processing of courts-martial cases, and that the primary causes for delays involve matters of personnel, training, and coordination with the CID. Judge Advocate operations are also held responsible, but only to a secondary degree. Finally, while they do not fully agree on their perception of the current situation, the students believe that high—and perhaps unrealistic—processing time standards should be achieved.

H. *SELECTION OF COURT MEMBERS*

Critics of the military justice system have raised violent objections to the procedures used for determining the composition and membership of courts-martial. As previously noted, the accused now has the right, in all but rare instances, to be tried by judge alone. However, if he chooses not to exercise this right, he is tried by a court with members. The members act as fact finders, similar to a jury in the civilian system, and determine an appropriate sentence if the accused is found guilty. Special and general courts-martial are composed entirely of officers, unless the accused expressly requests enlisted men. When such a request is made, enlisted men must constitute at least one third of the total membership of the court.

The statutory basis for the present practice of selecting court members is Article 25 of the Code which provides pertinently:

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[51] Interview with George Finkelstein, Captain, Military Justice Division, Office of The Judge Advocate General, US Army, Washington, 3 Mar. 1972 [hereafter referred to as the Finkelstein interview].

> When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. . . .[52]

Critics who seek to change the present system would do so in two ways. First, they would broaden the class from which members are chosen to achieve what is described as "trial by peers." Essentially, this would involve increased participation by enlisted personnel, particularly in the lower grades. While an enlisted man has the right to have at least one third of the court members drawn from enlisted ranks, this option is seldom exercised. Professor Edward F. Sherman comments:

> . . . since 1951, whenever there has been a request for one-third enlisted men, commanders have invariably chosen noncommissioned officers, who are usually considered even more disciplinarian and severe than officers. As a result, enlisted personnel are rarely requested (they were requested in only 2.6 percent of Army courts-martial in 1968), and so court-martial duty continues to be pretty much the exclusive province of the officer class.[53]

Although the federal courts have held that the doctrine of "trial by peers," as defined by civilian courts,[54] has no application to the military system, an all enlisted court is not impossible under the present law. In this regard, *Time* magazine reports a recent case in which all members of a special court-martial were in the grade of E–5 or below.[55] However, such cases are not likely to be precedent setting, and, so long as Article 25 remains in effect, the majority of court members will continue to be drawn from officer ranks.

The questionnaire did not specifically address the issue of trial by peers, but did seek to determine attitudes regarding the second and more striking criticism of the system, namely, the method by which individual members are selected. Historically, the commander had the responsibility for choosing the members of the court. Article 25 preserved this prerogative by requiring the convening authority to detail only those members who "in his opinion" were best qualified.

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[52] 10 U.S.C. § 826 (1970). A thorough study of random selection appears in Brookshire, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71 (1972). Empirical research by Major Brookshire also reveals widespread support for some aspects of random juror selection by field grade officers.

[53] Sherman, *supra* note 13 at 48.

[54] *DeWar* v. *Hunter*, 170 F. 2d 993 (10th Cir. 1949).

[55] *The Law*, TIME (8 Nov. 1971), 81–82.

Author Robert Sherrill uses more colorful words:

> The corruption of the military system of justice runs through every layer, but it starts at the top, where the whims of the commandants flutter like pigeons over a courtyard. . . .
>
> The commander can personally select the jury members from among officers who are beholden to him for favors, promotions, and other career opportunities. . .[14]

In civilian courts, jurors are selected on a random basis, using tax and voter lists, address directories, and like sources. Those who oppose the current military practice, call for the use of similar, random procedures in selecting the members of courts-martial. The following question was designed to determine the attitudes of the Class:

> Q 62. *Should court members be selected personally by the convening authority or should a random selection system be used as in civilian criminal courts?*
>
> 1. By convening authority 75 (41.7%)
> 2. By random system 105 (58.3%)

Surprisingly, a sizeable majority of the Class opt for a random system of selection. To insure that the question had not been misunderstood or misinterpreted, followup interviews were conducted with a number of students. Without exception, these interviews revealed no desire to change the composition of the court; there was, in fact, a strong attitude that the majority of the court members continue to be commissioned officers. Moreover, there was no desire to change the practice of allowing the convening authority to determine the size of the court or its composition by grade—these were viewed as essentially administrative matters. The attitudes of those favoring the random system were focused almost entirely on the method by which the individual member was selected. This, the majority believed, should be done by duty roster, without regard to the convening authority's personal opinion about qualifications.

Selection of court members has been one of the troublesome areas in the administration of military justice. The relatively clear preference for the random system is even more remarkable in view of the background of the subject group and the fact that the issue involves the elimination of a traditional command prerogative. A change in current procedures can best be accomplished by legislation. In view of the survey results, Department of the Army support for such legislation appears palatable to commanders. In any event, a random system of selecting court

[14] SHERRILL, *supra* note 12 at 76.

members would remove a constant source of criticism and suspicion in an area little understood by the public at large.

I. MILITARY JUSTICE TRAINING

In discussing the problem of military justice training for line officers, the Matheson Report observed:

> Commanders need to be educated in military justice, not to become lawyers but to assist them in the practical, day-to-day administration of military justice. . . . It should be apparent to even the most casual observer that junior commanders need more formal training in military justice—training, however, that is clearly suited to their particular needs. The leadership aspects must be included. . . .
>
> The one action that could contribute to a viable system of military justice and, as a result, improve discipline and morale is a massive, concerted effort on education and training in military justice.[57]

The Powell Report, some 11 years prior to Matheson, reported that 61 percent of senior commanders believe line officers received insufficient training to administer and conduct special courts-martial, and 80 percent of company and battery commanders consider their training insufficient.[58]

Prior to the Military Justice Act of 1968, many line officers received a comprehensive and highly practical course in military justice by serving as trial and defense counsel and members of special courts-martial. Since the fall of 1969, however, Judge Advocates have virtually assumed complete responsibility for the trial of court-martial cases and, as previously noted, there is little opportunity for line officers to serve as court members today because the great majority of cases are tried by military judge alone. While the means of acquiring a working knowledge of military justice has lessened, the need remains—company and battalion commanders cannot properly perform their duties unless they have sufficient knowledge to administer Article 15 punishments and to supervise the preparation and forwarding of court-martial charges to higher headquarters.

Two questions on military justice training are pertinent:

Q 68. *Do you feel you have sufficient knowledge and training in military law to properly serve as a special court-martial convening authority?*

1. Yes	130	(72.6%)
2. No	49	(27.4%)

Q 69. *Do you feel that company grade officers receive sufficient training in military law?*

1. Yes	24	(13.7%)
2. No	151	(86.3%)

[57] Matheson Report at 27 and 48.
[58] Powell Report at 28.

The responses to Question 69 clearly indicate an attitude on the part of the subject group that lieutenants and captains should receive additional training in military law. This attitude accords with the Powell and Matheson Reports. The responses to Question 50–51 and, to a lesser extent, Question 76 reinforce the belief that company grade officers need additional training in military justice. The responses to Question 50–51 reflect that the first and third most important causes for delays in processing courts-martial cases were lack of trained clerical and administrative personnel at unit level and lack of procedural knowledge on the part of commanders. Moreover, 81.4 percent of those responding to Question 76 indicated that Judge Advocates should be assigned below division level. While not directly in point, this could well reflect the lack of knowledge in military law and procedure at battalion and company levels.

While the Class is of the opinion that company grade officers *need more training*, 72.6 *percent believe that they have sufficient* knowledge and training in military law to serve as special court-martial convening authorities (Q 68). In other words, company officers need more training but War College students do not. This attitude is attributed in part to a feeling that company grade officers never receive enough training on any subject. However, the proper evaluation of this attitude probably lies in the prior experience and training of the subject group, including service on many courts-martial as members and counsel. Future War College students will not have this opportunity and the need for military justice training will increase. Moreover, civilian and military criminal law is changing and a program of "continuing legal education" is clearly indicated.

J. *RACE*

It is common knowledge among Staff Judge Advocates and many commanders that black soldiers receive more disciplinary punishments than white soldiers. For example, from October 1970 to September 1971, the black prisoner population in USAREUR confinement facilities averaged about 50 percent of those confined (black pretrial confinement was slightly higher, 52.8%). During this same period USAREUR's military population was approximately 14 percent black.[59]

[59] US Department of the Army, Headquarters US Army, Europe and Seventh Army, *Conference on Equal Opportunity and Human Relations, 10-12 Nov. 1971* (Nov. 1971), pp. K–9 and K–10. On 31 December 1971, 32 percent of the Army world-wide stockade population was black—about twice the black enlisted strength (15.7%, 31 Oct. 1971); Finkelstein interview.

The causes for the disproportionate number of disciplinary actions directed against black soldiers are uncertain. For the purposes of this study, however, the important question is not whether blacks are punished more often—they are—but whether the military justice system discriminates against black soldiers because of their race. To determine student attitudes on this point, the subject group was asked whether black soldiers were discriminated against by the military justice system, military judges and court members, or commanders and convening authorities (Q's 65, 66, and 67). The affirmative responses were:

Q 65. The military justice system—4 (2.2%)
Q 66. Military judges and court members—6 (3.3%)
Q 67. Commanders and convening authorities—13 (7.2%)

While over 90 percent of the subject group expressed the opinion that disciplinary actions were not racially motivated, it is observed that 85 percent of the Class had previously held command positions at battalion or higher levels with direct responsibility for such actions. More significantly, only five members of the Class of 1972 are black (less than 3%). Thus, the unusually low percentage of affirmative responses, while accurately reflecting group attitudes, is highly suspect and may not accord with the true facts.

An optional, free-response question was included in the survey in an effort to determine opinions on the underlying causes of why black soldiers are punished more often than whites. Eighty percent (144) of the completed questionnaires contained a written comment to this question. Environmental and social factors and the commission of more offenses were the two most prevalent responses. It is also interesting to note that about 10 percent of the written comments took the position that black soldiers were not subjected to disciplinary punishments more often than whites.

A continuing problem in race relations for Staff Judge Advocates is the near total absence of black Judge Advocates. Increasingly, black soldiers request a black defense counsel and utterly refuse to discuss their case with white, uniformed Judge Advocates. In this connection, The Judge Advocate General recently commented:

> We presently have 16 [black Judge Advocates] on duty in a corps of 1,700. Only 3 of these regularly or frequently serve as military trial judges, where there is the greatest need for them. We are actively recruiting and looking into every reasonable means to help alleviate the shortage. But there is a basic limitation. Blacks com-

> pose only about 1% of the qualified lawyers, and that is a tough hurdle to get over. The few blacks that are admitted are consequently in tremendous demand, and the sheer economics of the situation make us poor competitors for this limited supply of talent.[60]

In a recent experiment at Fort Carson, Colorado, Judge Advocate defense counsel were permitted to wear civilian clothes for the purpose of determining whether they would be more acceptable to black soldiers. The Commanding General at Fort Carson termed the results "excellent," and intends to continue the practice.[61] Question 78 asked whether the subject group would object to a policy of permitting Judge Advocate defense counsel to wear civilian clothes. Over 61 percent of the Class responded that they would object to such a policy. In view of this expression of objection, Army officers should be educated on the background and rationale for this policy in the event a decision is made to extend the Fort Carson program to other installations.

K. *LEGAL ASSISTANCE AND CLAIMS*

Military justice is often described as the "bread and butter" of the Judge Advocate General's Corps, and Judge Advocates are most often thought of as performing such duties. In truth, there are many functions performed by military lawyers which are in no way connected with the practice of criminal law. For example, Judge Advocates have staff responsibilities in procurement, administrative, and international law. Additionally, they provide personal legal assistance and claims services to military personnel and their dependents. These last two functions may be especially important in the formation of attitudes, as they affect the individual in a personal and financial way. For this reason, the questionnaire was designed to determine the attitude of the subject group toward the manner in which Judge Advocates perform legal assistance and claims duties.

Army regulations provide for the establishment of legal assistance offices wherever Judge Advocates are assigned. Assistance may be given to military personnel, their dependents, and specified civilians to the extent that staffing and facilities permit. The regulations recognize that personal legal difficulties may contribute to a state of low morale and inefficiency, as well as disciplinary problems.[62] Prompt legal assistance is considered an

[60] George S. Prugh, MG, Address to Army Policy Council (Dec. 1971), p. 5. Cited with special permission of General Prugh.

[61] Finkelstein interview.

[62] Army Reg. No. 608-50: *Personal Affairs, Legal Assistance* (28 Apr. 1965, as changed), para 1.

effective preventive measure. The service extends to a wide range of legal matters such as wills, powers of attorney, taxation, contracts, and domestic relations, but generally excludes appearances in state or federal courts. Question 31 pertains to legal assistance:

Based on your experience as an officer, what is your overall attitude toward the manner in which personal legal assistance (e.g., wills, tax, domestic and financial matters) is provided to members of the armed forces and their dependents?

1.	Highly disapprove	2	(1.1%)
2.	Disapprove	9	(5.0%)
3.	Slightly disapprove	19	(10.6%)
4.	Slightly approve	22	(12.2%)
5.	Approve	78	(43.3%)
6.	Highly approve	49	(27.2%)
7.	No opinion	1	(0.6%)

The results indicate a generally favorable attitude toward the legal assistance program. Over 82 percent of the respondents voiced approval, with a strong (27%) showing in the category of highly approve.

Judge Advocates administer a number of programs involving claims both for and against the Government. However, the average officer is most likely to gain his impression of the manner in which claims are processed when his household goods are lost or damaged in shipment or storage. The frequency of moves necessitated by military life makes such loss or damage commonplace. Law and regulations provide for the administrative settlement of personal property claims which do not exceed $10,000.00, and readily available field approval authorities can pay claims of $2,500.00 or less.[63] Question 32 pertains to claims:

Based on your experience as an officer, what is your overall attitude toward the manner in which claims against the U.S. (e.g., household goods, damage to personal property) are processed and paid to members of the armed forces and their dependents?

1.	Highly disapprove	10	(5.6%)
2.	Disapprove	23	(12.8%)
3.	Slightly disapprove	23	(12.8%)
4.	Slightly approve	22	(12.2%)
5.	Approve	61	(33.9%)
6.	Highly approve	27	(15.0%)
7.	No opinion	14	(7.8%)

The survey results are less favorable to Judge Advocates in this area, particularly when compared to the responses concern-

[63] Army Reg. No. 27-20: *Legal Services, Claims* (18 Sep. 1970, as changed), para 3-14*b*(1), based on 31 U.S.C. § 240 *et seq.* (1970).

ing legal assistance. While a majority of the subject group approve the manner in which claims were processed, a strong minority (31.2%) register some degree of disapproval. Indeed, the total indication of disapproval for the manner in which claims are processed and paid exceeds any other attitudinal factor involving Judge Advocate operations or personnel, including the disapproval indicated for Judge Advocate company grade officers and the overall attitude toward the military justice system.

During follow-up interviews, respondents complained of overly complex claims procedures, excessive requirements for documentation and estimates, and inordinate time delays. Most Judge Advocates view the claims program as a valuable fringe benefit which should result in favorable reaction toward their Corps. They recognize that prompt and fair investigation and settlement of claims is a major morale factor for military personnel.[64] However, in view of the degree of negative response, administration of claims may be one area in which more favorable attitudes toward Judge Advocates can be developed.

L. *KNOWLEDGE OF THE JUDGE ADVOCATE GENERAL'S CORPS*

No examination of attitudes toward the Judge Advocate General's Corps would be complete without mention of the chronic officer retention problem the Corps has experienced since the end of the Korean conflict. As of 1 February 1972, there were 1,672 Judge Advocates on active duty in the Army, categorized as follows: [65]

	GEN	*COL*	*LTC*	*MAJ*	*CPT*	*TOTAL*
Regular Army	5	97	112	159	203	576
Volunteer Indef (USAR)		2	8	15	21	46
Obligated Tour (USAR)					1,050	1,050
Total	5	99	120	174	1,274	1,672

As can be seen, field grade officers are less than 25 percent of the total strength of the Corps. The most critical shortages are

[64] US DEPARTMENT OF THE ARMY, DEPARTMENT OF THE ARMY PAMPHLET 27-5, STAFF JUDGE ADVOCATE HANDBOOK (19 Jul. 1963), para 11*a*.

[65] Interview with Miss Beth Beckley, Chief Clerk, Personnel, Plans and Training Office, Office of The Judge Advocate General, US Army, Washington, 28 Feb. 1972.

in the grades of lieutenant colonel and major where, in 1970, the combined shortfall reached 33 percent of authorizations. In this regard, the Judge Advocate General's Corps has consistently led all other Army branches, including the Medical Corps, in comparative field grade shortages.[66]

Extensive studies have been conducted to determine why the military services have been unable to retain sufficient numbers of career military lawyers. While it is beyond the scope of this study to examine this subject in detail, there is general agreement that inadequate financial incentives and a perceived lack of Judge Advocate prestige within the military community are the principal causative factors.[67]

In the main, then, the Judge Advocate General's Corps must rely on young captains to perform the bulk of legal services. Almost all of these officers, both Regular and Reserve, are serving four year periods of obligated service—few will remain to pursue a military career. While the junior military lawyer is generally conscientious, he often lacks the level of experience and maturity required for his work. The problem is aggravated by the fact that one out of every three Judge Advocate captains is filling an authorized field grade position.

As the strength of the Army declines, the situation should tend to improve. However, the personnel requirements imposed by the Military Justice Act of 1968 are so substantial that it will be impossible in the foreseeable future to return to the experience levels which obtained in the pre-Vietnam period.[68] In direct relation to this study, the heavy reliance on young and relatively inexperienced officers will continue to have a significant, and perhaps disproportionate, impact on the shaping of attitudes toward the Judge Advocate General's Corps.

The questionnaire contained five questions to test the knowledge of the subject group about Judge Advocate personnel policies. Considering only Army responses, the results are summarized: while 96.0 percent know that Judge Advocates are graduates of an accredited law school (Q 34), only 74.7 percent are aware that Judge Advocates must also be licensed to practice law (Q 35). A good many officers (19.6%) erroneously believe that Judge Advocates receive professional pay (Q 36). Concerning promotion

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[66] Emory M. Sneeden, LTC, *A New Look at the Lawyer Retention Problem in the Army, or Why Lawyers Get Out?* Essay (1 Dec. 1969), p. 2.

[67] US Department of Defense, Assistant Secretary of Defense for Manpower and Reserve Affairs, *Military Lawyer Procurement, Utilization, and Retention* (Oct. 1968).

[68] Sneeden, *supra* note 66 at 4.

policies, although Army Judge Advocates are not promoted more rapidly than their contemporaries and do not have a separate promotion list (Q's 37, 38), 8.2 percent and 28.8 percent believe to the contrary. The results are not considered remarkable, although Judge Advocates may be piqued at the responses concerning their authority to practice law and their entitlement to professional pay. In the authors' opinion, these attitudes are unrelated to Questions 33, 56, and 58 regarding attorney trustworthiness (See Section B).

The individual followup interviews in this area may be more significant than the response to the questionnaire. Based upon these interviews, the Class is generally aware that the Judge Advocate General's Corps is experiencing personnel shortages. However, the students are not fully cognizant of the critical problem of grade imbalance or the extent to which the experience level of the Corps has been diluted.

M. *CONTRASTS IN ATTITUDES*

As stated earlier, the subject group reflected a high degree of homogeneity in terms of personal background and general experience. Analysis of the biographical section of the questionnaire, compared and correlated with the substantive portions, supports this statement. For example, there were no meaningful differences in attitudes between Army officers and those of the other services. However, the attitudes of Army officers assigned to the three basic combat branches (Armor, Field Artillery, and Infantry) and officers who held command positions and those who served as special courts-martial convening authorities, both before and after the implementation of the Military Justice Act of 1968 (1 August 1969), vary in some particulars from the attitudes held by the Class as a whole. These differences, while interesting, do not substantially alter the attitudes revealed in the preceding sections of this chapter. Briefly, however, the more significant contrasts are noted below:

a. Armor, Field Artillery, and Infantry Officers: Basic combat branch officers are more opposed to legal advice prior to Article 15 punishment, the use of young Judge Advocates as military judges, and restrictions on their search and seizure powers than the Class as a whole. They were more complimentary in evaluating company grade Judge Advocate job performance and more critical of the rules of evidence as being "technical and legalistic."

b. Officers who held command positions since 1 August 1969: These commanders were more adverse in their overall attitude toward the military justice system and Judge Advocate company grade job performance.

c. Officers who served as special courts-martial convening authorities since 1 August 1969: These officers were more critical of the present military justice system, the use of Judge Advocate defense counsel in special courts, and the random system of selecting court members. They were more favorable in their view of whether the Army was sufficiently disciplined to fight.

d. Officers who held command positions prior to 1 August 1969: These commanders evidenced greater disapproval of the state of discipline, Judge Advocate defense counsel and military judges in special courts, search and seizure rights, random selection of court members, and the rules of evidence.

e. Officers who served as special courts-martial convening authorities prior to 1 August 1969: These officers were less favorable toward Judge Advocate defense counsel and military judges in special courts-martial, search and seizure rights, random selection of court members, and the rules of evidence. On the other hand, their evaluation of the ability of the Army to perform its combat mission was more optimistic.

The following table portrays these variances in greater detail:

TABLE VI

Contrasts in Attitudes

	Overall average (Percentages)	Armor, Inf & FA Officers	Command Since '69	SPCM Convening Auth Since '69	Command Prior '69	SPCM Convening Auth Prior '69
Q12. Mil Justice System—Disapprove	21.4	20.3	26.8	31.7	22.7	24.5
Q23.* JA Captains—Disapprove	21.8	16.0	28.4	26.3	22.4	21.6
Q39.* State of Discipline—Disapprove	81.2	77.4	82.7	84.2	87.9	85.5
Q40. Disciplined to Fight—No	41.7	40.0	43.4	32.5	48.8	37.5

Contrasts in Attitudes

	Overall average (Percentages)	Armor, Inf & FA Officers	Command Since '69	SPCM Convening Auth Since '69	Command Prior '69	SPCM Convening Auth Prior '69
Q41. Art 15 Legal Advice—No	31.1	40.7	31.3	34.1	33.3	29.8
Q43. JA SPCM Defense Counsel—No	16.3	17.6	19.6	27.5	24.1	25.0
Q44. SPCM Military Judge—No	16.8	19.8	18.4	19.5	22.6	24.6
Q47. Search and Seizure Rights—No	72.2	77.9	72.7	73.2	79.8	80.7
Q62. Random Sel of Members—No	41.7	40.7	39.4	46.3	51.2	52.6
Q73.* JA Young Judges Disapprove	60.3	63.8	59.5	51.5	63.3	62.5
Q63. Evidence Rules Legalistic—No	73.3	67.4	74.7	73.2	78.6	80.7

*No opinion responses excluded.

From the above it would appear that officers who held command positions prior to 1969, and, to a slightly lesser extent, those who served as special courts-martial convening authorities prior to 1969, are markedly less libertarian in their outlook than any other group. These differences are not explained by age or any other demographic factor.

IV. CONCLUSIONS AND RECOMMENDATIONS

Based on analysis of the questionnaire as amplified by followup interviews, the significant attitudes of the Army War College Class of 1972 toward the present system of military justice and its administration by Army lawyers are

a. Strong support generally exists for the present system of military justice and its administration.

b. Strong disapproval of the present state of Army discipline

exists—a considerable minority question as to whether discipline is sufficient to perform the Army's combat mission.

c. Sentences by military judges are not less severe than those adjudged by court members—sentences by junior judges are viewed less favorably than those by senior judges.

d. Young Judge Advocates should not be assigned as military judges.

e. Judge Advocate job performance, by both field grade and company grade officers, is viewed favorably.

f. Company grade Judge Advocates are rated lowest in appearance and bearing and attitude toward their own status.

g. The trustworthiness of Judge Advocates—confidence in their ability, objectivity, and ethical standards—is questioned.

h. Overhelming support exists for the principal features of the Military Justice Act of 1968—military judge and Judge Advocate defense counsel on special courts and trial by military judge alone.

i. There is inadequate recognition of the extent to which recent innovations have released line officers for the performance of primary duties.

j. Judge Advocates should be assigned below division level.

k. The rules of evidence and their application by military judges are not overly technical and legalistic except for the rules regarding search and seizure.

l. The range of Article 15 punishments is adequate without regard to expanded use of correctional custody.

m. A soldier should be permitted to consult a Judge Advocate prior to accepting Article 15 punishment.

n. The processing time for general and special courts-martial cases is excessive.

o. Primary factors causing court-martial delays are lack of trained clerks, completion of CID reports, and insufficient procedural knowledge on the part of commanders.

p. A random system of selection should be used to determine court membership.

q. The military justice system does not discriminate against black soldiers on the basis of race.

r. Company grade line officers do not receive sufficient training in military justice.

s. The manner in which legal assistance is provided meets with approval; however, the manner in which claims are administered is questioned.

t. General awareness exists concerning career aspects of the Judge Advocate General's Corps, but there is a lack of appreciation for the critical shortage of experienced personnel.

This study was undertaken to determine the attitudes of a highly select group of senior officers about the present system of military justice and the Judge Advocate General's Corps. It was not undertaken for the purpose of recommending revisions to the Uniform Code of Military Justice. However, as stated in Chapter I, the Class of 1972 represents the future leadership of the Army and their attitudes toward military justice are both pertinent and significant. Any intelligent reform of military justice, while considering other and possibly contradictory desires, should take into account these attitudes.

Generally stated, the Class views favorably and supports the present system of military justice and the Judge Advocate General's Corps. While there are no adverse attitudes which raise fundamental issues concerning the administration of military justice, the attitudinal conclusions of this study suggest several changes that would do much to further enhance the acceptability of military law to these active participants in the military justice process.

1. To the extent possible, Judge Advocate captains and majors should not be assigned as military judges. In this regard, it may be preferable to assign a senior Judge Advocate as a special court-martial military judge rather than as Staff Judge Advocate or Deputy Staff Judge Advocate.

2. Standards of appearance and military bearing of junior Judge Advocates, especially those assigned as military judges, should be improved. Attitudes of senior line officers on this and other aspects of military justice should be explained to young Judge Advocates.

3. Tables of Organization and Equipment should be revised to provide for the assignment of Judge Advocates below division level.

4. Department of the Army should sponsor legislation to—

(*a*) permit the Government to appeal adverse rulings by the military judge in the area of search and seizure.

(*b*) require convening authorities to select members of courts-martial by a random system, but allowing the convening

authority to determine the composition of the court by number and grade.

5. Payment of claims to military personnel should be simplified and expedited.

6. Military justice training of line officers should stress—

(*a*) the responsibilities at unit level for accurate preparation and timely forwarding of disciplinary actions.

(*b*) the need for absolute fairness and objectivity in disciplinary actions involving members of minority races.

(*c*) legal ethical standards for defense counsel and military judges.

(*d*) the present shortage of senior military lawyers and the grade and experience imbalance in the Judge Advocate General's Corps.

(*e*) both proper and improper reasons for delays within the office of the Staff Judge Advocate in scheduling cases for trial and completing the record of trial.

APPENDIX

The following questionnaire is in the same format as that distributed to the subject group, except for the annotations immediately following each question indicating the number of responses and the percentage in parentheses. For clarity, Questions 6–7 omits percentages. Some students did not complete every question; consequently, the number of responses to particular questions may vary.

MILITARY JUSTICE QUESTIONNAIRE

Name: _____ (Optional)

1–2. Age: 41.6

3–4. Years of Service: 20.0

5. *Armed Force* (circle one; number only)*

1. Army	151 (83.9)	3. Air Force	13 (7.2)
2. Navy	10 (5.6)	4. Marine Corps	6 (3.2)

6–7. *Branch* (circle one)

1. ADA–9	6. CE–13	11. MI–4	16. SIGC–9
2. AGC–5	7. FA–30	12. MPC–4	17. TC–8
3. Armor–8	8. FC–2	13. MSC–0	18. WAC–0
4. CH–0	9. INF–49	14. ORDC–4	19. Other–16
5. CMLC–1	10. MC–1	15. QMC–6	

8. *Source of Commission* (circle one)

1. USMA	46 (25.7)	3. OCS	42 (23.5)
2. ROTC	70 (39.1)	4. Other	21 (11.7)

9. *Grade* (circle one)

1. O–5 137 (76.1)
2. O–6 43 (23.9)
3. Other —

10. *Prior Enlisted Service* (circle one)

1. None 89 (49.4)
2. Less than one year 10 (5.6)
3. One year or more, but less than three years 61 (33.9)
4. Three years or more 20 (11.1)

11. *Education* (circle one; highest degree attained)

1. High School 2 (1.1)
2. Bachelor's 71 (39.4)
3. Master's 104 (57.8)

*Please circle number only, e.g. "①. Army"

4. PhD. 1 (0.6)
5. Professional (e.g., MD, JD, LLB, DDS) 2 (1.1)

12. *What is your overall attitude toward the present system of military justice?* (circle one)

1. Highly disapprove 2 (1.1)
2. Disapprove 5 (2.8)
3. Slightly disapprove 31 (17.5)
4. Slightly approve 18 (10.2)
5. Approve 105 (59.3)
6. Highly approve 16 (9.0)

Note: If you have commanded a unit, organization, or post since 1 August 1969, answer questions 13 through 17. If you have commanded more than one unit since 1 August 1969, provide information on unit commanded in combat if any; if no combat command, select unit commanded longest in point of time.

If you have not commanded since 1 August 1969, skip directly to question 18 (or 23, as appropriate).

13. *Type unit commander* (circle one)

1. Battalion 88 (77.9)
2. Brigade 0
3. Group 4 (3.5)
4. Post 2 (1.8)
5. Other 19 (16.8)

14. *Nature of unit commanded* (circle one)

1. Combat 62 (54.4)
2. Combat support 29 (25.4)
3. Combat service support 11 (9.6)
4. Other 12 (10.5)

15. *Location of unit commanded* (circle one)

1. CONUS 18 (16.1)
2. Europe 66 (5.4)
3. Korea 1 (0.9)
4. RVN 82 (73.2)
5. Other 5 (4.5)

16. *How long did you command this unit?* (circle one)

1. Less than three months 3 (2.6)
2. Three months or more, but less than six months 13 (11.4)
3. Six months or more 98 (86.0)

17. *As a commander, what court-martial jurisdiction did you exercise?* (circle highest jurisdiction)

1. Summary court-martial 47 (41.6)
2. Special court-martial 41 (36.3)
3. General court-martial 0
4. I did not exercise court-martial jurisdiction 25 (22.1)

Note: If you commanded a unit, organization, or post during the period 1 August 1967 to 1 August 1969, answer questions 18 through 22. If you commanded more than one unit during the period 1 August 1967 to 1 August 1969, provide information on unit commanded in combat if any, if no combat command, select unit commanded longest in point of time.

If you did not command a unit during the period 1 August 1967 to 1 August 1969, skip directly to question 23.

18. *Type unit commanded* (circle one)
    1. Battalion 80 (84.2)
    2. Brigade 1 (1.1)
    3. Group 1 (1.1)
    4. Post 0
    5. Other 13 (13.7)

19. *Nature of unit commanded* (circle one)
    1. Combat 45 (48.4)
    2. Combat support 29 (31.2)
    3. Combat service support 10 (10.8)
    4. Other 9 (9.7)

20. *Location of unit commanded* (circle one)
    1. CONUS 24 (25.5)
    2. Europe 11 (11.7)
    3. Korea 0
    4. RVN 57 (60.6)
    5. Other 2 (2.1)

21. *How long did you command this unit?* (circle one)
    1. Less than three months 3 (3.2)
    2. Three months or more, but less than six months 9 (9.5)
    3. Six months or more 83 (87.4)

22. *As a commander, what court-martial jurisdiction did you exercise?* (circle highest jurisdiction)
    1. Summary court-martial 23 (24.5)
    2. Special court-martial 57 (60.6)
    3. General court-martial 0
    4. I did not exercise court-martial jurisdiction 14 (14.9)

BASED ON YOUR EXPERIENCE, KNOWLEDGE, INFORMATION OR OPINION—

23. *What is your overall attitude toward the manner in which JAGC company grade officers (O–3 and below) perform their duties?* (circle one)

1.	Highly disapprove	2 (1.1)
2.	Disapprove	12 (6.7)
3.	Slightly disapprove	22 (12.2)
4.	Slightly approve	27 (15.0)
5.	Approve	94 (52.2)
6.	Highly approve	8 (4.4)
7.	No opinion	15 (8.3)

24. *What is your overall attitude toward the manner in which JAGC officers in grades O–4 and above perform their duties?* (circle one)

1.	Highly disapprove	0
2.	Disapprove	3 (1.7)
3.	Slightly disapprove	3 (1.7)
4.	Slightly approve	15 (8.3)
5.	Approve	96 (53.3)
6.	Highly approve	52 (28.9)
7.	No opinion	11 (6.1)

25–27. *Which three of the following traits, qualities or attributes do you like best about company grade (O–3 and below) JAGC officers?* (circle three)

1. Legal education and training 136 (29.4)
2. Job performance 67 (14.5)
3. Appearance and military bearing 3 (0.6)
4. Concern for the individual soldier client 104 (22.5)
5. Attitude toward his own status as a commissioned officer 6 (1.3)
6. Speaking and writing ability 54 (11.7)
7. Cooperation with commanders 44 (9.5)
8. Concern with the state of military discipline 22 (4.8)
9. Common sense 26 (5.6)

28–30. *Which three of the following traits, qualities or attributes do you like least about company grade (O–3 and below) JAGC officers?* (circle three)

1. Legal education and training 7 (1.5)
2. Job performance 26 (5.7)
3. Appearance and military bearing 118 (25.9)

4. Concern for the individual soldier client 10 (2.2)
5. Attitude toward his own status as a commissioned officer 106 (23.3)
6. Speaking and writing ability 9 (2.0)
7. Cooperation with commanders 44 (9.7)
8. Concern with the state of military discipline 86 (18.9)
9. Common sense 49 (10.8)

31. *Based on your experience as an officer, what is your overall attitude toward the manner in which personal legal assistance (e.g., wills, tax, domestic and financial matters) is provided to members of the armed forces and their dependents?* (circle one)

1. Highly disapprove	2	(1.1)
2. Disapprove	9	(5.0)
3. Slightly disapprove	19	(10.6)
4. Slightly approve	22	(12.2)
5. Approve	78	(43.3)
6. Highly approve	49	(27.2)
7. No opinion	1	(0.6)

32. *Based on your experience as an officer, what is your overall attitude toward the manner in which claims against the U.S. (e.g., household goods, damage to personal property) are processed and paid to members of the armed forces and their dependents?* (circle one)

1. Highly disapprove	10	(5.6)
2. Disapprove	23	(12.8)
3. Slightly disapprove	23	(12.8)
4. Slightly approve	22	(12.2)
5. Approve	61	(33.9)
6. Highly approve	27	(15.0)
7. No opinion	14	(7.8)

33. *If you were accused of a serious offense under the UCMJ (e.g., murder, larceny, war crime) would you prefer to be represented by a*—circle one)

1. Judge Advocate	73	(42.4)
2. Civilian Attorney	99	(57.6)

The next five questions (34 thru 38) should be answered based upon your knowledge or belief. Please do not look up the answer or obtain the answer from others.

34. *Are officers of the JAGC graduates of an accredited law school?* (circle one)

1. Yes 170 (95.5)
2. No 8 (4.5)

35. *Are officers of the JAGC duly licensed to practice law?* (circle one)

1. Yes 129 (73.7)
2. No 46 (26.3)

36. *Do JAGC officers receive professional pay?* (circle one)

1. Yes 42 (23.7)
2. No 135 (76.3)

37. *Following initial appointment, are JAGC officers promoted more rapidly than their contemporaries in other branches (e.g., Infantry, Armor, Engineers)?* (circle one)

1. Yes 15 (8.5)
2. No 161 (91.5)

38. *Are JAGC officers promoted from a separate promotion list?* (circle one)

1. Yes 62 (35.4)
2. No 113 (64.6)

39. *What is your attitude toward the state of discipline in the Army today?* (circle one)

1. Highly disapprove 22 (12.3)
2. Disapprove 64 (35.8)
3. Slightly disapprove 56 (31.3)
4. Slightly approve 24 (13.4)
5. Approve 9 (5.0)
6. Highly approve 0
7. No opinion 4 (2.2)

40. *In your opinion, are today's soldiers sufficiently disciplined to accomplish the Army's combat mission?* (circle one)

1. Yes 104 (58.4)
2. No 74 (41.7)

41. *In your opinion, should a soldier have the right to consult with a judge advocate prior to accepting Article 15, nonjudicial punishment?* (circle one)

1. Yes 124 (68.9)
2. No 56 (31.1)

42. *As a battalion commander imposing Article 15 punishment, would you object to participation by a judge advocate defense counsel in the proceedings held before you?* (circle one)

1. Yes 85 (47.2)
2. No 95 (52.8)

43. *Recent UCMJ changes require that defense counsel before special court martial be a judge advocate (or a lawyer). Do you*—(circle one)

1. Approve 149 (83.7)
2. Disapprove 29 (16.3)

44. *Recent UCMJ changes require, in effect, that military judges be assigned to special courts-martial. Do you*—(circle one)

1. Approve 149 (83.2)
2. Disapprove 30 (16.8)

45. *Recent UCMJ changes provide that an accused may be tried by a military judge alone (without court members). Do you*— (circle one)

1. Approve 149 (83.2)
2. Disapprove 30 (16.8)

46. *Under recent UCMJ changes, judge advocates serve as trial and defense counsel, and the great majority of cases are tried by a military judge without court members. To what extent has this released troop officers for the performance of other duties?* (circle one)

1. Insignificantly 18 (10.0)
2. Some 56 (31.1)
3. Substantially 54 (30.0)
4. Greatly 10 (5.6)
5. No opinion 42 (23.3)

47. *Do you believe that today's soldiers living in troop billets should have substantially the same rights as civilians with respect to searches and seizures?* (circle one)

1. Yes 50 (27.8)
2. No 130 (72.2)

48. *In your opinion, are the delays (processing time) involved in administering Article 15 punishment excessive?* (circle one)

1. Yes 44 (24.6)
2. No 135 (75.4)

49. *In your opinion, are the delays (processing time) involved in disposing of special and general courts-martial excessive?* (circle one)

1. Yes 143 (79.9)
2. No 36 (20.1)

50–51. *Which two of the following factors are, in your opinion, primarily responsible for delays in the processing of courts-martial cases?* (circle two)

1. Completion of CID investigation and report 61 (17.7)
2. Requirements imposed by law and regulations 37 (10.7)
3. Lack of procedural knowledge on the part of commanders 42 (12.2)
4. Lack of trained clerical and administrative personnel at unit level 92 (26.7)
5. Administrative delays in the SJA office 40 (11.6)
6. Delays caused by defense counsel 27 (7.8)
7. Unavailability of military judge 29 (8.4)
8. Lack of commitment and dedication on the part of JAGC officers 3 (0.9)
9. Other factors 14 (4.1)

52. *Based on your experience, how many days does it take to process a typical special court-martial case from knowledge of the commission of the offense to completion of the record of trial and action by the convening authority?* (circle one)

1.	1–14 days	6 (3.5)
2.	15–29 days	28 (16.3)
3.	30–44 days	51 (29.7)
4.	45–59 days	32 (18.6)
5.	60–89 days	33 (19.2)
6.	90–119 days	12 (7.0)
7.	120–180 days	7 (4.1)
8.	Over 180 days	3 (1.7)

53. *Considering the requirements of military discipline and the rights of the accused, how long should it take, in your judgement, to process such a typical special court-martial case?* (circle one)

1.	1–14 days	48 (27.0)
2.	15–29 days	91 (51.1)
3.	30–44 days	28 (15.7)
4.	45–59 days	6 (3.4)
5.	60–89 days	4 (2.2)
6.	90–119 days	1 (0.6)
7.	120–180 days	0
8.	Over 180 days	0

54. *Based on your experience, how many days does it take to process a typical general court-martial case from knowledge*

of the commission of the offense to completion of the record of trial and action by the convening authority? (circle one)

1.	15–29 days	2 (1.3)
2.	30–44 days	3 (1.9)
3.	45–59 days	21 (13.5)
4.	60–89 days	39 (25.0)
5.	90–119 days	34 (21.8)
6.	120–179 days	31 (19.9)
7.	180–219 days	18 (11.5)
8.	220–365 days	5 (3.2)
9.	Over 365 days	3 (1.9)

55. *Considering the requirements of military discipline and the rights of the accused, how long should it take, in your judgment, to process such a typical general court-martial case?* (circle one)

1.	15–29 days	25 (14.3)
2.	30–44 days	46 (26.3)
3.	45–59 days	43 (24.6)
4.	60–89 days	37 (21.1)
5.	90–119 days	12 (6.9)
6.	120–179 days	11 (6.3)
7.	180–219 days	1 (0.6)
8.	220–365 days	0
9.	Over 365 days	0

56. *Is a judge advocate defense counsel ethically bound to do his utmost (within legal standards) to obtain an acquittal for a client whom he knows to be guilty?* (circle one)

1.	Yes	114 (63.3)
2.	No	40 (22.2)
3.	I do not know	26 (14.4)

57. *Should there be a difference in the ethical standards of conduct for judge advocates and civilian attorneys?* (circle one)

1.	Yes	23 (12.9)
2.	No	145 (81.5)
3.	I do not know	10 (5.6)

58. *If you were accused of a serious offense under the UCMJ, would you prefer to be tried by—* (circle one)

1.	A military judge alone	20 (11.2)
2.	A court with members	158 (88.8)

59. *In your opinion, are sentences imposed by younger military judges (grades of O3 and O4) adequate to maintain minimum standards of discipline?*

1. Yes	48	(26.7)
2. No	43	(23.9)
3. No opinion	89	(49.4)

60. *In your opinion, are sentences imposed by senior military judges (grades O5 and O6) adequate to maintain minimum standards of discipline?* (circle one)

1. Yes	92	(51.4)
2. No	11	(6.1)
3. No opinion	76	(42.5)

61. *In your opinion, are sentences imposed by military judges less severe than those imposed by court members (i.e. jury)?* (circle one)

1. Yes	42	(23.3)
2. No	67	(37.2)
3. No opinion	71	(39.4)

62. *Should court members be selected personally by the convening authority or should a random selection system be used as in civilian criminal courts?* (circle one)

1. By convening authority	75	(41.7)
2. By random system	105	(58.3)

63. *Do you believe that the rules of evidence prescribed for military courts are overly technical and legalistic?* (circle one)

1. Yes	48	(26.7)
2. No	132	(73.3)

64. *Do you believe that military judges are overly technical and legalistic in applying the rules of evidence?* (circle one)

1. Yes	32	(18.0)
2. No	146	(82.0)

65. *It has often been publicly reported that the comparative percentage of black soldiers who are the subject of disciplinary action is substantially higher than that for white soldiers. Do you believe that the current system of military justice discriminates against black soldiers?* (circle one)

1. Yes	4	(2.2)
2. No	176	(97.8)

66. *In your opinion, do military judges and court members discriminate against black soldiers?* (circle one)

1. Yes 6 (3.3)
2. No 174 (96.7)

67. *In your opinion, do commanders and convening authorities discriminate against black soldiers?* (circle one)

1. Yes 13 (7.2)
2. No 167 (92.8)

Why, in your opinion, are black soldiers more often subjected to disciplinary proceedings than white soldiers? (write in)

Remarks (optional):

68. *Do you feel you have sufficient knowledge and training in military law to properly serve as a special court-martial convening authority?* (circle one)

1. Yes 130 (72.6)
2. No 49 (27.4)

69. *Do you feel that company grade officers receive sufficient training in military law?* (circle one)

1. Yes 24 (13.7)
2. No 151 (86.3)

70. *In your opinion, is the range of punishments authorized under Article 15 sufficient to solve the unit commander's day-to-day disciplinary problems?* (circle one)

1. Yes 158 (88.3)
2. No 21 (11.7)

71. *Have you ever served with a unit in which correctional custody (a form of "confinement" imposed under Article 15) was an authorized punishment?* (circle one)

1. Yes 58 (32.8)
2. No 119 (67.2)

72. *Would you favor an expanded use of correctional custody as a punishment under Article 15?* (circle one)

1. Yes 93 (52.5)
2. No 84 (47.5)

73. *Do you feel that younger judge advocates in grades O3 and O4 have sufficient training and understanding of military problems to serve as military judges and arrive at appropriate decisions regarding military offenses?* (circle one)

1. Yes 52 (29.4)
2. No 79 (44.6)
3. No opinion 46 (26.0)

74. *Do you feel pretrial confinement policies are overly restrictive?* (circle one)

1. Yes 94 (52.8)
2. No 84 (47.2)

75. *Under current Army policies enlisted personnel in grades E–7 through E–9 may not be reduced in grade under Article 15 by field commanders. Do you approve or disapprove of this policy?* (circle one)

1. Approve 109 (60.6)
2. Disapprove 71 (39.4)

76. *At what level of command should JAGC officers be assigned?* (circle one)

1. Company 1 (0.6)
2. Battalion 37 (20.9)
3. Brigade 106 (59.9)
4. Division 33 (18.6)

77. *In 1969 the U.S. Supreme Court ruled (O'Callahan case) that offpost offenses in the U.S. could not be tried by court-martial unless the offense had a direct connection to military service. Has this decision substantially affected unit discipline in the U.S.?* (circle one)

1. Yes 35 (19.4)
2. No 55 (30.6)
3. No opinion 90 (50.0)

78. *As a commander, would you object to a policy that would permit judge advocate defense counsel to wear civilian clothes?* (circle one)

1. Yes 111 (61.7)
2. No 69 (38.3)

79. *Do you object to a personal interview on matters covered in this questionnaire?* (circle one)

1. Yes 4 (2.2)
2. No 176 (97.8)

80. *Do you desire a personal interview?* (circle one)

1. Yes 16 (9.7)
2. No 149 (90.3)

MY LAI AND MILITARY JUSTICE—TO WHAT EFFECT?*

By Captain Norman G. Cooper**

This article analyzes the impact of the My Lai cases upon military justice from several perspectives. Considered are their international law implications, the effect of the cases upon extraordinary writ practice in the military courts, the judicial competency of the My Lai courts-martial to deal with constitutional issues, and the attacks upon the military justice system in a federal forum. These elements tentatively reflect that the impact of My Lai upon the present military justice system has been rather limited.

I. INTRODUCTION

Military justice was tested by the My Lai cases in an atmosphere of unparalleled publicity, and while the "My Lai Massacre" has become a contemporary symbol of atrocity, the My Lai courts-martial have yet to be accorded their due impact upon military law. This article examines the present and potential effect of My Lai upon military justice.

The competency of military courts to deal with the unusual and varied issues spawned at the My Lai trial and pretrial proceedings may be measured in several different ways. For example, their resolution of difficult questions involving grants of immunity and the applicability of the Jencks Act to congressional testimony indicates to a certain extent their capability. Beyond the immediate scope of trial were problems which tested the viability of extraordinary writ practice in the military. A system of law, however, is not to be evaluated by direct analysis of trial issues alone. To judge the effect of My Lai upon the military justice system, it is necessary also to view the cases in their factual set-

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ting, to weigh their implications as to international law, and to evaluate their jurisdictional vitality in a federal court forum. The total influence of the My Lai cases, of course, extends to areas other than our military justice system; nonetheless, an examination of their impact on that system is indicative of their ultimate importance to American military jurisprudence.

II. THE MY LAI MASSACRE: MURDERS AND MYTHS

A. *THE ULTIMATE FACTS*

There is no doubt that the My Lai incident was a horrendous event, one which sullied the record of the United States Army in Vietnam beyond any other occurrence. Yet the intensive journalistic and judicial scrutiny accorded My Lai fails to reveal its ultimate effect—there is no satisfactory theory as to its cause, nor is there reasonable agreement as to its extent. Nonetheless, an initial summary of what reportedly happened at My Lai on March 16, 1968, and why, provides the factual framework for discussion of the subsequent legal proceedings.

As first reported [1] and later largely verified in official investigations, a large number of men, women, and children were slain by American soldiers assaulting My Lai 4, a village in Quang Ngai province, South Vietnam, on March 16, 1968. The village itself was only one of several such hamlets in that bitterly contested, Viet Cong dominated area. As a prelude to the slaughter of that March day, Charlie Company, 1st Battalion, 20th Infantry, part of Task Force Barker, a battalion-sized unit created to counter the 48th Local Force Viet Cong Battalion operating in the area, suffered weeks of death and demoralization from mines, booby-traps and a hostile populace. The troops, expecting to encounter their elusive enemy in the environs of My Lai gave full measure of revenge to the inhabitants of My Lai, killing nearly all of those present and destroying their livestock and crops.

These notorious facts surfaced in late 1969 and early 1970.[2] In later analyses journalists, lawyers and those attracted to the My Lai atrocity for whatever motive, concerned themselves with one facet of the incident or another, fashioning their theories to suit their prejudices.[3] The Army itself, in a surfeit of responsibility,

[1] S. HERSH, MY LAI 4 (1970 [hereafter cited as HERSH], and R. HAMMER, ONE MORNING IN THE WAR (1970).

[2] For an account of the My Lai story as it developed, *see* HERSH at 129–43 (1970).

[3] My Lai is also often discussed in the context of the larger responsibilities of the Vietnam War, *e.g.*, T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970).

leveled numerous charges against those still subject to court-martial jurisdiction.[4] The first to be charged with offenses arising out of the My Lai tragedy was First Lieutenant William L. Calley; ironically, he was the only alleged participant convicted,[5] although others were brought to trial. As for those offenses related to an alleged coverup, only one officer stood trial, Colonel Oran K. Henderson, the brigade commander at the time of the My Lai incident and the officer immediately responsible for investigating reports of misconduct stemming from the assault on My Lai. He was acquitted December 17, 1971, at the last My Lai trial.[6]

In between the cases of Lieutenant Calley and Colonel Henderson are to be found those ultimate facts of My Lai subject to judicial resolution. However, an examination of the judicial proceedings of others charged in connection with the overall My Lai incident is of limited value in fixing criminal responsibility and determining specific criminal acts. Dismissal of most of the charges without trial and the considerable legal maneuvering at the few trials obscure those ultimate criminal facts capable of judicial resolution. That murders were committed at My Lai was well established by the Calley conviction; nonetheless, many myths surround the extent and nature of the total crimes of My Lai. It is beyond the scope of this analysis to evaluate the extent of the My Lai crimes, any command responsibility for those crimes or any conspiracy to hide them. It is nonetheless helpful in weighing the impact of My Lai upon military justice to review the several investigations of My Lai, the charges laid against the alleged participants, and those brought against officers in the chain of command for an alleged coverup of war crimes.

B. *REVELATIONS AND INVESTIGATIONS*

The first indication that something had gone terribly amiss during the assault of the members of Charlie Company upon My Lai 4 in 1968 did not confront high Army officials until over a year later. A Vietnam veteran named Ron Ridenhour had heard disturbing stories of what had occurred at a village called "Pinkville" in March 1968. He decided to bring these stories to the attention of Congress and the United States Army in a letter dated 29 March 1969.[7] The next month the Inspector General of

[4] *See*, Department of the Army News Release, "Army Announces Peers-MacCrate Inquiry Findings," March 17, 1970, announcing charges against fourteen officers.

[5] United States v. Calley, C.M. 426402 (ACMR 7 Sep. 1971).

[6] *See* Hersh, *Coverup*, THE NEW YORKER, Jan. 29, 1972, at 40, 71.

[7] *See, Report of the Department of the Army Review of Preliminary Investigations into the My Lai Incident* (U), Vol. I, Incl. 2 (14 Mar. 1970).

the Army initiated a full scale investigation at the direction of the Army Chief of Staff, General William C. Westmoreland. Colonel William Wilson of the Inspector General's staff set out on a nationwide inquiry, taking statements from numerous members of Charlie Company. This investigation continued through the summer of 1969, revealing damning evidence against Lieutenant Calley especially. He was identified in a lineup on June 13, 1969, conducted in Washington, D.C., at Colonel Wilson's instigation. By the end of July 1969, Lieutenant Calley's records were "flagged", and Colonel Wilson's investigation was completed shortly thereafter. Because of the extensive evidence of criminal conduct contained in Colonel Wilson's Inspector General report, the Army turned the report over to its Criminal Investigation Division.[8]

Agents of the Army's Criminal Investigation Division continued to uncover mounting evidence of criminal acts at My Lai on March 16, 1968. In the meantime, charges were preferred against Lieutenant Calley on 5 September 1969. An Article 32 investigation was conducted and six specifications of premeditated murder of over one hundred "Oriental human beings, occupants of the village of My Lai 4, whose names and sexes are unknown," were referred to trial by general court-martial on 24 November 1969.[9] By this time the My Lai horror stories were confronting the world; indeed, a key witness in the *Calley* case, Paul Meadlo, had shocked the nation with his revelations on television.[10] On 28 October 1969 charges were brought against Staff Sergeant David Mitchell at Fort Hood, Texas; they were likewise subjected to an Article 32 investigation and referred to trial by general court-martial by the end of 1969.[11] The Army's Criminal Investigation Division pursued its inquiry well into the summer of 1970, setting up special investigating teams in the United States and Vietnam. The wide-reaching efforts of agents of the Criminal Investigation Division resulted in over five hundred statements, covering twenty-four separate reports and involving more than forty-five suspects, including ex-soldiers. To a great degree criminal prosecutions of those charged with actually par-

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[8] *See* HERSH at 103–27 (1970).

[9] United States v. Calley, C.M. 426402 (ACMR 7 Sep. 1971).

[10] *See* HERSH at 140–42 (1970).

[11] Staff Sergeant Mitchell was the first My Lai accused acquitted. The Mitchell case is discussed with respect to the Jencks Act and congressional testimony, at VA.

ticipating in crimes at My Lai were based upon the work of Criminal Investigation Division agents.[12]

The dimensions of the My Lai incident and attendant publicity expanded greatly during the months of November and December 1969. One crucial question immediately became apparent—why had it taken so long for My Lai to become known? On 26 November 1969, the Secretary of the Army, Stanley R. Resor, and the Army Chief of Staff, General William C. Westmoreland, directed Lieutenant General William R. Peers, a former Vietnam field commander, to explore the original Army investigations into the My Lai incident to determine whether they were adequate and whether there had been any suppression of information connected with them. General Peers' inquiry was designated as "The Department of the Army Review of the Preliminary Investigations into the My Lai Incident." He launched an exhaustive investigation, assisted by special civilian counsel, which included extensive testimony, document searches, and on-the-scene inspections. When the investigation was completed on 14 March 1970, it included the testimony of almost four hundred witnesses which was incorporated in thirty-three books comprising twenty thousand pages. In additon, General Peers' report contained 240 photographs, 119 Army directives, 51 official reports, and well over 100 miscellaneous documents.[13] Out of this investigation grew charges against fourteen officers, including two generals, one of whom, Major General Samuel Koster, was Superintendant of the United States Military Academy at West Point. The charges related to an alleged coverup of the My Lai incident, involving dereliction of duty, failure to comply with regulations, false swearing, and misprision of a felony. They were based upon a review of the evidence developed for General Peers by a team of The Judge Advocate General Corps officers.[14] In spite of the massive effort spent by the Army in the Peers investigation, no convictions were obtained; this led to considerable criticism of the military judicial

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[12] *See*, Memorandum for Record, "Criminal Investigation of Son My Incident," AJAJA-SA, Third United States Army, Fort McPherson, Georgia, 29 Jul. 1970.

[13] *See*, *Report*, *supra* note 7, Vol. I, and "Government Answer to Defense Motion for Production of Alleged 'My Lai Incident' Testimony and Evidence, in the Custody and Control of the United States of America—Specifically Information in the Custody and Control of Certain Members of the Congress of the United States," *United States* v. *Calley*, C.M. 426402 (ACMR 7 Sep. 1971).

[14] *See*, Department of the Army News Release, "Army Announces Peers-MacCrate Inquiry Findings," Mar. 17, 1970.

system, one authority referring to a "fiasco with respect to the coverup. . . ." [15]

Congress was not content to let the Army delve into the My Lai incident by itself. On December 12, 1969, after testimony by the Secretary of the Army and others, the Chairman of the Committee on Armed Services, Representative L. Mendel Rivers, announced that a Subcommittee would go into the My Lai incident in depth. Its report was published on July 15, 1970, and it cited a lack of cooperation on the part of the Army as a primary reason for the delay in the completion of the report.[16] During its investigation the Subcommittee interviewed over one hundred fifty witnesses and reviewed hundreds of documents. The Subcommittee concluded that My Lai was "a tragedy of major proportions" [17] and that afterward there was a failure to make "adequate, timely investigation." [18] It also found that the Army "overreacted by recommending charges in several cases where there was insufficient evidence to warrant such action." [19] This finding of the Subcommittee would seem to have been borne out by the later dismissals of many of the My Lai charges. However, it must be kept in mind that many charges were hastily drawn to meet the two year statute of limitations on certain offenses which was up on 16 March 1970.

Of special significance with regard to military justice were two recommendations of the Subcommittee. They proposed to deal with two problems peculiar to the My Lai cases by amending the Uniform Code of Military Justice. The first amendment dealt with the problem of publicity; the Subcommittee recommended that "no person subject to the Code shall make public release of any information respecting any investigation or the pendency of any charge until after the convening authority has referred such charge to trial by court-martial." [20] The second amendment recognized that one of the difficulties with what happened at My Lai was the fact that "it was so wrong and so foreign to the normal character and actions of our military forces as to immediately raise a question as to the legal sanity at the time of

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[15] *See*, Taylor, "The Course of Military Justice," New York Times, Feb. 2, 1972, at M-37, col. 1.

[16] *See, Report of the Armed Services Investigating Subcomm. of the Comm. on Armed Services, "Investigation of the My Lai Incident,"* H.R. 91st Cong., 2d Sess., under H. Res. 105, Jul. 15, 1970.

[17] *Id.* at 4.

[18] *Id.*

[19] *Id.* at 7.

[20] *Id.*

those men involved." [21] Therefore, the Subcommittee proposed to amend the Uniform Code of Military Justice and change the legal presumptions of sanity in cases similar in nature to My Lai. It recommended that the Code be changed so that "no charge involving an alleged capital offense, committed during a military action against an enemy, shall be referred to trial by court-martial until a duly appointed competent authority has determined the mental responsibility of the prospective accused at the time of the alleged crime." [22]

In the final analysis it will not be Army investigations of the Inspector General's office, nor the massive evidence of the Peers inquiry, or even the efforts of the Criminal Investigation Division which will have the most impact upon military justice. If My Lai does have a definite effect upon military law it will most likely come in the form of legislative action. Thus, the measure of the My Lai revelations and investigations is to be found in public demand for legislative reform of the kind proposed by the Armed Services Subcommittee in its report on the My Lai incident.

C. *THE ALLEGATIONS AGAINST CHARLIE COMPANY*

The soldiers of Charlie Company became public figures during the two years the My Lai incident agonized the nation. They were viewed by some as heroes, by others as monsters, and by still others as victims themselves. Taken as a whole, however, "the personnel of Company C contained no significant deviation from the average and there was little to distinguish it from the other rifle companies." [23] While the character of the men of Charlie Company is of some importance in understanding the why of My Lai, of more immediate significance to military justice are the charges brought against the men of Charlie Company.

Although the courts-martial of the pivotal personalities of Charlie Company—Medina, Calley, and Mitchell—attracted close public scrutiny, relatively scant attention was given the individual cases of the soldiers of Charlie Company. They appeared in the public mind as an operative class of accused, the instruments, willing or unwilling, of a command impetus gone terribly awry. Indeed, it has been argued with authority that "the attack on My Lai 4 was not the only massacre carried out by American

[21] *Id.* at 53.
[22] *Id.* at 7.
[23] *See, Report supra* note 7, Vol. I, 4–9.

troops in Quang Ngai Province that morning." [24] The issues of ultimate responsibility for My Lai are myriad but are best left to historical judgment; on the other hand, a chronicle of the charges against the men of Charlie Company is useful in evaluating My Lai's inroads into the military justice system.

After the extent of the My Lai incident became known to the Army, it was realized that some means of consolidation of the cases was necessary because of the number of potential accused and witnesses. It was therefore decided to transfer those soldiers suspected or accused of crimes at My Lai to Fort McPherson, Georgia, an Army headquarters, for the administration of military justice. As proceedings were already underway in the cases of Lieutenant Calley and Sergeant Mitchell, they remained respectively at Fort Benning, Georgia, and Fort Hood, Texas. In one instance, that involving the transfer of Sergeant Charles Hutto from Fort Lewis, Washington, where charges had been preferred, was reassignment resisted. In spite of a suit in federal district court and a request for the recission of reassignment orders, Sergeant Hutto found himself stationed at Fort McPherson for the consideration of the charges lodged against him.

Of more jurisdictional significance than his transfer was Sergeant Hutto's objection to being held past the expiration of his service obligation for the processing of the charges against him. Sergeant Hutto found himself in a situation where the law gave the Army court-martial jurisdiction because charges had been filed against him with a view toward trial.[25] That is, he had a military status which he retained for purposes of court-martial even though his enlistment contract time had run. As if to underscore the jurisdictional ties upon Sergeant Hutto, he was additionally charged with false swearing on March 9, 1970, at Fort McPherson. After investigation his case was referred to a general court-martial on September 4, 1970. Dismissed prior to referral were charges of rape and murder brought at Fort Lewis, and withdrawn prior to trial was the charge of false swearing.[26] Sergeant Hutto stood trial for assault with intent to commit murder, one of the original charges brought at Fort

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[24] *See*, Hersh, *Coverup*, THE NEW YORKER, Jan. 22, 1972, at 34, and Jan. 29, 1972, at 40, for a two-part updated story of My Lai which is purportedly based on the complete transcript of the Peers Inquiry.

[25] *See*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para 11*d*.

[26] *See*, My Lai News Releases Nos. 32 (4 Sep. 1970), 34 (21 Sep. 1970), 35 (24 Sep. 1970), and 39 (31 Dec. 1970), Information Office, Third United States Army, Fort McPherson, Georgia.

Lewis. In spite of the introduction into evidence of damaging admissions made by Sergeant Hutto to a criminal investigator, the prosecution was unable to secure a conviction and Sergeant Hutto departed the Army shortly after his acquittal on January 14, 1971.[27]

Yet another accused charged prior to assignment to Fort McPherson was Private Gerald Smith. On January 7, 1970, while at Fort Riley, Kansas, he had been charged with murder and indecent assault. He did not contest his transfer to Fort McPherson in the manner of Sergeant Hutto, although he also was held past the expiration date of his service contract. Private Smith, on the other hand, was never to stand trial, even though his charges were referred to a general court-martial after investigation.[28] On January 22, 1971, the general court-martial convening authority dismissed the charges against Private Smith, the possibility of conviction having been diminished by the acquittal of Sergeant Hutto and "other considerations bearing upon their prosecutive merit." [29]

In addition to the transfer of accused with charges pending, several soldiers were sent to Fort McPherson after attention had focused upon them as suspects. On March 10, 1970, the Army announced charges of rape and assault with intent to commit murder against Staff Sergeant Kenneth Hodges, but after an investigation it was concluded that there was insufficient evidence and they were dismissed on August 19, 1970.[30] At the same time charges against Sergeant Hodges were announced, charges of murder and assault with intent to commit murder were announced in the cases of Sergeant Esequiel Torres and Private Max Hutson, the latter being also charged with rape.[31] In the case of Sergeant Torres, one charge of murder was predicated upon events prior to My Lai; this charge was later reduced to

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[27] *See, e.g.*, My Lai News Release No. 41–A (21 Jan. 1971), Information Office, Third United States Army, Fort McPherson, Georgia.

[28] *See*, My Lai News Release No. 18–A (19 Jun. 1970), Information Office, Third United States Army, Fort McPherson, Georgia.

[29] *See*, My Lai News Release No. 42 (22 Jan. 1971), Information Office, Third United States Army, Fort McPherson, Georgia. The "other considerations were the lack of success in the courts-martial of Staff Sergeant Mitchell and Sergeant Hutto, as well as the inability of the prosecution to locate a key prosecution witness, a discharged soldier whose name was also Smith.

[30] *See*, My Lai News Release No. 28 (19 Aug. 1970), Information Office, Third United States Army, Fort McPherson, Georgia.

[31] *See*, My Lai News Release No. 1 (10 Mar. 1970), Information Office, Third United States Army, Fort McPherson, Georgia.

aggravated assault at a preliminary hearing.[32] Ultimately, the charges against both Private Hutson and Sergeant Torres were withdrawn and dismissed without trial.[33] Other charges of murder, involving Specialist Four William Doherty, Corporal Kenneth Schiel, and Specialist Four Robert T'Souvas, were investigated but found wanting in one aspect or another; only Specialist T'Souvas faced the possibility of trial by court-martial before the charges were dismissed.[34]

Out of the numerous allegations leading to charges against these several soldiers of Charlie Company, none were sustained in the form of a federal conviction. All, however, were subjected to the processes of the military justice system. Can it then be said that military justice had failed in permitting charges which could not be substantiated or had suffered from inherent inadequacies in the prosecution of such charges? Or can it be reasoned that the broad protections of an accused's rights in the military justice system caused the charges to fail? Neither conclusion is a satisfactory rationale in the My Lai cases. The complexity of events, the reluctance of witnesses to testify against their former comrades-in-arms or in some instances to incriminate themselves, and the enormous distance from events at My Lai in time and environment undoubtedly hampered prosecution efforts. Finally, the unarticulated public feeling that responsibility for crimes at My Lai somehow fell on shoulders other than those of ordinary soldiers argued against their conviction in any forum.

D. *OTHER RESPONSIBILITIES*

Of the numerous charges arising from the My Lai incident, many did not stem from the crimes allegedly committed at My Lai. The charges made against the officers in the main grew out of alleged failures to adequately investigate and deal with what occurred at My Lai. As mentioned, the dismissal of such charges concerned with an alleged "coverup" of My Lai generated considerable criticism of the military justice process. In those cases

[32] A change in the available evidence caused the reduction of the charge. The writer was military defense counsel for Sergeant Torres. *See*, General Court-Martial Convening Order No. 26, Headquarters, Third United States Army, 22 Jun. 1970.

[33] *See*, My Lai News Release No. 42 (22 Jan. 1971), Information Office, Third United States Army, Fort McPherson, Georgia.

[34] *See*, My Lai News Release Nos. 32 (4 Sep. 1970), 41 (21 Jan. 1971), and 42 (22 Jan. 1971), Information Office, Third United States Army, Fort McPherson, Georgia.

where it was determined that an officer had failed to meet his responsibilities, the Army resorted to administrative measures. The Army reasoned that "the dismissal of charges against an officer means that further prosecution under the criminal law was deemed unwarranted; it does not necessarily mean that the individual's performance was found to be adequate by professional standards." [35] While the story of the Army's handling of the My Lai cases involving serious issues of investigative responsibility is a significant study in itself, it falls into a special area of consideration, an amorphous area somewhat outside of this appraisal of My Lai and military justice. That responsibilities in this regard were weighed and found wanting by the Army is clear, as witnessed in the administrative actions taken against the several officers originally charged with violations of the Uniform Code of Military Justice. Nonetheless, the ultimate results in the officers' cases are difficult to ascertain, being lost in considerations extending beyond those of the military justice system.[36]

The many issues of responsibility, criminal and otherwise, spawned by My Lai have no definite parameters. My Lai's shadow extended to a sister company on February 12, 1970, when Captain Thomas Willingham was charged with committing unpremeditated murder at My Khe 4 on the same day as the My Lai incident. Later charges of making false official statements and misprision of a felony were also lodged against the former platoon leader of Bravo Company.[37] These charges were dismissed in June, 1970, a determination being made that, "based upon available evidence, no further action should be taken in the prosecution of those charges." [38] As Captain Willingham had been held past his obligated tour of active duty pending disposition of the charges, he was released from the Army after they were dismissed.[39] Other less direct consequences of the My Lai investigations contained a certain degree of irony. One member of the Peers' Inquiry, Colonel Ross Franklin, was himself charged with derelicition in connection with the reporting of alleged of-

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[35] *See*, Department of the Army Fact Sheet on the Son My Incident, 2 Apr. 1971, at 3.

[36] The Army's performance with respect to any "coverup" of the My Lai incident is scrutinized by Hersh in *Coverup*, THE NEW YORKER, Jan. 29, 1972, at 40.

[37] *Id.* at 63–64.

[38] *See*, My Lai News Release No. 17–A (9 Jun. 1970), at 1, Information Office, Third United States Army, Fort McPherson, Georgia.

[39] *Id.* at 2.

fenses in Vietnam; the charges were eventually dismissed.[40] Also charged with offenses unrelated to My Lai but evolved out of the extensive investigation surrounding it was Brigadier General John Donaldson; murder charges were dismissed after additional investigation.[41]

The fact that the My Lai investigations touched upon such disparate criminal responsibilities is illustrative of the Army's desire to avoid any allegation of a "white wash" of its obligations under the military justice system. However, in the end, the failure to secure but one conviction in all the My Lai cases, that of Lieutenant Calley, has only led to unwarranted criticism of the military justice system in this regard.

III. INTERNATIONAL LAW IMPLICATIONS AND ALTERNATIVES

A. JURISDICTIONAL ALTERNATIVES

Perhaps the most interesting questions raised by the My Lai cases were those dealing with the applicability of principles of international law.[42] Much of the legal comment generated has been directed at governmental responsibilities with regard to the investigation and prosecution of war crimes.[43] Indeed, more than mere legal issues are at stake in war crimes, for implicitly recognized are moral obligations of governments and individuals.[44] United States participation in the Vietnam war has been brought into focus by many events, but no single event has so vividly crystalized opinion as has the My Lai incident. The alleged atrocities at My Lai were not only crimes, but evil in a moral sense; this was extended by critics of our participation in that war to condemn the entire nation.[45]

In addition to the larger issues related to war crimes, My Lai specifically created a crucial question as to jurisdiction over

[40] *See*, Hersh, *Coverup*, THE NEW YORKER, Jan. 29, 1972, at 62.

[41] *Id.* at 58.

[42] *E.g.*, "The alleged atrocities at My Lai have exposed one major gap. . . . The Geneva Civilian Convention does not protect the nationals of a co-belligerent state from the depredations of an ally." Bond, *Protection of Non-Combatants in Guerrilla Wars*, 12 WM. & MARY L. REV. 787, 788 (1971).

[43] *See*, U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE (1956), for a concise discussion of the customary and treaty law applicable to the conduct of land warfare. The Geneva Conventions of 1949 and The Hague Convention No. IV are of primary concern.

[44] "The exercise of individual conscience under military compulsion is an issue revived by the My Lai courts martial." Marcin, *Individual Conscience Under Military Compulsion*, 57 A.B.A.J. 1222 (1971).

[45] "Atrocity in general, and My Lai in particular, brings its perpetrators—even a whole nation—into the realm of existential evil." *R. Falk, G. Kolko*

discharged servicemen suspected of war crimes; however, jurisdiction was ultimately never tested.[46]

In 1954, the Supreme Court declared in *Toth* v. *Quarles*,[47] that a court-martial had no jurisdiction over a discharged serviceman for an offense committed while in the service. The effect of this case was to declare unconstitutional the provision of the Uniform Code of Military Justice which provided for such jurisdiction.[48] As to those ex-soldiers who were suspected of offenses at My Lai on March 16, 1968, the question became, "what court, then, can be used to try Americans accused of serious crimes committed abroad, but who are not subject to courts-martial?" [49] One suggestion was to establish a military commission for the trial of accused war criminals. Although some genuine doubts exist as to whether its jurisdiction would be appropriate, especially because "no requirement exists that the accused be afforded the safeguards that would be available in a trial by court-martial," [50] the military commission could exercise jurisdiction on the basis of offenses against the common law of war under Article 21 of the Uniform Code of Military Justice.[51] Article 21 was enacted pursuant to Congress' power with respect to offenses against the law of nations.[52] A military commission, then, would seem one viable response to the jurisdiction problem, although trial of civilians in a military tribunal of any kind would probably meet with public disfavor and legal censure.[53]

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and J. Lifton (eds.), CRIMES OF WAR 25 (1971). *See also* S. HERMAN, ATROCITIES IN VIETNAM: MYTHS AND REALITIES (1970); T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970); Chomsky, *The Rules of Force in International Affairs*, 80 YALE L. J. 1456 (1971); Cohen, *Taylor's Conception of the Laws of War*, 80 YALE L. J. 1492 (1971); and Falk, *Nuremberg: Past, Present and Future*, 80 YALE L. J. 1505 (1971).

[46] Washington Post, Apr. 9, 1971, at A–3, col. 5. The jurisdiction problem with former servicemen is not new. *E.g.*, Myers and Kaplan, *Crime Without Punishment*, 35 GEO. L. J. 303, 314–16 (1947).

[47] 350 U.S. 11 (1955).

[48] 10 U.S.C. § 803(a) (1970).

[49] Rubin, *Legal Aspects of the My Lai Incident*, 49 ORE. L. REV. 260, 270 (1970).

[50] Everrett and Hourcle, *Crimes Without Punishment—Ex-Servicemen, Civilian Employees and Dependents*, XIII JAG L. REV. 184, 196 (1971).

[51] 10 U.S.C. § 821 (1970).

[52] U.S. CONST. art 1, § 8, cl. 10.

[53] *See, Note, Jurisdiction Over Ex-Servicemen for Crimes Committed Abroad: The Gap in the Law*, 22 CASE W. RES. L. REV. 279 (1971); Note, *Jurisdictional Problems Related to the Prosecution of Former Servicemen for Violations of the Law of War*, 56 VA. L. REV. 947 (1970); Shaneyfelt, *War Crimes and the Jurisdictional Maze*, 4 INT'L LAWYER 924 (1970); Green, *The Military Commission*, 42 AM. J. INT'L LAW 832 (1948); and Kaplan, *Constitutional Limitations on Trials by Military Commissions*, 92 U. PA. L. REV. 119 (1943).

Another proposal dealing with the jurisdictional problem as to ex-servicemen is to amend the Uniform Code of Military Justice "to provide for trial in the United States District Courts, of persons charged with having committed offenses while on active military duty, who are no longer subject to military jurisdiction as a result of having been discharged." [54] The concept of conferring jurisdiction upon federal courts would appear valid if jurisdiction of the military commission were originally valid.[55]

In mid-1971, as the My Lai cases were fading from the public eye, a bill to provide federal court jurisdiction for trials of discharged soldiers accused of offenses committed while in the service [56] was introduced in the Senate.[57] The bill, if it were to become law, would seem of questionable application to those ex-soldiers suspected of crimes at My Lai because its effect would be tantamount to that of an *ex post facto* law in their cases. Simply put, a retrospective application of federal jurisdiction would deprive them of their extant defense of lack of jurisdiction, thus cutting across the constitutional prohibition on *ex post facto* laws.[58] In spite of this objection, it has been argued that since the bill captures the maximum punishment and statute of limitations existing under military law, no substantial rights would be denied and our international obligations demand such action.[59] Whatever the resolution of constitutional issues of retrospectivity attendant proposed legislation giving federal courts jurisdiction to try ex-soldiers for war crimes, there is no doubt that some form of legislation is badly needed to close the jurisdictional gap in future cases.

B. *THE FEDERAL FORUM*

It has been suggested that prosecution of both soldiers and civilians in the federal district courts is presently possible with-

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[54] This was one of the recommendations of the Herbert Subcommittee. *Report of the Armed Services Investigating Subcomm. of the Comm. on Armed Services, "Investigation of the My Lai Incident,"* H.R. 91st Cong., 2d Sess., under H. Res. 105, Jul. 15, 1970.

[55] Note, *Jurisdictional Problems Related to the Prosecution of Former Servicemen for Violations of the Law of War*, 56 VA. L. REV. 947 (1970).

[56] In the *Toth* case the Supreme Court made it clear that Congress could create such jurisdiction. *See, Toth* v. *Quarles*, 350 U.S. 11, 21 (1954).

[57] S. 1744, 92d Cong., 1st Sess., 117 CONG. REC. 6,042 (daily ed. May 3, 1971).

[58] U.S. Const. arts. 1 and 9, cl. 3.

[59] *See*, Corddry, *Jurisdiction to Try Discharged Servicemen for Violations of the Laws of War*, 26 JAG J. 63 (1971).

out legislation.[60] A brief examination of this point of view is revealing because it was indeed urged during the My Lai courts-martial that a "District Court of three judges order the charges transferred to the District Court for the Northern District of Georgia to be tried by a jury as provided by law" [61] in the cases of two servicemen charged with offenses growing out of the My Lai incident. The three judge panel dismissed the complaints in the cases, citing strong policy reasons requiring the plaintiffs to first exhaust the constitutional issues of fundamental fairness in the military courts. However, the holding was restricted to the timing rather than the merits of the complaints.[62] Hence, consideration of federal court jurisdiction in the My Lai cases is more than academic.

The power to define and punish offenses against the law of nations belongs to the legislative branch by reason of Article I, Section 8 of the United States Constitution.[63] The law of war as a distinct part of the law of nations has been incorporated into military law in Article 18, Uniform Code of Military Justice.[64] Article 18, Uniform Code of Military Justice, is applicable to "any person who by the law of war is subject to trial by a military tribunal." [65] These terms may be interpreted to create a body of law exempt from the limitations of military jurisdiction with respect to civilians.[66] The basis for considering Article 18, Uniform Code of Military Justice, as a special body of law is predicated upon its characterization as "international law developed by civilized nations of the world for the prosecution of any person who violates the commandments of the world community." [67] Thus, it's utilization may not be subject to the

[60] Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Court*, 50 TEXAS L. REV. 6 (1971).

[61] *See*, Complaints filed by plaintiffs in Torres v. Connor, C.A. 13895 (N.D. Ga. Aug. 10, 1970), and T'Souvas v. Connor, C.A. 13940 (N.D. Ga. Aug. 10, 1970).

[62] *See*, Torres v. Connor, C.A. 13895 (N.D. Ga. Aug. 10, 1970), and T'Souvas v. Connor, C.A. 13940 (N.D. Ga. Aug. 10, 1970).

[63] See, *Comment, The Offenses Clause: Congress' International Penal Power*, 8 COLUM. J. TRANSNAT'L L. 279 (1969).

[64] Article 18 provides in part that: "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. . . ." 10 U.S.C. § 818 (1970).

[65] 10 U.S.C. § 818 (1970).

[66] It has been suggested that by citing *Ex parte* Quinn and *In re* Yamashita in Toth v. Quarles, 350 U.S. 1, 14 n. 4 (1955), Justice Black preserved the application of Article 18, U.C.M.J., to civilians. *See*, Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Court*, 50 TEXAS L. REV. 6, 13 n. 32 (1971).

[67] *Id.* at 13.

law of *Toth* v. *Quarles*[68] and the more recent restrictions of *O'Callahan* v. *Parker*[69] inasmuch as they deal with military law and Congress' regulation of the armed forces. Assuming that Article 18, Uniform Code of Military Justice, in conjunction with Article 21, Uniform Code of Military Justice (which allows concurrent jurisdiction of certain courts other than courts-martial with respect to the law of war),[70] creates a federal criminal law to punish violations of the law of war,[71] there is the further question of how the federal courts would entertain the prosecution of those violations.

In *United States* v. *Keaton*[72] the Court of Military Appeals observed that there was no venue in the civil courts for offenses under the Uniform Code of Military Justice which were not concurrently offenses with respect to laws created pursuant to Article III, Section 2 of the United States Constitution. Thus, from the view of the highest military court it would appear unlikely that federal courts are looked upon as natural forums for offenses designated by the Uniform Code of Military Justice, although an assertion of judicial power by a federal court with regard specifically to violations of the law of war might be viewed otherwise. Where offenses arise which are cognizable at courts-martial and before federal district courts, generally the rule has been that concurrent jurisdiction exists for the prosecution of those offenses.[73] In other words, courts-martial do not possess exclusive jurisdiction for that offense which may be prosecuted in federal district court,[74] nor does a federal district court possess exclusive jurisdiction over service-connected courts-martial offenses.[75] An act does not *ipso facto* create military or federal exclusive jurisdiction because of its characteristics as a criminal offense. However, "it is not altogether clear in our

[68] 350 U.S. 11 (1955).

[69] 395 U.S. 258 (1969).

[70] Article 21 provides: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war must be tried by military commissions, provost courts, or other military tribunals." 10 U.S.C. § 821 (1970).

[71] The legislative history of Articles 18 and 21, U.C.M.J., in contrast to the concept of a broad federal criminal law being manifested, indicates rather a means "for the trial of spies [and] saboteurs." *See*, *Hearings on H.R. 2498 before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess., at 959 (1949).

[72] 19 U.S.C.M.A. 64, 67, 41 C.M.R. 64, 67 (1969).

[73] Franklin v. United States, 216 U.S. 559, 586 (1910).

[74] *E.g.*, Schmitt v. United States, 413 F. 2d 219 (5th Cir. 1969).

[75] *See*, United States v. Daniels, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970).

law whether initial jurisdiction exists in the federal courts for the same offense as is prosecutable in military tribunals," [76] and it remains an open proposition under the present state of the law as to how federal courts might prosecute criminal violations of the law of war, whether under a general criminal jurisdiction theory or by constitutional implication. The possible prosecution of the My Lai cases in federal district courts under Articles 18 and 21, Uniform Code of Military Justice, is nonetheless illustrative of the potential scope of jurisdiction raised by our obligations under international law.

C. *IMPLICATIONS FOR THE FUTURE*

Although the My Lai cases were not the first indicia of the intensity of debate over the international legal principles involved in the Vietnam war,[77] they served to solidify positions. Whether, in the words of former Secretary of the Army Stanley Resor, My Lai was "wholly unrepresentative" [78] of American policy, or merely indicative of a larger irresponsibility under international law [79] is a continuing and shrilly argued issue.[80] In fact, My Lai has already become a dubious standard in discussions of international principles of the law or war, leading one commentator to remark that "murder of civilians, such as the American massacre of the villagers of Songmy on March 16, 1968, is so obviously a capital violation of the laws of war as to need no extended comment here." [81]

While the My Lai cases cannot be totally credited with surfacing the many issues surrounding the applicability of principles of international law to the Vietnam war, they effectively focused attention on jurisdictional questions as to prosecution of ex-

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[76] Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Court*, 50 TEXAS L. REV. 6, 22 (1971).

[77] *E.g.*, Falk, *International Law and the United States Role in the Vietnam War*, 75 YALE L. J. 1122 (1966); Moore, *International Law and the United States' Role in the Vietnam War: A Reply*, 76 YALE L. J. 1051 (1967); and Falk, *International Law and the United States Role in the Vietnam War: A Response to Professor Moore*, *id.* at 1095; *see also*, Meeker, *The Legality of U.S. Participation in the Defense of Viet Nam*, DEP'T OF STATE BULL., Mar. 28, 1966.

[78] *See*, U.S. NEWS AND WORLD REPORT, Dec. 8, 1969, at 79.

[79] *E.g.*, B. RUSSELL, AGAINST THE CRIMES OF SILENCE: THE PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL (1967).

[80] Russell, *My Lai Massacre: The Need for an International Investigation*, 58 CALIF. L. REV. 703 (1970).

[81] D'Amato, Gould and Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Register*, 57 CALIF. L. REV. 1055, 1073 (1969).

soldiers for alleged war crimes where "some authority other than the court-martial jurisdiction must be found." [82] Since the *Toth* case the trend has clearly been to narrow rather than enlarge court-martial jurisdiction, and any theory of constructive military status in the cases of the discharged soldiers at My Lai would appear condemned by *O'Callahan* v. *Parker*.[83] Even exclusive of courts-martial, the "number of forum possibilities . . . is perhaps a sad commentary on the state of international law enforcement." [84] As discussed, trial by military commission appears "too questionable constitutionally to merit consideration," [85] and while trial in federal district courts seems more meritorious, it too "leaves much to be desired." [86] Perhaps in the end the most significant effect of the My Lai cases will be measured in terms of efforts to close this jurisdictional gap with regard to ex-soldiers and fulfill international obligations as to investigation and prosecution of alleged war crimes. As noted, the need for legislative reform to cure this jurisdictional problem has not gone unnoticed,[87] and My Lai may provide the incentive for legislation which has in the past been proposed but not imposed as law.[88]

IV. THE SEARCH FOR EXTRAORDINARY RELIEF

The My Lai cases were extraordinary in many ways. The difficulties of trial stemming from the lapse of over two years from the events which gave rise to the charges and the searching investigations which followed, coupled with notoriety of the events themselves, created several situations where legal relief beyond that available in the course of pretrial and trial procedure was sought.

"The development of a body of law relating to extraordinary relief under the All Writs Act within the military judicial

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[82] *Comment, Punishment for War Crimes: Duty or Discretion*, 69 MICH. L. REV. 1312, 1321 (1971).

[83] 395 U.S. 258 (1969). *See, Note, Military Law—Military Jurisdiction Over Crimes Committed by Military Personnel Outside the United States: The Effect of O'Callahan* v. *Parker*, 68 MICH. L. REV. 1016 (1970).

[84] Paust, *Legal Aspects of the My Lai Incident: A Response to Professor Rubin*, 50 ORE. L. REV. 138, 152 (1971).

[85] Everrett and Hourcle, *Crimes Without Punishment—Ex-Servicemen, Civilian Employees and Dependents*, XIII JAG L. REV. 184, 223 (1971).

[86] *Id.*

[87] *E.g.*, Paulson and Banta, *The Killings at My Lai: "Grave Breaches" Under the Geneva Conventions and the Question of Military Jurisdiction*, 12 HARV. INT'L L. J. 345 (1971).

[88] *E.g.*, S. 3188–89, 91st Cong., 1st Sess. (1969); S. 761, 89th Cong., 1st Sess. (1965); and S. 1791, 84th Cong., 2d Sess. (1956).

[system] still is in the early stages." [89] Nevertheless, several accused in the My Lai cases sought to take advantage of the All Writs Act, 28 U.S.C. § 1651a, which provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

In *United States* v. *Frischholz*,[90] the Court of Military Appeals announced its authority to grant extraordinary relief pursuant to the All Writs Act. The All Writs Act is the statutory source of procedures to insure the ultimate ends of justice in courts of the United States.[91] It is ancillary in jurisdiction and designed to give federal courts power "to issue appropriate writs and orders of an auxilliary nature in aid of their respective jurisdictions as conferred by other provisions of law." [92] After the Court of Military Appeals declared itself a "court established by Act of Congress" in the meaning of 28 U.S.C. § 1651a in the *Frischholz* case, it held that "this Court clearly possesses the power to grant relief to an accused prior to the completion of court martial proceedings against him." [93] Further, it subsequently asserted that "this Court is not powerless to accord relief to an accused who has palpably been denied constitutional rights in any court-martial." [94] In a later case the Court appeared to retreat from this view, in that it limited its role in affording relief in cases where there had been a denial of an accused's constitutional rights alleged to those cases "in which we have jurisdiction to hear appeals or to those to which our jurisdiction may extend when a sentence is finally adjudged and approved." [95] Nonetheless, it is clear that the Court of Military Appeals will entertain All Writs Act jurisdiction when charges are preferred, and such jurisdiction is "sufficiently broad to encompass aid to both actual and potential court-martial jurisdiction." [96] The My Lai accused focused on this aid to alleviate the extraordinary

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[89] Rankin, *The All Writs Act and the Military Judicial System*, 53 MIL. L. REV. 103, 135 (1971).
[90] 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).
[91] *See*, Harris v. Nelson, 394 U.S. 286, *reh. den.*, *395* U.S. 1025 (1969).
[92] Rankin, *supra* note 89 at 111.
[93] Gale v. United States, 17 U.S.C.M.A. 40, 43, 37 C.M.R. 306, 307 (1967).
[94] United States v. Bevilacqua, 18 U.S.C.M.A. 10, 11–12, 39 C.M.R. 10, 11–12 (1969).
[95] United States v. Snyder, 18 U.S.C.M.A. 480, 483, 40 C.M.R. 192, 195 (1969).
[96] Rankin, *supra* note 89 at 126.

situations that developed during proceedings of their cases. In particular, My Lai accused requested relief by prohibition or mandamus, seeking intervention at various stages in the pretrial and trial proceedings. An analysis of each case which went before the Court of Military Appeals is another means of ascertaining what influence on the military justice system was effected by the My Lai cases.

A. *CALLEY: FREE PRESS AND FAIR TRIAL*

The first relief of an extraordinary nature sought in the My Lai cases was a joint petition to restrain the news media from publishing information in *United States* v. *Calley*.[97] The petition was unusual (as well as extraordinary in relief sought) because both the trial and defense counsels joined in the request. The injunctive relief sought would have covered television, radio, newspaper and news magazine accounts of witness statements and pictures "purporting to represent the bodies of persons allegedly killed in the village of My Lai 4, Republic of Vietnam, on March 16, 1968." [98] That counsel successfully anticipated the extent of coverage which would be given the Calley trial is evident from the fact that it became the most publicized court-martial in history. The circumstances threatening Lieutenant Calley's right to a fair trial and the integrity of the military judicial system cast grave doubts on the outcome of the trial from the very beginning.[99] Indeed, "the cliché that extraordinary writs are reserved for truly extraordinary circumstances is an understatement where such a writ is sought by the prosecution in a criminal case," [100] as it partially was in the *Calley* case. In spite of the scope of the news coverage and its danger to a fair trial the Court of Military Appeals found "no basis for the extraordinary relief of curtailing future publications and speech." [101]

The unprecedented public attention focused on the *Calley* and other My Lai trials brought into conflict the traditional rights of fair trial and free press. The Court of Military Appeals in the *Calley* case decided that the facts did not require it "to propound rules for the resolution, prior to trial, of anticipated conflicts between the individual's right to a fair trial and the rights

[97] 19 U.S.C.M.A. 96, 41 C.M.R. 96 (1969).
[98] *Id.* at 96.
[99] *E.g.*, Haemmel, *Modern Military Justice and the Songmy Cases*, 33 TEXAS B. J. 441 (1970).
[100] Floyd, *Extraordinary Writs in Favor of the Government*, 25 JAG J 8, 30 (1970).
[101] United States v. Calley, 19 U.S.C.M.A. 96, 97, 41 C.M.R. 96, (1969).

of freedom of speech and of the press." [102] The Court opined that the propriety and accuracy of news stories were to be left in the hands of publishers initially, and ultimately the responsibility of insuring against prejudice would devolve to the military judge. The Court of Military Appeals considered it appropriate for the military judge to balance the constitutional protections of free press and fair trial. In the *Calley* case the Court gave some small indication of what was to be expected of the military judge faced with the constitutional dilemma.

At the *Calley* court-martial the military judge had taken steps to insulate the court members and "meet the ideal, advocated by Lord Coke, that a juror should stand indifferent as he stands unsworn." [103] He had ordered court members not to talk about the case and to refrain from listening to or reading accounts of it or other My Lai trials. He also directed prospective witnesses not to discuss any information or evidence related to the case. These initial measures were implicitly approved by the Court of Military Appeals but little other guidance was given the military judge. In lieu of specific rules, the Court of Military Appeals cited *Sheppard* v. *Maxwell* [104] as giving other measures available to the military judge and directed that they be used "as required by the circumstances as they exist at the time of the trial." [105] In brief, the Court of Military Appeals avoided the difficult constitutional task of balancing the interests of fair trial and free press but passed the problem to the military judge with kind words and little law. The pretrial publicity problem was one common to all the My Lai trials, but after the denial of extraordinary relief in the *Calley* case it was pursued by tactics other than petition for extraordinary relief in the Court of Military Appeals. Several of the My Lai defendants found other circumstances so extraordinary, however, that they sought relief at the highest military court.

B. *THE INVESTIGATIVE IMBALANCE:* HUTSON *V.* UNITED STATES

The My Lai incident was the subject of intensive and far-ranging investigations on several levels within the Army. [106] In

[102] *Id.* at 96.
[103] Tracy, *Fair Trial and Free Press*, 9 JAG L. REV. 24 (1967).
[104] 384 U.S. 333 (1966).
[105] United States v. Calley, 19 U.S.C.M.A. 96, 97, C.M.R. 96, 97 (1969).
[106] The Peers Inquiry, for example, interrogated several hundred witnesses. *See, Report of the Department of the Army Review of Preliminary Investigations into the My Lai Incident* (U), Vol. I (14 Mar. 1970).

addition, it was the subject of a searching inquiry by a congressional subcommittee.[107] In the case of *Huston* v. *United States*,[108] the petitioner, one of several enlisted accused assigned to Fort McPherson, Georgia, for disposition of charges growing out of the My Lai incident, sought investigative assistance for his defense. He initially applied to a summary court-martial convening authority and the military judge for the detail of criminal investigators or for funds to hire private investigators, but was turned down. He then applied to the Court of Military Appeals for relief in correcting the investigative imbalance.[109]

The accused pointed out in his petition that "such relief is provided for indigent defendants in United States district courts, under the provisions of 18 U.S.C. § 3006 A," [110] and he urged the Court to adopt an analogous procedure for indigent military defendants. However, the Court held that the All Writs Act "simply offers no basis for directing the assignment or employment of investigators on the defense staff," [111] and that the statute cited was inapplicable in a military situation.

In spite of its denial of the accused's petition, the Court was "not without sympathy" [112] toward the accused's circumstances. It pointed out that relief, in addition to that afforded by the discovery processes of an Article 32 investigation, must come from congressional action. Otherwise, the accused must rely on traditional pretrial investigative techniques and the government voluntarily furnishing expert assistance to "assure a fair opportunity to prepare for any trial which may ultimately be ordered." [113] In other words, the Court of Military Appeals did not feel the investigative imbalance could be remedied by extraordinary relief; nonetheless it recognized the problem and encouraged liberal administration of military justice to enable the accused to prepare his case.

C. *DOHERTY AND HENDERSON: PERIPHERAL RELIEF*

One of the My Lai cases involving extraordinary petitions for extraordinary relief filed with the Court of Military Appeals was

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[107] *See, Report of the Armed Services Investigating Subcomm. of the Comm. on Armed Services, "Investigation of the My Lai Incident,"* H.R. 91st Cong., 2d Sess., under H. Res. 105, Jul. 15, 1970.
[108] 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970).
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 438, 42 C.M.R. at 40.
[113] *Id.*

Doherty v. *United States*.[114] What makes the *Doherty* case perhaps more extraordinary than other instances of relief-seeking in the My Lai cases is the fact that the petition was predicated on circumstances twice removed from the forum in which the accused was found.

Because of inevitable differences in investigation and pretrial procedure, each My Lai accused found that developments in the other My Lai cases often affected the particular proceeding in his case. So it was with Specialist Four William F. Doherty in the late months of 1970. The evidentiary revelations in the *Calley* court-martial had generated massive, inflammatory publicity. At that time the outcome of Doherty's Article 32 investigation on the charge of premeditated murder at My Lai was still pending. Consequently, Specialist Doherty sought appropriate relief from the fair risk that the publicity surrounding the *Calley* trial would jeopardize his opportunity for an impartial Article 32 investigation. He asked that the *Calley* trial be delayed until such time as the charge against him was dismissed or referred to trial.[115]

In balancing the constitutional requirements of fair trial and free press in the *Calley* case, the Court of Military Appeals affixed responsibility for protecting the trial from prejudice with the military judge. In *Doherty*, the Court found that the Article 32 investigating officer had an analogous obligation, suggesting that a *voir dire* of the investigating officer be made part of the record "for all subsequent tribunals authorized to pass upon the investigating officer's qualifications." [116] However, since there was no evidence that the investigating officer had been unduly influenced by the *Calley* case publicity, the Court held that no foundation for the relief sought was presented and denied the petition.

In the *Hutson* [117] case, previously discussed, one of the grounds upon which extraordinary relief was sought grew out of the extensive investigations of the My Lai incident. In due course one of the investigations, the Peers Inquiry, was reduced to an official report, only part of which was released. While the major evidentiary portions of the report were eventually made available to accused, the classified findings and recommendations were withheld initially from parties to the cases. This led to an application for a writ of mandamus to force production of the report during the course of the Article 32 investigation in the case of *Henderson*

[114] 20 U.S.C.M.A. 163, 43 C.M.R. 3 (1970).
[115] *Id.*
[116] *Id.* at 164, 43 C.M.R. at 4 (1970).
[117] 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970).

v. *Resor*.[118] It alleged that the pertinent portion of the report contained "specific findings relating to allegedly criminal conduct on the part of the petitioner . . . ." [119] The part of the report in question allegedly formed the basis for a charge of dereliction against the accused, and the petition stated that subsequently discovered evidence would reveal that the decision to charge the accused was substantially in error. Hence, the accused urged production of the report in order that the convening authority would be able to make an informed decision with respect to referring the charges to trial. The Court of Military Appeals did not consider the information sought as attaining the "level of admissible evidence." [120] Further, whatever effect subsequently developed evidence would have on the convening authority was not, of course, apparent on the face of the petition. The Court held, therefore, that, "the request for the production of the pertinent portions of the Peers Report is premature." [121] Again a My Lai accused was rebuffed in an attempt to secure extraordinary relief; nonetheless, the Court of Military Appeals remained circumspect in its language denying relief.

D. MEDINA *V.* RESOR

Undoubtedly the most unusual petition filed by a My Lai accused was the one filed by Captain Ernest L. Medina. Considering the many roles of Captain Medina in the My Lai cases, it is perhaps appropriate that his search for extraordinary relief was the most ambitious. Essentially the several prayers for relief in the case of *Medina* v. *Resor* [122] embodied allegations that a conspiracy to deprive him of a fair trial existed among the several individuals charged with the administration of military justice within the Army command structure. The respondents named included the Secretary of the Army, the Judge Advocate General, the General Court-Martial Convening Authority, the Staff Judge Advocate, the Trial Counsel, and the Staff Judge Advocate and Trial Counsel in the *Calley* case.[123] In particular, the allegations concerned the alleged admission of unsworn statements into evidence at Captain Medina's Article 32 investigation, the absence of

[118] 20 U.S.C.M.A. 165, 43 C.M.R. 5 (1970).
[119] *Id.* at 166, 43 C.M.R. at 6. (1970).
[120] *Id.*
[121] *Id.*
[122] 20 U.S.C.M.A. 408, 43 C.M.R. 243 (1971).
[123] Respectively, the Hon. Stanley Resor, Major General Kenneth Hodson, Lieutenant General Albert Connor, Colonel Wilson Freeman, Major William Eckhardt, Colonel Robert Lathrop, and Captain Aubrey Daniel.

Captain Medina as a government witness in the court-martial of Sergeant Charles Hutto which resulted in an acquittal, and a decision not to call him as a government rebuttal witness in the *Calley* case on the issue of orders alleged to have been given by him prior to the assault of his company at My Lai.

The Court of Military Appeals held that the accused had failed to sufficiently set forth the nature, source, or possible effect of the unsworn statements, and that there was no showing that "the ordinary course of the proceedings against him through trial and appellate channels is not an adequate source of relief for any pretrial defects of this nature." [124] The Court clearly adhered to the general rule that extraordinary relief is reserved for extraordinary situations and not a substitute for appeal.[125] The Court, relying on its earlier decision with respect to the impact of the *Calley* court-martial upon related cases in *Doherty* v. *United States*,[126] denied any relief with regard to the accused's appearance as a witness at the *Calley* court-martial. Citing paragraph 44f, Manual for Courts-Martial, United States, 1969 (Revised Edition), the Court noted that the trial counsel has the primary responsibility for prosecution of a case, including the calling of witnesses. The means of fulfilling that responsibility are left to him. Finally, the Court concluded that the result of the *Calley* trial "can in no way be used for or against this petitioner at his possible future trial." [127] However, it was careful to reserve an opinion "whether or to what extent, a convening authority, a staff judge advocate, or other official, may limit trial counsel's authority to summon witnesses for the prosecution." [128] Further, the Court expressed "no opinion on the question of whether an uncalled witness may compel a party to produce his testimony at a given trial." [129] In its decision the Court again found no basis for extraordinary relief being granted to a My Lai defendant, thereby avoiding the unique and potentially embarrassing issues raised in Captain Medina's petition.[130]

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[124] Medina v. Resor, 20 U.S.C.M.A. 403, 405, 43 C.M.R. 243, 244 (1971).

[125] *See*, Grafman, *Extraordinary Relief and the U. S. Court of Military Appeals*, 24 JAG J. 61, 65 (1969).

[126] 20 U.S.C.M.A. 163, 43 C.M.R. 3 (1970).

[127] Medina v. Resor, 20 U.S.C.M.A. 403, 405, 43 C.M.R. 243, 245 (1971).

[128] *Id.* at 406, 43 C.M.R. at 246.

[129] *Id.*

[130] Captain Medina did testify subsequently as a witness called by the court in the *Calley* case, and was, of course, later acquitted of all charges at his own trial.

E. *THE FINAL EFFORT:* HENDERSON *V.* WONDOLOWSKI

The last case of extraordinary relief in the My Lai cases presented to the Court of Military Appeals concerned an earlier petitioner for relief, Colonel Oran K. Henderson.[131] In *Henderson* v. *Wondolowski*[132] the petitioner sought relief against the military judge in his case. Specifically, the accused asked that the military judge be ordered to direct the prosecution to furnish a bill of particulars and that he also be prohibited from proceeding with trial on one charge. The military judge had denied a motion for a bill of particulars and the accused had looked initially to the Court of Military Review for relief to make the specification of the charge in question more definite. The Court of Military Review denied the requested relief,[133] and the Court of Military Appeals expressed "no opinion respecting the applicability of 28 U.S.C. § 1651(a) to the Court of Military Review." [134] The Court of Military Appeals found that, since the relief sought had been the subject of examination by the military judge and Court of Military Review, the issues were preserved for review at each stage of appellate review.[135] It was therefore held that no basis existed for the Court of Military Appeals to grant extraordinary relief under the All Writs Act. The last petition for extraordinary relief by a My Lai accused was denied as had been the first such application.

Although several attempts in the My Lai cases to secure extraordinary relief from the Court of Military Appeals were ultimately unsuccessful, they contributed in a limited manner to the defining of the dimensions of the Court's role under the All Writs

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[131] *See*, Henderson v. Resor, 20 U.S.C.M.A. 165, 43 C.M.R. 5 (1970).

[132] 21 U.S.C.M.A. 63, C.M.R. 117 (1971).

[133] In Colonel Henderson's earlier petition for mandamus against Secretary of the Army Resor, the Court of Military Review stated that it would not "hesitate to grant such relief as is necessary and proper to insure the fair and orderly administration of military justice if the other provisions of military law establish no specific remedy and where in justice, fairness, and good Government there ought to be one," and indicated that it felt the Secretary of the Army was not justified in withholding a portion of the Peers Report. Nonetheless, it held that there was no basis for granting extraordinary relief since there appeared to be an adequate remedy in the normal process of judicial administration. *See*, *Henderson* v. *Resor*, Misc. Doc. No. 1970/7, A.C.M.R. (22 Sep. 1970).

[134] Henderson v. Wondolowski, 21 U.S.C.M.A. 63, 64 n.1, 44 C.M.R. 117, 118 n.1 (1971). The question of whether the Court of Military Review has All Writs Act jurisdiction remains open, although recently one writer tentatively concluded that they are "established by act of Congress, within the meaning of the All Writs Act and possess the powers conferred by that statute." Rankin, *supra* note 89 at 134.

[135] Henderson v. Wondolowski, 21 U.S.C.M.A. 63, 44 C.M.R. 118 (1971).

Act. This contribution should not be overlooked because of its restricted nature in the final evaluation of the impact of the My Lai cases within the overall system of military justice.

V. THE WITNESS PROBLEMS: CONGRESSIONAL TESTIMONY AND IMMUNITY

The My Lai cases spawned a multitude of issues which were ancillary to the court-martial proceedings yet vital to their prosecution. Two of the more significant problems created concerned the operation of the Jencks Act with respect to witnesses who had testified before the Hebert Subcommittee investigating the My Lai incident and the granting of immunity to witnesses for necessary trial testimony. Some discussion of both areas is important to an understanding of the diversity of the My Lai cases' impact upon military justice.

A. *THE JENCKS ACT AND CONGRESSIONAL TESTIMONY*

Shortly after My Lai became a public issue, Chairman L. Mendel Rivers of the House Armed Services Committee announced that a subcommittee would investigate the My Lai incident. On November 26, 1969, the subcommittee heard testimony from the Secretary of the Army. Subsequently the subcommittee heard extensive testimony from over 150 witnesses, involving over 1800 pages of sworn testimony.[136] However, the transcript of testimony was not released when the subcommittee released its report on 15 July 1970.[137] Counsel in several of the My Lai cases then requested it be made available, but Chairman F. Edward Hebert refused to release the evidence gathered by his subcommittee. His position was succinctly stated in a letter to the trial counsel in the *Calley* court-martial dated July 17, 1970:

> . . . it is our belief that only the Congress can direct the disclosure of legislative records. Therefore, it is our position that the My Lai Subcommittee documents demanded by defense counsel are not within the purview of the holding in *Brady* v. *Maryland*, 373 U.S.

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[136] *Report of the Armed Services Investigating Subcomm. of the Comm. on Armed Services, "Investigation of the My Lai Incident,"* 4 H.R. 91st Cong., 2d Sess., under H. Res. 105, Jul. 15, 1970.

[137] *Id.*

83 (1963). For the same reason we believe that those documents are not subject to the requirements of 18 U.S.C. 3500.[138]

Ultimately, witnesses who had testified before the subcommittee were called to testify at both the *Calley* trial and at the general court-martial of Sergeant David Mitchell, Lieutenant Calley's platoon sergeant at My Lai, at Fort Hood, Texas. In the *Calley* case, the military judge ruled that the defendant had no right to inspect the subcommittee's testimony and declared that there was no remedy for congressional refusal to produce the testimony. In contrast to this position, the military judge in the Mitchell court-martial held that the government could not call any witness unless it produced that witness' congressional testimony.[139]

The issue relating to a defendant's right under the Jencks Act [140] to pretrial congressional testimony has been characterized as "one of the most significant issues spawned by the My Lai incident. . . ." [141] The rule of law requiring production of relevant pretrial statements of prosecution witnesses for impeachment purposes without a preliminary showing of conflicting testimony originated in the case of *Jencks* v. *United States*.[142] A similar requirement was adopted in the military case of *United States* v. *Walbert*.[143] As to the applicability of the *Jencks* requirement to congressional testimony, the record is uncertain, although it has been argued that neither the Constitution, public policy, nor the statutory enactment of the requirement exempts congressional testimony.[144] As to the legislative history of the Jencks Act [145] it may be said that "no intention to exempt such [congressional] statements can be properly inferred." [146] On the other hand, since no specific rule was spelled out with regard to congressional testimony under the Jencks Act, it is perhaps better to regard

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[138] Cited in "Government Answer to Defense Motion for Production of Alleged 'My Lai Incident' Testimony and Evidence, in the Custody and Control of the United States of America—Specifically Information in the Custody and Control of Certain Members of the Congress of the United States," United States v. Calley, C.M. 426402 (ACMR 7 Sep. 1971).

[139] The Mitchell decision came on Oct. 15, 1970; in the subsequent courts-martial of Captain Medina and Colonel Henderson the military judges followed the holding in the *Calley* case.

[140] 18 U.S.C. § 3500 (1970).

[141] *Note, A Defendant's Right to Inspect Pretrial Testimony of Government Witnesses*, 80 YALE L.J. 1388 (1971).

[142] 353 U.S. 657 (1957).

[143] 14 U.S.C.M.A. 34, 33 C.M.R. 246 (1963).

[144] *See, Note, supra* note 141.

[145] Conference Report, H.R. Rep. No. 1271, 85th Cong., 1st Sess. 3 (1957).

[146] *See, Note, supra* note 141 at 1392.

the legislative history as simply leaving the option open for Congress or the Courts to decide the question.

An examination of the case law interpreting the Jencks Act, however, is "far from conclusive." [147] Arguments for applicability of the Jencks Act to congressional testimony may also be found in the Sixth Amendment of the Constitution, providing confrontation of witnesses and compulsory process. Then too, the broad language of *Brady* v. *Maryland* [148] pertaining to a defendant's discovery rights might support a defendant's position seeking congressional testimony.

Whatever reasoning is advanced to provide for a defendant's access to pretrial congressional testimony of witnesses, persuasive reasoning may be urged to the contrary. One reason for not making congressional testimony available to a defendant may be found in the overriding need for secrecy with respect to such testimony. That is, not only may such testimony involve military secrets, but a promise of secrecy may stimulate more responsive and comprehensive testimony for legislative purposes.[149] Regardless of the convincing nature of argument either for or against the applicability of the Jencks Act to congressional testimony, the military legal result is likely to remain as it was in the *Calley* court-martial with regard to obtaining the testimony for the defendant because of the ultimate power of Congress to withhold the testimony; all the military judges concerned recognized that power.[150] Only at the Mitchell court-martial did the military judge go so far as to exclude witnesses from appearing when their congressional testimony was not forthcoming. Whether the Mitchell ruling was an "equitable and admirable remedy" [151] is a matter of debate. Perhaps the military appellate courts will see fit to comment on the issue in their review of the *Calley* court-martial, although any error in the military judge's ruling may be considered harmless in view of the weight of other testimony to support the verdict.[152]

B. *IMMUNITY: TO WHAT EXTENT?*

Because of the question of trying ex-soldiers who were at My Lai for war crimes, and the number of soldiers either charged

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[147] *Id.* at 1394.
[148] 373 U.S. 83 (1963).
[149] *See*, *Note*, *supra* note 141 at 1405.
[150] *Id.* at 1417.
[151] *Id.* at 1419.
[152] *See*, UNIFORM CODE OF MILITARY JUSTICE, art. 59a; 10 U.S.C. § 859 (1970); and Rosenberg v. United States, 360 U.S. 367 (1959).

or under suspicion for offenses allegedly committed at My Lai, many potential witnesses were reluctant to testify at the My Lai trials. For this reason grants of immunity were given in the My Lai cases in several instances to secure essential testimony.

There is, of course, no immunity provision in the Uniform Code of Military Justice. The Manual for Courts-Martial provides the basis for the existence of immunity in military law, but it does not set forth any procedure for granting immunity.[153] Further, the practice in the military justice system has traditionally involved the granting of a form of immunity which was transactional in nature.[154] Transactional immunity is predicated on the proposition that "for a grant of immunity to be effective as to offenses within the jurisdiction of the forum, the grant must protect its recipient from being tried at all for any such offense as to which his testimony might tend to incriminate him." [155]

By the time the My Lai trials were underway in 1970, there had been a significant statutory change with respect to the fundamental nature of immunity. The Organized Crime Control Act of 1970 [156] provided that a more limited immunity, namely, use immunity which only protects the recipient's testimony or its fruits from use at any further prosecution against him, manifest the federal standard. The applicability of the Act to the military is questionable since its purpose and legislative history are distinctly nonmilitary in character.[157] Nonetheless, the Act was invoked in grants of immunity in the *Calley* court-martial.[158] One ex-soldier, Paul Meadlo, resisted testifying even under the grant of immunity pursuant to the Act. His reluctance to testify (in spite of his prior "public" testimony on nationwide television) is explicable only in terms of a fear of possible prosecution for war crimes in some uncertain international law forum. Yet another ex-soldier, Allen Boyce, required a grant of immunity before he would testify for the prosecution in the *Calley* trial. While the My Lai trials were different in having ex-soldier witnesses endangered by possible war crimes prosecution and therefore reluctant to testify,

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[153] MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969 (REVISED EDITION), para 68*h*.

[154] *See*, United States v. Kirsch, 15 U.S.C.M.A. 84, 87, 35 C.M.R. 56, 60 (1964).

[155] U.S. DEP'T OF ARMY, PAMPHLET NO. 27-2, ANALYSIS OF CONTENTS, MANUAL FOR COURTS-MARTIAL, 1969 (REVISED EDITION), para 150*b* (1970).

[156] Pub. L. No. 91-452 (Oct. 15, 1970).

[157] *See*, Green, *Grants of Immunity and Military Law*, 53 MIL. L. REV. 1, 27-37 (1971).

[158] *Id.* at 53.

a precedent for utilizing the federal use standard for grants of immunity to civilians was established.

Of more direct consequence to the law of immunity in the military justice system than grants to civilians reluctant to testify were those grants issued to military witnesses who themselves were My Lai accused. Corporal Kenneth Schiel had been charged in connection with the My Lai incident and had been assigned along with other soldiers similarly situated to Fort McPherson, Georgia. A charge of murder against him, however, was dismissed after an Article 32 investigation because of insufficient evidence. At that time, 4 September 1970, there was no grant of immunity involved in the dismissal of the charge.[159] He was thereafter summoned as a defense witness at the *Calley* court-martial to testify on the issue of what orders were given by Captain Medina to his company prior to the assualt on My Lai. He balked at testifying, however, and he was issued a grant of use immunity similar in form to the ones given the prosecution witnesses. He elected to testify under the grant in spite of the danger of subsequent prosecution which was enhanced by his immediate amenability to military jurisdiction since his case had been dismissed on the basis of insufficient evidence. The validity of use *versus* transactional immunity in the military remained untested until late in the *Calley* court-martial when Captain Eugene Kotouc was called as a rebuttal witness for the prosecution.

At the time Captain Kotouc was notified to appear at the *Calley* trial, he was himself pending general court-martial on charges of assault and maiming growing out of an incident occurring shortly after the assault on My Lai. He was therefore more than somewhat adverse to testifying. Nonetheless, after objecting to the effectiveness of a limited grant of use immunity given him in exchange for his testimony, he testified pursuant to the order of the military judge. Later, at his own trial, he sought to convert the shield of use immunity into a sword of transactional immunity to bar prosecution of the charges against him. Captain Kotouc urged that because a grant of use immunity had been forced upon him by order of the military judge to compel his testimony, he could not be prosecuted for events related to his testimony. He argued that the use immunity given him was constitutionally deficient and by operation of law tantamount to a grant of transactional immunity under military law which would

[159] *See*, My Lai News Release No. 32 (4 Sep. 1970), Information Office, Third United States Army, Fort McPherson, Georgia.

prohibit prosecution of charges related to his immunized testimony. The military judge rejected this reasoning and held the grant of use immunity efficacious under military law, noting that there was an insufficient nexus between Captain Kotouc's immunized testimony and the charges in his case. Captain Kotouc was nonetheless acquitted, and the intriguing questions relating to the extent and effect of immunity as raised at his trial were never subject to appellate resolution.[160]

While the My Lai cases illustrated several of the problems pertaining to grants of immunity in the military justice system, they did not ultimately formulate any satisfactory solutions. The emphasis on those problems did, however, point out a need for clarification in the area, statutory or otherwise.[161]

VI. MY LAI AND MILITARY JUSTICE IN THE FEDERAL FORUM

A. *MILITARY JUSTICE CHALLENGED*

The direct test of the My Lai cases issued to the military justice system came just before the trials began. Sergeant Esequiel Torres, one of several enlisted accused assigned to Fort McPherson, Georgia, for disposition of the cases, filed a complaint in the United States District Court in Atlanta, Georgia, contesting the referral of charges of murder and assault to general court-martial. He alleged that to subject him to trial by court-martial would violate his constitutional rights.

Sergeant Torres stated fifteen separate grounds for relief in his complaint. Most of the grounds involved the differences in civilian and military law with respect to the Fifth and Sixth Amendments of the Constitution. However, one of the grounds set out the proposition that "trial by General Court-Martial will contravene the provisions of Article III, Section 1 of the Constitution . . . and the provisions of Article III, Section 2. . . ."[162] Thus Sergeant Torres questioned the very existence of judicial power in military courts, as well as the procedural disparities of trial by jury and trial by court-martial.

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[160] The writer was military defense counsel for Captain Kotouc. *See*, General Court-Martial Convening Order No. 6, Headquarters, Third United States Army, 2 Mar. 1971.

[161] *See*, Green, *Grants of Immunity and Military Law*, 53 MIL. L. REV. 1, 27–37 (1971).

[162] *See*, Thirteenth Ground, Complaint, Torres v. Connor, C.A. 13895 (N.D. Ga. 1970).

In *O'Callahan* v. *Parker*[163] the majority opinion of the Supreme Court observed differences in civilian and military trials:

> A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.[164]

The My Lai cases provided an opportunity for a federal forum to pass judgment on the military justice system when a three-judge court was convened to hear Sergeant Torres' complaint and a temporary restraining order was issued to prevent his trial by court-martial. Soon after the Torres complaint was accepted, Specialist Four Robert T'Souvas, another My Lai accused, filed a similar action.[165] The two actions were consolidated for argument, and the question became one of whether the antipathy of *O'Callahan* and the acute issues of the My Lai cases would combine to work permanent change in the military justice system.[166]

At first glance it appeared that the Torres and T'Souvas complaints had little chance of success. These My Lai accused sought to have courts-martial permanently enjoined or, in the alternative, the charges transferred to the federal district court for trial by jury. Civilian courts "have generally maintained a hands-off policy toward military trials."[167] Only in the rare case has a federal court intervened to halt military judicial process. The attitude of federal courts has generally been one of nonintervention, enhanced perhaps by legislative reforms and military appellate requirements of constitutional due process.[168]

B. *THE FEDERAL RESPONSE*

In the case of *Torres and T'Souvas* v. *Connor*,[170] a three-judge panel dismissed the complaints of the two My Lai accused "for

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[163] 395 U.S. 258 (1969).

[164] *Id.* at 266.

[165] T'Souvas v. Connor, C. A. 13940 (N.D. Ga. 1970).

[166] Subsequent to the complaints of Torres and T'Souvas Lieutenant Calley filed a similar action, but it was soon dismissed. *Calley* v. *Talbott*, C.A. 2159-70 (D.D.C. 1970).

[167] Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1, 5 (1971).

[168] *See*, Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969), where injunctive relief was obtained in a marihuana case based upon the O'Callahan ruling involving "service-connection."

[169] *See*, Weckstein, *supra* note 167 at 5.

[170] C.A. Nos. 13895 and 13940 (N.D. Ga. 1970).

failure to exhaust military remedies." [171] It relied primarily on the decisions in the Supreme Court cases of *Gusik* v. *Schilder* [172] and *Noyd* v. *Bond*.[173] Considering first the allegations that the Uniform Code of Military Justice was unconstitutional, the court found that while the law restricted military jurisdiction to its narrowest limits, it did not make the system of military justice under the Uniform Code of Military Justice *per se* unconstitutional. Also rejected somewhat summarily were any contentions regarding the illegality of the war in Vietnam. The real issue as seen by the court was "those grounds alleging that it would be fundamentally unfair, in view of the peculiar facts and circumstances surrounding the My Lai incident, to require plaintiffs to be tried by court-martial." [174] Of particular concern to the court were problems of command influence, pretrial publicity, denial of effective right of counsel, inability to obtain relief within the military system, and selective prosecution. The court decided that there was no showing of such fundamental unfairness which would warrant enjoining the pending courts-martial, but emphasized the fact that it was not passing judgment on the merits of the complaints themselves as alleging matters violative of due process. The rather careful language of the court made it clear that its ruling related to "the timing, rather than the merits, of this suit." [175] In sum, the court adhered to the rule of noninterference by federal courts in military justice. It reasoned that policy demanded exhaustion of military remedies prior to any intervention by federal courts; but, should the military courts be deficient in their constitutional obligations. the court indicated that the traditional remedy of *habeas corpus* would remain available.

It would seem from the decision that the military justice system met the initial challenge of the My Lai cases with some success. Of course, not all the issues which surfaced at the later courts-martial were passed upon by the court. In the context of the traditional reluctance of federal courts to intervene in the military justice process, the Torres and T'Souvas complaints were perhaps too easily dismissed as premature. In the end all but one of the accused charged with crimes arising out of the My Lai incident escaped judicial punishment, and the President's

[171] *Id.* at 7.
[172] 340 U.S. 128 (1950).
[173] 395 U.S. 683 (1969).
[174] Torres and T'Souvas v. Connor, C.A. Nos. 13895 and 13940 at 4 (N.D. Ga. 1970).
[175] *Id.* at 5.

own intervention in the *Calley* case removed most of the chance for a federal court consideration of the My Lai issues confronting military justice. The frontal attack on military justice at best stands for inconclusive results rather than absolute preservation of the military justice system.

VII. CONCLUSION: A TENTATIVE APPRAISAL OF THE EFFECT OF MY LAI UPON MILITARY JUSTICE

In the areas examined no major change in the present system of military justice directly attributable to My Lai or the cases it precipitated has resulted. Why is this so, and what changes should have resulted?

One factor obscuring any change in the military justice system caused by My Lai was the excessive publicity surrounding the cases. They were accorded an inordinate amount of attention and this tended to cloud the real issues and how they were treated in the military justice system. In addition, the sheer administrative dimensions of both the investigatory and trial stages dissipated the effects of the law and facts developed in the cases. Finally, attitudes about the Vietnam War ran deep before, during, and after the courts-martial, and served to distort events. Thus was My Lai's potential for reform in military justice lost due to other historical consequences.

In spite of the narrow effects My Lai had upon military justice, some significant impetus for change remains. Most important to the fulfillment of international legal obligations is the need for legislation to close the jurisdictional gap with respect to the prosecution of discharged servicemen for war crimes. In connection with cases involving the prosecution of war crimes in particular, serious consideration should be given to creating a permanent committee at Department of the Army level to review, coordinate and set policy consistent with our responsibilities under international law. Also of immediate concern to the administration of military justice is the establishment of regular procedures for handling complicated cases subject to public scrutiny, such as a central facility for the release of information and witness coordination. My Lai clearly demonstrated the viability of the military justice process itself, but exposed a need for some positive direction in investigation of complicated cases which would lessen duplication of effort by different agencies. Ultimately, however, the challenges presented by My Lai fall outside the administration of military justice; only leadership and adequate training can prevent another My Lai.

COMMENTS
THE COURT OF MILITARY APPEALS: A SURVEY OF RECENT DECISIONS*

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This comment studies the work of the United States Court of Military Appeals from 1 September 1971 to 31 August 1972.[1] In most respects the term was a quiet one. Public interest in military justice was largely focused on the conclusion of the My Lai courts-martial and the court-martial of a Navy chaplain for alleged sexual misconduct. At term's end the military's most significant case of the last decade, *United States* v. *Calley*, awaited decision before an Army Court of Military Review.

The old issues of search and seizure and speedy trial again occupied a significant portion of the Court's time. Fourth Amendment cases were less significant for principles of law established than for the frequency of dissenting opinions. The speedy trial cases, on the other hand, appeared to cut significant new ground in this disturbing area. Confession and counsel issues also drew the Court's attention.

Significant conflicts between convening authorities and military judges tended to resolve in favor of the former. Dissenter's rights faired poorly. *United States* v. *Priest*[2] sustained military good order and discipline against the attacks of a serviceman underground newspaper editor. Also, three years of confusion may have ended with the Court's apparent rejection of the conscientious objector defense at court-martial. Lastly, the rare "service connected jurisdiction" and guilty plea explanation cases suggest that *O'Callahan* v. *Parker*[3] and *United States* v. *Care*[4]

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* The opinions and conclusions presented herein are those of the authors and do not necessarily represent the views of The Judge Advocate General's School or any governmental agency.

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[1] A previous survey by the same authors examined the work of the Court from 1 January 1970 to 31 August 1971. See MIL. L. REV. 187 (1972).

[2] 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972).

[3] 395 U.S. 256 (1969).

[4] 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

and their progeny have been successfully incorporated in the military practice.

I. JURISDICTION

A. *O'CALLAHAN INTERPRETATION*

It has been three years since the Supreme Court's decision in *O'Callahan* v. *Parker*, and while many of the questions posed by this case have been answered, the Court dealt with two *O'Callahan* problems during the last year. The first decision was in *United States* v. *Bonavita*.[5] A marine stole an automobile from a civilian outside a military reservation. However, he concealed the car at the Marine Corps Base, Quantico, and the court-martial conviction was for this unlawful concealment rather than the theft. For this reason the Court found sufficient service connection and affirmed the conviction.

The other, more significant, *O'Callahan* case was *United States* v. *Wolfson*.[6] The offenses under consideration concerned the issuance of bad checks in violation of Article 123*a*, UCMJ. Wolfson cashed five of the bad checks at a department store in the civilian community. The checks bore no indication of military status on their face. However, on the back of each check was the imprint of a charge card for the store which listed an account number and accused's name with his military rank. However, testimony by the store's credit manager indicated that neither the issuance of the card nor the cashing of the check bore any relation to the fact of accused's military status. The Court held, therefore, that accused's military status was not the "moving force" on the occasion that he cashed his checks in the store.

Two other checks in dispute were given to two loan companies in payment of installments on loans made by each to accused. Again, it was clear that membership in the military was not significant in the transaction, and the Court held that the court-martial was without jurisdiction.

B. *OTHER JURISDICTIONAL MATTERS*

In addition to the *O'Callahan* related decisions the Court decided several other cases which turned on jurisdictional matters. In *Johnson* v. *The Judge Advocate General of the United States*

[5] 21 U.S.C.M.A. 407, 45 C.M.R. 181 (1972).
[6] 21 U.S.C.M.A. 549, 45 C.M.R. 323 (1972).

Army,[7] accused petitioned for extraordinary relief, seeking permission for his detailed appellate defense counsel to participate in related proceedings (seeking a writ of habeas corpus for discharge as a conscientious objector) before a United States District Court. The Court dismissed the petition stating that the jurisdiction of the Court did not encompass orders relating to the representation of litigants before the District Courts.

More typical of the Court's work in this area was *United States* v. *Singleton*,[8] where a defective convening order deprived the court-martial of jurisdiction. The convening order contained a statement that "Military judge, trial and defense counsel will be appointed as cases are referred to this Court for trial." When the court convened, an oral modification of the convening order was referred to which designated counsel and the military judge and stated their qualifications. A written modification of the convening order was made after trial to include military judge and counsel, but without reference to the oral modification. Other than these facts, the Court was unable to find any reference to the composition of the court in the record of trial. Since the court-martial was not convened in conformity with the provisions of the Code and the Manual it was without jurisdiction.

United States v. *White*,[9] extended the rationale of *United States* v. *Dean*,[10] to requests for enlisted members on courts-martial. It was held that such requests must be made in writing and signed personally by the accused. In the absence of a signed writing, the convening authority is without power to designate enlisted members and an attempt to do so, as was the case here, will result in a failure to create a court and a resultant lack of jurisdiction.

Finally, on the basis of *United States* v. *Dean*, jurisdictional error was found in *United States* v. *Brown*,[11] when the request for trial by military judge alone did not contain the name of the military judge.

II. COUNSEL RIGHTS

An accused's rights with respect to counsel was one of the predominant concerns of the Court during the last year. The first case was *United States* v. *Andrews*,[12] which held that the

[7] 21 U.S.C.M.A. 520, 45 C.M.R. 294 (1972).
[8] 21 U.S.C.M.A. 432, 45 C.M.R. 206 (1972).
[9] 21 U.S.C.M.A. 583, 45 C.M.R. 357 (1972).
[10] 20 U.S.C.M.A. 212, 43 C.M.R. 52 (1970).
[11] 21 U.S.C.M.A. 516, 45 C.M.R. 290 (1972).
[12] 21 U.S.C.M.A. 165, 44 C.M.R. 219 (1972).

accused had been improperly denied the counsel of his choice. Andrews was represented at his Article 32 investigation by Captain *W*. When trial began, the defense raised the issue of insanity; and a continuance was granted, over defense objection, for a sanity board hearing. The objection was based on the fact that the government had been forewarned that the insanity issue would be raised by the defense and that Captain *W*'s term of service was nearing an end. A further delay was secured by the defense to obtain the services of a private psychiatrist.

Captain *W* was released from active duty, but agreed to continue as accused's counsel. Andrews was to pay *W*'s travel expenses but no other compensation. However, *W* was informed by the post judge advocate that "higher military authority" had determined that it would be improper for *W* to act as civilian counsel. As a result *W* did not again appear on accused's behalf. On these facts the Court held that *W*'s representation of accused would have been proper and that "the unwarranted intervention of [W's] superiors deprived Andrews of his statutory right to have the civilian counsel of his choice." The futility of questioning the decision of the superior officers prevented the doctrine of waiver from being invoked.

The accused in *United States* v. *Kinard*[13] found that while the right to civilian counsel may not be improperly denied, the burden is on the accused to obtain such counsel. Kinard was to be tried in Vietnam. He obtained two continuances due to his claimed inability to find satisfactory military counsel. When court convened for the third time, accused claimed he had not had an opportunity to obtain civilian counsel. The Court held that it was proper for the military judge to order the court-martial to proceed in that Kinard had been given "ample opportunity" to obtain counsel of his choosing.

In *United States* v. *Eason*,[14] the Court found that accused's attorney-client relationship with his military counsel was improperly severed. Eason was originally to be tried in Vietnam where he was represented by Captain *P*, appointed counsel. Civilian counsel was involved but did not come to Vietnam. Ultimately accused was returned to the U.S. for psychiatric evaluation, and the case was referred to trial at Quantico. Trial counsel also rotated and remained the same. Captain *P* had returned to the U.S. but was stationed in California. Accused's request for Captain *P* as appointed defense counsel was denied

[13] 21 U.S.C.M.A. 300, 45 C.M.R. 74 (1972).
[14] 21 U.S.C.M.A. 335, 45 C.M.R. 109 (1972).

on the basis of unavailability. The Court found the basis for severing the relationship to be insufficient in light of Captain *P*'s involvement in Vietnam, Eason's preference for him, and the fact that the case was a capital one. "*Under the circumstances of this case*, something more than unavailability of counsel because of workload was necessary before *this* attorney-client relationship could be validly terminated" (emphasis by the Court).

Distinguished from *Eason* was *Stanten* v. *United States*.[15] In this case, prior to his assignment as counsel, counsel was notified that his tour would not be extended and that he would not be retained on active duty beyond his term of obligated service. Thereafter he was assigned as counsel for accused, but returned to the U.S. prior to trial. The fact that the decision concerning the termination of counsel's duties had been made prior to the establishment of the attorney-client relationship distinguished this case from *Eason*.

Three other cases dealt not with established attorney-client relationships, but with the point in time at which the right to an attorney comes into existence. In *United States* v. *Mason*,[16] a case turning on speedy trial considerations, Judge Duncan set forth his views on this question. Mason had been frustrated in his attempts to consult with an attorney while in pretrial confinement and before charges were preferred. Judge Duncan stated that he would require the Government, whenever practicable, to furnish an accused in confinement with counsel, upon request, for consultation within eight days, even if charges had not been preferred. Judge Duncan would also require appointment of counsel when charges were preferred. Judge Quinn did not comment on this proposal but used the failure to provide requested counsel as one element in finding a speedy trial violation. Chief Judge Darden supported the objective that whenever practicable an accused in confinement who desires to consult with an attorney should have the opportunity to do so, even though the law requires only that counsel be appointed when charges are preferred.

The issue arose again in *United States* v. *Adams*.[17] The accused was in confinement prior to the preferring of charges, and was unable to consult with counsel despite his requests. Confinement was on board ship, but it was alleged that counsel could have been provided for consultation at one of several port calls of the

[15] 21 U.S.C.M.A. 431, 45 C.M.R. 205 (1972).
[16] 21 U.S.C.M.A. 389, 45 C.M.R. 163 (1972).
[17] 21 U.S.C.M.A. 401, 45 C.M.R. 175 (1972).

ship. The Court, in an opinion by Chief Judge Darden, in which Judge Quinn concurred, noted that the accused was entitled to the appointment of counsel only after the referral of charges to trial. It assumed, without deciding, that a military accused is entitled to the assistance, but not appointment of counsel at any critical stage of the proceeding against him. These requirements were met and the Court found denial of counsel at earlier stages "had no material effect upon the progress or the result" of the proceedings. Judge Duncan would have reversed the conviction because of the failure to allow accused to consult with counsel on request.

This theme was further developed in *United States* v. *Bielecki* [18] where, again, the accused was incarcerated for a substantial length of time prior to the referral of charges, requested the assistance of counsel, and had his request denied. The Court stated that its opinions in *Adams* and *Mason* held that pretrial confinement or its equivalent is not of itself a "critical stage" of the proceedings which entitled an accused to the assistance of counsel. However, refusal to provide legal counsel, when coupled with delay, may "cause a Court to characterize trial delay, if it exists, as vexatious." Finally, *United States* v. *Winston* [19] made clear that the accused must request counsel during pretrial confinement in order to raise the issue for any purpose on appeal. Adequacy of civilian counsel was discussed in *United States* v. *Walker*,[20] The Court first assumed, without deciding, that adequacy of counsel was a relevant issue with regard to civilian counsel of an accused's own choosing. Thus, looking to civilian counsel's performance, the Court found that accused was not denied the assistance of an attorney of reasonable competence. The most significant factor was the active participation in the case of appointed defense counsel, a judge advocate officer. The Court considered the two to be a team and held that these combined efforts constituted the measure of representation accused received.

In *United States* v. *Whitmire* [21] the Court found an error under *United States* v. *Donohew*,[22] not to be prejudicial. While the military judge failed to question accused as to his understanding of his right to select individual military counsel, accused had, in fact, made such a selection at the Article 32 investigation and

[18] 21 U.S.C.M.A. 450, 45 C.M.R. 224 (1972).
[19] 21 U.S.C.M.A. 573, 45 C.M.R. 347 (1972).
[20] 21 U.S.C.M.A. 376, 45 C.M.R. 150 (1972).
[21] 21 U.S.C.M.A. 268, 45 C.M.R. 42 (1972).
[22] 18 U.S.C.M.A. 149, 35 C.M.R. 149 (1969).

in a written instrument on the day of trial. Also, at trial, accused indicated he wished to be represented by his selected counsel.

III. GENERAL PROCEDURE

A. *RECORDS OF TRIAL*

Records of trial pose a continuing problem. In *United States* v. *Harris*,[23] someone tampered with the authenticated transcript of trial. The record was altered to add the words "Your motion is denied" to indicate that the trial judge had specifically ruled on a motion to dismiss a specification for lack of speedy trial. However, the Court held the unauthorized addition to be harmless to the accused.

Failure of a recording device prevented preparation of either a verbatim or summarized record of trial in *United States* v. *Stacy*.[24] The Court noted that the convening authority had the option under 82*i*, MCM, of disapproving any sentence or ordering a rehearing.

Finally, in *United States* v. *Richardson*,[25] an unrecorded side-bar conference between the military judge and counsel drew the attention of the Court. The conference took place after findings and its purpose was to ask counsel if they desired special instructions. It was held that this kind of unrecorded side-bar conference does not violate the verbatim record requirement. Reference was made to 57g(2), MCM, which lists six types of proceedings which must be recorded.

B. *CONVENING AUTHORITIES*

Actions by convening authorities occupied a significant portion of the Court's time during the past year. In *United States* v. *Johnson*,[26] even though the record of trial contained the recommendation of the military judge that the discharge be suspended, a new convening authority action, ordered by the Court of Military Review, was stated to be an appropriate remedy. The Court of Military Review had held that the stark affirmance of the sentence provided insufficient assurance that the convening authority was aware of the military judge's recommendation. Judge Quinn, relying on an 8-day interval between the action on the case and its reading could not say the Court of Military Re-

[23] 21 U.S.C.M.A. 123, 44 C.M.R. 177 (1971).
[24] 21 U.S.C.M.A. 274, 45 C.M.R. 48 (1972).
[25] 21 U.S.C.M.A. 383, 45 C.M.R. 157 (1972).
[26] 21 U.S.C.M.A. 270, 45 C.M.R. 44 (1972).

view erred in its action. Chief Judge Darden concurred because of his opinion that the Court of Military Review acted within the scope of its sentencing power. Judge Duncan, applying the presumption of regularity would have reversed the Court of Military Review.

A similar case was *United States* v. *Gibson*,[27] but with sufficient difference to warrant a different result. The military judge in this case only recommended "that the convening authority seriously consider the desirability of suspending the discharge, because he is in a better position than I to define what that record is." The Court found the presumption of regularity to be controlling and affirmed the conviction.

A third case in this area was *United States* v. *Chesney*.[28] Here, as in *Johnson* and *Gibson* the convening authority, in affirming the adjudged sentence, gave no indication that he had considered the military judge's recommendation that the discharge be suspended. However, applying *Johnson*, Chief Judge Darden found no merit in the assignment of error and denied any relief. Judge Duncan concurred in the result. Judge Quinn would have required a new convening authority action.

The convening authority's powers with respect to rulings of the military judge were at issue in *United States* v. *Frazier*,[29] *United States* v. *Bielecki*,[30] and *United States* v. *McElhinney*.[31] In *Frazier* the convening authority, exercising his power under Article 62, overruled and reversed the military judge's ruling that the charges should be dismissed for lack of a speedy trial. The Court first stated that the factual disputes involved in a motion to dismiss for lack of a speedy trial are not of a kind that "would necessarily be tried with the general issue in the case." Thus, it was held, a ruling that the Government has been unreasonable as to time or impermissibly oppressive does not amount to a finding of not guilty, and the ruling can be reviewed by the convening authority. On the other hand, with regard to the factual basis for a speedy trial ruling, the convening authority is limited in his review. He may inquire as to whether the facts as found by the military judge are reasonably supported by the evidence; if so, they must be accepted; but, if not, the convening authority may disregard these findings of fact in determining the validity of the speedy trial ruling even though he cannot

[27] 21 U.S.C.M.A. 276, 45 C.M.R. 50 (1972).
[28] 21 U.S.C.M.A. 358, 45 C.M.R. 132 (1972).
[29] 21 U.S.C.M.A. 444, 45 C.M.R. 218 (1972).
[30] 21 U.S.C.M.A. 450, 45 C.M.R. 224 (1972).
[31] 21 U.S.C.M.A. 436, 45 C.M.R. 210 (1972).

make new findings of fact. If the facts are supported by the evidence, then the convening authority may ask whether they justify the ruling as a matter of law. Protection is afforded to the accused by appellate review of any reversal of a military judge's ruling by the convening authority.

In *Bielecki* the military judge granted a defense motion to dismiss the charge for denial of effective assistance of counsel. As in *Frazier* the convening authority, relying on Article 62, reversed this decision and ordered the court-martial reconvened. Having decided that accused was not denied effective assistance of counsel, the court stated that under *Frazier* the convening authority was correct in his action.

In *McElhinney*, the convening authority directed the military judge to reconsider a ruling as to the materiality and necessity of a proposed defense witness. It was the military judge's understanding that the witness would not be brought to Vietnam under any circumstances, and thus he had to choose between continuing the trial or dismissing the charges. For that reason he altered his prior ruling and denied the motion for the witness. The Court held the action of the convening authority to be outside the scope of his powers. The question of the necessity of the witness is an interlocutory matter where the ruling of the military judge is final. However, the Court found no prejudice to accused and affirmed the conviction.

A pretrial agreement was discussed in *United States* v. *Troglin*.[32] In this case defense counsel agreed, without accused's knowledge, not to raise issues of former jeopardy or speedy trial in return for the pretrial agreement. The Court held that where an accused is not advised of his rights to a defense and does not knowingly and intelligently waive it, a pretrial agreement based on such a waiver is violative of public policy.

C. *SJA REVIEW*

The staff judge advocate's post-trial review, always a fruitful field for the labors of appellate defense counsel, came under successful attack in *United States* v. *Cruse*.[33] In ten sentences the staff judge advocate summarized twenty-one pages of testimony by accused in his own defense, attempting to explain his unauthorized absence. The review did not mention the explanation, or the deposition of a Government witness which harmonized with accused's testimony in defense of the larceny charge.

[32] 21 U.S.C.M.A. 188, 44 C.M.R. 237 (1972).
[33] 21 U.S.C.M.A. 286, 45 C.M.R. 60 (1972).

In *United States* v. *Massingill*,[34] the error was the failure to refer to a comment of the military judge which recommended suspension of the sentence following six months confinement. This recommendation could not have been upheld by the convening authority since it called for confinement and could not have favorably influenced him. Thus, the error was not prejudicial.

The deficiency in the post-trial review in *United States* v. *Stevenson*[35] was the failure to inform the convening authority of subsequent disciplinary action against the officer who was the subject of accused's alleged assault and disobedience. This knowledge might have affected the sentence and a new convening authority action was ordered.

Finally, in *United States* v. *Arnold*,[36] the sentence given by the military judge included a bad-conduct discharge. However, the judge recommended that the convening authority "give serious consideration to probationally suspending . . . the punitive discharge." The post-trial review failed to mention this recommendation. The Court held the omission to be prejudicial.

D. *APPELLATE REVIEW*

The scope of appellate review was discussed in *United States* v. *Lohr*.[37] It was reaffirmed that findings of fact by the Court of Military Review are not reviewable by the Court of Military Appeals.

An unusual case in this area was *United States* v. *Crider*,[38] in which the Court held that a panel of the Navy Court of Military Review should have disqualified themselves from hearing accused's appeal. The basis for this decision was that in reviewing the record of trial of accused's co-actor, the panel stated that the fact "leaves us in no doubt that the alleged victims were killed by accused and his co-actor Crider." This factual determination was not necessary to the decision, and the Court held that there was more than a mere showing of prejudicial exposure to the present party.

E. *GUILTY PLEAS*

The guilty plea, a significant source of error in the past, was

[34] 21 U.S.C.M.A. 428, 45 C.M.R. 202 (1972).
[35] 21 U.S.C.M.A. 426, 45 C.M.R. 200 (1972).
[36] 21 U.S.C.M.A. 151, 44 C.M.R. 205 (1972).
[37] 21 U.S.C.M.A. 150, 44 C.M.R. 204 (1972).
[38] 21 U.S.C.M.A. 193, 44 C.M.R. 247 (1972).

of little concern during this survey period. The only case reversed for failure to comply with *Care*, was *United States* v. *Terry*,[39] in which the military judge failed to adequately develop the facts supporting the plea of guilty.

Three cases dealt with the improvidency of the guilty plea. *United States* v. *Timmins*,[40] dealt with a marine baseball player who failed to report back to his unit following the end of the baseball season. While pleading guilty, he testified that he thought he was to be transferred to a baseball team in Hawaii. This belief was based on conversations with the officer in charge of the Hawaiian team and the fact that he did not receive any orders back to his unit, while others on his team did. The Court found the defense of honest and reasonable mistake of fact, raised by the testimony, to be inconsistent with the plea of guilty.

Also improvident was the accused's plea in *United States* v. *Thompson*.[41] Here despite the plea of guilty, the accused claimed that heroin found in his room was planted there by another and that he was attempting to dispose of it. Finally, in *United States* v. *Acemoglu*,[42] the Court found a plea of guilty to AWOL to be provident. The accused's testimony concerning inquiries made to a US Embassy did not evidence a submission to military control sufficient to have terminated his absence at an earlier date.

E. MISCELLANEOUS

Several novel questions arose during the last year. In *United States* v. *Johnson*,[43] service of a copy of the charges upon which trial was to be had, as required by Article 35, was made upon the appointed defense counsel rather than upon the accused. The Court in denying the Petition for Grant of Review found no prejudice in light of accused's clear knowledge of the charges, but noted that such "substituted service" is clearly in conflict with Article 35.

The question in *United States* v. *Barnes*,[44] was the use of a revision proceeding to correct an error in the military judge's inquiry as to accused's awareness of his right to counsel under

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[39] 21 U.S.C.M.A. 442, 45 C.M.R. 216 (1972).
[40] 21 U.S.C.M.A. 475, 45 C.M.R. 249 (1972).
[41] 21 U.S.C.M.A. 526, 45 C.M.R. 300 (1972).
[42] 21 U.S.C.M.A. 561, 45 C.M.R. 335 (1972).
[43] U.S.C.M.A. , C.M.R. (1972).
[44] 21 U.S.C.M.A. 169, 44 C.M.R. 223 (1972).

United States v. *Donohew*.[46] It was held that the error was the proper subject of a proceeding in revision.

The question of the legality of an *in absentia* rehearing on sentence was discussed in *United States* v. *Staten*.[48] The accused was absent from the rehearing, having escaped from confinement. The Court held that rehearings are to be treated as if a new court-martial had been convened. Thus, the rule of 11*c*, MCM applies, and the accused must be present at the beginning of the rehearing.

Possible influence on the court members of charges on which the Government knew it would present no evidence was the subject of *United States* v. *Phare*,[47] Phare was charged with wrongful possession of marihuana and heroin and two charges of unlawful possession of a hypodermic needle. Defense counsel's motion to suppress the physical evidence and testimony concerning the marihuana, heroin, and one possession of a needle charge due to an unlawful search was granted. However, his objection to the Government's handing to the court members copies of all the charges, including those on which it could not now produce evidence was not sustained. The Court held that the convening authority should have been informed of the situation so that the charges could be withdrawn. The error was held to be prejudicial.

The power of a military judge to order a change of venue was discussed in *United States* v. *Nivens*.[45] Civilian counsel requested a change in venue from the selected place of trial to a Naval Air Station 150 miles away, which was the place of the offense, the location of the witnesses, and the home of the civilian counsel. The military judge granted the request, but was overruled by the convening authority. The Court held that a motion for a change of venue is an interlocutory matter and that the military judge's ruling is final. It was further held that paragraph 69, MCM, does provide for a change of venue based on factors other than a general atmosphere of prejudice at the situs of the trial. On this basis the Court found that the convening authority unlawfully intruded into the trial of the case, but found no prejudice to accused and affirmed the conviction.

Finally, in *United States* v. *McMullen* [49] accused was charged with disobedience of an order "to get a haircut." In his findings the military judge modified the specification by inserting the

[46] 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969).
[48] 21 U.S.C.M.A. 493, 45 C.M.R. 267 (1972).
[47] 21 U.S.C.M.A. 244, 45 C.M.R. 18 (1972).
[45] 21 U.S.C.M.A. 420, 45 C.M.R. 194 (1972).
[49] 21 U.S.C.M.A. 465, 45 C.M.R. 239 (1972).

word "regulation" causing it to change disobedience of an order "to get a regulation haircut" and thus conforming the charge to the facts. The Court held that this was an unlawful addition to the specification and set aside the findings of guilty of that specification.

IV. MILITARY CRIMINAL LAW

A. *SUBSTANTIVE OFFENSES*

1. Felony Murder

In *United States* v. *Sikorski*,[50] the accused was charged with robbery and felony murder. The Court of Military Review held that the accused lacked the requisite state of mind for robbery and dismissed that charge. The court, however, affirmed the accused's conviction of the charge of felony murder based upon the robbery. The Court of Military Appeals held that although inconsistent verdicts are permissible, in this particular case the Court had not found merely a general verdict of not guilty on the robbery charge, but had specifically found that the accused lacked the requisite state of mind for robbery. The conviction for felony murder based upon that robbery therefore could not be upheld.

The Court faced the reverse situation in *United States* v. *Ferguson*.[51] The Court held that a not guilty verdict on the felony murder charge did not require a verdict of not guilty to the underlying robbery charge. The existence of a forceable taking apart from the force causing the death of the victim was found. Under these circumstances the doctrine of res judicata did not apply.

2. *Larceny-Wrongful Appropriation*

Family problems and an overgenerous travel claim caused problems for the defendant in *United States* v. *Dale*.[52] Accused filed claims for travel allowance based on a permanent change of station for himself, his estranged wife and his two daughters. He was later convicted of stealing the portion of the claim which was paid in excess of his personal travel entitlement. He argued that he was entitled to the portion of the allowance for his estranged wife and children, because although his children had been living with their mother, they actually made the trip with him and there was a prospect of a family reconciliation. The

[50] 21 U.S.C.M.A. 345, 45 C.M.R. 119 (1972).
[51] 21 U.S.C.M.A. 200, 44 C.M.R. 254 (1972).
[52] 21 U.S.C.M.A. 307, 45 C.M.R. 81 (1972).

Court of Military Appeals found that the lower court was not justified in finding beyond a reasonable doubt that at the time his daughters traveled to the new station with him, accused did not intend that they would establish permanent residence with him then. However, the Court sustained the conviction based on the claim for the wife's travel as she simply did not make the trip regardless of any reasonable basis for a belief that she might do so subsequently.

The accused in *United States* v. *Taylor*,[53] was convicted of the wrongful appropriation of a Government truck. The evidence indicated that the accused had a trip ticket for the vehicle, was an authorized mechanic, and had taken the vehicle for a road test. Although he had not asked permission to road test the vehicle, there was evidence that the permission would have been granted had he so requested. In the absence of any showing that accused had withheld the vehicle by diverting it for his own purposes, the conviction was overturned.

3. *Forgery*

Two forgery convictions faced the Court. In *United States* v. *Driggers*,[54] accused uttered a forged military order in order to obtain approval of a $133.00 travel request from Fort Campbell, Ky. to Fort Ord, California. On appeal Driggers argued that this type of order could not support a forgery conviction because it was not signed and, therefore, did not have legal efficacy. He further argued that the specifications must allege that the order would, if genuine, operate to the legal prejudice of another. The Court held that the instrument in question bore sufficient resemblance to the document it was intended to represent as to deceive a person of ordinary observation or business capacity. The Court further held that the document in question would have had the effect of creating a legal liability for the person or organization that accepted it as authentic.

The Court held in *United States* v. *Crawford*[55] that a conviction for forgery for attempting to cash a pay check after the amount on the check had been raised from $21.00 to $521.00 would be upheld even where the Government had not produced evidence eliminating all possibilities that the check could have been altered prior to presentment to accused.

4. *Disobedience of Orders*

In six cases the Court examined the contour of the disobedience

[53] 21 U.S.C.M.A. 220, 44 C.M.R. 274 (1972).
[54] 21 U.S.C.M.A. 373, 45 C.M.R. 147 (1972).
[55] 21 U.S.C.M.A. 252, 45 C.M.R. 26 (1972).

of orders offenses. A frontline confrontation in Vietnam led to disobedience and "communicating a threat" charges in *United States* v. *Wartsbaugh*.[56] Wartsbaugh was ordered by his company commander to remove a silver wrist bracelet. The command later testified that he understood the wearing of such a bracelet was prohibited by battalion regulations. Court-martial charges resulted when Wartsbaugh disobeyed. Operating on a somewhat sketchy record the Court determined that as a matter of law it could not hold the company commander's order overly broad, arbitrary or capricious. This decision was in part determined by the defense's failure to produce some evidence that the order went beyond the military's authority to regulate dress regulations.

All was not lost for Wartsbaugh, however. Reviewing the facts of the case, the Court found the company commander's order was in fact a statement to Wartsbaugh to obey an existing battalion directive. Under these circumstances Wartsbaugh should have been charged with the "ultimate offense committed" namely violation of the directive rather than violation of the superior order. Since the directive in question was never introduced at trial, Wartsbaugh could not be convicted of any offense involving the silver bracelet.

Wartsbaugh likewise won reversal of the "communicating a threat" conviction. While engaged in field operations Wartsbaugh became angry with a Lieutenant Hoffman. Wartsbaugh attempted to place a magazine in his weapon and stated to Hoffman "Sir, you had better take this from me too or you may not make it back." Wartsbaugh at no time pointed the weapon at Hoffman nor did he resist the taking of the weapon.

The Court found the circumstances attending Wartsbaugh's statement to be "highly relevant in evaluating the sufficiency of the evidence." The Court found it unnecessary to resolve an evidentiary dispute over the time of the alleged threat: "If [Wartsbaugh] made the utterance *before* the weapon was taken away, his words reveal a fixed purpose to avert [injury to Hoffman]. If *after*, . . . the same words indicate his relief that he was rendered unable to effectuate such injury." This conviction was also reversed.

Selection of the wrong charge also caused reversal in *United States* v. *Rios*.[57] While riding with Rios, a lieutenant noted he was wearing an unauthorized name tag. He gave Rios a "set of instructions" to see either the first sergeant or the executive

[56] 21 U.S.C.M.A. 535, 45 C.M.R. 309 (1972).
[57] 21 U.S.C.M.A. 547, 45 C.M.R. 321 (1972).

officer and to surrender the name tag. Words were exchanged between Rios and the lieutenant including Rios' remark: "Why couldn't you have told me yourself . . . to take it off and give it to you?" The lieutenant answered "Fine, take it off and give it to me." Rios did not and the lieutenant let him leave the vehicle. Subsequently Rios was charged with violating the lieutenant's "set of instructions."

The Court reversed the conviction for this offense. It found the lieutenant's subsequent instruction to "give it to me" revoked the prior "set of instructions" for which Rios was convicted. Since Rios was not charged with violation of the subsequent instruction, he avoided conviction for the incident.

United States v. *Nixon*[58] reduced a disobedience offense to a less severe one of resisting apprehension. The offense arose out of Captain Pearl's order to Nixon to board a jeep that would take him to pretrial confinement. Nixon's violent resistance, including the biting of Captain Pearl, resulted in several charges including disobedience of Pearl's order. The majority of the Court viewed the order's only purpose as being to effect custody. The Court could not "imagine that the extreme penalty for willful disobedience of a lawful order is an allowable price to extract of an accused who resists apprehension for . . . minor offenses." Nixon's conviction of this offense was reversed. Judge Darden, in dissent, viewed Nixon as in custody from the time Captain Pearl told him that he was to be placed in pretrial confinement. Pearl's subsequent order to board the jeep for the stockade was, therefore, a lawful order to a prisoner. Its disobedience was punishable under Article 90.

A noncommissioned officer lacks authority to formally restrict enlisted personnel under the Manual for Courts-Martial. However, an order from an NCO "restricting" accused to the company orderly room overnight after a dispute with another soldier in order to prevent a resumption of the controversy was held to be a valid order.[59]

In *United States* v. *Nardell*,[60] accused was convicted of violating a general order in that, while in a duty status as assistant manager of an NCO Club in Vietnam he played the club's slot machine in violation of a Wing Order issued by the Commanding General, First Marine Aircraft Wing, Fleet Marine Force, Pacific. The conviction was reversed by the Court. They found the order was quite voluminous, basically advisory and instructional and that only

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[58] 21 U.S.C.M.A. 480, 45 C.M.R. 254 (1972).
[59] United States v. Smith, 21 U.S.C.M.A. 231, 45 C.M.R. 5 (1972).

this one provision could even arguably operate as a code of conduct. The Court refused to charge Nardell with knowledge of such a prohibition and held it unenforceable as a general order against club or mess employees playing slot machines in a duty status.

Finally, in *United States* v. *McMullen*,[61] accused was convicted of disobeying an order "to get a haircut." At trial it appeared that accused had in fact had his hair cut, but not in accord with pertinent regulations. The military judge modified the specification by inserting the word "regulation" causing it to charge disobedience of an order "to get a regulation hair cut." The Court indicated that a military judge acting as a fact finder may amend specifications by exceptions and substitutions, but that he may not change the nature of the offense charged by the addition of new matter, as in this case. Findings of guilty of the specification in question were set aside.

5. *Housebreaking*

In *United States* v. *Sutton*[62] accused pleaded guilty to a charge of violation of Article 30 in that he unlawfully entered a tracked vehicle. Citing *United States* v. *Gillin*,[63] the Court held that a tracked vehicle was indistinguishable from an automobile and could not be the object of an unlawful entry. The conviction was reversed.

6. *Possession of Drugs*

In the *Meyer*[64] and *Gauthier*[65] cases, the Court held that possession of different prohibited drugs at the same time and place constituted separate offenses. The standard advanced in support of this finding was based on the following test: "[I]f the evidence sufficient to prove one offense also proves the other offense the two may not be separate for the purposes of punishment."

7. *Assault*

In *United States* v. *Hendrix*,[66] accused was convicted of assaulting a superior officer in the execution of his office when he pushed his platoon leader. The platoon leader had been given authority to search accused's belongings by his company commander and was doing so when he came upon a personal letter. Accused told the platoon leader not to take the letter. However, the platoon leader

[60] 21 U.S.C.M.A. 27, 45 C.M.R. 101 (1972).
[61] 21 U.S.C.M.A. 465, 45 C.M.R. 239 (1972).
[62] 21 U.S.C.M.A. 344, 45 C.M.R. 118 (1972).
[63] 8 U.S.C.M.A. 669, 25 C.M.R. 173 (1958).
[64] United States v. Meyer, 21 U.S.C.M.A. 310, 45 C.M.R. 84 (1972).
[65] United States v. Gauthier, 21 U.S.C.M.A. 313, 45 C.M.R. 87 (1972).
[66] 21 U.S.C.M.A. 412, 45 C.M.R. 186 (1972).

ignored the request and started to read it. Accused pushed the platoon leader, demanding the return of his letter.

The Court held the reading of the letter to exceed the scope of a lawful search and, therefore, concluded that the lieutenant was not in the exercise of his office at the time he was reading the letter. Therefore, defendant could not be guilty of assaulting a superior officer in the execution of his office. The Court, however, did find that the accused may have been guilty of an assault upon a commissioned officer *not* in the execution of his office in violation of Article 128.

8. *The General Articles–133 and 134*

The Court renewed its uneasy relationship with the First Amendment in *United States* v. *Priest.*[67] Priest's non-duty-hour publication and circulation of an underground newspaper resulted in court-martial charges of promoting disloyalty and disaffection among members of the armed forces and being disloyal to the United States. The two papers involved contained advice for deserters, other specific suggestions for resistance to the military and directions for making explosives.

Other pages contained familiar underground rhetoric: "Smash the state, power to the people"; "Free us now, guns baby guns!"; "Bomb America." "Make Coca Cola some place else." "Today's pigs are tomorrow's bacon." Further items speculated on pushing the Vice President off the Empire State Building and quoted from a Phil Ochs' song, "When I feel a little safer we'll assassinate the President."

Priest challenged the sufficiency of evidence on three grounds: (1) Neither paper in its entirety was disloyal to the United States; (2) There was no design to promote disloyalty and disaffection among servicemen; and (3) Priest's conduct was not prejudicial to good order and discipline. The Court rejected Priest's contentions. They viewed the substance of each newspaper as a "call to violent revolution against our Government." Priest's willingness to abandon change by Constitutional means far exceeded "mere opposition to the Vietnam conflict." Given specific suggestions as to how "troops might actively demonstrate their own disloyalty and disaffection," Priest's second contention was rejected. Thirdly, the Court found sufficient evidence to show injury to good order and discipline. While granting some First Amendment rights to servicemen, the Court noted that these were "not necessarily coextensive" with those of civilians. This was justified on the

[67] 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972).
[68] 21 U.S.C.M.A. 264, 45 C.M.R. 38 (1972).

grounds that "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." The Court found the "proper standard for the governance of free speech in military law" in Justice Holmes' "clear and present danger test": "Whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Priest's activities were such as to place him within the scope of permissible government regulation. His conviction was affirmed.

More mundane matters were involved in *United States* v. *Smith*.[68] Accused was convicted of possessing counterfeit money orders in violation of Article 134. Ten specifications alleged possession of counterfeit US postal money orders with intent to defraud the United States. The remaining three specifications alleged similar possession of bogus bank money orders. The Court held that as a matter of federal law, it was not a crime merely to possess such money orders.[69] Conviction could not be based on Article 134 because of the specific reference to Title 18 sections in the specification.

The Court held in *United States* v. *Johnson* [70] that where accused told an individual who had testified against him at a prior trial that "I am not threatening you, but I am telling you that I am not personally going to do anything to you, but in two days you are going to be in a world of pain. I would suggest you damn well better sleep light," the language was criminally actionable under Article 134 as a threat.

Several cases examined the concept of preemption. Due to the military nature of the offense of endangering Government property in violation of Article 134, conviction as a lesser included offense of the charge of attempting to damage two aircraft engines in violation of Article 80 is permissible as an exception to the preemption doctrine [71] announced in *United States* v. *Norris*.[72]

In *United States* v. *Bonavita* [73] accused was charged with concealing a vehicle belonging to another at the Marine Corps Base, Quantico, Virginia, in violation of Article 133. Under the preemption doctrine as set forth in *United States* v. *Norris* [74] and

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[68] Kniess v. United States, 413 F. 2d 752 (9th Cir. 1969).
[70] 21 U.S.C.M.A. 279, 45 C.M.R. 53 (1972).
[71] United States v. Martinson, 21 U.S.C.M.A. 109, 44 C.M.R. 163 (1971).
[72] 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953).
[73] 21 U.S.C.M.A. 407, 45 C.M.R. 181 (1972).
[74] 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953).

United States v. *Martinson* [75] accused contended that only those acts of wrongfully withholding property belonging to another pursuant to Article 121 are punishable as violations of the UCMJ. The Court held that concealing stolen property in violation of Article 133 is a separate military offense and was not intended by Congress to be preempted by Article 121.

Conviction for altering public records under Article 134 is not preempted under the *Norris* doctrine in that an alteration of supply records to cover up shortages in accused's property accounts, is an offense different from forgery under Article 123 or the third part of Article 134 (as an offense against the United States defined by nonmilitary law).[76]

In *United States* v. *Pettingill* [77] appellant was convicted of dishonorable failure to pay a debt. Accused had purchased a house on Okinawa giving the seller a purchase money mortgage. The seller had sued for payment according to its terms. The Court held that in the absence of clear evidence of Okinawan law as to the effect of the mortgage lien on the right of the lienor to enforce immediately or directly the personal obligation of the debtor, it cannot be said that the accused's failure or even willful refusal to pay was dishonorable or discreditable conduct. The Court noted that it was possible that in a foreclosure proceeding there could be a surplus, which would be owed to accused.

9. *Fraudulent Enlistment*

The temptation of re-enlistment bonuses proved too much for the defendant in *United States* v. *Danley*.[78] Danley first enlisted in April 1967 for three years. One year later he re-enlisted for three years receiving a bonus payable only to those re-enlisting for the first time. Another year went by and Danley again re-enlisted and again was paid a first timer's bonus. When the Army finally caught up with Danley he was charged with larceny by false pretenses and fraudulent enlistment.

The Government argued that Danley's concealment of his prior re-enlistment enabled him to secure an otherwise unavailable re-enlistment. An examination of Army regulations, however, disclosed that Danley's first re-enlistment did not make him ineligible for the second re-enlistment. Therefore, there was no "deliberate concealment as to his qualifications for that enlistment" to bring Danley within Article 83 UCMJ.

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[75] 21 U.S.C.M.A. 109, 44 C.M.R. 163 (1971).
[76] United States v. Maze, 21 U.S.C.M.A. 260, 45 C.M.R. 34 (1972).
[77] 21 U.S.C.M.A. 409, 45 C.M.R. 183 (1972).
[78] 21 U.S.C.M.A. 486, 45 C.M.R. 260 (1972).

The concealed prior re-enlistment was significant in upholding the larceny by false pretenses conviction. In doing so the Court rejected Danley's contention that the larceny charge depended on the Government's success on the fraudulent enlistment charge.

B. *DEFENSES*

1. *Speedy Trial*

The problem of speedy trial continues to plague the administration of justice throughout the United States. The Court's approach to this problem was further refined in four major cases. *United States* v. *Burton*,[79] and *United States* v. *Hubbard*,[80] were decided the same day. Hubbard was convicted for unauthorized absence following a 134 day pretrial confinement. The military judge considered the confinement in sentencing. Nevertheless, Judges Quinn and Ferguson held that the charges should have been dismissed. Their decision was based solely on Article 10, which provides that if timely steps are not taken to try an accused in pretrial confinement, the relief to which he is entitled is dismissal of the charges. Chief Judge Darden would not have dismissed the charges, finding no prejudice to the accused. *Burton* spent 196 days in pretrial confinement and alleged specific prejudice. However, the Court rejected the allegations, found no prejudice and held that the military judge's determination that there was no denial of speedy trial was not so unreasonable as to require reversal.

Despite the discussion of prejudice in *Burton* and a finding of no denial of speedy trial, it is not in conflict with *Hubbard*. In *Burton* the existence or lack of prejudice was considered in determining whether the Government had exercised reasonable diligence. In *Hubbard*, in spite of a lack of prejudice, the charges were dismissed because of a lack of reasonable diligence. Thus, prejudice is not a key to dismissal of the charges, but rather, is one factor in determining the reasonableness of a delay.[81] Other factors delineated by the Court which are to be considered in deciding reasonableness of delay are length of pretrial confinement, reasons for the delay, and whether the accused received his right to speedy trial.

Finally, in Burton the Court laid down a prospective rule for speedy trial questions. It was stated:

> In the absence of defense requests for continuance, a presumption of

[79] 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971).
[80] 21 U.S.C.M.A. 131, 44 C.M.R. 185 (1971).
[81] Recent Development, 57 MIL. L. REV. 189, 199 (1972).

> an Article 10 violation will exist when pretrial confinement exceeds three months. In such cases, this presumption will place a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed. Similarly, when the defense requests a speedy disposition of the charges, the Government must respond to the request . . . a failure to respond . . . may justify extraordinary relief.

The other two cases, *United States* v. *Mason*,[52] and *United States* v. *Adams*,[53] were also decided on the same day, some five months after *Burton* and *Hubbard*. It should be noted that these cases did not fall under the *Burton* prospective rule; however, they are instructive as to the Government's burden of proof in showing diligence, which it will have to meet in *Burton* situations.

Mason spent 131 days in pretrial confinement. The Government explained parts of the delay as follows: delay in preparation of the CID report while awaiting laboratory reports, improvident appointment of one of accused's company officers as the Article 32 investigating officer, and the problem of adding an additional charge against accused.

This fact situation produced three separate opinions. Judge Duncan held that the burden of the Goverment to show the incapability of complying with the eight day provision of Article 33 had not been met. The problem of waiting for laboratory results was held not to be adequate justification. Judge Duncan stated "if a commanding officer has sufficient basis upon which to conclude a confined accused has committed an offense and that there is sufficient documentation for that conclusion, his duty is then to forward the charges with that amount of documentation without delay." Judge Duncan also found a violation of Article 10. Looking to the total circumstances it was stated that other unreasonable delays were not sufficiently explained. Judge Duncan did not reach the question of prejudice to the accused.

Judge Quinn held that the circumstances showed "willful, purposeful, vexatious . . . [and] oppressive delay by the Government." In so finding he referred to the fact that Mason had been denied his requests to consult with counsel. While the right to appointment of counsel does not arise until charges are preferred, Judge Quinn used the denial of requests to consult with a lawyer as a factor in showing the delay to be oppressive, thus adding a new element to speedy trial. Chief Judge Darden tested for prejudice and finding none, would have affirmed the conviction.

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[52] 21 U.S.C.M.A. 389, 45 C.M.R. 163 (1972).
[53] 21 U.S.C.M.A. 401, 45 C.M.R. 175 (1972).

In the *Adams* case, a three-month delay between the offense and the preferring of charges and a six-month delay to trial were explained as being due to the processing of accused's application for discharge as a conscientious objector and the fact that he was aboard ship for a substantial portion of the time. The Court tested for prejudice and, finding none, affirmed the decision that he had not been denied speedy trial.

Three other speedy trial cases were decided during the survey period. In *United States* v. *Mohr*,[84] the Court held that the period of accountability of the Government does not include time for charges which are subsequently dismissed. Rather, the Court looked to the beginning of the period for the charges of which the accused is convicted. Using that period, the Court found that the delay was not unreasonably long. Post-trial delay was found not to be prejudicial to the accused.

In *United States* v. *Wheeler*,[85] the Court again found that the Government had proceeded in an expeditious fashion and that post-trial delays were not prejudicial. Finally, in *United States* v. *Winston*,[86] it was found that the delay was not sufficient to deprive the accused of a speedy trial and was not deliberately achieved to harass or oppress the accused.

2. *Conscientious Objection*

It would appear that any question regarding the status of *United States* v. *Noyd* [87] has been put to rest in *United States* v. *Lenox*.[88] Lenox had filed an application for discharge as a conscientious objector pursuant to AR 635–20. That application was denied. Lenox was subsequently denied relief when the District Court of the Northern District of California turned down his application for a writ of habeas corpus. Lenox then refused an order to report for transportation to Vietnam and was tried by court-martial for that offense and for missing movement through design. Judge Duncan, adopting the rationale of Chief Judge Darden in *United States* v. *Stewart* [89] repudiated the *Noyd* doctrine. Judge Duncan noted that Lenox had been denied discharge as a conscientious objector and did not apply for further relief to the ABCMR. He had petitioned for a writ of habeas corpus which had been denied, but perfected no appeal on that judgment. Each of these applications and rejections had occurred

[84] 21 U.S.C.M.A. 360, 45 C.M.R. 134 (1972).
[85] 21 U.S.C.M.A. 468, 45 C.M.R. 242 (1972).
[86] 21 U.S.C.M.A. 573, 45 C.M.R. 347 (1972).
[87] 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969).
[88] 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972).
[89] 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971).

prior to the date of the alleged offense. The Court specifically found that contrary to the *Noyd* rationale, it did not deem either the order for movement or the order to board the plane given to Lenox to have been tainted with illegality or generated by any alleged illegality of the Army's administrative decision. Judge Duncan concluded, that "After the Secretary of the Army had denied an accused's application for discharge from military service as a conscientious objector and when no application for discharge as a conscientious objector was pending on the date of the alleged offenses, a claim of error in the Secretary's decision cannot be interposed as a defense to charges of missing movement and willful disobedience of a lawful order."

In reaching its decision the Court examined the recent Supreme Court case of *Parisi* v. *Davidson*.[90] There it was held that a District Court need not defer its consideration of a petition for separation as a conscientious objector pending final determination of criminal charges in the military justice system and that Article III Courts provided a forum in a proper case for litigation of conscientious objection cases.[91]

3. *Res Judicata*

In *United States* v. *Marks and Burgett* [92] the accused had been tried by a US District Court on a charge of stealing Government weapons. The evidence at that trial had consisted primarily of the testimony of a witness who asserted that he had acted as lookout while the accused entered an Army supply room and removed a suitcase and footlocker. The accused had denied the charge and testified to being in another place at the time. The judge had instructed there was no doubt the weapons had been stolen on or about the date alleged. The only rational basis on which the District Court could have acquitted the accused was that it believed the accused and disbelieved the prosecution witnesses. Thus, under the doctrine of res judicata the accused's subsequent trial by court-martial on charges of housebreaking and larceny of a footlocker was barred. The prior acquittal had determined the issues as to the accused's having unlawfully entered the supply room and having committed larceny by wrongfully taking a footlocker.

4. *Insanity*

United States v. *Triplett*,[93] and *United States* v. *Mulhern*,[94] both

[90] 405 U.S. 34 (1972).
[91] See generally, Recent Development, 58 MIL. L. REV. 241 (1972).
[92] 21 U.S.C.M.A. 281, 45 C.M.R. 55 (1972).
[93] 21 U.S.C.M.A. 497, 45 C.M.R. 271 (1972).
[94] 21 U.S.C.M.A. 507, 45 C.M.R. 281 (1972).

presented the issue of whether the accused was entitled to a hearing on the issue of sanity. In both cases psychiatric reports following trial brought up the issue of accused's mental responsibility. In both cases the Court of Military Review found that the new information did not so impugn the validity of the findings of guilty as to require that they be set aside. The Court stated that such a determination was within the power of the Court of Military Review. Paragraph 124, MCM, does not make a rehearing mandatory on the mere presentation of new information as to the issue of sanity. Rather the Court of Military Review may consider the record as a whole and if it concludes, as it did here, that the total evidence casts no doubt on the accused's mental capability, it may affirm the findings of guilty.

V. EVIDENCE

A. *SEARCH AND SEIZURE*

At a time of continuing debate over the wisdom and contours of the Exclusionary Rule, it was not surprising that search and seizure cases occupied a significant portion of the Court's time. In particular, questions of informant reliability and the scope of authorizations to search were prominent.

Accused in *United States* v. *Miller*[95] challenged the proceedings which led to the discovery of four LSD tablets. The battalion commander received a report from two soldiers that Miller had "over 100 tablets of LSD in match boxes." They further reported that they had seen the tablets in Miller's possession one or two nights before. The battalion commander verified several details regarding Miller's identity. He further testified he regarded one of the informants as a "reputable member . . . of the battalion" who on two occasions had assisted in drug seizures. After a search of Miller's quarters disclosed no LSD, the battalion commander ordered a subordinate to search Miller's person. When confronted, Miller handed over a match box containing four LSD tablets.

The Court found "ample support" for the battalion commander's probable cause determination. The Court found it reasonable to infer, given evidence that Miller was a user and not a pusher, that in two days time Miller had not disposed of all tablets and that the remaining ones were either on his person or in his room. The Court further found no necessity for the subordinate

[95] 21 U.S.C.M.A. 92, 44 C.M.R. 146 (1971).

officer to have independent probable cause knowledge. He was merely acting as the battalion commander's subordinate in carrying out the search.

Considerably more complicated was the informant's testimony in *United States* v. *Sparks*.[96] One point of agreement between the majority and dissenting Senior Judge was the crying need for a written application for authority to search. The lengthy reconstruction of the facts known to Captain Marshall amply proved the Court's contention.

At issue was Captain Marshall's authorization to search Sparks' wall locker for a trench coat, a camera, and a pawn ticket, all implicating Sparks in a recent barracks larceny. Captain Marshall's information was received from CID agent Nevin. Nevin provided the following information: (1) a pair of shoes, a trench coat, and a polaroid camera had recently been taken at the same time and from the same place; (2) the shoes had been recovered from the car of Private Sloss, a close friend of Sparks; (3) the shoes had been discovered on the tip of Private Coleman, a suspect in other thefts; (4) Coleman told Nevin that Sparks had put the shoes and a radio in Sloss' car; (5) the stolen shoes and radio were both identified by their owners; (6) Private Sloss also implicated Sparks.

All members of the Court found it "reasonable to infer from the fact of possession of part of stolen property that the possessor had the remainder." Here, however, the judges parted company. The majority found Coleman's actions in leading Agent Nevin to the stolen property sufficient to vouch for his reliability. Further the short period of time since the theft allowed the inference that the stolen property or a pawn ticket would be among Sparks' possessions in his quarters. In a lengthy opinion Senior Judge Ferguson disputed both majority contentions. He viewed Coleman and Sloss as suspected thieves with little reputation for credibility. The stolen property inference pointed only to Sloss rather than to Sparks. Secondly, even if Coleman and Sloss' information were credible, their information did not lead to a probable cause finding regarding stolen property in Sparks' quarters.

Defendant in *United States* v. *Fleener*[97] was an Air Force Major convicted for his part in smuggling opium into South Vietnam. It was undisputed that probable cause existed for the issuance of a written authorization to search Fleener's quarters for evidence of his crimes. However, the words "person of" had

[96] 21 U.S.C.M.A. 134, 44 C.M.R. 188 (1971).
[97] 21 U.S.C.M.A. 174, 44 C.M.R. 228 (1972).

been stricken from the authorization. Two OSI agents and the commander of the combat support group who issued the authorization later testified they understood a search of the person was also authorized. After receiving the authorization, the OSI agents had confronted Fleener with the warrant and advised him of his rights under Article 31. A seerch of his person then disclosed the incriminating evidence challenged before the Court. Looking at both the written authorization and its author's in-court testimony the Court simply did not find sufficient evidence that the commanding officer had specifically authorized the search of Fleener's person.

Fleener's triumph was short-lived, however. Treating the matter as a search incident to apprehension, the Court found authority for admitting the evidence. The delivery to Fleener of the search authorization, the statement that he was suspected of opium offenses, and the reading of Article 31 rights were sufficient to indicate that "appellant knew or reasonably should have known he had been apprehended."

Judge Quinn reached opposite conclusions on both issues. He found the oral testimony did indicate an authorization to search the person as well as the property of Major Fleener. He did not, however, find authority to arrest arising out of the obvious authority to execute the search authorization.

In *United States* v. *Jeter*[98] the lack of a written record of the search authorization again hampered Court review. Jeter's convictions stemmed from the disappearance of $76 from a fellow squad bay member's locker. The following information was presented to the officer authorizing the search: (1) the money had disappeared during a three-hour period when the unit was taking morning training; (2) Jeter and another marine were seen in the squad bay during the time of the theft; (3) Jeter had been given permission by Lieutenant Stokes to leave the company area after noon formation in order to pay bills in town;(4) the accused had not attended the noon formation. A majority of the Court found probable cause for the authorized search of Jeter's property. The Court also rejected Jeter's claim that the search was limited to the $76 and its container. Reconstructing the conflicting evidence, the Court held the authorization to extend to any evidence relative to the disposition of the stolen money. Judge Duncan dissented. He found the only significant facts in the case to be those indicating Jeter's presence by his bed during the three-hour period in which the theft occurred.

[98] 21 U.S.C.M.A. 208, 44 C.M.R. 262 (1972).

Jurisdictional questions determined the validity of the search in *United States* v. *Mitchell*.[99] Under attack was a military commander's authorization to search defendant's off-post residence on Okinawa. Noting its previous opinion in *United States* v. *Vierra*,[100] the Court held that clear language in the penal code promulgated by the United States Civil Administration Court, Ryukyu Island, governed off-post searches on the Island.

The failure to supply the commanding officer with all information known to the OSI agent fatally tainted a drug search in *United States* v. *Lidle*.[101] For about a month prior to the 1 March search of Lidle's car his drug trafficking activities had been monitored by his roommate Houltz and OSI Agent Owens. Owens had checked Houltz's background, verified his information, and on one occasion had Houltz make a controlled purchase of marihuana from Lidle. Houltz informed Owens that Lidle was not keeping the contraband in his room and that he had been told it was stored in Lidle's car. Three days prior to the 1 March search Houltz again expressed his opinion that the car was the storage place.

At 12:30 a.m. on 1 March Houltz phoned Owens to inform him that Lidle had a large sack of marihuana in his possession and had just left for a lower floor to make a sale. Owens immediately sought authority from the commanding officer to search. The commander was informed of Houltz's prior contacts with Lidle and of the fact that a purchase had just taken place. The commander was not informed, however, of Houltz's suspicions regarding storage of drugs in the automobile. Nevertheless, a search of both the quarters and the vehicle was authorized.

On appeal the Court found Houltz's reliability well established and the information conveyed to the commander sufficient to support a search of Lidle's person and locker. Insufficient information, however, supported the search of the automobile. The Court found that the commander was not entitled to rely on Houltz's unsubstantiated opinion as to the presence of marihuana in the car. Unfortunately for the Government, the Court stated that Agent Owens need only have relayed all of Houltz's information to the commander in order to win the case.

In dissent, Judge Quinn felt the majority took "too narrow a view of the evidence presented to . . . the base commander." From the facts presented he found the conclusion "eminently reasonable" that Lidle was storing contraband in his vehicle.

[99] 21 U.S.C.M.A. 340, 45 C.M.R. 114 (1972).
[100] 14 U.S.C.M.A. 48, 33 C.M.R. 269 (1963).
[101] 21 U.S.C.M.A. 455, 45 C.M.R. 229 (1972).

The contours of the search incident to arrest were explored in *United States* v. *Brashears*.[102] Brashears was apprehended by military police for his suspected role in the larceny of a wallet. A thorough search produced several vials of heroin and heroin residue. Brashears contended that, absent any probable cause to believe he possessed heroin, the scope of the search violated his Fourth Amendment rights. Quoting extensively from *Charles* v. *United States* [103] the Court found the search of the person was not unreasonable given probable cause to arrest on the larceny charge. Noting the considerable invasion of privacy already resulting from the permissible arrest and the clear validity of a subsequent police station search, the Court found "no reason in law or logic to cause a different result simply because the appellee was searched at the scene of the arrest." The contrary ruling of the Court of Military Review was accordingly deemed erroneous.

Judge Quinn concurred that the evidence in *Brashears* case provided a reasonable basis for a thorough search of the individual. He rejected, however, any suggestion in the Court's opinion that any arrest justified an unrestricted search of the person.

The complexities of informant reliability were again illustrated in *United States* v. *Brown*.[104] Jackson, described by his company commander as one of his "more reliable people" visited Captain Bell, the commander of Brown's company. Jackson advised Bell that a "good friend of his" had seen what he thought to be Jackson's stolen amplifier in Brown's quarters. From previous use, Jackson's friend was familiar with the amplifier and from its various dents thought it "looked very much like" Jackson's. A search of Brown's quarters revealed Jackson's amplifier. It also led to the recovery of a TV set stolen from another soldier.

For undisclosed reasons Jackson's absence at trial compelled Brown's acquittal on the amplifier charge. However, he was convicted for the TV larceny and on appeal challenged the initial search which led to this item. All members of the Court granted Jackson's reliability and the sufficiency of the evidence, if believed, that the stolen amplifier was in Brown's quarters. Dividing the Court was the reliability of Jackson's friend. The majority found reliability in Jackson's description of him as "a good friend" by the fact that he had previously returned the borrowed amplifier to Jackson and the improbability of his lying to a good friend about the theft. Chief Judge Darden in dissent found more was needed than a bare statement by Jackson that he felt his friend

[102] 21 U.S.C.M.A. 552, 45 C.M.R. 326 (1972).
[103] 278 F. 2d 386 (9th Cir. 1960).
[104] 21 U.S.C.M.A. 522, 45 C.M.R. 296 (1972).

was truthful. Such support was inadequate under both *Aguilar* v. *Texas*,[105] and *United States* v. *Harris*.[106]

The presence of a written search warrant was not enough to sustain the search in *United States* v. *Gibbins*.[107] Gibbins and Groves had been apprehended under suspicious circumstances and a bag thought to contain marihuana and other narcotics was taken from Groves. He had stated that most of the bag's contents belonged to Gibbins. The officer authorizing the search of Gibbins' quarters had also been told by unidentified participants in the drug amnesty program that Gibbins was the pushers' contact. Previous searches of Gibbins' quarters had disclosed no narcotics. Finally, needle marks were observed on Gibbins' arm at the time of his apprehension.

The majority found the search of Gibbins' quarters was based on "mere suspicion alone" and not probable cause. Nothing was offered to prove the reliability of the drug amnesty program informants or to connect Gibbins' alleged possession of drugs in one place with their presence in his quarters. Finally nothing suggested that the needle marks were the product of narcotics use while in his room.

Judge Quinn was willing to equate participation in the amnesty program with informant reliability. He also concluded that since no equipment for drug injection was found on Gibbins' person, it could logically be assumed to be located in his quarters.

Finally, several search and seizure grounds were discussed in *United States* v. *Wheeler*.[108] Prior to Wheeler's apprehension in his vehicle at the direction of Chief Warrant Officer Blocker, the latter had gathered the following evidence: (1) PFC Ball had hold him that he and Wheeler had taken a television set; (2) Private Rush stated he and Wheeler had taken a stereo and a television; (3) Rush also stated they had smoked marihuana and usually "stashed their bags" in the car; (4) Rush stated Wheeler's car had transported the stolen items; (5) Based on Rush's information the stolen property was recovered from its innocent purchaser. One purchaser identified Wheeler as the seller of the stolen goods.

On the evening the property was recovered Wheeler was apprehended in his car. Blocker arrived shortly thereafter and began a search of the vehicle. His initial search found evidence of

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[105] 370 U.S. 108 (1964).
[106] 403 U.S. 573 (1971).
[107] 21 U.S.C.M.A. 556, 45 C.M.R. 330 (1972).
[108] 21 U.S.C.M.A. 468, 45 C.M.R. 242 (1972).

marihuana. Thereafter because he felt the car was posing a traffic hazzard, Blocker had it moved to the Provost Marshal's office. After this 10-minute interruption the search was resumed and an incriminating picture found in the trunk.

Reviewing these facts the Court found ample probable cause for apprehending Wheeler. Under the circumstances the search of the vehicle was a proper action incident to arrest.[108] The action in removing the car to the Provost Marshal's office did not so dissipate "the continuity of the search as to effectively render what was incidental to the apprehension thereafter divorced from direct incidents to the apprehension." The Court also found there were independent grounds for a probable cause search of Wheeler's vehicle. Blocker had reliable information that marihuana was kept in the car. Additionally, Rush had informed Blocker shortly before the search that Wheeler had threatened him. The Court inferred from this that Wheeler was aware of the investigation and a delay to seek a search warrant might have allowed Wheeler to dispose of incriminatory items. On either ground, therefore, the evidence was properly admitted.

B. *WARNINGS AND CONFESSIONS*

Despite 20 years of judicial interpretation, the Court of Military Appeals still devotes considerable time to interpreting the requirements of Article 31 and determining the voluntariness of pretrial statements. Two cases considered the applicability of Article 31 to inquiry situations. In *United States* v. *Henry*,[110] the acting battalion executive officer was aroused by shooting in the compound area. Proceeding towards the place of the shots, he observed a group of 8 or 10 persons outside a hut. He addressed the group asking "Who shot who?" The accused thereupon raised both hands and stated "I shot him." At trial and on appeal, defendant contended that the failure to give Article 31 warnings prohibited the admission of this statement.

A majority of the Court viewed the executive officer's action as a preliminary inquiry into apparent misconduct. Relying on his testimony that at the time of inquiry "I had no suspect at all. I was still trying to ascertain what had happened," it was determined that no requirement to give an Article 31 warning

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[108] The search in this case took place prior to the Supreme Court decision in Chimel v. California, 395 U.S. 752 (1969). That decision was held nonretroactive in Williams v. United States, 401 U.S. 646 (1971) and United States v. Bunch, 19 U.S.C.M.A. 309, 41 C.M.R. 309 (1970).

[110] 21 U.S.C.M.A. 98, 44 C.M.R. 152 (1971).

arose. Noting the broad scope of Article 31, Senior Judge Ferguson dissented. His reading of the facts indicated that the executive officer was reasonably certain that criminal activity had taken place and that one of the group surrounding the hut had been involved. Examining the legislative history of Article 31, Judge Ferguson found clear congressional intent that warnings be given in such situations.

The Court had less difficulty ruling admissible the responses to certain unwarned questions by an Army doctor in the course of emergency room treatment.[111] At the time of questioning, the defendant patient was undergoing severe drug reactions that left him "in immediate danger of serious physical consequences." Seeing no criminal investigative purpose in the doctor's questions, the Court ruled that Article 31 was inapplicable.

Defendant's conduct in *United States* v. *Sikorski*,[112] interrupting the reading of his Article 31 rights, effectively foreclosed his claim of improper advisement. While the investigating agent was explaining Sikorski's Article 31 rights the accused interrupted explaining that he "knew his rights" and had "worked around law enforcement agencies." When the agent handed Sikorski a written statement of rights, the accused stated he had seen similar sheets and "knew his rights." Sikorski then signed the written advisement statement. Based on Sikorski's own testimony, the Court of Military Appeals found no voluntariness issue raised for the court members at trial. The Court further observed that no voluntariness issue was raised by Sikorski's in-court testimony that he drank two beers during the course of a fairly lengthy interrogation ending in his confession. The Court found nothing in the testimony suggesting intoxication or an impairment of Sikorski's "ability 'to think out' his choice between speech and silence."

Three separate admissions came under appellate attack in *United States* v. *Graham*.[113] Initially Graham was stopped by military police for a traffic violation. When he was unable to produce a driver's license and identification card, he was ordered out of the vehicle and questioned by the MP officer. Graham stated again that he had no driver's license or ID card. The officer then asked whose car it was, to which Graham responded "It's stolen." Examining the fact of the questioning, the Court found Graham

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[111] United States v. Fisher, 21 U.S.C.M.A. 223, 44 C.M.R. 277 (1972).
[112] 21 U.S.C.M.A. 345, 45 C.M.R. 119 (1972).
[113] 21 U.S.C.M.A. 489, 45 C.M.R. 263 (1972).

was not reasonably suspected of an offense, to justify a determination that as a matter of law Article 31 warnings were required.

After being placed in custody Graham was given a full rights warning by a CID agent. He answered certain questions but refused to make a written statement. On appeal this fact was cited as indicating Graham's unwillingness to talk or his lack of awareness of his rights. The Court found sufficient evidence to support the trial judge's factual determination that proper warnings had been given and Graham was aware of his rights. Similarly a final challenge to Graham's eventual written admission was rejected.

Some of the Court's most difficult decisions involved the subsequent impairment of an initially correct advisement of rights. A brief period of silence *per se* was insufficient to invalidate a confession to homicide in *United States* v. *England*.[114] It was undisputed that England waived his rights after a proper warning. However, after two hours of conversation with the investigating agents, the accused became silent for a few minutes and then said "Well, I shot her." Both investigators testified that England gave neither physical nor verbal suggestion that he wished the questioning to stop. Relying in part on England's trial testimony that he had difficulty in expressing himself to the agents, the Court refused to equate his silence with a desire that the questioning be terminated. England's confession was held to have been properly admitted.

In two cases the Court reemphasized that Article 31 protects the innocent along with the guilty. PFC Hundley, evidently not one of the Marines "few good men," was suspected of homicide in connection with a racial disturbance.[115] Properly warned by CID officers, Hundley denied all knowledge of the affray. He was then told that if he was free of any connection with the incident, he could be held responsible for not cooperating with the investigation. Hundley thereupon acknowledged his involvement and signed a written confession. The military judge refused the motion to suppress the confession as a matter of law. He did instruct the jury on the issue. The Court of Military Appeals overturned the verdict finding that the CID agents' supplemental statements "modified the terms of the original warning in an unacceptable way." The agents' error also tainted Hundley's second confession given three days after the initial one. The Court noted that at the second interrogation Hundley was presented

[114] 21 U.S.C.M.A. 88, 44 C.M.R. 142 (1971).
[115] United States v. Hundley, 21 U.S.C.M.A. 320, 45 C.M.R. 94 (1972).

with his first confession, was told nothing to suggest it might be inadmissible at trial, and was asked questions about it. The Court characterized the proceeding "as a resumption of the first interrogation [rather] than an independent questioning" and excluded the second confession.

The Marines yielded the "oppressive investigator" award to the Army on the facts in *United States* v. *Peebles*.[115] There investigator Miles informed the suspect that if he was not involved in the crime and withheld information he could "get up to 300 years" as an accessory after the fact. The Court had little difficulty holding Peebles subsequent confession involuntary.

An overly energetic polygraph operator secured the confession that lost the case in *United States* v. *Handsome*.[117] When the operator discovered Handsome was lying, he told him of a similar case in which an accused robber had received three years confinement after continually asserting his innocence in the face of polygraph denials. The operator told Handsome that telling the truth could only benefit him.

The Court noted the thin line between permissible admonitions to tell the truth and impermissible admonitions to tell the truth connected with suggestions of a threat or benefit. Here the polygraph operator's discussion of another defendant's heavy punishment for lack of candor placed the situation in the impermissible category. Looking at the facts, the Court found the impermissible promise or threat established "a strong likelihood" that Handsome's confession stemmed from it.

Investigating officers overstepped the bounds in *United States* v. *Borodzik*.[118] The accused was suspected of the larceny of Government owned aviation stop watches. When advised of his rights, Borodzik stated he had better get a lawyer. While one agent left to relay his request, the other continued conversation with Borodzik and his wife. The other agent then returned, informing Mrs. Borodzik that her husband would have to be confined. Further conversation with Mrs. Borodzik stressed it would be easier on her husband if he confessed. She passed on the agent's comment to her husband who shortly thereafter surrendered the watches to the agents. The Court found the agents' actions impermissibly subjected Borodzik "to an indirect form of questioning or influence or both" sufficient to invalidate his "verbal act" admitting guilt.

[115] 21 U.S.C.M.A. 466, 45 C.M.R. 240 (1972).
[117] 21 U.S.C.M.A. 330, 45 C.M.R. 104 (1972).
[118] 21 U.S.C.M.A. 95, 44 C.M.R. 149 (1971).

Not every instance of coercive pressure resulted in reversal. In *United States* v. *Carmichael* [119] accused was told during the interview that his commander would see the report of his interrogation and the fact that it "would have a gap" where Carmichael refused to talk. Carmichael was also told there was "a possibility" that cooperation would bring trial in an American rather than a Chinese court. An example was cited of three GI's who had been on international hold for 2 1/2 years pending a Chinese trial. The majority of the Court found neither statement impermissible as a matter of law despite their tendency to induce statements. Judge Duncan dissenting found the case clearly governed by the recent *Handsome* [120] opinion. The undisputed facts clearly showed improper influence exerted and an inadmissible confession stemming from that influence.

Coercive confinement conditions are to be judged by the exigencies of the place, ruled the Court in *United States* v. *Mackey*.[121] After his apprehension in Vietnam, defendant was confined overnight in a CONEX container, a large metal shipping container. On review the Court found that normal confinement facilities were unavailable, that accused was provided a stretcher and a blanket, and that the CONEX was no dirtier or mosquito prone than the entire area. The Court found no coercive circumstances in the confinement to invalidate Mackey's confession.

Defendant's claims that he was "frustrated" in his attempts to meet with counsel and thereby coerced into a confession were rejected on factual grounds in *United States* v. *Gaines*.[122] While some dalliance in providing legal representation was present, the Court cited evidence of several proper rights warnings, defendant's friendship with investigating agents, his statements that he did not need counsel, and psychiatrist's testimony that defendant could understand the explanation of his rights to validate the conviction.

Three cases explored the confusing world of *United States* v. *Bearchild* [123] and the effect of an improperly admitted pretrial statement on defendant's in-court testimony. Most significant of the three was the previously discussed *United States* v. *Mackey*.[124] After failing to exclude incriminatory pretrial statements, Mackey testified to sleeping with the murder victim and awaking

[119] 21 U.S.C.M.A. 530, 45 C.M.R. 304 (1972).
[120] United States v. Handsome, 21 U.S.C.M.A. 330, 45 C.M.R. 104 (1972).
[121] 21 U.S.C.M.A. 254, 45 C.M.R. 28 (1972).
[122] 21 U.S.C.M.A. 236, 45 C.M.R. 10 (1972).
[123] 17 U.S.C.M.A. 598, 38 C.M.R. 396 (1968).
[124] 21 U.S.C.M.A. 254, 45 C.M.R. 28 (1972).

the next morning with his hands on her throat. He testified he remembered nothing else. The military judge properly instructed the court members regarding the voluntariness of Mackey's pretrial statement. However, no instruction was given regarding the effect of an inadmissible pretrial statement on Mackey's in-court testimony. On appeal it was argued the judge had a sua sponte responsibility to give such an instruction. The Court rejected the defendant's contention holding that consideration of the *Bearchild* issue was best left to the appellate level. The Court found little potential benefit from a trial determination of the *Bearchild* issue and considerable advantage in dispensing with "an additional instruction that at best tends to be complicated and at times produces instructional error." As noted earlier the Court then found that Mackey's pretrial admissions were properly admitted into evidence.

The standard of proof that an accused's decision to testify was not influenced by the prosecution's use of inadmissible pretrial statements could be quite stringent as evidenced by *United States* v. *Hundley*.[125] Strong independent circumstantial evidence implicated Hundley. Further, two admissible pretrial statements of the accused stated that "he had done a beast down" and "that he killed a person." While conceding the evidence other than the challenged pretrial statement was "extensive," the Court was not convinced beyond reasonable doubt that the *inadmissible statements* did not compel Hundley's appearance on the witness stand.

The Court's third *Bearchild* case re-examined ground covered in last term's decision in *United States* v. *Carey*.[126] Faced with a challenged pretrial statement and defendant's subsequent in-court testimony, the military judge instructed that if the pretrial statement was inadmissible and it compelled defendant to testify at trial both pretrial statement and in-court testimony must be disregarded. The Court again ruled that because such an instruction might preclude consideration of *exculpatory* testimony at trial it should not be given. However, the error was held harmless in view of the fact accused specifically requested the improper instruction and there was no factual issue concerning the inadmissibility of the pretrial statements.[127]

C. *LINEUPS*

The aftermath of a robbery at Fort Dix provided the Court's

[125] 21 U.S.C.M.A. 320, 45 C.M.R. 94 (1972).
[126] 21 U.S.C.M.A. 33, 44 C.M.R. 87 (1971).
[127] United States v. Sikorski, 21 U.S.C.M.A. 345, 45 C.M.R. 119 (1972).

only consideration of lineup practice during the term. Both parties conceded that the lineup failed to meet the standards of *United States* v. *Wade*.[128] The Government however contended that the victim's in-court identifications of the accused were independently based and admissible. The military judge concurred. The judge refused, however, to permit defense counsel to cross-examine as to the circumstances of the improper lineup. The Court held the military judge erroneously precluded testimony that might reflect on the witness's credibility. Given the significance of the identification issue in the case, the ruling was prejudicial and the conviction reversed. While agreeing that the trial judge erred in cutting off the defense inquiry, Judge Quinn felt the acceptance of a defense offer of proof in the judge-only trial cured any prejudice.[129]

D. *PRIVILEGE CLAIMS*

Military security and a defendant's rights clashed in *United States* v. *Gagnon* [130] with privilege yielding to fairness. At issue in Captain Gagnon's assault with intent to commit murder trial was his mental responsibility at the time of the offense. Both sides evidently conceded that Gagnon's difficulties were in part caused by the extreme stress of his work with classified documents. Government psychiatrists testified that Gagnon suffered from an "emotionally unstable personality" rather than a legally exonerating mental disease, defect or derangement. Because of a prior security clearance the prosecution psychiatrist was able to discuss specific details and messages involved in Gagnon's classified work. Despite defense request, its psychiatrists were not granted access to such material.

The Court recognized the civilian precept that the Government should not be able to protect the information it was relying on to convict the defendant. While noting that not every bit of "remotely relevant" evidence should put the military to the test, the same basic rule would apply at a court-martial. Here Gagnon's capacity for good judgment under stress was an important factor in reaching the diagnosis of "emotionally unstable personality." Since the prosecution psychiatrist had drawn heavily on classified information to reach his determination, the Court felt that the defense had been unfairly handicapped by its lack of access.

The Court then set general guidelines for handling a classified

[128] 388 U.S. 218 (1967).
[129] United States v. Greene, 21 U.S.C.M.A. 543, 45 C.M.R. 317 (1972).
[130] 21 U.S.C.M.A. 158, 44 C.M.R. 212 (1972).

information issue at trial. Should the judge find the classified information sufficiently relevant, he must force the Government to choose between "(1) foregoing prosecution, (2) not using the classified information in any way, or (3) devising a system under which the information can be used at trial."

The second privilege case, *United States* v. *Williams*,[131] involved an alleged grant of immunity. At Williams' trial Airman Mack testified that the base commander had told him that if he would make a statement he would be immune from prosecution. The base commander who reviewed Williams' subsequent conviction made no comment regarding Mack's unrebutted testimony in his action on the record. Subsequently the base commander denied discussing immunity with Mack and further pointed out that as a special court-martial convening authority he was not able to grant immunity under MCM, paragraph 68h. The Court reiterated the prohibition on a commander reviewing a record of trial in which he had granted immunity to a prosecution witness. While noting the Manual prohibition on the base commander's formal grant of immunity, the Court observed that he could easily have obtained the same results by simply not referring charges against Mack to special court-martial. Since the evidence strongly suggested just such an occurrence, a new review was required.

E. *CONFRONTATION*

At issue in *United States* v. *Jones* [132] was the denial of a defense request for the subpoena of six witnesses. As to one witness the Court found the Government had concurred his presence was necessary but erroneously taken no action to provide for his attendance. The remaining witnesses were expected to testify to the relations between accused and the superior officer he was accused of disobeying and assaulting. Defense counsel specifically stated the witnesses would show the officer was lying in his testimony. Given the significance of his testimony the disallowance of the witnesses was prejudicial error.

Several cases in recent terms spelled out the Government burden in proving unavailability before the admission of a deposition.[133] In *United States* v. *Mohr* [134] the Court reemphasized de-

[131] 21 U.S.C.M.A. 292, 45 C.M.R. 66 (1972).
[132] 21 U.S.C.M.A. 215, 44 C.M.R. 269 (1972).
[133] United States v. Gaines, 20 U.S.C.M.A. 557, 43 C.M.R. 397 (1971); United States v. Hodge, 20 U.S.C.M.A. 412, 43 C.M.R. 252 (1971); United States v. Davis, 19 U.S.C.M.A. 217, 41 C.M.R. 217 (1970).
[134] 21 U.S.C.M.A. 360, 45 C.M.R. 134 (1972).

fense responsibilities in the area. Specifically the defense "failure to object to departure and discharge of . . . witnesses constitutes a waiver of evidence of their unavailability after their discharge." The facts of the case satisfied the Court that the defense was fully apprised of the witnesses' expected testimony and their impending return to the United States. Further the Court saw little in their testimony that would lead the defense to prefer their personal appearance to their deposition.

The Court in *United States* v. *Wheeler*[135] examined the unavailability requirement for the use at trial of verbatim testimony taken at an Article 32 investigation. The following facts were undisputed: (1) witness Rush's testimony at the Article 32 session seriously incriminated the defendant; (2) some cross-examination did take place; (3) by the time of trial Rush had been discharged from service; (4) three separate efforts to subpoena or contact Rush had failed. On the last occasion Rush's mother had stated that he was "somewhere in the Caribbean" and had spoken of his intention not to testify.

The defendant urged that an important witness like Rush "should have been held in the service until he testified in this case." The Court rejected this suggestion and held the Government's actions had sustained its burden in showing Rush's unavailability. Accordingly, his Article 32 testimony was properly admitted at court-martial.

Unlawful convening authority intrusion is not always grounds for reversal. Defendant in *United States* v. *McElhinney*[136] sought his father's attendance as a witness at his involuntary manslaughter trial. The request was initially denied by the convening authority. At a subsequent Article 39a session the military judge granted the defense motion. Pursuant to trial counsel request, the convening authority asked the judge to reconsider his decision. The judge, feeling pressured by the convening authority, reversed his ruling and denied the motion for the father's attendance.

The Court had no difficulty finding that UCMJ Article 51 and Manual paragraph 67f clearly prohibited "the convening authority from directing the reconsideration of a judge's ruling on a motion to grant appropriate relief." However, the Court was not persuaded there was specific prejudice in the denial of the witness. The evidence indicated that seven witnesses testified to the character trait that the father was expected to verify. Further, defendant's own trial admission tended to refute his claim of

[135] 21 U.S.C.M.A. 468, 45 C.M.R. 242 (1972).
[136] 21 U.S.C.M.A. 436, 45 C.M.R. 210 (1972).

careful weapons handling, and other evidence of defendant's guilt was overwhelming. Lastly, the Court held that any prejudice in extenuation and mitigation had been dissipated by favorable convening authority action on the sentence.

F. *LABORATORY REPORTS*

An LSD possession conviction gave the Court an opportunity to consider the use of criminal laboratory reports.[137] At trial the Government introduced a written report from the North Carolina State Bureau of Investigation Laboratory identifying the questioned substance as LSD. The report was produced without production of the examiner or any authenticating witness. The defense made no objection to such procedure.

On appeal the Court rejected a series of objections to the report's admissibility. Initially the waiver of authentication entitled the judge to treat the report as a genuine document from the North Carolina State Bureau of Investigation Laboratory. The Court next found the report a business record exception to the hearsay rule. The Court observed "the regular course of the laboratory's business is to record the results of its analysis and make its report to those concerned. From the file number and tenor of the report involved here, we are satisfied that it was made in the regular course of the laboratory's business."

Two further objections remained. The first contended the report was a statement of opinion rather than fact, thereby disqualifying admission under the business records rule. The Court analogized the report to a physician's diagnosis or a pathologist's report, both well accepted as factual statements. Defendant's final claim was that the report was prepared for purposes of prosecution. The Court was convinced that the chemical examiner's report was not made principally for prosecution purposes. His role was viewed as "intrinsically neutral" and having no connection with the case beyond identifying the substance in question.

A concluding paragraph emphasized that the defendant at trial was still free to personally confront the laboratory analyst in order to test his competence and review the procedures used. However, in the absence of trial objection, the report could stand on its own.

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[137] United States v. Evans, 21 U.S.C.M.A. 579, 45 C.M.R. 353 (1972).

VI. ARGUMENTS, INSTRUCTIONS, AND SENTENCES

A. *DEFENSE ARGUMENT*

Three cases considered defense counsels' responsibility to act in their clients' best interests at sentencing. Defendant McDonald was convicted of four specifications of assault with intent to murder, for fragging a noncommissioned officer's hut.[138] In argument on sentencing defense counsel stated that he was in *"a kind of difficult position right now . . . because I've still got quite a few misgivings."* Counsel continued, however, to make an argument for clemency citing favorable recommendations from personal acquaintances and counsel's own two-and-a-half-month contact with the defendant. Apparently unmoved the court returned the maximum sentence in only 17 minutes. On appeal the Court found counsel's mention of his "few misgivings" coupled with his close association with defendant, clearly damaged any claim for clemency. A rehearing on sentencing was ordered.

In 1970, in *United States* v. *Weatherford* [139] the Court approved defense counsel's argument for a bad conduct discharge when expressly authorized to do so by the accused. In *United States* v. *Drake* [140] and *United States* v. *Richard*,[141] the Court found sufficient evidence in the records that defendants had impliedly approved their counsels' arguments. Prior to the unauthorized absence and breach of restriction offenses for which he was convicted, Drake had a series of nonjudicial punishments. Upon apprehension for his last absence he testified he would "leave again" if restored to duty. Drake himself felt that "just a BCD" would best serve his interests. Richard similarly had several unauthorized absence offenses and testified he would "definitely" leave again or "get into trouble" if retained in service. There was also evidence that he had firm postservice employment plans and "had accumulated an appreciable amount of money." The accused had further certified to the Court of Military Appeals that he wished no action which might result in a rehearing on sentence.

B. *IMPROPER CONSIDERATION OF NONJUDICIAL PUNISHMENT*

In *United States* v. *Cohan*,[142] decided the previous term, the

[138] United States v. McDonald, 21 U.S.C.M.A. 84, 44 C.M.R. 138 (1971).
[139] 19 U.S.C.M.A. 424, 42 C.M.R. 26 (1970).
[140] 21 U.S.C.M.A. 226, 44 C.M.R. 280 (1972).
[141] 21 U.S.C.M.A. 227, 44 C.M.R. 281 (1972).
[142] 20 U.S.C.M.A. 469, 43 C.M.R. 309 (1971).

Court interpreted Army regulations providing for the elimination of Article 15 records of punishment upon transfer between units. In *United States* v. *Turner*,[143] the Court reaffirmed that Article 15 records should be eliminated "whenever the individual is transferred from a unit whose commander has authority to impose Article 15 punishment to another unit whose commander possesses the same power."

Factual considerations determine the existence of prejudice stemming from the trial judge's error in improperly admitting Article 15 records. In *Turner* the defendant was convicted of assault with a switchblade knife. The improperly admitted Article 15 involved wrongful possession of a switchblade. Further, the staff judge advocate's review had highlighted the existence of a prior Article 15. Reconsideration of sentence was required. Similarly, in *United States* v. *Scott* [144] the military judge's specific announcement that he was considering an improperly retained Article 15 punishment at sentencing required a rehearing.

C. *INSTRUCTIONAL ERROR*

An instruction concerning the possession of recently stolen property was imprecise but not prejudicial in *United States* v. *Jeter*.[145] The military judge initially instructed that stolen property "shortly thereafter found in the exclusive possession of the accused" could provide a permissive inference of guilt. The trial counsel interjected that the stolen property was not "actually found in the possession of the accused." He apparently was referring to the fact that the amount and denominations of cash found on the accused bore a "significant correspondence" to that taken from the victim. The judge then corrected his instruction to read "in this case, evidence has been introduced showing that property was wrongfully taken from a certain place at a certain time and under certain circumstances. Based upon this evidence, you may justifiably infer that the accused wrongfully took the property from that place at that time and under those circumstances."

On appeal the defendant contended that the modified instruction allowed the conclusion that he had taken the property solely on evidence that it was missing. Noting the judge's additional admonitions to consider "all the circumstances attending the proved facts" the Court did not find the instruction prejudicial.

[143] 21 U.S.C.M.A. 356, 45 C.M.R. 130 (1972).
[144] 21 U.S.C.M.A. 154, 44 C.M.R. 208 (1972).
[145] 21 U.S.C.M.A. 208, 44 C.M.R. 262 (1972).

Prejudicial error did occur in *United States* v. *Pennington*.[146] Defendant had been convicted of kidnapping and assault arising out of an incident in which he compelled a fellow marine to drive him off post. At trial, the defense of consent was raised as to the kidnapping charge. The judge apparently agreed to instruct that in order to convict it had to find beyond reasonable doubt that the acts of the driver were not of his own volition but done at the defendant's direction. Unfortunately, through some mixup the following consent instruction was actually given: "You are further instructed: That, in order for consent to be a complete defense to a charge of kidnapping, it must appear that the victim, voluntarily and of his own free will, gave his consent, either expressedly [sic] or impliedly, and that in order to form the basis of a defense, it must be shown that the consent in question was not the product of force, fear, or coercion. *You are further advised: That the acts of Lance Corporal BUELL were not of his own volition but done at Corporal PENNINGTON'S direction.*"

The Court of Military Review found the instruction fatally flawed the kidnapping conviction. Before the Court of Military Appeals, defendant contended that the instruction also prejudiced the assault conviction. The Court found no objection to the assault instruction itself including its direction that the "victim must reasonally apprehend immediate bodily harm." However, coupled with the erroneous kidnapping instruction that the victim's acts were not of his own volition, the jury may have assumed the required finding that the victim reasonably apprehended immediate bodily harm. Doubt as to the effect of the joint instructions was resolved in favor of the defendant. The assault conviction was reversed.

D. *JUDICIAL PREJUDICE*

Two cases raised the disturbing issue of improper judicial behavior. The more severe in the Court's view was *United States* v. *Posey*.[147] There defendant pleaded guilty to LSD possession. During the guilty plea inquiry and for three hours during sentencing the judge asked either personally or through the trial counsel a variety of questions as to the source of drugs, "their cost, and the interest of others in them." The "inquisition" touched on such details as the availability of drugs in a distant city and the hair color of an individual selling LSD. Defense objections to questioning were consistently overruled and the judge reacted

[146] 21 U.S.C.M.A. 461, 45 C.M.R. 235 (1972).
[147] 21 U.S.C.M.A. 188, 44 C.M.R. 242 (1972).

angrily to defendant's expressions of despair at the nature and length of the inquiry. Based on the record as a whole the Court concluded the judge had left his impartial role to become a prosecutor. A resentencing was ordered.

Less drastic remedies were available to correct the error in *United States* v. *Hill*.[148] Defendant pleaded guilty to conspiracy to sell heroin. The Court of Military Review found the judge had improperly considered evidence of uncharged misconduct and reassessed the sentence. Before the Court of Military Appeals defendant argued that the trial judge was so prejudiced against him that an entirely new sentencing procedure was required. The Court agreed with the lower appellate court that the judge's attitude in sentence was suggested by his remark "Now you take that message back to those other pushers." Such an attitude disregarded "the basic concept in sentencing that punishment not only fit the crime, but be responsive to the character, the background, and potential for rehabilitation of the particular accused." Hill also contended that questions to him by the military judge constituted "partisan interrogation." Reviewing the questions the Court found either appropriate inquiry into matters raised by the defendant or improper inquiries into the accused's knowledge of other drug transactions. The latter questioning, however, did not "remotely suggest a predetermined intention to adjudge a severe sentence." The Court concluded that the corrective action of the Court of Military Review had cured the only errors in the case.

VII. EXTRAORDINARY RELIEF

The various miscellaneous docket cases evidenced the Court's continuing reluctance to exercise powers under the All Writs Act. The four cases in which relief was granted involved the implementation of recent court decisions. In *Coleman* v. *United States*[149] petitioner's conviction had been affirmed by a 1970 Air Force Court of Military Review en banc decision. A petition for Court of Military Appeals review was denied. Subsequent to the decision *United States* v. *Chilcote*[150] forbade the practice of en banc reconsideration of a panel decision. In his petition for extraordinary relief Coleman asserted that the en banc AFCMR review had denied him the benefits of a favorable three judge

[148] 21 U.S.C.M.A. 203, 44 C.M.R. 257 (1972).
[149] 21 U.S.C.M.A. 171, 44 C.M.R. 225 (1972).
[150] 20 U.S.C.M.A. 283, 43 C.M.R. 123 (1971).

ruling. The Court of Military Appeals adopted Coleman's contention of fact and reversed the en banc decision.[151]

Private Bronco Belichesky's invocation of the Court's powers involved the lack of a written request for trial by military judge alone at his court-martial.[152] The Court's decision in *United States* v. *Dean* [153] mandating the written request was held to be retroactive. A pending proceeding to vacate the suspension of Belichesky's sentence was ordered terminated. Less successful in securing *Dean* relief was petitioner in *Allen* v. *United States*.[154] Like Belichesky, he had not appealed the Court of Military Review decision to the Court of Military Appeals. Unlike Belichesky, however, Allen was facing no present proceeding and the challenged sentence had long since been served. His petition for relief was dismissed.

Typically the availability of other sources of relief motivated the Court inaction. In *Robertson* v. *Wetherill* [155] petitioner's counsel contended that special court-martial charges had been dropped and proceedings referred to an Article 32 investigator because of counsel's vigorous advocacy. The Court held the issue could be handled by the military judge if charges were in fact referred to a general court-martial. In *West* v. *Samuel* [156] denial of the motion for severance of charges was neither extraordinary nor in aid of the Court of Military Appeals jurisdiction.

In *Stanten* v. *United States* [157] petitioner sought application of the decision in *United States* v. *Eason* [158] to his previously finalized conviction. Factual differences in the loss of counsel left Stanten ineligible for relief. Unlike Eason's situation Stanten's counsel knew prior to taking the case that he would not be retained on active duty after the completion of his current tour.

The Court showed similar hesistancy to intervene in matters outside its jurisdiction. In *Platt* v. *United States* [159] the Court re-

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[151] The Chilcote rationale also controlled in United States v. Lohr, 21 U.S.C.M.A. 150, 44 C.M.R. 204 (1972), and Seelke v. United States, 21 U.S.C.M.A. 299, 45 C.M.R. 73 (1972). In Seelke's case, however, the Court found the action of the original panel and the en banc court were for practical purposes the same.

[152] 21 U.S.C.M.A. 146, 44 C.M.R. 200 (1972).
[153] 20 U.S.C.M.A. 212, 43 C.M.R. 52 (1970).
[154] 21 U.S.C.M.A. 288, 45 C.M.R. 62 (1972).
[155] 21 U.S.C.M.A. 77, 44 C.M.R. 131 (1971).
[156] 21 U.S.C.M.A. 290, 45 C.M.R. 64 (1972).
[157] 21 U.S.C.M.A. 431, 45 C.M.R. 205 (1972).
[158] 21 U.S.C.M.A. 335, 45 C.M.R. 109 (1972).
[159] 21 U.S.C.M.A. 496, 45 C.M.R. 270 (1972).

fused to act on a request for a new trial on the basis of newly discovered evidence where UCMJ Article 73 clearly placed responsibility in the discretion of The Judge Advocate General. Likewise involvement in federal court proceedings was rejected in *Johnson* v. *Judge Advocate General*.[160] Johnson's alleged conscientious objector beliefs had resulted in military criminal charges for willful disobedience of an order and a federal civilian court habeas corpus proceeding to achieve discharge from the service. Johnson's military counsel sought and was denied permission from The Judge Advocate General to represent his client in the civilian habeas proceeding. That decision was challenged by petition for extraordinary relief to the Court. The Court found nothing in the Code to expand its jurisdiction to encompass the requested order, and dismissed the petition.

A final area of successful challenge involved conditions of confinement. Petitioner in *Catlow* v. *Cooksey*[161] had been convicted of aggravated arson and participating in a riot. While appeal was pending, Catlow had gone AWOL. Upon learning of a Court of Military Review reversal of his conviction he returned to Fort Dix. Catlow now challenged the reversal of an initial decision not to confine him. He contended that the confinement was "in reality an extra legal effort on the part of respondent to exact punishment for the charges for participating in a riot and aggravated arson." The Court of Military Appeals rejected Catlow's claim on two grounds. First, his prior AWOL while review was pending made the decision to confine a reasonable one. Second, Catlow's initial remedy must be through Article 138 with subsequent review obtainable from the military judge.

Catlow's dictates were repeated in *Tuttle* v. *Commanding Officer*.[162] Petitioner attempted to meet the Article 138 requirement by noting that a copy of his petition to the Court of Military Appeals had been "forwarded through channels prescribed as a Complaint pursuant to Article 138, UCMJ." The Court spoke harshly of this attempt to by-pass 138 relief. Noting the article's "readily available means for remedying any pretrial impropriety of the sort alleged in the instant petition" Tuttle's extraordinary relief petition was dismissed.

[160] 21 U.S.C.M.A. 520, 45 C.M.R. 294 (1972).
[161] 21 U.S.C.M.A. 106, 44 C.M.R. 160 (1971).
[162] 21 U.S.C.M.A. 229, 45 C.M.R. 3 (1972).

APPENDIX
THE COURT OF MILITARY APPEALS
1971—1972 TERM
ACTION OF INDIVIDUAL JUDGES [a]

	Darden	*Quinn*	*Duncan*	*Ferguson*	*Total*
Opinion of Court	40	38	31	2	111 [b]
Concur	56	56	52	5	169
Separate Concurring	1	2	2	--	5
Concur in Result	7	2	4	--	13
Written Opinion	(4)	(2)	(1)		(7)
Concur in part/ Dissent in part	2	1	1	1	5
Dissents	5	12	10	3	30
Total	111 [b]	111 [b]	100 [c]	11 [d]	333 [b]

[a] 1971–1972 Term *Robertson* v. *Wetherill*, 21 U.S.C.M.A. 77, 44 C.M.R. 131 (1971) thru *United States* v. *Harris*, U.S.C.A. , C.M.R. (1972).

[b] Does not include 1 Per Curiam and 13 Memorandum Opinions of the Court. Were 125 total opinions.

[c] Does not include 11 Memorandum Opinions.

[d] Does not include 1 Per Curiam and 2 Memorandum Opinions.

This material prepared by CPT John Willis, JAGC, US Army Judiciary.

THE MILITARY LAW SYSTEM IN INDONESIA

By
Captain Djaelani*

I. INTRODUCTION

Indonesia was a Dutch colony for more than 3 centuries, followed by Japanese occupation for another 3 1/2 years prior to becoming independent. In 1918, the Dutch enacted a criminal law for Indonesia, i.e., "Wetboek van Strafrecht voor Indonesie" or "Criminal Law Book for Indonesia." This law was similar to both the "Nederlandsch Wetboek van Strafrecht" or Criminal law book for the Netherlands and the French Penal Code.

Besides the civilian criminal law, the Dutch also enacted two military law books in 1934. These were originally intended for the Dutch military personnel and were called "Wetboek van Militair Strafrecht voor Nederlandsch-Indie" or Military Criminal Law Book for Indonesia and also the "Wetboek van Militar Krijgstucht voor Nederlansch-Indie" or Military Disciplinary Law Book for Indonesia. These two books have been the Indonesian military law books since then, supplemented with a Military Disciplinary Regulation enacted by the Indonesian government in 1949.

As military personnel are also subject to civilian criminal law, the civilian criminal law is a primary tool of the military lawyer in addition to the military law books.

The history of Indonesia shows many conflicts which have affected her laws. As a matter of fact, there had been no feeling of peace in Indonesia from the proclamation of the independence on 17 August 1945 until 1966. The conflict with the Netherlands from 1945 until 1949 with bitter armed clashes including the first Communist rebellion in 1948 kept Indonesia at war in her early years. These were followed by minor internal anti-Sukarno armed conflicts, another armed conflict with the Netherlands on the West Irian dispute, internal conflicts among the political parties, and then the last and the worst, the second Communist rebellion in 1965.

* Indonesian Army. This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Twentieth Advanced Class. The opinions and conclusions presented are those of the author and do not necessarily represent the views of any American or Indonesian governmental agency.

Those facts were, in my personal opinion, ample justification for Indonesia's making little progress in most fields of law. Since 1966, however, we have made considerable progress. Indonesian lawyers are encouraged to study, to create and to improve our national laws, and to contribute to the improvement of International laws for world peace.

II. THE INDONESIAN POSITIVE LAWS

A. *THE CIVILIAN LAW.*

Besides the Constitution, the People's Congress (People's Consultative Assembly) decisions, the Government's decisions, the President's Acts and International law, there are two groups of civilian laws. These are the public and private laws.

Public Law regulates the relationship between the government and the people, viewed from the community-interest standpoint. It consists of 1) Criminal law and 2) Criminal law procedure.

Private law regulates the relationships among the people viewed from the individual interest standpoint. It consists of 1) Civil law, 2) Civil law procedure, 3) Commercial law, 4) the Law of Bankruptcy, and 5) Customary or Adat law.

B. *THE MILITARY LAW*

All civilian laws are applicable to military personnel. But since military courts are only concerned with criminal acts, the civilian criminal law and criminal law procedures are most important to the military man.

Besides the civilian laws there are three other sets of laws that apply only to the military. These are 1) Military Criminal Law (M.C.L.), 2) Military Disciplinary Law (M.D.L.) and 3) Military Disciplinary Regulations (M.D.R.).

The Military Criminal Law consists of 150 articles. It is an addition and a "lex Specialis" to the Civilian Criminal Law (C.C.L.) which consists of 570 articles as a "Lex Generalis." Whereas the U.S. UCMJ places the extent of punishment in a separate Table of Maximum Punishments, M.C.L. includes the maximum punishment in each article. The M.C.L. adds special military infractions, such as disobedience to military orders and desertion, to the C.C.L. Compared to C.C.L., the maximum punishments in the M.C.L. are generally more severe.

Military Disciplinary Law consists of 76 articles concerning discipline. It also acts as an extension to both mentioned crim-

inal laws. Any case which is not covered by the C.C.L. or the M.C.L. will be covered by the M.D.L. Unlike the criminal law books, the maximum punishment is not mentioned in each article but is formulated in one article.

As "disciplinary" itself has broad meanings, the M.D.L. just gives general guidance for disciplinary measures. Article 32 of the M.D.L. suggests, "In deciding the kind and degree of any military disciplinary punishment, the authorized commander should do justice besides disciplinary strictness, and he should also wisely consider the situation when the offense occurs, as well as the daily personality and conduct of the accused."

Military Disciplinary Regulation consists of 33 articles and gives a more elementary guidance on military discipline. It includes such things as how to give and carry out orders and how to behave in a superior-subordinate relationship. It directs that military personnel should set a good example in community life, that military personnel should dress, talk and behave properly, and that military personnel should obey all laws and orders. There are also tables of punishments in this regulation which are intended only to give guidance in minor disciplinary offenses.

Article 30 states that a soldier should be given this book of regulations at the time that he is formally accepted into the military. Article 35 further states that during his training, a soldier should be given clear instruction about the military Disciplinary Regulation, about all important articles from M.C.L. and M.D.L., about the military law system and the Constitution of the Republic of Indonesia.

Besides the M.D.R. there are many internal regulations. These are found in every military training center or school, every barracks, military houses, *etc.* These regulations are more specific than the M.D.R.

C. *MILITARY LAW IN ITS RELATION TO CIVILIAN LAW*

The C.C.L. is the source of the civilian criminal law and is also one source of military criminal law. Military criminal law procedure is basically the same as the civilian criminal law of procedure in Indonesia. However, there are also some special regulations published for military law procedure.

As mentioned before, the soldier is subject to all civilian laws. When there is a "connexitas," which means that a crime is done by both civilian(s) and one or more military men, the case shall go to a civilian court, unless otherwise authorized by a written

agreement between the Minister of Judiciary and the Minister of Defense and Security.

In the case of a violation of private law by a military man such as in connection with making a contract, the matter will be referred to a civilian court. In such a case, the commander of the accused will generally further investigate and interrogate the accused. He may impose strict military disciplinary measures if the accused is guilty because such guilt disgraces the army. The measure can be an oral or written warning, postponement of promotion, transfer or discharge depending upon the degree of the offense, and the individual's prior record. Military sanctions are necessary to discourage the men from disgracing the armed forces. The measure is a disciplinary one considered from the disciplinary point of view, not a judicial one. A military man, as a member of the community, is subject to "Adatlaw" (local customary law) which is still strict in some regions.

I can make my own conclusion that civilian laws, especially the criminal ones, are inseparable from military law. The other kinds of relationships will be touched on indirectly in later chapters.

III. MILITARY COURTS AND THEIR JURISDICTION

A. *THE TYPES OF COURTS AND THEIR JURISDICTION*

Besides the Supreme Court as the highest judicial body of the state, there are two ordinary military courts and one extraordinary military court. These are 1) Military Territorial Command Tribunal (MTCT) or Low Military Tribunal (LMT), 2) High Military Tribunal (HMT) and 3) Extraordinary Military Tribunal (EMT). The jurisdiction of the Law and High Military Tribunals is differentiated neither by the degree of the offence nor by the degree of the possible punishment, but by the rank of the accused.

1. *Military Territorial Command Tribunal (MTCT).* Indonesia is divided into 17 military territorial commands, each with its own MTCT as the lowest court. The MTCT tries all military personnel in the ranks of private through captain charged with all degrees of criminal offenses. This tribunal, like all other military courts, is presided over by a military judge who is a lawyer and at least two officer-judges (non-lawyers) who hold at least the rank of major but not higher than the president. Upon the verdict of the court, either the prosecutor or the accused or

his lawyer can appeal to a higher court. Further details on appellate procedure will be discussed in the next chapter.

2. *High Military Tribunal (HMT).* There are four HMTs in Indonesia. There is one HMT for every four or five MTCTs. This court tries officers from major through general. It is presided over by a military judge who is a lawyer and at least two officer-judges (non-lawyers) not higher in rank than the president. This court also acts as a court of review upon the decision of the MTCT if there is an appeal.

3. *Extraordinary Military Tribunal (EMT).* The Extraordinary Military Tribunal tries leaders or highly classified personnel, either military or civilian, who are charged with committing or participating in offenses which are classified as "endangering national security or defense." These offenses are mostly political in nature. The commander who has the right to present the case before this court is the President. He may authorize the Minister of Defense and Security to present the case on his behalf, or in fact, he may designate anyone. The decision of this court needs approval from the President before it is announced. This is the only court with this jurisdiction and there is no appeal. The only thing an accused can do is petition the President for clemency or pardon after the President receives an opinion of the Military Supreme Court. There is only one EMT, but trials can be held anywhere throughout Indonesia.

4. *The Supreme Court (S.C.).* There is only one Supreme Court. It is the highest court of the state and is a civilian as well as a military Supreme Court. Upon appeal, it has the power to review and change any court's decision except acquittals and except as noted above, decisions of the EMT; to control judicial personnel in carrying out their duties; and if asked, it can give advice to the Government on judicial matters. Its decision upon appeals is final.

There is an informal principle that "military personnel charged with committing offenses should be tried by military tribunals." Although there are some exceptions as mentioned in Chapter II, this principle is practiced as far as possible. The military courts are known as more strict and more courageous in deciding cases. The military judges, either the chief military judge (lawyer) or the other judges, are, of course, familiar with military life and background.

As mentioned previously, the jurisdiction of the low court is from private to captain and the jurisdiction of the high court is from major to general. Establishing jurisdiction by rank,

without considering the kinds of the offenses and the possible punishment, proves simpler than the alternative and works well.

An individual is under military law jurisdiction from the date of his appointment as a soldier. The date of the offense and an individual's rank will determine whether or not an individual is under military law jurisdiction, and if he is, to which court he will be sent.

Dismissal of charges is possible if there is a lack of evidence and if there is doubt as to the guilt of the accused. The following are, I think, principles which are common everywhere: 1) A wrong-doer deserves punishment; 2) A man cannot be tried twice for the same offense; 3) When there is a change of law, or a new law, while a case is still in progress, the one to the accused's benefit will be applied; and 4) No one can be tried unless there has been a law regulating the conduct in question.

The court will usually discharge a serviceman who is convicted of committing a crime. For nonjudicial offenses, commanders are advised to impose strict but wise disciplinary measures.

Indonesian military law has no equivalent to the summary court. Article 15 of the UCMJ is similar to the M.D.L. in that the commander gives punishment for disciplinary offenses. Individuals may be punished by a commander for offenses of a disciplinary nature or for very minor crimes. All other criminal offenses are referred to the courts. If a suspect had a choice, he would prefer the former.

B. *THE QUALIFICATIONS AND ROLE OF THE JUDGE, PROSECUTOR AND ADVOCATE*

The judicial body, both civilian and military is divided into two separate parts which also give rise to two separate career lines, i.e., the judge's or court's line and the prosecutor's line. The top of the judge's line is the Supreme Court, and the top of the prosecutor's line is the Attorney General. The Chief of the Supreme Court has two functions, the chief of the civilian and military judiciary; the Attorney General also has similar functions. When an officer is a military judge he will be in the judge line during his career. A military prosecutor will also remain in his career line, but he may be transferred upon selection as a military judge but will then stay in that line.

1. *The Judge.* A military judge of a MTCT is a selected qualified lawyer, with at least the rank of major, having both experience as a prosecutor and a master of law degree. A military judge of a MHT, who is called a High Judge, is a selected qualified lawyer.

He is usually at least a colonel but sometimes may be a mature promotable lieutenant colonel who has previously been a judge of the MTCT. A military officer-judge is an officer who is not a lawyer and is not higher in rank than the military judge who is president of the court. Although the law of procedure allows an officer-judge to be an officer in the same rank as the accused, whenever possible, a commander will choose officer-judges who are higher in rank than the accused.

In appointing the officer-judges, the planning is done by the Assistant on Personnel Affairs of the Commander. Besides considering personnel records, appointments are based on a rotation system. A commander usually will approve the choices made by his assistant. The commander gives no special orders or messages concerning the case to the officer-judges. The officer-judges, after studying a case, will, if there are questions, ask the military judge. In the EMT, the officer-judges are usually military judges from the armed forces.

The judge or the court concerns itself only with the case which has been delivered to the court by the Commander, whom we call "Commander who has the right to deliver a case," i.e., the Chief of the Military Territorial Command, the Chief of Staff or the Minister of Defense and Security on behalf of the President. Before delivery the case is still in the pretrial process and fully within the commander's responsibility. The judge has no right and no relation at all to such matters as pretrial confinement or search and seizure.

After receiving a case, the judge will study the documents. Besides a delivery letter, the documents consist of 1) an accusatory letter by a prosecutor, 2) records of the pretrial investigation, and 3) evidence. When the documents are administratively incomplete, incorrect, or otherwise unsatisfactory, the judge will return the documents to the prosecutor to be completed or corrected.

The Chief of the court will discuss the date for trial with the commander. Then the commander will issue a letter setting the date for the trial. Further explanation of the trial is in the next chapter.

2. *The Prosecutor.* As mentioned above, in every Military Territorial Command there is an MTCT. Accordingly there is also an MTCPO or MTCT Prosecutor's office, the chief of which is the legal adviser to the chief of the MTC. He may have some additional military prosecutors in his office.

A military prosecutor at the MTC level, except the Chief of the

MTCTPO, is usually at least a captain but may be a mature promotable 1st Lieutenant with a bachelor or master of laws degree. Before being a full prosecutor, he begins his career as a clerk of the court, a pretrial investigator or an assistant prosecutor. A prosecutor in a high court (a high prosecutor) is at least a lieutenant colonel and has been a prosecutor in a lower court.

A prosecutor usually gets a case in the form of preliminary inquiries or pretrial investigation records (process verbaal) which have been prepared by investigators from the military police department or from an officer or team appointed to investigate. In some special cases, the commander may order the prosecutor to handle the case from the very beginning. If necessary, the commander himself may do the investigation. Any pretrial investigation not done by a prosecutor should be done under the supervision of a prosecutor. In short, a prosecutor is responsible for the pretrial investigation and he prepares and follows the case from the very start.

After sufficient investigation, he will make a preliminary conclusion and give his opinion to the commander either directly or through his chief of staff. Major cases require special consideration and discussion with the commander. When there is an unresolved disagreement between the commander and the prosecutor over whether a case should be tried, the prosecutor may make an appeal to the Military Supreme Court through command channels, in which, each commander gives his own opinion. Disagreement usually arises when the commander doesn't want to hand the case to the court for a "military reason" while the prosecutor believes that the case should be handed to the court for a "legal reason." Another possibility of disagreement is when the commander wants to dismiss or put aside a case, while the prosecutor believes that a disciplinary punishment should be given to the accused. In this case the prosecutor may make an appeal to the higher commander up to the chief of staff, since it is a disciplinary problem. These appeal procedures are another means of restricting the commander from trespassing on the boundary between disciplinary and criminal matters. This is very different from the US system. If the commander decides that the case will be handed to the court, the prosecutor will make an accusatory letter.

In court the prosecutor represents the Government and is responsible for the presence of the accused, any witnesses and the evidence. He can appeal any decision of the court to a higher court except verdicts of dismissal or acquittal. He is responsible for the execution of the verdict of the court. Execution of a death

penalty, however, should wait for the approval of the President. After approval, the execution is also under the supervision of the prosecutor.

3. *The Advocate.* We use the term advocate or legal adviser for defense counsel. Advocacy in Indonesia has not been well regulated. Only in major cases does an accused get a government appointed advocate. In a routine case it depends upon the accused himself whether he will request an advocate or get one at his own expense. In civilian court, in routine cases, it also depends upon the accused whether or not he will hire an advocate, ask a friend to defend him or have no advocate at all. There is a regulation stating that "any officer can give legal advice *at the request* of the accused" and that "the commander should fulfill the *request* of any accused for an advocate" but it is based on request of the accused and is clearly not mandatory. There is no rule requiring the accused to be advised of his right to request an advocate. This is, in my opinion, one of the worst injustices in our legal system. I would personally direct primary attention to correcting this situation.

Generally speaking, no special qualifications are needed to be an advocate. This is clear from the above sentence that any officer can give legal advice. However, for "government appointed advocates" there are some specifications.

An accused is usually provided with two or more advocates. They can be a military lawyer and a civilian lawyer or they can all be civilian lawyers. A military advocate is usually a lawyer; however, a judge may not be an advocate. The military advocate is assigned by the judiciary.

Civilian advocates have an advocate organization. There is only one government-recognized advocate organization—PERADIN (Persatuan Advocat Indonesia or Indonesian Advocate Association [IAA]). The members are carefully selected. Most of them are mature, experienced and excellently qualified lawyers. With the approval of the accused, the government and the president of the IAA, one or more civilian advocates will be appointed to defend a case upon the request of the Government. In capital cases, advocacy is imperative.

An advocate can communicate with his client from the time of his arrest. He has to prepare his case and may interview his client with the presence of the prosecutor. The prosecutor will always be present during these interviews. The advocate should always remember that an advocate, a prosecutor, and a judge have

the same principle duty, i.e., to maintain justice and see that all sides of the case are presented in a fair and just manner.

IV. TRIAL AND APPELLATE PROCEDURES

A. *PRETRIAL*

An accused is generally a novice, a first timer in a military tribunal. There will generally never be a second time because a guilty verdict for the first cime usually includes a discharge. As the people in general are still simple and honest, the accused generally will only say the truth during the pretrial investigation. Not only is the accused helpful, but his family, friends and relations are also generally very helpful to the military authorities. They will voluntarily give anything useful for evidence and will show or give information in connection with the crime, sometimes without even being asked. The people are very cooperative and are glad to be searched since that helps the Government.

Because of the close relationship between servicemen and civilians and their cooperation in investigating criminal acts, a crime is usually easy to trace. Evidence is easily obtained and the case is often clear from the beginning. Very bad things can happen to the criminal who is caught in the act because he may get direct punishment (torture, etc.) from the surrounding people, unless policemen come immediately.

A pretrial investigation consists of all the processes or activities including interrogations and investigations before a case is delivered to a court. If a case is clearly a disciplinary offense, a company commander can give disciplinary punishments for a very minor offense and report the case to the higher commander. In a more serious disciplinary offense, in a case where there is doubt as to whether it is a disciplinary or a criminal offense, or for a clearly criminal offense, the case will be sent to the next higher commander then through the chain of command to the commander who has the right to deliver a case to court.

In the ordinary situation, when required during an investigation, searches and seizures should be made by 1) a prosecutor, although rarely alone, or 2) military policemen, or 3) both. The accused's commanding officer or his representative is present, and the whole process should be recorded in writing. The commander, for ordinary cases, has delegated his authority to the chief of the Mililitary Police Division. The close coordination among the commander, the Chief of the P. O. and the Chief of the M.P.D. makes the procedure simpler.

The right to confine is only in the hands of a commander, at least at the battalion level, whom we call "Commander who has the right to condemn" and is also called "the Disciplinary Judge." He may issue a pretrial confinement for 20 days. After that time an extension can be proposed to the chief of the M.T.C. who can prolong the period for 30 days, after considering the reasons and with the opinion of his legal advisor. Further extensions of 30 days are possible again with the opinion of the legal advisor.

A prosecutor may propose a confinement, but he may not confine directly except in an emergency case. During a trial, if the judges consider it necessary to confine a witness, the President may ask the prosecutor for the confinement. The prosecutor is required to immediately report the case to the commander for action.

Reasonable apprehension is the responsibility of a commander. But in unusual cases it can be done by any officer or by anyone. The apprehended person should immediately be submitted to his commander either directly or through the M.P. office, the prosecutor or the nearest military authority.

A pretrial investigation can be made by a prosecutor or under the supervision of a prosecutor. All interrogations are put in writing and signed by the accused and the interrogator after being read to the accused. The questions may be asked either orally or in writing. Written questions and answers are regarded as more convenient for the accused but oral questions are usually used.

After analyzing the investigation and evidence, the case will be brought to the commander with the written opinion of a prosecutor. This prosecutor will prosecute the case if it is brought to court. The commander then decides upon 1) dismissing the case and closing it, 2) giving disciplinary punishment, or 3) delivering the case to court. In most cases the commander agrees with the opinion of his legal adviser who will have performed a full investigation. The procedure in the event of disagreement has been previously discussed. If the commander decides to deliver the case to court, he will then issue a decision letter of delivery and send it to the court together with the prosecutor's accusatory letter and all the pretrial records and evidence.

If the commander changes his mind and wants to retract the case from the court with the agreement of the prosecutor, he can do so before the trial begins but not after. The beginning of the trial marks the transfer of the authority and responsibility for a case from a commander to the court.

B. *TRIAL*

1. *Trial Practice.* After receiving a case, a judge will study it. If everything is satisfactory, he then makes agreement with the commander about the date of the trial and about the officer-judges. The commander then issues a letter appointing the officer-judges and a letter of decision setting the date, time and nature of the trial.

The accusatory letter should be read to the accused and his advocate, if any, at least two days before the trial so they can prepare for their answer in court. The procedure in court after an opening by the President is as follows:

Phase I: The prosecutor reads the accusational letter followed by the "exceptie" or answer or comment either of the accused or his advocate.

Phase II: Examinations and cross-examinations of the accused and the witnesses by the judges, the prosecutor, and the advocate, preceded by oaths taken by the officer in charge. Evidence is exhibited.

Phase III: The prosecutor delivers his prosecution or "requisitoir." The trial investigation has given him more material to make his accusation and prosecution more vivid.

Phase IV: Either the accused or the advocate delivers the defense (the "pleidooi").

Phase V: The prosecutor delivers his "replic" or replication upon the "pleidooi."

Phase VI: The accused's side has the last chance to deliver a "duplic" or duplication. The last opportunity to speak is always on the accused's side.

Phase VII: The President of the court announces the finding of the court. Before closing, the President asks if either side has decided to appeal. If not, they are given time to consider making an appeal. If there is to be an appeal, it must be handed to the Clerk of the Court within 14 days after trial, or the right to appeal will be lost.

Between one phase and the other there can be an adjournment for a considerable time as decided by the President.

During the trial all parties perform their roles based on the "facts." The prosecutor prosecutes based on the facts he has.

The prosecutor may point to the good sides or the favorable background of the accused; such as his long service in the Army and the fact that he has never received any disciplinary or criminal punishment. It is also not unusual for an advocate to acknowledge the guilt of his client because of the overwhelming evidence. Then he stresses the mitigating circumstances. He never defends his client by doing something which is against the law.

2. *Evidence.* There should be corroboration of evidence in a trial. A confession alone, or one witness is not enough. Such evidence should be corroborated by another piece of evidence. Usually a prosecutor prepares more than enough evidence to convince the judges.

There is one decisional condition, the belief of the judges without doubt. Although there may be enough evidence to support a conviction, if the judges are not fully convinced, they can decide in favor of the accused. During a trial a judge may restrict the evidence and can also ask the prosecutor to bring new evidence into court.

3. *Silence.* If an accused remains silent, the judges are permitted to regard his silence as an indication of his guilt, although other evidence is needed. The reason behind this is that if an accused were not guilty, he would cooperate, explain everything and prove his innocence. This is exactly the opposite of a US accused's unqualified right to remain silent.

C. *THE APPELLATE PROCEDURE*

Unlike under US military law where a review is not only available from CMR and COMA, but all cases are reviewed by the convening authority, the appellate procedure is a very simple one in Indonesia.

Automatic review is only done upon a verdict of capital punishment. Upon an appeal the higher court can 1) approve or affirm the lower court decision, 2) reduce the sentence, 3) increase the punishment, or 4) disapprove the findings completely and dismiss the charges. The ability to increase the punishment is contrary to US practice.

A prosecutor seldom makes an appeal because it would mean that he wants a harsher sentence. The punishment is usually either precisely the same as he requested or lighter but rarely very different. It is only in the rare instance where the verdict is substantially lighter than what he requested that a prosecutor will appeal. The advocate usually makes the appeal.

V. THE ROLE OF THE COMMANDER

A. *CRIMINAL ACTS IN THE ARMY*

Historically, as our society has been growing and slowly developing, there has been some increase in criminal or other violations of law. The Army, or the armed forces as a whole, as a part of the whole society, is not exempted. A comparison of annual crime statistics of the Army since 1945 points out the increase. Generally speaking, however, we do not have a lot of problems with crime committed by servicemen. Crime occurs mainly in several big cities and is rare in small towns. The crimes are usually petty offenses. More serious crimes are very rare. Disciplinary offenses are more numerous but are mostly minor in nature. These are strictly handled by the commanders.

Economic problems are not necessarily the reason for increases in crime. But, rather, the bad habits of an individual or a group of individuals leads them to violate the law. These bad habits include gambling, prostitution, or other excessive or uncontrolled spending of money for entertainment, food, etc. We do not have any problem with drugs as it has not entered into military life. Even in civilian life it is almost nonexistent although there has been a slight rise in recent years. We do not have the problem of liquor, due to religious reasons and the climate.

B. *THE ROLE OF THE COMMANDER*

We believe that bad soldiers with a good commander will become good ones and conversely that good soldiers with a bad commander will become bad ones. Therefore, a commander has the decisive role in the creation of an effective Army. We also believe that discipline must come from the top down, not from the bottom up.

Maturity, wisdom, and leadership are always expected from any commander and officer. In maintaining discipline, the lower commanders are most important because they have direct communication with the individual soldier who is usually young and poorly educated. Leading them is a more difficult assignment than leading officers.

It is the task of every commander and officer to prevent his men from committing any offense, either disciplinary or criminal. For a question of "how," the answer is inseparable from the situation and condition of the country as a whole. What we should do now, among other things, is to stress discipline and

try to give the right job to the right person. But, we must also give soldiers enough activities to prevent idle time and give more amusements as a break in the military routine. In greater scope, systematic training and schooling related to the promotion system is one of the policies of the Indonesian Army. This policy has a positive effect on the individual soldier. It makes an individual more mature in performing his duty, gives more feeling of responsibility and encourages him to study and learn the laws and regulations.

Our schooling system operates as follows. We divide soldiers by ranks into five groups; from private to corporal (Tamtama), from sergeant to warrant officer (Bintara), from second lieutenant to captain (first officers), from major to colonel (middle officers) and the generals (high officers). Promotion from one group to another requires additional schooling. Without schooling, one will either not be promoted at all, or promotion will be delayed for two or more years. Each period of schooling is between 6 months and 1 1/2 years during which one will be assigned to barracks or a military training center. Any new serviceman, whether he is a regular or reserve, must pass basic training. In every course of training military discipline is among the subjects taught.

In every recruiting drive, we always have more candidates than positions which is to our favor. We can make careful selections to choose the best candidates to find those who will best respond to discipline and make good soldiers.

A commander acts in various roles: as a strict leader, a wise father, or a kind elder brother for his men. He has a major role in maintaining law and order for the Army, the armed forces, and for the whole nation. He is a disciplinary judge who has to be cooperative with the lawyers.

VI. MILITARY LEGAL EDUCATION

A. *AKADEMI HUKUM MILITER*

Established in 1952, "A.H.M." which means Military Law Academy, is producing armed forces lawyers and awarding bachelor of laws degrees.

To be accepted in A.H.M., one should: 1) be a senior high school graduate, 2) pass the selective tests, 3) pass the physical and psychological tests, 4) have his commander's approval, 5) be an officer, or a recommended NCO (who will be promoted to second lieutenant after finishing his study).

During its early years, the lecturers were all civilians who were either outstanding professors from the Indonesian University or judges from the Supreme Court. Later, Army officers were added. These are alumni of the A.H.M. who have practiced law for years.

The students are in a "study-duty" status, although on some occasions they may be given special duty. Between 1965 and 1969, for instance, the students got special duty as interrogators or were assigned to screening teams, in connection with the "30 September Movement" (2nd Communist rebellion).

There are two roll-calls every day. Morning rollcall followed by physical exercises and an afternoon class rollcall. Sometimes there are evening classes in addition to morning classes of 3 or 4 hours daily. Classes are held 6 days a week.

During their first year period, students get military basic training as refresher training. Military staff duty and military tactics are given in the second year. A special six month officer training course is given to the NCOs after they finish their study at the A.H.M., but prior to their promotion to lieutenant. This is given in a military training school, not the A.H.M.

The following subjects are taught in A.H.M.:

First Year: Military Basic training, Social Anthropology, Economics, "Pantja Sila" (five philosophical principals of Indonesia), Politics (Staatsleer), Introduction to Law—Science, Sociology, English Language.

Second Year: Military Staff Duty, Military Tactics, Criminal Law (I), "Adat Law" (I) (Customary Law), Moslem Law (I). Constitutional Law (Staatsrecht), Emergency Constitutional Law, Civil Law (I), Economics, English Language.

Third Year: Criminal Law (II), Civilian; Criminal Law Procedure, Civilian; Military Criminal Law; Military Criminal Law Procedure; "Adat Law" (II); Moslem Law (II); Administrative Law (administratiefrecht); International Law; Criminology; Military Administration and Leadership; Military Judicature; Commercial Law I; English Language; Papers.

The students are divided into platoons, with a company commander and platoon commanders who are appointed on a monthly rotation basis. Every student will thus have the experience of being a commander. The company commander also acts as a class leader. He has to know how many are present and who are absent and why. Before and after class, the class leader reports to the lecturer while the others are sitting in attention. There is a "senate." It tackles all students' problems and acts as a

mediator between students and the commandant or the board of lecturers.

B. *PERGURUAN TINGGI HUKUM MILITER (P.T.H.M.)*

Besides A.H.M. there is P.T.H.M. or Military High Educational Institution of Law. It was established in 1962. P.T.H.M. is a place for the alumni of the A.H..M to further their study for a master's degree. Before 1962 some alumni continued their study in civilian law schools. Here, the students are not in a "study-duty" status. They study in addition to performing their routine duty. Classes are usually, therefore, held in the evening, although sometimes there are morning classes. There is also a "senate" in P.T.H.M.

The subjects in P.T.H.M. are Civil Law II, Civil Law Procedure, Moslem Law III, Commercial Law II, Military Law & Papers, Philosophy of Law, Inter-gentile Law (Intergentielrecht), Forensic Medicine (Gerechtelijke geneeskunde, medicine forensis), Thesis.

During the earliest years of our independence, prior to having any military lawyers, the judges and counsel in military courts were civilian lawyers who were given titular ranks. This led military authority to the establishment of the A.H.M. and then the P.T.H.M. We are now filling our need for lawyers through A.H.M. and P.T.H.M.

VII. THE PAST, THE PRESENT, AND A CONCLUSION

Before the enforcement of the Dutch laws in the beginning of the 20th century, Indonesian people had applied their "Adat-laws" or customary laws for centuries. As Indonesia consists of thousands of islands (6 big islands and 13,677 small islands) of which 6,044 are inhabited, there were hundreds of regional adatlaws. Even now the adatlaws mixed with religious teachings have great effect especially in civil law concerning inheritance and marriage. Marriage by elopement, for instance, is still common in Bali, even among members of the armed forces.

During the Japanese occupation (1942-1945) Dutch laws were still valid and the Japanese added "Gunsei Keizi Rei" or Criminal law regulations during wartime. During the war against the Dutch from August 17, 1945, to December 1949 some territories were occupied by the Dutch in which they applied the "Wetboek van Strafrecht voor Indonesie" with some changes to their advantage. On the other side we also used the same law book with

some changes in our interest. Strangely enough, this dualism of criminal laws continued until 1958. Statute number 73 of 1958 annulled the Dutch changed WVS and announced the use of a single WVS.

Prior to 1966, the fact that making any new law would take a long time and that new regulations were needed resulted in the issuance of temporary statutes, President's acts, government's or ministers' regulations, etc. Since 1966 corrections have been made. Many of the temporary laws were annulled as they were declared unconstitutional; some were, however, repromulgated as new laws. On December 17, 1970, a new fundamental law on judiciary (Statute No. 14, 1970) was enacted to replace the old unconstitutional 1964 law. The old law was unconstitutional because it gave authority to the head of state to interfere or meddle with judicial problems. Article 24 of the Constitution demands that "The judicial power of the Republic of Indonesia is vested in the Supreme Court. In exercising their powers, the Supreme Court and other courts are independent from the influences of the Government." Although the new fundamental law on the judiciary is better than the previous one and consistent with the constitution, I believe it will be further improved in the future.

Comparing the U.S. Military law system with the Indonesian system, it may be concluded that: 1) The U.S. system is very lenient to a suspect while our laws are very strict. 2) The law is deeply detailed in the UCMJ and MCM while ours is still too simple. I believe more completeness, accuracy, and further details are needed. 3) In the U.S., a commander has great powers in the judicial area; in Indonesia the power of the commander is limited to exercising discipline. 4) In the U.S. a defense counsel can communicate with his client from the beginning of the confinement. In Indonesia both counsel (if there is any D.C.) can communicate with an accused from the time of his confinement. 5) A jury system or trial by more than one man is a better system but there is a tendency for most of the accused in the U.S. to choose trial by a single military-judge. In Indonesia a trial is always presided over by at least three judges, one of whom is a military-judge (lawyer) who is the president. I feel that judgment by more than one person is better and more objective and minimizes possible errors.

The military laws, as well as other laws, of Indonesia do need reforms to fit present conditions and the future. Our substantive laws need improvement as do our laws of procedure. There are

some articles which are no longer appropriate. In particular, I feel advocacy is not well regulated yet.

The lawyers realize this, and some have begun to do something; but we also realize that this is no easy task. Up to now in our law school we have learned the old theories which led to the birth of our present laws. We see our laws mostly from our own viewpoint with no comparison with other sources. I believe the study of military law systems of other countries is worthwhile and will broaden our knowledge. It will give us materials to compare and to adopt if appropriate.

THE KNOX COURT-MARTIAL: W. T. SHERMAN PUTS THE PRESS ON TRIAL (1863)*

By Professor John F. Marszalek, Jr.**

The relationship between the press and the military has at times in our history been an uneasy one. This was never more true than during the Civil War. The intense public interest in the conflict and the immediacy of its battlefields created an eager group of war correspondents. Their reportorial zeal was at times actively opposed by military commanders fearful of the exposure of military secrets or merely career damaging "bad press." Few generals on the northern side matched General William T. Sherman in his distaste for the press. Therefore, when an enterprising New York Herald correspondent aroused Sherman's ire, his response was military and direct. He court-martialed him.

It was November 1862. William T. Sherman left his post as military governor of Memphis [1] to join with U. S. Grant to begin the movement that would soon find them trying to solve the Vicksburg riddle. The fortress on the Mississippi was the only

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* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of any governmental agency. This article is drawn from the author's forthcoming study of Sherman's relationship with reporters throughout the Civil War. He is also author of *Court-Martial: A Black Man in America* (Charles Scribner's Sons, 1972) a biography of a black West Point cadet, Johnson Chesnut Whittaker, and a description of his encounters with military justice in the 1880's.

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[1] William T. Sherman graduated from West Point in 1840 and for the next thirteen years was an officer in the United States Army. In 1853, he resigned to become a San Francisco banker, but the next eight years saw him frustrated in every job he attempted. When it looked as though he had found job satisfaction as superintendent of the Louisiana Military Seminary (the forerunner of Louisiana State University) the war intervened. Patriotism won out and Sherman resigned, returned North, and in June 1861 reentered the Army.

Sherman did well at Bull Run, but the Union debacle only intensified his anxiety that the Union was not taking the Confederacy seriously. When he was transferred to Kentucky, the chaos there made him more anxious, and he suffered through a prolonged depression. He was relieved from command and soon found himself training recruits in Missouri. Under General H. W. Halleck's watchful eye, he regained his confidence; and at Shiloh in April 1862 he regained his reputation. He then took part in the capture of Corinth, and in July of 1862 became military governor of Memphis.

remaining Confederate deterrent to complete Union control of the river.

On December 8th, Sherman and Grant met to discuss strategy, and a plan for a three pronged attack on Vicksburg resulted. Grant, Sherman, and Nathaniel Banks presently in New Orleans were simultaneously to drive against the Confederate stronghold. Sherman's forces were to make their movement against Haynes Bluff, Chickasaw Bayou, the anchor of the Confederate right.

When Sherman made his attack on December 29th, Grant was unable to cooperate as planned because the Confederates had cut his supply line.[2] Banks was also missing, lying sick in New Orleans. Sherman was on his own and suffered a resounding repulse. He was able to withdraw, but the entire plan was a failure. To add to his difficulties, circumstances and lack of accurate information made it seem as though he had foolishly led Union troops to defeat for selfish reasons.

I. GENERAL ORDER NO. 8

Prior to his expedition's embarkation, Sherman had taken action to be sure that his arch enemies, newspaper reporters, would not interfere with his movements. As part of his battle preparations, he had issued General Order #8 forbidding any civilians but the transports' crews from accompanying the expedition. Punishment for disobedience was conscription into the army and, for intransigence upon being discovered, work as a deck hand. Anyone on board the transports writing anything for publication would be arrested and treated as a spy.[3]

The press had received the attempted black-out order warily but confidently. Junius H. Browne of the *New York Tribune* expressed no surprise at the order because, he said, Sherman blamed reporters for "his reputation for occasional insanity", which reputation Browne felt he would not have had "without some very satisfactory cooperation on his part." Sherman was, in fact, "a competent and an efficient officer" but as this "absurd order" showed, he had "sundry defects of judgment." Another

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[2] L. LEWIS, SHERMAN: FIGHTING PROPHET (1932), 255–59, emphasizes that Grant pushed the attack too quickly because he wanted to make it before political General John McClernand arrived. Other accounts of this battle include: B. H. LIDDELL HART, SHERMAN, SOLDIER, REALIST, AMERICAN (1958), 160–65, and J. MERRILL, WILLIAM TECUMSEH SHERMAN (1971), 213–15.

[3] General Orders No. 8, HQ Right Wing, 13th Army Corps, William T. Sherman Papers, Library of Congress [hereafter cited as WTS Papers, LC].

Tribune reporter, Gualbert, confidently predicted that, despite the order, "there will be correspondence from the expedition." [4]

Gualbert was right. A number of correspondents tagged along with Sherman and reported the events of the battle. They included Thomas W. Knox of the *New York Herald*, and Franc B. Wilkie of the *New York Times*, two reporters with whom Sherman would have particular trouble. Sherman soon learned of the reporters' presence and issued a second order directing them to be sent to the front to "pass powder." This new order, like the first, "was more honored in its breach than in its observance" and Sherman was stuck with his journalistic impedimenta.[5]

Reporters observed the battle and several were nearly captured. They suffered the mud and rain with the troops and seemed just as confused as the soldiers when the fighting was over. Their news accounts mirrored their confusion. The first reports, appearing on January 6th, announced Vicksburg's capture, but two days later the tone changed. The *New York Tribune* chronicled "no decisive results" although Sherman, outnumbered and "without present hope of accomplishing his object," was performing to the "best in his power." By January 12, the truth finally came out. It was reported that "General Sherman's repulse was complete." Secretary of State William H. Seward, surveying the press accounts, complained that they were "confused and unsatisfactory." [6] In their confusion, however, the press had groped to the truth. The Union had been rebuffed severely. Newsmen quickly followed up this information and found a scapegoat for the debacle.

The *New York Times* was the first paper to assess responsibility. It editorially emphasized the lack of coordination between land and naval forces, in effect, left handedly blaming Grant. The *Louisville Journal* reprinted the *St. Louis Missouri Republican's* partial criticism of Sherman. Sherman was responsible for the rout, but he really could not be blamed too much. He had underestimated the enemy and had displayed "a lamentable ignorance of the character and extent of their defenses." He had shown "most consumate [*sic*] bravery and daring" nonetheless. The *New York Herald*, on the other hand, defended

[4] New York Tribune, Jan. 1, 12, 1863.

[5] S. CADWALLADER, THREE YEARS WITH GRANT (Thomas ed. 1956), 45; J. ANDREWS, THE NORTH REPORTS THE CIVIL WAR (1953), 376 [hereafter cited as ANDREWS]. Chicago Times, Jan. 13, 1863, quoted in *id.* at 376–77.

[6] New York Tribune, Jan. 3, 1863; New York Herald, Jan. 12, 1863; W. SEWARD, VI THE WORKS OF WILLIAM H. SEWARD (Baker ed. 1884), 88.

Grant and Sherman extolling the latter for "his rare military requirements, his large experience and . . . his pre-eminent fighting qualities." [7]

The *Chicago Tribune* at first counseled moderation and objectivity. Citing the lack of adequate information, it called for an investigation to determine guilt. The next two days, it displayed no such restraint in headlining its Vicksburg report: "A Fredricksburg in the West! Another National humiliation? More Blundering! Immense energy squandered! Heroism thrown away! Defeated, baffled, repulsed, disheartened!" It called for Sherman's replacement if Vicksburg was to be taken. Sherman was "most bitterly hated" and displayed "a lack of positive power, that inventive faculty, the adaptability and exhaustive insight of genius." [8]

Other papers took up the cry and the blame for Vicksburg was placed squarely on Sherman's shoulders. Significantly, press criticism of his battle performance was mingled with criticism of his policy toward reporters, the two obviously combined in reporters' minds. Sherman's search through mailbags and his confiscation of reporters' letters being sent for publication became the chief bone of contention. The *Cincinnati Gazette* asked why Sherman was afraid of the truth.[9]

The criticism soon became even more personal and more vicious. His alleged "insanity" in Kentucky in 1861 was brought out.[10] The *New York Times*, citing the reports of correspondent Franc B. Wilkie (Galway), said that everyone could "see the madness of Gen. Sherman" in his choice of attack sites. Obviously knowing nothing of the collapse of Grant's and Banks' parts of the supposedly coordinated assault, the *Times* concluded: Sherman "who, during the war, has suffered an amazing variety of

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[7] New York Times, Jan. 12, 1863; Louisville Journal, Jan. 13, 1863; New York Herald, Jan. 14, 1863.

[8] Chicago Tribune, Jan. 13, 14, 15, 1863.

[9] While in command in Kentucky, Sherman argued with and restricted newspaper reporters. When the rumor mills in Louisville began to whisper about Sherman eccentricities (he was indeed in a state of depression), the Cincinnati Commercial on December 11, 1861, publicly called him insane. Other papers quickly agreed and his reputation for mental unbalance was made.

This author in a forthcoming book will discuss the insanity matter in detail, but suffice it to say here that the charge was erroneous. More to the point, however, it should be noted that every time the press became angry at Sherman during the war, as in this Vicksburg reporting, the insanity charge was resuscitated.

[10] New York Tribune, Jan. 15, 1863; New York Herald, Jan. 16, 1863; Cincinnati Gazette, Jan. 15, 1863.

ups and downs, was anxious to reduce the great stronghold by his own unaided efforts. Hence the insane attack." The *Cincinnati Gazette* took the final step. It gleefully quoted the *Jackson* (Miss.) *Appeal* (actually the *Memphis Commercial Appeal* published in Jackson) that Sherman was "confined to his stateroom perfectly insane." [11]

Nowhere was the criticism more consistently severe and so obviously linked to Sherman's antipress activities than in the *New York Times* columns of Franc B. Wilkie. In a January 1 dispatch, not printed until January 19th, 1863 because of Sherman's interference, Wilkie wrote: "Had the commanding General, W. T. Sherman and his Staff, spent half the time and enterprise in the legitimate operations of their present undertaking, that they have [*sic*] in bullying correspondents, overhauling mail-bags and prying into private correspondence, the country would not now have the shame of knowing that we have lately experienced one of the greatest and most disgraceful defeats of the war." The next day, Wilkie accused Sherman of having "Insane ambition" and said he "was carried away by jealousy of other commanders." [12]

Another reporter who nearly equalled Wilkie in the vehemence of his personal attack was Thomas W. Knox of the *New York Herald*. He wrote a full critical account of the Vicksburg repulse which was destined to become the most controversial description of the battle. With studied sarcasm Knox wished Sherman and his staff had acted with as much energy against the enemy as they had against reporters. Sherman was welcome to the letter he had confiscated from him if he felt he needed it to write his report. Sherman had mismanaged the whole affair and now was so afraid news of the debacle would reach the North that, despite the danger this caused to his men, he was even keeping hospital boats from the scene. "Insanity and inefficiency have brought their result: let us have them no more. With another brain than that of General Sherman's, we will drop this disappointment at our reverse, and feel certain of victory in the future." [13]

Wilkie and Knox were obviously referring to the fact Sherman had been replaced as commander of the expeditionary force by Major General John McClernand and had been demoted to corps

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[11] New York Times, Jan. 19, 1863; Cincinnati Gazette, Jan. 31, 1863.
[12] F. WILKIE, PEN AND POWER (1888), 237; New York Times, Jan. 18, 19, 1863.
[13] New York Herald, Jan. 18, 1863.

commander. McClernand was a politician and was distrusted by Grant and other military men, but his influence with Lincoln and his recruiting success in the Midwest had gained him the command. He would have replaced Sherman no matter what the outcome of the Vicksburg assault but the press and public were not aware of this fact. It looked as though Sherman had made a premature solo assault on Vicksburg to try to avert his demotion. When the McClernand forces captured Arkansas Post, according to plans already set in motion by Sherman, confusion increased. Who should receive the credit, Sherman or McClernand? Most papers praised McClernand.

Sherman had been worried about press reaction to his repulse, even before the first newspaper reports appeared. Immediately after the battle he had written his brother, John, fearing the worse. He had expressed it even more graphically to Admiral D. D. Porter, the commander of the naval forces involved in the attack. Porter remembered Sherman coming on board his ship after the battle looking "as if he had been grappling with the mud and got the worst of it." He told Porter he had lost 1700 men and "those infernal reporters . . . [would] publish all over the country their ridiculous stories about Sherman being whipped, etc." Complicating matters was the fact he was slightly ill and angry over being replaced. He saw McClernand's appointment as Lincoln's attempt to insult him and the entire military profession. McClernand was after all a politician not a soldier.[14]

Feeling frustrated and therefore depressed, Sherman lashed out at his favorite scapegoat when he learned of the press reaction to the battle. He threatened to quit if the government did not prevent the armies from being "surrounded by such spies" as the press. No success was possible as long as reporters were around. His wife, Ellen, stimulated him even more by writing that "if Satan had let all his imps loose upon a special mission of lying we could not have had more false information" in the press. Yet, she told him to stop fighting reporters. He "might as well attempt to control the whirlwind as the newspaper mania." [15]

Sherman was in no mood to be conciliatory and lashed out in all directions. "It was simply absurd" for Lincoln to replace

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[14] WTS to JS, Jan. 6, 1863, WTS Papers, LC; D. PORTER, INCIDENTS AND ANECDOTES OF THE CIVIL WAR (1886), 129; L. N. Dayton to Ellen Sherman, WTS Papers, LC; WTS to ES, Jan. 12, 1863, Sherman Family Papers, University of Notre Dame Archives [hereafter cited as S.F.P., UNDA].

[15] WTS to JS, Jan. 17, 31, 1863, WTS Papers, LC; ES to WTS, Jan. 19, 1863, S.F.P., UNDA.

him with McClernand, a man so unsuited for command. The press could try to turn his soldiers against him, but he was sure it would not succeed. How he wished he had been killed earlier in the war. Anything would be better than his present predicament. His family, notably his wife and his Senator brother, tried to lift his spirits by being understanding and counseling moderation. Even though reporters were "poor forlorn devils," as Ellen put it, Sherman had to learn to live with them.[16]

II. THE KNOX COURT-MARTIAL

Sherman turned a deaf ear and declared open season on reporters. He decided to court martial a correspondent as a spy and threatened to "banish" himself to some foreign country if Lincoln interfered with the sentence. The accused was Thomas W. Knox, (although Franc B. Wilkie or anyone else might just as easily have been chosen). The person was not as important as the principle. It was not simply Knox who was going to be on trial, it was the entire corps of correspondents.

Knox was a well known reporter. He had been one of the coeditors of a Memphis newspaper appointed by General Lew Wallace, and, more importantly, he wrote for the powerful *New York Herald*. He had accompanied the Haynes Bluff expedition despite Sherman's order and later had been with the Sherman/McClernand expedition to Arkansas Post. Sometime during the period he had become friendly with Frank Blair, the Missouri politician turned general. Blair had apparently criticized Sherman's generalship at Haynes Bluff and had given reporters Knox, Wilkie and Richard T. Colburn of the *New York World* quite an earful. Whether Knox based his critical article at least in part on Blair's indiscreet talk is uncertain, but probable.[17]

Knox had been absent from the Vicksburg area but must have heard of Sherman's anger because on February 1, 1863, he wrote the general an explanatory letter. He said he had attached himself to Sherman's expedition because he had been unaware of the exclusion order until the flotilla had reached the battle zone. He had gone to the battle field only twice because of being under

[16] WTS to ES, Jan. 24, 28, 1863, S.F.P., UNDA; WTS to JS, Jan. 25, 1863, WTS Papers, LC; JS to WTS, Jan. 27, 1863, WTS Papers, LC; ES to WTS, Jan. 28, 1863, S.F.P., UNDA.

[17] WTS to ES, Jan. 28, 1863, S.F.P., UNDA; F. WILKIE, PEN AND POWER (1888), 23–24; E. CROZIER, YANKEE REPORTERS, 1861–1865 (1956), 3, 6; the Blair family biographer argues that Knox's account was not based on Frank Blair's gossiping. W. SMITH, II THE FRANCIS PRESTON BLAIR FAMILY IN POLITICS (1933), 152.

the impression Sherman had ordered his detention. His account of the battle, he said, was "the correct history of the affair" based on "narrow channels of information." Now that he had seen reports, plans and so forth, he realized he had "labored under repeated errors, and made in consequence several misstatements." He apologized and said he was now "fully convinced of your [Sherman's] prompt, efficient and judicious management of the troops under your control from its [the battle's] commencement to its close." In another letter that same day he offered to write another article correcting the mistakes in the first one.[18]

Sherman was not impressed. He ordered the correspondent arrested upon his arrival and immediately confronted him with the article. Contradicting his letter, the reporter replied: "Of course, General Sherman, I had no feeling against you personally, but you are regarded the enemy of our set, and we must in self-defense write you down." Besides, General Frank Blair was "authority for most of . . . [the] general and specific assertions." [19]

An angered Sherman who previously had discussed the matter with Blair immediately questioned him again on his relationship with Knox. Blair just as quickly responded: "I made no statement to Mr. Knox at any time which would serve as the foundation of his criticisms upon you." Any remarks he might have made in Knox's presence were meant as points for discussion not criticism, Blair insisted. Showing his anger at being doubted, he ended, "I hope to receive no more letters of the same character from you and shall not answer them in the same spirit if I do."

Sherman accepted Blair's answer completely, apparently relieved he did not have to take on the powerful Blair family as codefendants with Knox. "If at one time I did think you had incautiously dropped expressions which gave the newspaper spy the grounds of accusation against all save those in your brigade and division, I now retract that and assure you of my confidence and respect." As for Knox, Sherman said "he could hardly believe that a white man could be so false as this fellow Knox . . . a spy and infamous dog." [20]

[18] Thomas W. Knox to WTS, Feb. 1, 1863, WAR OF THE REBELLION . . . OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (1880–1901), Series I, Volume 17, Part 2, 580–81 [hereafter cited as O.R.]; Knox to WTS, Feb. 1, 1863, WTS Papers, LC; T. KNOX, CAMPFIRE AND COTTONFIELD (1865) 254.

[19] WTS to Murat Halstead, Apr. 8, 1863, O.R. I, 17, 2, 896.

[20] WTS to F. P. Blair, Feb. 1, 1863; F. P. Blair to WTS, Feb. 1, 1863; WTS to F. P. Blair, Feb. 2, 3, 1863; O.R., I, 17, 2, 581–90.

To others, Sherman explained his motives for trying Knox. He ignored Admiral Porter's veiled hint to drop the whole case but assured the admiral he did not want to see Knox shot as a spy. He simply wanted "to establish the principle that such people cannot attend our armies, in violation of orders, and defy us, publishing their garbled statements and defaming officers who are doing their best." To his brother-in-law, he said his purpose was "to establish the fact that all civilians whatsoever who follows an army are [*sic*] amenable to Military Law." He told John Sherman he had to stand up for his order because the question of the army's ability to protect itself from internal spies was at issue. In short, Sherman wanted a legal precedent to keep reporters away from all future military operations.[21]

The court martial[22] convened at Young's Point Louisiana on February 5, 1863 under the presidency of Volunteer Brigadier General John M. Thayer. It consisted of other officers ranging in rank from Colonel to Major while the Judge Advocate, C. Van Rensselaer, was a captain. Three charges were leveled against Knox: "Giving intelligence to the enemy, directly or indirectly," "Being a spy," and "Disobedience of orders." The day before the court convened, Sherman sent pertinent materials to Grant so he might "see the truth amid the cloud of falsehood and defamation."

The first charge consisted of two specifications. Knox was charged with accompanying the military expedition, contrary to General Order #67, and publishing an article which included names of commanders and the strength of one division. This indirectly gave the enemy an idea of the force's strength and was in violation of Article of War #57.

The second charge's two specifications accused Knox of boarding the steamer *Continental* despite the well publicized promulgation of Sherman's General Order #8. Knox was also accused of publishing "sundry and various false allegations and accusations against the Officers of the Army of the United States, to the great detriment of the interest of the National Government and comfort of our enemies." A long section from the article in question was cited verbatim.

[21] D. D. Porter to WTS, Feb. 3, 1863; WTS to Porter, Feb. 3, 1863, WTS Papers, LC; WTS to Porter, Feb. 4, 1863, O.R. I, 17, 2, 889; WTS to Hugh Ewing, Feb. 4, 1863, William T. Sherman Papers, Ohio State Historical Society, WTS to JS, Feb. 4, 1863, WTS Papers, LC.

[22] The account of the court-martial is based on the original court-martial records: Records of the Office of The Judge Advocate General (Army), Court-Martial Thomas W. Knox, LL–554, Record Group 153, National Archives; WTS to John Rawlins, Feb. 4, 1863, O.R. I, 17, I, 763.

The two specifications of the third charge claimed Knox had "knowingly and willfully" disobeyed not only Sherman's exclusion order, but also the War Department General Order #67 which forbade the printing of any news "without the authority and sanction of the General in command."

After preliminary organizational business, Knox was brought before the tribunal on February 7. He made no objection to any member of the court and asked that Lt. Col. W. B. Woods be made his defense counsel. This request was granted and the charges and specifications were read. Knox immediately made the first of his legal maneuvers. He refused to plead to anything but the first specification of the third charge, namely that he "knowingly and willfully" violated Sherman's exclusion order. To this he pleaded not guilty. Through his counsel, he proceeded with the court's permission to present his reasons for refusing to plead to anything else. He pointed out technical defects in the charges and specifications, basically arguing that they were too general and did not indicate specifically his alleged crimes. He cited pertinent passages from contemporary military law to buttress his point, but the court, after deliberation, sustained his objection only to the second specification of the second charge, that he published false statements against Army officers and thus aided the enemy. Knox then pleaded not guilty to the remaining charges and specifications. He had, at the least, whittled the charges down.

On February 10th, the prosecution opened its case by calling Sherman to the stand. He was the prosecution's only witness, in fact its entire case. The Judge Advocate tried to get a delay to await the arrival of newspapers allegedly in Admiral Porter's possession which would aid the government's case but the defense objected and was sustained.

Sherman, during his two days on the stand, presented little that was not stated in the charges and specifications. His testimony was constantly interrupted by defense objections either to prosecution questions or Sherman answers. The court cleared the room for private deliberation after almost every question, and progress was consequently slow. The prosecution contention as presented in Sherman's answers was that it was a known fact that information printed about the Northern Army in Northern newspapers regularly appeared in the Southern press. Sherman said he had seen this himself and his spies in the South corroborated it. The defense countered that that was beyond the point. The prosecution had to prove Knox's article had been

copied and had actually been seen by the enemy. Suppositions about other articles even when corroborated were irrelevent.

When it was the defense's turn to cross-examine Sherman, he was asked only one question: the name of the commander of the 13th Army Corps during the Haynes Bluff attack. He answered Grant. The prosecution then redirected, asking if Grant had been present with that portion of the 13th Corps which had attacked the Vicksburg heights. Sherman said no. Sherman was then excused and, after making another futile effort to delay the trial to await the newspapers from Porter and after the introduction of General Order #67, the prosecution rested its case.

Knox's defense was an able one. His counsel, Lieutenant Colonel W. B. Woods, called upon Knox's former school teacher, Colonel Issaac Shepherd of the 3rd Missouri Infantry, Brigadier Generals Francis P. (Frank) Blair and Frederick Steele, and William E. Webb of the *St. Louis Missouri Republican* as character witnesses. All spoke in glowing terms of Knox's loyalty and reliability. The defense argued that General Order #67 had been modified, and reporters in Gen. McClellan's Army of the Potomac had been permitted to give details of a battle after the fighting had already taken place. It was also pointed out that Knox's account had been written four days after the battle's completion when Sherman's army was already twenty-five miles away. Finally, the defense argued that Knox had a right to be on the *Continental* despite Sherman's order because he had a pass from Grant, the commander of the 13th Army Corps of which Sherman's expedition was a part.

All of these were telling arguments and the prosecution attempted to overcome them by recalling Sherman. The commanding general said he had never seen Knox's pass from Grant, and McClellan's modification of General Order #67 had never been "officially communicated" to him. He knew of no other similar modifications to this order.

Except for his testimony, Sherman stayed out of the court martial's deliberations. But they were never far from his mind. "Shall the orders of the War Department be respected? Or shall the press go on sweeping everything before it. . . . If the press can govern this country, let them fight the battles." Friends tried to calm him but with little success. His wife, his brother and fellow officers might pledge their support but his antipress anger continued unabated.

To make matters worse, the court-martial was not going to his liking. He inferred from the court's periodic rulings that in order to bring Knox within the jurisdiction of the 57th Article of War, it would have to be proven that the enemy had actually read the offending article. He realized he could not do this, although he believed it self-evident that the Southern press continually clipped military material printed in Northern journals. He had little confidence in a favorable decision because, he said, the court was "more or less afraid of the Press." [25]

The court-martial, in the meantime, was drawing to a close. On the morning of February 14th, the defense and prosecution presented their final arguments. The defense statement was written by Knox himself and was read to the court by defense counsel Wood. Knox reminded the court that it was duty bound to make its decision only on the evidence presented during the trial when such evidence proved guilt "beyond reasonable doubt." Otherwise he had to be found innocent.

The prosecution case had not proven his guilt, he argued. He admitted writing the correspondence in question but argued that McClellan's modifications of General Order #67 which, he said, applied to the entire army, allowed the printing of unit and commander names after the completion of a battle. In any case, the letter was written four days after the battle when the army was twenty five miles away from Vicksburg.

The prosecution had also not proved that he had intended his correspondence as a method of informing the enemy and, more to the point, had not proved the article's content was dangerous nor that the enemy had ever seen it. They had, in fact, never proved that any *New York Herald* had ever reached enemy hands. "The fact that a thing might possibly happen does not prove or tend to prove that it has happened."

Sherman's Order #8 would not have applied to Knox even if the prosecution had proven Knox had been aware of it. The order prevented only those in the service of the United States or the transports from writing anything for publication. Others were excluded from being on board. But he had a pass from Grant who knew he was a reporter. This fact was his authority for writing the article.

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[25] WTS to JS, Feb. 7, 1863, WTS Papers, LC; ES to WTS, Feb. 8, 11, 1863, S.F.P., UNDA; Officers of the Second and Third Brigade of the 15th Army Corps to U. S. Grant, Feb. 10, 1863; JS to WTS, Feb. 10, 16, 1863, E. Ord to WTS, Feb. 13, 1863, WTS to JS, Feb. 12, 1863, all in WTS Papers, LC.

The defense witnesses had shown Knox to be a man of character and loyalty. Though he felt mortified at having his lifelong loyalty to the Union questioned, he admitted making mistakes in his article and stood ready to make the necessary corrections. He left the verdict confidently in the hands of the court, "men without fear and without reproach." He felt sure, he concluded, "that humble as is his station and high as is the character and position of his accuser, his every right will be protected and justice will be done him."

After a brief recess, the Prosecution presented its final arguments. In a highly organized presentation, the Judge Advocate, Capt. C. Van Rensselaer, listed the evidence against Knox as being the letter, Knox's admission he wrote it, and the fact Sherman had not authorized it. Knox's presence on a military transport without Sherman's authorization despite the officially promulgated General Order #67 and General Order #8 was also part of the evidence. Finally Sherman "who from custom and necessity had had every means of knowing," was sure that material from the Northern press "very often" appeared in Southern newspapers.

The key point, said Van Rensselaer, was that General Order #67 had to be interpreted. The section which read "shall reach the enemy" had to be interpreted to mean "may or might reach the enemy." "There is a general presumption in capital cases that a person intends whatever is the natural and probable consequence of his own actions." A newspaper man who writes an article containing useful information for the enemy in a paper known to be read by the enemy is in fact guilty of leaking secrets. His intent unless he can prove otherwise is to aid the enemy.

Knox's defense, said the Judge Advocate, was inadequate. Knox's character was irrelevant. McClellan's "Notice to a Correspondent" had no validity in any Western army and had, in any case, been superseded by Sherman's General Order #8. A pass kept in a pocket was useless. Besides, Knox's pass had been superseded by competent military authority (i.e. Sherman) some time after its issuance.

Finally, the prosecution argued, public safety required the strict enforcement of all pertinent rules and regulations.

> The discipline of military powers and authority is claimed to have been violated. It must be sustained. The safety of our Army is claimed to have been endangered: it should be secured.

> The interests of our cause are claimed to have been imperilled: they should be placed where the hand of danger cannot reach.

The closing arguments completed, the court went into closed sessions to deliberate. Four days later, it promulgated its decision. It found Knox not guilty of the first ("giving intelligence to the enemy") and second ("being a spy") charges and guilty of the third charge (disobedience of orders). As concerned the specifications of the first charge (accompanying the expedition and publishing an article mentioning troop commanders and strength), Knox was found guilty of both, except that part which said he had violated the 57th Article of War. In regards to the first specification of the third charge (that Knox violated Sherman's order by accompanying the expedition) the court ruled "the facts proven as stated, but attaches no criminality thereto." Knox was ordered outside Army lines under threat of arrest.[24]

III. THE AFTERMATH

Sherman became livid at the decision. He asked Grant's Adjutant, Colonel John A. Rawlins, to forward the court's verdict through the Judge Advocate General to the General-in-Chief. He particularly attacked two aspects of the decision. The court's ruling in attaching no criminality to Knox for accompanying the expedition despite Sherman's order inferred "that a commanding officer has no right to prohibit citizens from accompanying a military expedition, or, if he does, such citizens incur no criminality by disregarding such command." Secondly, he protested the decision that Knox's article gave no information to the enemy. It was impossible to track down the exact article among an enemy one was fighting except to note that their press was full of clippings from Northern newspapers. This, he believed, was sufficient. "I believe this cause [freedom of the press] has lost us millions of money [sic], thousands of lives, and will continue to defeat us to the end of time, unless some remedy is devised." [25]

Newspapers were surprisingly silent at the banishment of reporter Knox. Press commentary was brief with even the *New York Herald* taking no stand in support of one of its own staff members. The *Washington Chronicle*, fortified by correspondence provided it by John Sherman, was on Sherman's side. The *St.*

[24] The charges, specifications and decision were published in General Orders No. 13, HQ Department of the Tennessee, Feb. 19, 1863, in court-martial records cited, *supra* note 22, and in O.R. I, 17, 2, 889–92.

[25] WTS to John Rawlins, Feb. 23, 1863, O.R., I, 17, 2, 892–93.

Louis Missouri Republican alone was strongly opposed. William E. Webb, a character witness for Knox during the trial, talked of Knox's "arbitrary arrest" and described the whole incident as a test to see "whether military power" could be used "for the gratification of private malice" and whether "just criticism [would] be suppressed." The *Chronicle*, on the other hand, called for moderation and attacked reporters who made attacks "without knowing the details."

T. A. Post, a *New York Tribune* reporter, wrote his editor a private letter expressing great concern. He agreed that Knox's account was "harsh and one-sided" but also opposed Sherman's rifling of the mail bags. The court-martial was unnecessary and wrong. Knox was "a throughly loyal man" and had "no personal ill will toward Gen. Sherman." Post agreed with Sherman, that this trial could set a "precedent." The whole press could be "gagged" and no one allowed to criticize any generals without the danger of being put on trial. He thought Sherman's conduct was "contemptible" and hoped the *Tribune* would treat Knox fairly in its columns. The *Tribune*, like most papers, feared repercussions and remained silent.[26]

With the trial over and the press apparently cowed, Sherman might have supposed the whole matter was over. Such was not the case. Colonel John W. Forney and some Washington journalists undertook to vindicate Knox. They drew up a memorial to Abraham Lincoln contending that Knox's loyalty and the obsolescence of the Article of War in question should mean his release from sentence. Knox's old colleague A. D. Richardson of the *New York Tribune*, James M. Mitchell of the *New York Times* and H. P. Bennett, the Congressional Delegate from Knox's prewar residence, Colorado, personally presented the petition to the President. Lincoln recieved the delegation warmly and traded stories with Richardson whom he had known before the war. He expressed his willingness to "serve" any loyal journalist at any time, but, for the present, the nation's generals were even more important than he was. He wished "to do nothing whatsoever which . . . [could] possibly embarrass any of them." However, he would write a letter on Knox's behalf. As Richardson later put it, "there was too much irresistible good sense in this to permit any further discussion," so the delegation left. Lincoln had effectively but graciously sidetracked them.

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[26] (St. Louis) Missouri Republican, Feb. 14, 20, 1863; Washington Chronicle, Feb. 16, 1863; T. A. Post to Sydney Howard Gay, Feb. 6, 1863, Sydney Howard Gay Papers, Columbia University.

The letter Lincoln composed was addressed to "whom it may concern." It said that, since the President of the Court Martial and Major General McClernand and "many other respectable persons" were "of the opinion that Mr. Knox's offense was [a] technical rather than wilfull [*sic*] wrong," Knox had his permission to proceed to Grant's camp. Grant, however, was to decide whether Knox could remain. Lincoln took himself off the hook and left the whole matter up to Grant.[27]

Armed with Lincoln's letter, Knox arrived at Grant's camp at the beginning of April. Grant read Lincoln's letter and penned a defense of Sherman and a stinging attack on Knox in reply. He said he would not allow Knox to remain unless Sherman gave his assent. Knox wrote Sherman that same day and enclosed Lincoln's letter. He said Grant had no objection to his return if Sherman agreed! "Without referring in detail to past occurrences," he expressed his "regret at the want of harmony between portions of the Army and the Press' and hoped for better relations in the future. Sherman's "favor in the matter . . . [would] be duly appreciated" by himself and the paper he represented.

Sherman exploded. He regretted that Thayer and McClernand regarded Knox's actions "as mere technical offenses" and reminded Knox of his statements about the necessity of writing down all who stood in the way of the "fraternity" and of the right to publish false news.

> Come with a sword or musket in your hand, prepared to share with us our fate, in sunshine and storm, in prosperity and adversity, in plenty and scarcity and I will welcome you as a brother and associate. But come as you now do expecting me to ally the honor and reputation of my country and my fellow soldiers with you, as the representative of the press, which you yourself say makes so slight a difference between truth and falsehood, and my answer is, Never.

Knox saw the situation clearly and soon moved to other battlefields. In later years, he urged that, in any future war, reporters be made part of the military establishment so they might be free from wrathful generals. In retrospect he felt his "little quarrel with General Sherman; . . . [had] proved 'a blessing in disguise'." Had Sherman not ejected him, he would certainly have been with reporters Richardson, Browne and Colburn as they attempted to run the Vicksburg batteries. Their boat was blown out of the water and they were captured and spent twenty

[27] A. RICHARDSON SECRET SERVICE (1865), 318–20; Abraham Lincoln to whom it may concern, O.R., I, 17, 2, 894.

months in a Confederate prison. Knox, in the meantime, was reporting other battles including Gettysburg.[25]

Knox had failed to gain readmittance to Sherman's camp but he had succeeded in stirring Sherman's blood again. The peripatetic general thundered that Thayer supported Knox because the reporter had eulogized him. As for McClernand, "he would sign the death warrant of his son for a newspaper puff." "Knox is simply nobody," he wrote, "but he represents the Press, and as such expects to rule the Country." He warned that Lincoln had to make a choice: rule the *New York Herald* or be ruled by it. Either the Press was checked or constitutional government was at its end. He was "no enemy to freedom of thought, freedom of the 'press' and speech," he said unconvincingly," but in all controversies there . . . [was] a time discussion . . . [had to] cease and action begin." "All I propose to say is that Mr. Lincoln and the press may, in the exercise of their glorious prerogative, tear our country and armies to tatters; but they shall not insult me with impunity in my own camp." [29]

Thus ended the only recorded court martial of a newspaper reporter in American history. Knox was excluded from the Western theatre of the war, but otherwise continued as a war correspondent. Reporters, however, felt threatened as demonstrated by the paucity of comment on the sacrifice of one of their numbers. Most importantly, Sherman was further convinced that his antipress feelings were correct. His court martial of Knox, as he himself admitted on several occasions, was actually an attempt to try the entire press. He was concerned not so much with Knox as he was in obtaining a legal precedent to exclude all reporters on a legally devised premise that they were all spies. He believed any war news aided the enemy, thus it should all be excluded or, at the least, an effective system of censorship should be established. Though he denied it, his position was in direct conflict with the Bill of Rights' guarantee of freedom of the press.

The need to know always clashes most violently with the need for secrecy during war time. At this time, a general believed the solution was a trial while reporters believed ridicule and sloppy reporting were acceptable answers. Neither side really won, but in the next several years as he rose in power, Sherman

[25] U. S. Grant to Knox, Knox to WTS, Apr. 6, 1863, WTS to Knox, Apr. 7, 1863, O.R., I, 17, 2, 894–95; T. KNOX, CAMPFIRE AND COTTONFIELD (1865), 260, 490.

[29] WTS to JS, copy, Apr. 7, 1863, S.F.P., UNDA; WTS to U. S. Grant, Apr. 9, 1863, WTS to Murat Halstead, Apr. 8, 1863, O.R., I, 17, 2, 895–97.

pushed his ideas to their logical conclusion—complete exclusion of reporters and total secrecy. Because of the isolated nature of his famous marches, he was successful. But his success was the result of victories not legal precedent. And the press, though hampered, was never completely controlled.

RECENT DEVELOPMENTS

COMA Reexamines the Convening Authority and Military Judge Relationship; A Threat to the Judicialization of Military Justice: *United States* v. *Frazier*, 21 U.S.C.M.A. 444, 45 C.M.R. 218 (1972; *United States* v. *Bielecki*, 21 U.S.C.M.A. 450, 45 C.M.R. 224 (1972); *United States* v. *Nivens*, 21 U.S.C.M.A. 420, 45 C.M.R. 194 (1972); *United States* v. *McElhinney*, 21 U.S.C.M.A. 436, 45 C.M.R. 210 (1972).*

I. INTRODUCTION

One of the hallmarks of the Military Justice Act of 1968 was the increased powers and responsibilities given to that officer performing the judicial function at courts-martial. Formerly designated a "law officer" he was renamed "military judge" in an effort to bolster his prestige.[1] For the first time the military judge was empowered to hold pretrial hearings to dispose of preliminary matters including receiving pleas,[2] and to conduct courts-martial without members.[3] His rulings on all interlocutory issues became final with the single exception of the factual issue of mental responsibility which remained subject to challenge by court members.[4] Congress also required in the 1968 Act that military judges sit on special courts-martial adjudging a bad conduct discharge (except in rare circumstances) as well as on all general courts-martial.[5] While not explicitly, the Military Justice Act of 1968 encouraged and facilitated the strengthening of the judicial structure within the military by requiring general court-martial judges to be assigned and directly responsible to The Judge Advocate General and have as their primary duty the trying of courts-martial.[6]

*The opinions expressed are those of the author and do not necessarily represent the views of any governmental agency.

[1] *See* S. Rep. No. 1601, 90th Cong., 2d Sess. (1968); Ervin, *The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 88 (1969).

[2] 10 U.S.C. § 839(a) [hereinafter cited as UCMJ]. Attempts by well meaning judges to hold pretrial sessions prior to the 1968 Act were disapproved in United States v. Kendall, 17 U.S.C.M.A. 561, 38 C.M.R. 359 (1968); and United States v. Robinson, 13 U.S.C.M.A. 674, 33 C.M.R. 106 (1963).

[3] UCMJ Art. 16.

[4] UCMJ, Art. 51(b).

[5] UCMJ, Art. 19.

[6] UCMJ, Art. 26(c). In United States v. Moorehead, 20 U.S.C.M.A. 574, 44 C.M.R. 4 (1971), a conviction was set aside where the officer detailed as military judge did not have as his primary duty the trying of courts-martial. The Court of Military Appeals strictly construed Art. 26(c) even

These legislative efforts to judicialize the court-martial process solidified the previous steps taken by the services to erect an independent judicial structure [7] and ratified the upgrading of the power and position of the law officer by the United States Court of Military Appeals.[8] Soon after the effective date of the Uniform Code of Military Justice the "Supreme Court of the Military" proclaimed its intention "to assimilate the status of the law officer, wherever possible, to that of a civilian judge of the Federal system." [9] Manifesting that intent, the law officer was judicially granted the power to declare a mistrial,[10] to *sua sponte* challenge a court member,[11] and to grant a change of venue.[12] In a sharp departure from traditional practice the law officer's function as the sole source of the law was secured by judicially outlawing the use of the Manual for Courts-Martial by court members.[13]

Near the end of its 1971–1972 Term the Court of Military Appeals reexamined on several occasions the powers of the military judge and his relationship with the convening authority. In *United States* v. *Frazier* [14] and *United States* v. *Bielecki* [15] the Court upheld the right of a convening authority to return charges and specifications to a court-martial if they were dismissed on a motion not amounting to a finding of not guilty. The reversal of a speedy trial motion was sustained in *Frazier* and the convening authority's overruling of a dismissal based on the denial of effec-

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though the Coast Guard conducts very few general courts-martial and had, at the time, no military judge with the primary duty of trying courts-martial. For an understanding of the organization and operation of the various military judicial structures, *see* Douglass, *The Judicialization of Military Courts*, 22 HASTINGS L. J. 213 (1971); Kenney, *The Trial Judiciary*, 11 JAG L. REV. 208 (1969).

[7] The Army as early as 1958 established a law officer program whereby judge advocates were assigned for a 3 year tour solely as law officers to a division of the Office of The Judge Advocate General known as the Field Judiciary. This organization was given its own administrative responsibilities in 1962. A similar program was initiated in 1960 and formally adopted two years later by the Navy and Marine Corps. *See* US DEP'T OF ARMY PAMPHLET NO. 27-173—MILITARY JUSTICE, TRIAL PROCEDURE, 19 (1964); Wiener, *The Army's Field Judiciary System: A Notable Advance*, 46 A.B.A. J. 1178 (1960).

[8] Bodziak, *The Law Officer Under the UCMJ, Authoritative Court of Military Appeals Concept*, 16 JAG J. 3 (1962); Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 39 (1959); Perkins, *The Military Judge: Evolution of a Judiciary*, 23 JAG J. 155 (1969).

[9] United States v. Biesak, 3 U.S.C.M.A. 714, 722, 14 C.M.R. 132, 140 (1952).

[10] United States v. Stringer, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954).

[11] United States v. Jones, 7 U.S.C.M.A. 283, 22 C.M.R. 73 (1956).

[12] United States v. Gavitt, 5 U.S.C.M.A. 249, 17 C.M.R. 249 (1954).

[13] United States v. Rinehart, 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957).

[14] 21 U.S.C.M.A. 444, 45 C.M.R. 218 (1972).

[15] 21 U.S.C.M.A. 450, 45 C.M.R. 224 (1972).

tive counsel was likewise supported in *Bielecki*. In *United States* v. *Nivens*[16] and *United States* v. *McElhinney*[17] the convening authority was found to have unlawfully intruded into the court-martial process by overriding interlocutory decisions of the military judge.

An analysis of these four cases suggests a weakening of appellate court support for military trial judges. Concurring in *Nivens*, Chief Judge Darden sounded a new perspective in noting:

> Throughout this evolutionary process the accretion in the role of the military judge has been legislated. Enhancement of the judge's status and authority *has* gratified members of this Court, but Congress retains the power to prescribe the division of authority between a convening authority and a military judge.[18]

Even in *McElhinney* where the Court was dismayed over the intervention of the convening authority Judge Duncan laid as much blame on the military judge:

> Nevertheless, under these circumstances, we do not believe that the judge used all the weapons in his arsenal of discretion; the error lies in the judge having allowed his decision to be influenced by the convening authority.[19]

II. ARTICLE 62(A)—THE ULTIMATE IN LAWFUL COMMAND INFLUENCE

Article 62(a), UCMJ, provides:

> If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.

This potential control over the conduct of courts-martial by the convening authority was only first given a statutory basis in 1951 with the enactment of the UCMJ. The roots of the power, however, lay firmly entrenched in the traditional power of a convening authority which until 1920 included the right to return a finding of not guilty or a lenient sentence to a court-martial.[20] The ability to return dismissed charges and specifications was thus considered only a natural adjunct of his overall responsi-

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[16] 21 U.S.C.M.A. 420, 45 C.M.R. 194 (1972).
[17] 21 U.S.C.M.A. 436, 45 C.M.R. 210 (1972).
[18] 21 U.S.C.M.A. 420, 424, 45 C.M.R. 194, 198. (emphasis added)
[19] 21 U.S.C.M.A. 436, 439, 45 C.M.R. 210, 213.
[20] The historical role of the commander is outlined in Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3 (1970).

bility for the administration of military justice. With some differences the pre-Code Manuals for Courts-Martial and the Naval Courts and Boards had given executive sanction to the practice.[21] Although Article 62(a) only provided for "reconsideration of the ruling and any further appropriate action" by the court-martial, paragraph 67*f* of the 1951 Manual for Courts-Martial following Army practice required that a law officer or court-martial accede to the convening authority in certain instances. The 1969 Revised Manual contains the same key language:

> To the extent that the matter in disagreement relates solely to a question of law . . . the military judge or the president of a special court-martial without a military judge will accede to the view of the convening authority. If the matter in disagreement relates to issues of fact . . . the military judge or special court-martial without a military judge will exercise his or its discretion in reconsidering the motion.[22]

Somewhat surprisingly, the validity of paragraph 67*f* and the meaning of Article 62(a) was not adjudicated by the Court of Military Appeals until 17 years after the initiation of the UCMJ. In *Gale* v. *United States*[23] the Court reserved decision on the issues in denying a petition for extraordinary relief. Finally, in *United States* v. *Boehm*[24] the Court discussed this ultimate in lawful command influence. Chief Judge Quinn, writing for the Court, found that the convening authority's overruling of the granting of a speedy trial motion by a special court-martial was proper inasmuch as the speedy trial ruling was tantamount to a plea in bar and "did not amount to a finding of not guilty." Without discussion of the law/fact distinction made by the Manual or of the meaning of "reconsideration" in Article 62(a) the accession requirement of paragraph 67*f* was implicity upheld. Dissenting to the erosion of the independence of the law officer, Judge Ferguson felt that the convening authority reversal was improper because speedy trial is a mixed question of law and fact. He too did not pause to consider the word "reconsideration" evidently because he viewed Article 62(a) as merely codifying previously acceptable court-martial procedure.

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[21] *Compare* Manual for Courts-Martial, US Army, 1949, para 64*f with* Naval Courts and Boards, 1937, sec. 473. The development of the convening authority's right to return dismissed charges and specifications is discussed in Floyd, *Government Appeals in Military Criminal Cases*, 24 JAG J. 129 (1970) [hereinafter cited as Floyd].

[22] MANUAL FOR COURTS-MARTIAL, 1969 (REV. ED.), para 67*f*.

[23] 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967).

[24] 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968).

The holding of *Boehm* was affirmed less than a year later in the denial of a petition for extraordinary relief with the observation that Article 62(a) empowered the convening authority "to review and *reverse*" the speedy trial ruling of a special court-martial.[25] In *Priest* v. *Koch*[26] the Court of Military Appeals sustained the reversal of a military judge's dismissal of specifications for legal insufficiency specifically rejecting appellate counsel's arguments that Article 62(a) conflicts with the independence of military judges intended by the Military Justice Act of 1968 and that in any case the military judge need only further deliberate his prior ruling.[27] Responding to the argument that Article 62(a) only requires reconsideration in its dictionary sense the Court stated:

> Carried to its outer limits, the petitioner's argument envisages an impasse between an unyielding trial court and a persistent convening authority. We do not believe that kind of exercise in futility was intended by Congress.[28]

The potential impasse was resolved by requiring the military judge to accede in *Priest*. The Court did expressly reserve the question of whether the Manual properly differentiated between questions of law and fact.

Frazier and *Bielecki* provide a clearer answer to the Manual construction problem. The power of the convening authority under Article 62(a) has been further extended, emasculating, if not obliterating, the law/fact distinction made in paragraph 67*f* of the Manual.

A speedy trial ruling once again supplied the subject matter in *Frazier* as the Navy Judge Advocate General certified the correctness of the Court of Military Review determination that the convening authority is empowered to overrule the military judge. Although the trial judge admittedly decided the issue as a matter of law, Judge Quinn took the opportunity to state:

> [T]he convening authority's power of review does not allow him to substitute his judgment for that of the trial judge in regard to the findings of fact underlying that trial ruling. He can, however, review the facts from two points of view: (1) Are the facts, as found by the trial judge, reasonably supported by evidence? If they are, the convening authority must accept them; but if they are not, he may disregard the findings in determining the validity of the

[25] Lowe v. Laird, 18 U.S.C.M.A. 131, 132, 39 C.M.R. 131, 132 (1969).
[26] 19 U.S.C.M.A. 293, 41 C.M.R. 293 (1970).
[27] The arguments of counsel are recounted by one of the participants in Floyd, *supra* note 20 at 132, note 29.
[28] Priest v. Koch, 19 U.S.C.M.A. 293, 298, 41 C.M.R. 293, 298 (1970).

> ruling even though he cannot make new findings of fact. (2) Do the facts found by the trial judge, which are supported by evidence, justify his ruling as a matter of law? If they do, the ruling must be sustained; if they do not, the ruling is properly reversible. In either event, the review presents a question of law.[29]

Judge Duncan, although bothered by requiring the military judge to accede to the view of the convening authority, concurred on the basis of *stare decisis*.

In *Bielecki* the military judge at a pretrial hearing dismissed a charge and specification after taking testimony and receiving exhibits on the issue of whether the accused was denied effective counsel by not having counsel appointed until 45–50 days after confinement and by not having consulted with counsel for 61 days. Almost two months later the court reconvened with the trial counsel informing the military judge that the convening authority had construed the ruling as a matter of law, overruled him, and directed that the trial proceed. The military judge, opining that he had no other option, continued the trial after denying a speedy trial motion. Finding the convening authority action lawful (as well as correct in law) Chief Judge Darden noted "that nothing is gained by describing a trial ruling as a mixed question of fact and law." [30]

Because the facts (events) were not in dispute in *Frazier* and *Bielecki*, it could be argued that a dismissal based on a purely factual basis and subsequently overruled by a convening authority has not yet been presented to the Court of Military Appeals and that paragraph 67*f* remains intact. However, under the above quoted language of Judge Quinn, later adopted by the Chief Judge in *Bielecki*,[31] the Court has established a two pronged standard for the convening authority to use in reviewing the dismissal of charges and specifications by a military judge. Within the ambit of the convening authority's right to reverse is whether the factual basis for the trial judge's ruling is supported by the evidence of record *in addition* to whether the ruling is correct as a matter of law. Although Judge Quinn proclaimed that his interpretation comported with the Manual in that the trial judge may exercise his discretion in reconsidering questions of fact, one may seriously wonder if the law/fact distinction made in the Manual retains any vitality.

What kinds of dismissals may be premised on a purely factual basis? There are few, if any. Paragraph 67*f* gives as an example

[29] 21 U.S.C.M.A. 444, 446, 45 C.M.R. 218, 220.
[30] 21 U.S.C.M.A. 450, 454, 45 C.M.R. 224, 228.
[31] *Id.*

of a question of fact as to which a military judge need not accede to the view of the convening authority, the determination that a general court-martial convening authority has unconditionally and knowingly restored a deserter to full duty status thereby effecting a constructive condonation of desertion.[32] The determination of the existence of a pardon or immunity might also be a factual question although their scope and legal efficacy would be questions of law. All of the other motions to dismiss listed in the Manual and dismissals based on due process or constitutional ground would appear to involve what are traditionally considered questions of law or what are in reality mixed questions of law and fact.[33]

Even in those instances where a dismissal was clearly based on a factual determination, the Court of Military Appeals has threatened its finality by creating a "sufficiency of evidence test" for the convening authority to apply to the rulings of the trial judge. Both in *Frazier* and *Bielecki* the Court declared that as a matter of law, "Findings that are not supported by evidence do not bind a reviewing authority." [34] Cannot a convening authority reverse the finding of a constructive condonation of desertion as unsupported by the evidence? As long as the convening authority does not expressly rely on facts not in the record and he characterizes his reversal as a matter of law he may apparently overrule any dismissal by a military judge which does not amount to a finding of not guilty.

In *United States* v. *Boehm* Judge Quinn justified his decision in part as being consistent with federal practice. Although the

[32] MANUAL FOR COURTS-MARTIAL, 1969 (REV. ED.), para 68*f*.

[33] The grounds for dismissal listed in para 68 of the MCM are (1) lack of jurisdiction, (2) failure to allege an offense, (3) statute of limitations, (4) former jeopardy, (5) pardon, (6) constructive condonation of desertion, (7) former punishment, (8) grant or promise of immunity, (9) speedy trial. It is assumed, though not certain, that military judges possess inherent powers to dismiss for the denial of due process or constitutional rights. Dismissal for lack of speedy trial was upheld prior to its inclusion in the Manual. *United States* v. *Hounshell*, 7 U.S.C.M.A. 3, 21 U.S.C.M.A. 129 (1956).

[34] 21 U.S.C.M.A. 444, 447, 45 C.M.R. 218, 221; 21 U.S.C.M.A. 450, 454, 45 C.M.R. 224, 228. In *Frazier* Judge Quinn cited *United States* v. *Kantner*, 11 U.S.C.M.A. 201, 29 C.M.R. 17 (1960) as support for this proposition. In *Kantner* COMA declared it was not bound by the statement in the staff judge advocate's review that the accused was denied the opportunity to consult with an attorney. A tracing of authority cited therein leads through United States v. DeLeon, 5 U.S.C.M.A. 747, 19 C.M.R. 43 (1955) (concerned with weight given to law officer ruling by appellate courts) back to the first case decided by COMA, United States v. McCrary, 1 U.S.C.M.A. 1, 1 C.M.R. 1 (1951) where the Court discussed the standards to be used in determining sufficiency of the evidence as a question of law.

legislative history of Article 62(a) is devoid of references to federal practice,[35] this approach has the support of one commentator who, examining pre-Code instances of the convening authority returning dismissed charges to a court-martial, discovered no occasion which would not have fallen within the contemporary government right to appeal in federal courts.[36] The Court of Military Appeals did not expressly rely on federal practice in *Frazier* and *Bielecki*, opting for a literal and broader interpretation of the word "dismissal" than federal courts have given to that word in the statute allowing government appeals in the federal judicial system.[37] By decimating the law/fact distinction of the Manual, the Court may have gone beyond the pre-UCMJ practice which Article 62(a) was intended to reflect in opposition to the historical policy against government appeals and the narrow construction normally accorded the statutes authorizing them.[38]

III. CONVENING AUTHORITY INTERFERENCE WITH INTERLOCUTORY RULINGS

The Court of Military Appeals has long supported the proposition that a convening authority should not interfere with the conduct of the court-martial proceeding itself. The power and prestige of the law officer (military judge) was strengthened,

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[35] The only discussion of Article 62(a) occurred in the House. *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess., 1177–80 (1949). A synopsis is reproduced in *United States* v. *Swartz*, _____ C.M.R. _____, (ACMR 1971).

[36] Floyd, *supra* note 20, at 136.

[37] The Criminal Appeals Act, 18 U.S.C. § 3731 (1970), provides for government appeals from "a decision, judgment, or order of a district court dismissing an indictment or information" except where the double jeopardy clause would be violated. Federal courts have construed the provision and its predecessors narrowly looking behind the apparently broad words to the legislative and judicial history of government appeals. *See Carroll* v. *United States*, 354 U.S. 394 (1957); *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (9th Cir. 1959). The government enjoyed the right of appeal to the Supreme Court from dismissals based on motions in bar or on the validity or construction of a statute until it was eliminated by The Omnibus Crime Control Act of 1970, Pub L. 91-644, Title III, § 14(a), 84 Stat. 1890 (1970). It should be noted that under 18 U.S.C. § 3731 the government in federal court also possesses the right to appeal an order suppressing or excluding evidence or requiring the return of seized property.

[38] At common law there was no right to a government appeal and in United States v. Sanges, 144 U.S. 310 (1892) this rule was confirmed by the Supreme Court for the federal system. The government was first granted a limited right to appeal in 1907. Act of March 2, 1907, 34 Stat. 1246. This and subsequent statutes have been narrowly construed. See note 37 *supra*.

and improper command influence on court members and the judicial officer has been generally checked.[39] In *United States* v. *Nivens* and *United States* v. *McElhinney* the status of the military judge is at first blush seemingly again supported by the Court's finding of unlawful intrusion into the court-martial process by the convening authority. However, closer examination of the opinions suggests otherwise.

Sergeant McElhinney was convicted by a general court-martial in Vietnam of involuntary manslaughter and willful discharge of a firearm under circumstances such as to endanger human life. Prior to trial the defense counsel requested the attendance of the accused's father as a witness on the merits. The convening authority denied the request. At an Article 39(a) session the defense counsel renewed his request before the military judge who, persuaded by the defense showing, directed the government to produce the accused's father. Upon prosecution prompting and citing of Article 62(a) and paragraph 67*f*, the convening authority directed the military judge to reconsider his ruling. At a subsequent pretrial hearing the military judge announced he had reconsidered and reaffirmed his prior ruling. Upon being informed by the trial counsel that no matter what his decision the witness would not be subpoenaed, the trial judge reflected: "So my decision has to be between continuing the trial or dismissing the charge, since I have no other alternative." [40] Presented with this dilemma the trial judge reversed his prior rulings and denied the motion for the attendance of the requested witness. Although sympathizing with the military judge's predicament, Judge Duncan, writing for a unanimous Court, stated in upholding the finding and sentence that "error arose when the trial judge succumbed to the tacit dictates of the convening authority" [41] and that "the heavy responsibility for the error is fastened to the judge." [42]

In *United States* v. *Nivens* the accused faced a general court-martial for assault with a dangerous weapon. The offense occurred at the Naval Air Station at Point Mugu, California; but after one night in pretrial confinement in nearby Port Hueneme, the accused was transferred to San Diego to accommodate an appointed military defense counsel. At a pretrial hearing the accused's civilian counsel asked for a change in the place of trial

[39] The latest compilation of case law appears in Barker, *Command Influence: Time For Revision*, 26 JAG J. 43 (1971).
[40] 21 U.S.C.M.A. 436, 438, 45 C.M.R. 210, 212.
[41] *Id.*, at 439, 45 C.M.R. at 213.
[42] *Id.*, at 440, 45 C.M.R. at 214.

back to Port Hueneme, for the accused to be returned there, and that a military defense counsel be appointed there. The purpose of the requests was to enable the accused to better assist in the preparation for trial since the witnesses and the civilian counsel lived in Port Hueneme area. The trial judge decided that the trial should be moved to the requested site, labeling his ruling a change in the location of the site of the trial as opposed to a change of venue. Recognizing that he could not order the accused transferred, the military judge suggested that the convening authority transfer the accused. Six days after this ruling the trial counsel asked for but failed in an effort to convince the military judge to reconsider his ruling. At another Article 39(a) session held soon thereafter, the military judge was presented with a letter from the convening authority stating that the military judge was being overruled with regard to the site of the trial. With deepfelt reservations in view of a recently granted government motion to move another case to Japan, the military judge acceded to the decision of the convening authority. After declaring that the trial judge can determine the situs of the trial for the convenience of the parties, the Court sustained the conviction notwithstanding the observation that "the system cannot function if the convening authority is permitted to usurp the power of the military judge." [42]

Despite the overt violations of the UCMJ and the Manual by the convening authority in *McElhinney* and *Nivens* the Court of Military Appeals tested for prejudice. The expected testimony of the accused's father in *McElhinney* was determined on appeal not to be relevant on the merits and any prejudice that may have occurred on sentencing was held dissipated by the action of the convening authority on sentence. Finding no evidence in the record that the defense was hampered in its trial preparation or could not secure witnesses, the Court in *Nivens* stated that "Under the circumstances of this case, substantial prejudice is not demonstrated." [44] The testing for prejudice in the face of unlawful convening authority action is somewhat astounding given the past sensitivity of the military justice system to command influence. It is difficult to see how respect for the rule of law is fostered by the mere winking at unjustified interference with the judicial process.

[42] 21 U.S.C.M.A. 420, 424, 45 C.M.R. 194, 198. Chief Judge Darden concurred in the result but opined that the convening authority acted properly and that the military judge did not possess statutory or regulatory authority to select the place of trial.

[44] *Id.*, at 423, 45 C.M.R. at 197.

In *McElhinney* the Court rejected the argument of appellate defense counsel that reversal is required when the convening authority usurps or interferes with the functions of the military judge. Casting part of the blame on the trial judge, Judge Duncan stated:

> We find no prior decision of this Court which dictates that in the absence of prejudicial error in such a case reversal must result. Moreover, we have stated our view of dismay over the convening authority's intervention in the instant case, but do not find such distress sufficient to justify the absolute rule the accused appears to advocate.[45]

A reading of prior case law might compel a different conclusion on the propriety of appellate reversal. All of the cases cited by the Court in *McElhinney* relating to the unlawful intrusion of the convening authority and the abdication by the military judge of his functions resulted in appellate sanction through reversal.

In *United States* v. *Berry* [46] the majority opinion reversed on the grounds of general prejudice where the president of the court usurped the functions of the law member by ruling on the admissibility of a confession and on other critical motions. When a convening authority overruled the granting of a continuance by the law officer in *United States* v. *Knudson*,[47] the Court reversed with Judge Brosman finding general prejudice and Chief Judge Quinn finding prejudice in not allowing time for the Secretary of Navy to have acted on the accused's request for termination of the proceedings against him. In *United States* v. *Whitley* [48] the removal of the president of a special court-martial after an adverse ruling to the prosecution sparked appellate reversal with Judge Latimer proclaiming that material prejudice resulted from the coercion placed on the remaining court members. Judge Ferguson, in writing the majority opinion in *United States* v. *Sears*,[49] found that the capitualtion to the will of the convening authority by the military judge in securing character and reputation witnesses for the defense was an abuse of discretion. Dis-

[45] 21 U.S.C.M.A. 436, 440, 45 C.M.R. 210, 214.

[46] 1 U.S.C.M.A. 235, 2 C.M.R. 141 (1952). Judge Latimer concurred in the result finding specific prejudice in not having one trained in the law passing on the motions as the Articles of War provided.

[47] 4 U.S.C.M.A. 587, 16 C.M.R. 161 (1954). Judge Latimer dissented finding the convening authority's action appropriate under his general powers as administrator of courts within his command.

[48] 5 U.S.C.M.A. 786, 19 C.M.R. 82 (1955). Judge Brosman concurred noting that general prejudice and military due process would support reversal even if specific prejudice was not so obvious.

[49] 20 U.S.C.M.A. 380, 43 C.M.R. 220 (1971). Judge Darden dissented finding no prejudice in view of appellant's inculpatory testimony.

missal of the charge and specification was not preceded in that case by an appellate review of expected testimony and the search for specific prejudice as was done in *McElhinney*. In the one other case cited by Judge Duncan the Court of Military Appeals granted a writ of prohibition to enjoin an Article 32 investigation when a convening authority withdrew charges from a special court-martial after the military judge granted a continuance and the defense requested the attendance of four witnesses.[50] The writ was granted without regard to the substance of expected testimony in order to prevent a flagrant disregard of proper judicial procedure.

Given the varying bases for reversal in the above cases, Judge Duncan may be technically correct that precedent does not require automatic reversal. However, it should be noted that *McElhinney* and *Nivens* are the first instances where unlawful convening authority conduct of this type has been found to exist but condemnation by the "Military Supreme Court" has not been accompanied by affirmative sanction. Similarly, past findings of the military judge subordinating himself to the opinion of the convening authority have occasioned appellate reversal.[51] Testing for prejudice in the face of undisputed command influence or interference with the judicial process is most curious in view of the presumption of prejudicial error, albeit rebuttable, that arises in other areas of command influence by the mere showing that a command lecture or briefing has occurred or that command policies have been communicated to subordinate commanders or court personnel.[52] These recent decisions of *McElhinney* and *Nivens* may manifest withdrawal from the broad inter-

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[50] *Petty* v. *Moriarity*, 20 U.S.C.M.A. 438, 43 C.M.R. 278 (1971). Judge Darden again dissented reasoning that the case was beyond the jurisdiction of the Court.

[51] In United States v. Cole, 12 U.S.C.M.A. 430, 31 C.M.R. 16 (1961) the law officer's referral to the convening authority to determine what to do with a prosecution witness who refused to be cross-examined was held an abdication of responsibility. Reversal was certain in view of the nature of the witness' testimony and the impact on court members from the direction to proceed. *Cf.* United States v. Kennedy, 8 U.S.C.M.A. 251, 24 C.M.R. 61 (1957) (dismissal where law officer consulted with staff judge advocate after both parties had joined in a motion for not guilty finding and reopened the case). In United States v. Johnpier, 12 U.S.C.M.A. 90, 30 C.M.R. 90 (1961) the Court declared invalid paragraph 55 of the 1951 Manual which allowed for suspension of the court-martial to report evidence of uncharged offenses to the convening authority.

[52] See *e.g.* United States v. Johnson, 14 U.S.C.M.A. 548, 34 C.M.R. 328 (1964); United States v. Kitchen, 12 U.S.C.M.A. 589, 31 C.M.R. 175 (1961); United States v. Hawthorne, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956).

pretation of prejudicial error that has marked most of the history of the Court of Military Appeals.[53] It remains to be seen whether these decisions coupled with those construing Article 62(a) will lead to increased tension in the administration of military justice as hypothetically posed in the following section.

IV. ANALYSIS AND CRITIQUE

Considering *Frazier*, *Bielecki*, *McElhinney*, and *Nivens* as a group, a convening authority may now be able to force a military judge to accede to his opinion on a wide range of issues heretofore thought beyond his sphere of influence. As described above, the power under Article 62(a) has been broadly construed in favor of a government appeal to the convening authority. Since every dismissal that "does not amount to a finding of not guilty" may be reviewed and reversed by the convening authority the prospect arises that even interlocutory rulings or motions for appropriate relief could be turned into Article 62(a) questions. A convening authority disagreeing with a military judge on the materiality and relevancy of a witness, the necessity for a new pretrial investigation, or the defense right to discovery of certain documents and evidence could by his refusal to cooperate place the military judge in an unenviable position. While not implying bad faith to convening authorities in general, the possibilities posed are unfortunately not so unrealistic.[54] *McElhinney*, *Nivens*, *Sears*, and others demonstrate the present reality of such circumstances.

Responsibility for error was laid on the military judge in *McElhinney* and *Nivens* but no real constructive alternatives were provided for trial judges to escape their dilemma. Thus, it may be helpful here to ponder the formal options that a military judge has in dealing with an obstructive convening authority.

1. Grant a continuance in the trial until compliance with the interlocutory ruling or motion for appropriate relief is forthcoming. This may be appropriate if the accused is not under pretrial restraint but otherwise may only unfairly hurt the accused.

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[53] U.S. DEP'T OF ARMY, PAMPHLET NO. 27-175-1, THE NATURE AND EFFECT OF ERROR, REVIEW OF COURTS-MARTIAL, PART I, INITIAL REVIEW, 175 (1962); Larkin, *When is an Error Harmless?* 22 JAG J. 65 (1968); Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 79 (1972).

[54] In present military practice the suggestion to reverse the ruling of the military judge, may very well come at the initiation of the trial counsel or the staff judge advocate, subordinates of the convening authority.

2. Prefer charges against the convening authority under Article 98 for causing unnecessary delay in the accused's case or knowingly and intentionally failing to enforce and comply with procedural rules governing courts-martial.[55] This approach was intimated in *McElhinney* by Judge Duncan. While certainly a dramatic weapon, its prior nonuse and the likelihood of its only creating increased tension probably render it inappropriate for the military judge. Again, if the accused is under restraint, this option may not benefit him nor solve the impasse in his trial.

3. Continue the trial and entertain a motion for a finding of not guilty. This approach would only succeed if the nature of the relief sought related to the merits of the case. Even then the accused is being subjected to the ordeal of a trial and judicial resources are being inefficiently used. It might also involve ethical considerations for the trial judge.

4. Seek extraordinary relief from the Courts of Military Review or the Court of Military Appeals in the form of a writ of mandamus or prohibition This avenue has not yet been tried by military judges and might be successful notwithstanding the disinclination of military appellate courts to issue writs.[56] The Court of Military Appeals has granted relief in one instance where the convening authority overruled the military judge on an *O'Callahan* issue [57] and enjoined an Article 32 investigation where the convening authority acted without cause in withdrawing charges from a special court-martial.[58] While it would delay the accused's trial, assistance from the higher military tribunals would likely secure compliance from the recalcitrant commander.

5. Dismiss the charges and specifications related to the motion for appropriate relief or interlocutory ruling. Although the propriety of this ultimate sanction was curiously not discussed

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[55] Although numerous cases have been reversed for command influence there have been no reported instances of commanders being sanctioned through the use of UCMJ Article 98. *See* dissent of Ferguson, J. in United States v. Ray, 20 U.S.C.M.A. 331, 336, 43 C.M.R. 171, 176 (1971).

[56] In its 1971 Annual Report COMA stated that relief may be granted only if the action complained of tends to defeat its jurisdiction or precludes the possibility of providing meaningful relief in the normal course of review. Only COMA has granted extraordinary relief and that has been infrequent. *See* Willis, *The Constitution, The United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27, 81 (1972).

[57] Fleiner v. Koch, 19 U.S.C.M.A. 630 (1969) (trial by general court-martial on charges of indecent assault and acts committed off post prohibited for lack of jurisdiction) The granting of the writ was discussed in Priest v. Koch, 19 U.S.C.M.A. 293, 298, 41 C.M.R. 293, 298 (1970).

[58] Petty v. Moriarity, 20 U.S.C.M.A. 438, 43 C.M.R. 278 (1971).

by the Court of Military Appeals the remedy befits government wrongdoing or gross negligence. However, the judge's dilemma may only be heightened. Since a dismissal for noncompliance with an interlocutory ruling or motion for appropriate relief would not amount to a finding of not guilty, cannot the convening authority simply review and reverse the military judge under *Frazier* and *Bielecki*? One would hope that military appellate courts would not countenance such a subversion of military criminal procedure. Article 51(b) imports finality to the interlocutory rulings of the military judge and paragraph 67*f* of the Manual forbids the convening authority from reversing motions for appropriate relief or the granting of continuances. The government or convening authority should not be allowed to do indirectly what it may not do directly, but the testing for prejudice in *McElhinney* and *Nivens* beclouds this result.

The contempt powers of the military judge are of little or no utility in this situation for the convening authority action will be taken outside the presence of the court and is not likely to be of the character made punishable by the UCMJ.[59] Reliance on the trial counsel to enforce orders of the trial judge as suggested in *McElhinney*[60] may be sufficient in some circumstances but inasmuch as the trial counsel works for the staff judge advocate who works for the convening authority the expectation that he will oppose the expressed desires of the convening authority is highly questionable. The defense counsel or the accused could be a helpful ally of the military judge in a confrontation with a convening authority. The making of an Article 138 complaint, the preferring of charges under Article 98, or the seeking of extraordinary relief may offer a solution. If military judges do require the assistance of one of the parties to secure compliance with their orders, it is not a very good commentary on the scope and efficacy of their powers.

The failing of the military judges in *Nivens* and *McElhinney*

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[59] Article 48, UCMJ provides:

> A court-martial, provost court, or military commission may punish for contempt any person who uses any *menacing word, sign, or gesture* in its *presence*, or who disturbs its proceedings by any *riot* or *disorder*. The punishment may not exceed confinement for 30 days or a fine of $100, or both. (emphasis added)

A critique and analysis of the military contempt power may be found in McHardy, *Military Contempt Law and Procedure*, 55 MIL. L. REV. 131 (1972).

[60] Judge Duncan pointed to the trial counsel's duties under paragraph 115 of the Manual to subpoena witnesses, 21 C.S.C.M.A. 436, 439, 45 C.M.R. 210, 213 (1972), but this same paragraph makes clear that in some situations the trial counsel must rely on the assistance of the commander to arrange for and compel attendance.

may have been not pursuing one of these suggested options, particularly seeking extraordinary relief or dismissing the related charges and specifications. Reluctance to use the ultimate sanction of dismissal may reflect an unsureness of their powers or a recognition of the convening authority's right of reversal, and any unwillingness to dismiss when confronted with official intransigence may be further ingrained without stronger appellate court support for trial judges. Testing for prejudice only benefits the convening authority who disposes of his immediate concern by securing a conviction and an adjudged sentence while the accused languishes the confinement or under the threat of a punitive discharge awaiting possible relief in the uncertainties of appellate review.

Fortunately, instances of convening authority reversal under Article 62(a) and interference with the interlocutory rulings of military judges are infrequent. None of the subject cases of this Note occurred in the Army. In fiscal year 1972 Army military judges in the continental United States reported only 3 reversals under Article 62(a).[61] Nevertheless, it is important for the development of a truly independent military trial judiciary that such instances be eliminated. The possibility of convening authority intrusion into the court-martial process detracts from the power and prestige of the military judge. It also affords critics of military justice a viable although narrow basis to attack the system's capacity for impartiality.

V. RECOMMENDATIONS

Perhaps the best that may be said for *Frazier*, *Bielecki*, *Nivens* and *McElhinney* is that they may prompt legislative activity by starkly painting the relationship between the military judge and the convening authority. The need for further statutory change to strengthen the powers of the military judge is clearly evident in view of the Court of Military Appeal's present "strict constructionist" attitude towards its role in the administration of military justice. A government right to appeal from certain lower court rulings which prevent prosecution is certainly a legit-

[61] This statistic was gathered through the cooperation of the Office of the Trial Judiciary, US Army Judiciary, Falls Church, Virginia. In one of these instances of several the ruling of the trial judge was vindicated by the Court of Military Appeals. United States v. Marks & Burgett, 21 U.S.C.M.A. 281, 45 C.M.R. 55 (1972). Military judges sat on over 18,000 courts-martial during fiscal year 1972.

imate public policy. However, the lodging of this extraordinary government right with the convening authority is fraught with apparent and actual shortcomings. Although the judicial authority of the convening authority has long been sanctioned he remains a layman whose primary interest is the effective operation of his command. His prior referral of charges and his post-trial powers may color his attitude toward a ruling of the trial judge notwithstanding the case law supporting his ability to fill conflicting roles.[62] The convening authority's statutory right to reversal and his control over interlocutory rulings through actual and felt muting of the military judge's power to dismiss casts a shadow over the court-martial process belying the heralded predominance of the military judge. Lastly, cries of command influence still plague the military justice system [63] and by the shifting of the government right of appeal away from the convening authority they could be ameliorated.

The proper forum for the exercise of a government right to appeal would be either the Court of Military Review, a three judge panel in a judicial circuit or area, or the senior judge of a judicial circuit or area. Logistical and time objections to a change in Article 62(a) can be discounted by first observing that there are few instances of government appeal and second, by noting that present appeals to the convening authority take time. In *Bielecki* the convening authority reversal occurred two months after the ruling by the military judge. Unusual logistical problems could be overcome by deeming written appeals sufficient to protect the interests of the parties. Removing the government right to appeal from the specter of command influence might even increase their utilization. To those concerned about the possible frustration of the prosecution by a zealous trial judge government petitions for extraordinary relief for gross abuse of discretion may be available.[64] While legislation is necessary provide adequately for a wholly judicial procedure and to make more

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[62] *See* Priest v. Koch, 19 U.S.C.M.A. 293, 41 C.M.R. 293 (1970).

[63] CONSCIENCE AND COMMAND (J. Finn, ed., 1971); Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM., L. REV. 9 (1971); Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 87–97 (1970); West, *A History of Command Influence on the Military Justice System*, 18 U.C.L.A.L. REV. 1, (1970); *Beyond the Military Justice Act of 1968: Proposed Amendments to the Uniform Code of Military Justice*, 7 COLUM. J. L. & SOC. PROB. 278 (1971).

[64] Floyd, *Extraordinary Writs in Favor of the Government*, 25 JAG J. 3 (1970).

definite the grounds for governmental appeal [65] the services might meanwhile seek improvement through executive or secretarial initiative. For example, as was done in authorizing military judges to issue search warrants,[66] a government right to appeal certain rulings of trial judges within a given period of time (30 days) to a senior judge of a judicial circuit could be provided as a first step in an alternative process under Article 62(a) without, of course, denying the convening authority his statutory prerogative.

The problems posed by the government right to appeal only represent the more dramatic half of the important issues raised by the cases discussed in this Note. Of perhaps more pressing concern is the status of the military trial judge's powers. It is essential to the continued vitality of military justice that the trial military judge be given the statutory authority to issue orders and extraordinary writs and that he be given an enforcement mechanism to secure compliance with those orders. There is comforting evidence that the military lawyers are committed to the increased growth in the responsibility and authority of the military trial judiciary.[67] *Frazier*, *Bielecki*, *Nivens*, and *McElhinney* demonstrate that necessity as they slightly puncture the concept of a truly independent trial judiciary in the military justice system. Hopefully, increased tension in the administration of military justice will not develop but efforts to fully judicialize military justice will be spurred.

JOHN T. WILLIS**

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[65] The Code Committee is considering amendments to Article 62(a) including the right of government appeal on search and seizure and confession rulings. *See* Annual Report of United States Court of Military Appeals and the Judge Advocates General, 2 (1971).

[66] Army Reg. No. 27-10, Ch. 14 (Change 8, 15 December 1971), discussed in McNeill, *Recent Trends in Search and Seizure*, 54 MIL. L. REV. 83, 94-102 (1971).

[67] The 1972 Military Judicial Seminar held at Newport, Rhode Island Naval Base on 6-8 April was characterized by the participants calling for increased responsibility and authority for the military judge including increased sentencing powers, greater control over the location of the trial, and more pretrial powers. *See* Views From Upstairs: Excerpts From Addresses to 1972 Military Judicial Seminar (printed by US Navy-Marine Corps Judiciary Activity, 9 Jun 1972). *See also*, Hodson, *The Manual for Courts-Martial, 1984*, 57 MIL. L. REV. 1 (1972).

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BOOK REVIEWS

Great Court-Martial Cases, Joseph DiMona

Grosset and Dunlap, 1972 [1]

The uniformed attorney is as introspective and sensitive as his fellow officers in the military society. Upon seeing a title such as *Great Court-Martial Cases*, his involuntary thoughts run immediately to Sherrill,[2] or Rothblatt.[3] Happily, such defensive reactions are inappropriate to Mr. DiMona's work which balances criticism of military justice with recognition of its strengths, potential, and essentiality. Nonetheless one may regret that the book does not reflect literary and legal skills equal to the author's good disposition.

Mr. DiMona's Foreword tells us that he has undertaken to present "the entire legal history of military justice in this country as seen through actual courtroom confrontations." To that end he selected twelve cases "for their legal significance and historical importance." Included are excerpts from the trials of Benedict Arnold, George Armstrong Custer, Billy Mitchell, Captain Levy and Lieutenant Calley. The stated objective is worthwhile; we do not have a good history of military law, which means that the Services do not know enough about themselves and that Congress and the Public are less well informed than they ought to be.

Unfortunately, Mr. DiMona's historiography and his law are both short of the mark, even for a first effort. History—if more than a chronology—will rank events with prevailing influences upon the actors in the context of their common time.[4] Further a good legal history should describe the structure of law plus its function of value determination in social transactions and institutions; it should also assess the continuum of interaction between law and the rest of life.[5] The first case in the book is bad history and worse law.

Benedict Arnold was tried for dealing in scarce commodities, for conversion of public vehicles to his private use, and for

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[1] [Hereafter cited as: DiMona.]

[2] R. Sherrill, Military Justice is to Justice as Military Music is to Music (1970).

[3] R. Moore and H. Rothblatt, Court-Martial (1971).

[4] H. Butterfield, George, III and the Historians, 15–36 (1969).

[5] Hurst, *Legal Elements in United States History* in Law in American History (Fleming and Bailyn Eds.), 67 (1971).

traffic with "disaffected persons" while military commander of Philadelphia. Even if the trial precipitated his treason, as asserted, the consequences for American legal history are undiscernible. Viewed as the trial of an army officer by court-martial for abuse of his authority for personal gain, the case is equally insignificant—in law or history. In his majority opinion in *O'Callahan* v. *Parker*, Mr. Justice Douglas commented on a long list of cases summarized in the Government's Brief to support the proposition that military members were customarily tried by court-martial for civilian offenses in the early days of the nation. Justice Douglas dismissed from that list

a. All those cases which were "identifiably prosecutions for abusing military position by plundering the civilian population;"

b. All those which were committed by officers because "in the 18th Century at least the 'honor' of an officer was thought to give a specific military connection" and

c. "All those courts-martial held between 1773 and 1783 [since they] were for the trial of acts committed in wartime." [6] All of the above make *Arnold* a routine trial, yet Mr. DiMona presents it as one which "in effect, set a legal precedent that would last for almost two hundred years." The author must have read the Douglas opinion because over a page of it is quoted in his chapter on *O'Callahan*.

Although he did appear to assume the narrower responsibilities of an historian, it may be unjust to charge Mr. DiMona with the rigorous obligations of legal historical research since his experience has been in news and fact gathering. A news reporter's approach to law and history may readily be entertained by thoughtful persons. Responsible reportorial procedures, reflected in careful writing and reasonable calls for action, frequently produce useful popular books on subjects ordinarily remote from general public attention. Just as the novelist, without evidence, can get the right flavor in recounting an episode of history or politics because of his sensitivity to human drives, the reporter can isolate those elements of a situation which are of general concern and communicate them more skillfully than one unpracticed in public dialogue.

As one example, Leonard Downie's recent survey of American courts [7] illustrates the value of external comment on closely-held

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[6] O'Callahan v. Parker, 395 U.S. 258 (1969).
[7] L. DOWNIE, JUSTICE DENIED (1971).

social systems and, at the same time, its danger. Downie's well-founded commentary on the absence of substantial justice in many family law and routine criminal cases accurately describes the affected groups in American society. His useful work illuminates a current need for reform by focusing on the phenomenal effects of law in life rather than on an internal view of the legal subsystem which would measure legal results by legal theory in a repetition of closed circles. However, he totally misapprehended the notion of the "Rule of Law," apparently seeing it as some sort of a standard of successful criminal investigation and prosecution rather than as the touchstone of constitutionalism in the United States.[8] Such occasional error may be taken as the price to be paid for active interest from outside the legal profession and public administration.

If we accept the risks of some legal error as above, compensation must be found in the quality of both news and communication. Mr. DiMona writes evocatively in a book which is "modern slick" in form and style. However, his sense of newsworthiness does not satisfy, nor is that quality supplied by Senator Bayh's Introduction which commends the book to historians, lawyers and persons interested in the reform of the military justice system. The author adverts to the use of trial transcripts, "many of them never before unearthed," suggesting with the flyleaf that great secrets are to be disclosed. Minimal effort in the library quickly dispels this notion; the earth has been often trod. The Arnold transcript was twice printed; the second publication was *Proceedings of a General Court-Martial for the Trial of Major General Arnold* (Philadelphia: J. Munsell, 1865) which was cited in the *Encyclopedia Britannica* (1946 and 1958 Editions). The Custer transcript was reproduced from microfilm in Lawrence A. Frost, *The Court-Martial of General George Armstrong Custer* (Norman: University of Oklahoma Press, 1968). As is well known, William Huie's, *The Execution of Private Slovik* first appeared in 1954 and is now in a 1970 Edition (New York: Dilarcarte Press, 1970).

A second failing in the selection process lies in the neglect of quality. Courts-martial themselves set no "precedents" as that term is properly used to suggest determinations of law binding in subsequent cases. Decisions of The Judge Advocate General or an appellate military tribunal with respect to a court-martial will create law for the services, but decisional law for the United

[8] *Id.* at 201.

States generally is made only when courts-martial are collaterally attacked in the US Federal Courts. In such cases military legal history and military law advance with unmistakable steps; the cases are both "good law" and "good news."

To illustrate: The author has not considered the *Swaim* case [9] which grew from a court-martial of The Judge Advocate General of the Army and determined that the President is empowered to convene courts-martial. Surely this is "great" on all counts: notoriety, decisional importance, and the display of the amenability of all ranks of military persons to trial. Additionally, the basic charges stemmed from personal financial dealings and the case would have been better than *Arnold* on that point since it occurred during peacetime and involved less abuse of position. Many other courts-martial have reached consideration by the US Supreme Court by way of *habeas corpus* or proceedings in the Court of Claims. Names such as Story,[10] Harlan,[11] and Clark [12] appear at the head of the opinions. There are some "great" cases among those proceedings—if only to show the efficacy and immediacy of civilian judicial influence on military law, but our author favors us with none of these.

The failure to treat the crucial notion of civilian control of the military developed in *Swaim* and other early cases meant that Mr. DiMona missed the thread which would have made intelligible his episodic references to Presidential or Secretarial actions. The cases of Lieutenant Howe (trial for using contemptuous words against the President), the *Pueblo* (decision not to try), the Presidio Mutiny and Sergeant McKeon (reduction of sentences), and even President Nixon's several actions in *Calley* illustrate various important aspects of military subordination which a good historian would turn into a neat bit of "process" analysis. The failure to discern a process is not only a fault defined by historiography, but also one of news reporting. Military legal history has been dominated by trends toward judicialization, diminution of the role of the commander and conformity with federal civilian practice. At least since 1951 the protections for the accused in courts-martial, *e.g.*, the right to counsel, "discovery" of prosecution evidence, and mandatory appellate review of cases, have been well in advance of civilian practice. These trends and conditions are "news," but Mr. DiMona fails us here, too.

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[9] Swaim v. United States, 165 U.S. 553 (1897).
[10] Martin v. Mott, 25 U.S. (12 Wheat) 19 (1827).
[11] Mullan v. United States, 140 U.S. 240 (1891).
[12] Hiatt v. Brown, 339 U.S. 103 (1950).

Reference to the author as a literary critic may seem out of place or trivial, but the book is full of many flat and unsupported assertions which cannot all be ignored. Mr. DiMona tells us [13] that the *MacKenzie* case became the inspiration for Herman Melville's *Billy Budd* and that, in his pages, Melville's Captain Vere "again and again confronts a 'young midshipman' with 'the most painful duty that has ever devolved on an *American* commander.'" Suffice it to observe that

a. Spencer, whom MacKenzie hanged, was a midshipman; Billy Budd was but an able seaman.

b. Captain Vere commanded a *British* ship of the line, not an American training vessel as did MacKenzie.

c. Melville's drafts (the book was posthumously published) and expert opinion do not establish the determinative influence of the *MacKenzie* case, although Melville was certainly aware of the case which occurred 20 years before he began to write Billy Budd.[14]

A second type of assertion, that containing errors concerning the content of military law, is more dangerous. The basis for jurisdiction in the *Arnold* case and the improper use of the concept of a "precedent" have already been mentioned. A third illustration may be found in the discussion of the *Slovik* case where the author says: "The Army, then as now, did not take into account a man's civilian record in a military case." [15] Admittedly, Mr. DiMona was introducing his next point—the impact of Eddie Slovik's active criminal past on Army reviewing authorities who approved the sentence to death by musketry. Nonetheless, the prior record of an accused may be introduced at trial in a variety of situations: by the accused as part of good character evidence "on the merits;" by the accused in extenuation and mitigation during sentencing proceedings; and by the Government in rebuttal or impeachment.[16]

In sum, the principal value of Mr. DiMona's effort is in its demonstration of the need for good military legal history. The subject has been opened by *Great Court-Martial Cases;* primary

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[13] DiMona at 71.

[14] H. Melville, Billy Budd, Sailor (Hayford & Sealts Eds.) (1962), 27–30, 176–77, 182–83.

[15] DiMona at 123.

[16] Manual for Courts-Martial, 1969 (Rev.), para 138f; United States v. Hamilton, 20 U.S.C.M.A. 91, 42 C.M.R. 283 (1970).

and secondary materials are ready to hand. All that remains is for the challenge to be accepted.

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The International Law of Civil War

Richard A. Falk (Editor)
The Johns Hopkins Press, 1971

Any individual with even a cursory knowledge of world affairs cannot but agree with Professor Falk's conclusion, ". . . the prevalence of domestic conflict, foreign intervention and world concern is not likely to diminish in the years ahead." [1] The Civil War Project initiated by the American Society of International Law should make a major contribution in addressing the problems of extensive internal conflicts. This series of case studies is an important step toward understanding the issues in domestic violence. At the same time a serious disservice is done to the role of law and particularly the role of international law in controlling the extent of domestic violence. This fault is found in the question and discussion of the relevancy of international legal norms to internal conflicts.

The purpose of the Project is presented as a means of clarifying patterns of state practice and illuminating policy problems.[2] By so doing, the relevancy of existing norms to internal conflict can be determined and new more relevant norms can be developed.[3] In effect this is to give content to norms or legal rules that will justify particular human conduct. This is nothing more than legalistic rationalization. This effect is quite apparent when applied in an after-the-fact manner. Thus, the rejection, even by most communist bloc states, of the rule content developed by the Soviet Union to support its invasion of Czechoslovakia. Yet rationalization before the fact of conduct is no less hypocritical and in reality may be an even greater license to steal. It obviously is an extreme example, but the development of national legal norms by Hitler legitimatized a variety of subsequent conduct that most other nations have characterized as heinous and atrocious. To question the relevancy of law to human conduct (i.e., the relevancy of international legal norms to domestic conflict) is to build a system of law on the sandy foundation of arbitrary action. Certainly the rule of law has a greater purpose than this.

[1] THE INTERNATIONAL LAW OF CIVIL WAR (R. Falk, ed. 1971) 2 [Hereinafter cited as Falk].

[2] Falk at xvi.

[3] There appears to be an implied assumption that existing norms are relevant. Query the objectiveness of conclusions of a study where the answer to a critical inquiry is assumed before the study is begun.

Every social unit from the tribe to the international community has certain values. A primary purpose of the law is to express these recognized values in a general manner. Secondly, the law protects and enhances those values through more particularized rules and norms. Thus conduct in derogation of the values is restricted, and conduct in conformity with them is encouraged. Social unit leaders are tasked with managing daily affairs and social interests so as to achieve, implement and maintain those values. This is the policy side of value oriented society. The policy maker is guiding conduct toward a recognized value by managing affairs in conformity with those values as they are expressed generally and particularly by legal norms. Management of conduct, policy decisions, become difficult and problems arise when one value is in apparent or actual conflict with a second recognized value. The problem is more acute where the content of one or both values has not been sufficiently particularized, leaving the policy maker with no, or less than adequate, parameters for direction and control of conduct.

The Covenant of the League of Nations, and subsequently the Charter of the United Nations, was a general law of the community of states. One clear value, recognized, shared and expressed by the participants in the Covenant, was peace. A second value was the independence and sovereignty of the individual states. These two values were to some extent particularized in the international legal norm expressed in the Kellogg-Briand Pact of 1928. The value of sovereignty has been particularized to an even greater extent. The traditional rule of "Thou shalt not help the insurgent; thou may help the recognized government" demonstrates this. To protect the value (sovereignty) conduct in derogation of it (help to insurgents) is proscribed by legal rule, and conduct in conformity with it (help to recognized government) is permitted. The traditional rule on neutrality is likewise a particularization of the value of peace, proscribing conduct (involvement in and extension of a belligerency) that would likely destroy peace. With the advent of the Spanish Civil War in 1936 the quality of these two values was placed in jeopardy. Germany, Italy, and, to some extent the Soviet Union, cast aside both values. As is pointed out in the second study [4] the democratic states gave a greater quality to the value of peace than to the value of sovereignty in their policy determinations. The nonintervention pact was an attempt to manage and guide conduct toward peace.

[4] Falk at 120.

The invasion of Poland by Germany and the bombing of Hawaii by Japan flipflopped the quality of these values and the democratic states then acted to guide conduct in pursuit of the value of sovereignty even at the cost of the value of peace.

Traditional rules protecting state sovereignty did not become irrelevant in the Spanish conflict any more than did the rules protecting peace become irrelevant during World War II. Rather, the value of peace was the greater shared value in 1936, while the value of sovereignty was the greater shared value in 1941, and it was the particularizing rules of the greater value that served as the parameters for policy decisions. The conflict of these values may not have been so apparent or real, had the value of peace been as particularized by adequate legal norms, as had been the value of sovereignty. Apparently states assumed that these two values were complementary. The Thomas' study demonstrates they are two separate values that, while compatible most of the time, are competitive at other times. If the drafters of the U.N. Charter had had the Thomas' study available, perhaps these two values would not once again have been juxtaposed in a complementary fashion. This series of studies points out that other values are being recognized and that all too frequently they are in competition. The rules and norms of one such value are not irrelevant to another, since conduct proscribed to protect the one may be conduct encouraged to protect the other. This requires the policy decision makers first to determine the values at stake in any particular conflict and then to guide conduct in conformity with the greater values with as little derogation as possible from the lesser values. The greater the particularity that exists for each value in the form of legal norms and rules, the easier will be the resolution of the policy problem. To fail to do this, to throw out some rules as irrelevant, is to deny the existence of the value that the rules support. One may disagree on the quality to be given to a particular value, but to deny the value itself is to deny reality.

A major task facing the international lawyer is to assist in identifying values that are recognized by participants in the international system. Secondly, they must determine as accurately as possible the extent to which each value is shared or is a clear mutual interest. With this information, the job of developing content for the values and legal norms expressing the values in a more particular fashion can be undertaken. As content and norms are particularized, many of the value conflicts can be avoided or perhaps even eliminated. If human rights is a widely shared

value and is given sufficient quality, perhaps the particular rules defining a state should be further refined. The requirement for an organized government [5] could be particularized as "a government organized to protect basic human rights." Very simplistically, intervention against a group in control of a territory, which group acted against human rights, would be perfectly permissible. As the group did not protect human rights, it would not be a government, hence no state and no problem of domestic jurisdiction or force against a state.[6] This concept is not new as evidenced by the refusal of the United States to recognize the government of Carranza in Mexico in 1915, or the governments of Brazil or China in more recent years. The Brezhnev Doctrine is another approach that limits or further particularizes the value of sovereignty in favor of other values. The failure of other values such as self-determination, human rights or modernization to compete effectively with sovereignty is a strong indication that these values are not shared sufficiently or are not given as much quality as sovereignty. The quality of the value of sovereignty may have decreased somewhat in relation to other values [7] but it is probably the most widely shared value, with the greatest quality, in the international community today. Ms. Boals recognizes that her proposed norm of modernization is unrealistic.[8] What she fails to recognize is the cause of her hopelessness. Relevancy and rightness are not involved; it is simply that she is proposing particular rules for a value that is not shared nor greatly desired by participants in the international process. The evidence she marshals in support of her desired value is scanty at best.[9] Whether the value of state sovereignty is good or is bad will remain an academic question so long as the value *is*. Any attempt to throw out the baby with the bath water is not likely to be viewed with great approval.

The conceptual difficulties with some of these studies should not, however, overshadow the tremendous contribution each of the studies makes in filling a rather large scholarly gap and in providing sources for further inquiry into this difficult problem area. These purposes [10] have been accomplished in an admirable

[5] J. BRIERLY, THE LAW OF NATIONS 137 (6th ed. 1963).
[6] U.N. CHARTER arts. 2(4) and 2(7).
[7] Falk at 27 and 319–20.
[8] *Id.* at 347.
[9] *Id.* at 341, note 12.
[10] *Id.* at xvi. One must agree with Professor Falk that it is unfortunate the number and scope of studies were not greater. This does not detract from present studies; it hopefully will encourage the American Society of International Law toward greater fulfillment of its self-imposed mandate.

manner. Exchange of prisoners of war provides only one example. Prisoner exchange has been at the heart of political debate in the United States over our disengagement from the Vietnamese conflict. If the debaters had read the McNemar study on the Congo,[11] it is doubtful they would be so quick to say, "Prisoners are never exchanged until after the hostilities are concluded." Not only do these studies provide historical sources for contemporary accuracy, but also and more importantly, they provide a basis of hope for present and future action. Actions and decisions based on utilization of international institutions,[12] noninvolvement of the super powers,[13] or morally responsible conduct by soldiers [14] should not be cast aside as hopeless. They have worked in internal conflict situations and therefore there is hope for them working again, either in present or future conflicts.

Arnold Fraleigh's study on the Algerian conflict highlights the second major contribution of these case studies. He devotes an entire paragraph [15] to asking questions on the values at stake in internal conflict. Some may criticize this, and the other studies, for asking too many questions and providing too few answers. Granted the world might be a more peaceful place if answers were given, but he does not make the drastic mistake of providing an answer before the question is formulated much less before the question is even known. The source material now available from these studies makes possible the asking of questions. Part of the remaining purpose of the Civil War Project is to develop some answers. Many persons have assumed the Algerian conflict was fought in support of the value of decolonization. His study points out the presence of another value, human rights,[16] that in contemporary society may be of greater quality and more widely shared than the value of decolonization Perhaps this also provides a better understanding for the hands-off attitude of NATO

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[11] *Id.* at 264. Prisoner exchanges, though on a more limited basis, are verified in the other studies as well.

[12] *Id.* at 285–96.

[13] *Id.* at 221–23 and 306–09.

[14] *Id.* at 54–71. In one sense it is unfortunate that the case study presents "a legal model" of domestic violence and belligerency is the American experience. Because "our" experience is a model because "we" did it right there is a great tendency to criticize the other person because "he" did not follow the model, because "he" did not do it right. The shortcoming of the United States, based on its own experience, operates from a less than realistic or objective position.

[15] *Id.* at 186.

[16] *Id.* at 185.

and the U.S.[17] In short, these studies enable the scholar and the policymaker to realize the tremendous importance of determining what value, or values, are at stake in a particular conflict. With this determination they can know better which legal norms are the parameters of their daily management decisions.

The study on Yemen concludes that that particular social organization was neither a state nor a nation.[18] Yet other states acted and talked as if it were a state. More important perhaps than the problem of values at stake for the inhabitants of Yemen, is the question of what values were at stake for other states and participants in the international system. An answer is suggested in all of these studies and that is the issue of "social revolution." It is not really appropriate to say social revolution is the value or the answer or even the right question. Certainly it includes more than just the communist—anticommunist struggle, as it is found in both the Algerian and Yemen studies. It does not fit easily into any of Professor Falk's categories.[19] These studies, and hopefully future studies of a similar nature, will permit some tentative answers to be propounded, will provide sources so that the underlying values can be pinpointed, articulated and particularized. Determination of state practice in domestic violence situations helps determine existing legal practice, but the practice is not considered a legal norm until the reason for adherence to the practice is also determined.[20] And, reason, obligation and sanction are little more than content expression of values.

A brief review of the Vietnam conflict in the context of values illuminated by these studies and policy decisions relating to those values may provide a better understanding of what has happened and an insight for better, more effective conduct in the future. The initial struggle against the French certainly appears to be in support of the value of decolonization; but was it any more "nationalistic" than the Yemen conflict? Perhaps the 1954 Geneva Accords recognized the lack of nationalism and tried to provide for a peaceful means of resolving that multination problem in lieu of intertribal, internation violence. The reaction against U.S. help and presence in the late 1950's is probably comparable

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[17] United States thinking could easily be characterized as "Communism is *per se* a denial of fundamental human rights. Communism is not really involved in this conflict. Therefore, no value of importance to the U.S. is under attack and the U.S. can stay out of it."

[18] Falk at 327–28.

[19] *Id.* at 18–19.

[20] BRIERLY *supra* note 5 at 59–62.

to the Congolese acceptance of a U.N. force but rejection of Belgian forces. The fear that "help" might mean recolonization was undoubtedly present in Vietnamese thinking as it was in the Congolese. Certain aspects of the Vietnam struggle indicate it was a standard civil war, with competing factions trying to gain political control of state machinery as was the case in the Congo. Without doubt some of the effort was directed toward that vague concept of social revolution. But perhaps it was not just that part of social revolution that is equated with communism. If not, the Algerian and Yemen conflicts offer guides for effective response. The United States has been able to respond to domestic conflicts with these values at stake without direct involvement by using the more "hopeless" techniques of benign indifference, U.N. control or good offices.

It is too late to use these values to correct past policy decisions, but it is not too late to use them to guide future decisions in Southeast Asia or some other potential Vietnam. It is not too late partially because of these case studies. The studies may not offer a lot in the way of answers; they do offer a valuable means of finding some workable answers. Therein lies the important contribution of this book to the development of international law and to a more stable world situation.

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United States Law and the Armed Forces:
Cases and Materials on Constitutional Law,
Courts-Martial, and the Rights of Servicemen

Edited by Willis E. Schug
Praeger Publishers, 1972

As with other aspects of the military, the law applicable to it has, within the last decade and especially since our deep involvement in the defense of South Vietnam, been the subject of a relatively high level of interest by the academic community and the public at large. On balance, this is good, since the interest of and scrutiny by a particular segment of society, or even better, society as a whole can have decidedly salutary results.

It is likely that *United States Law and the Armed Forces* is, at least in part, a result of this increased public interest. However, unlike most of the recent nonmilitary publications dealing with this subject matter, this book is designed for use as the basic material in a course in military law. It would be appropriate for such a course offered at either the advanced undergraduate or graduate level in a political science or similar curriculum or in law school. In this regard it is important to note that this is basically a casebook and is thus designed to be used with case method instruction.

A glance at the editor's preface and the table of contents indicates that this book presents what could be called an overview of much of the spectrum of military law. It begins with the constitutional and statutory bases of United States law concerning the Armed Forces. This deals with, of course, the powers of the Congress and the President. Next is considered a subject that Dean Schug calls, "The Personnel of the Armed Forces." It includes the law pertaining to the way persons come into and leave the military and some other aspects of personnel law.

A large segment of the book is, not surprisingly, concerned with military justice. Following that, the last part discusses such miscellaneous subjects as The First Amendment and The Military, Claims, and The Soldiers and Sailors Civil Relief Act.

Once into the work itself, it becomes obvious that in addition to being an overview, many sections are in sufficient detail to be called, at the least, an overview in depth. All in all, a great wealth of material essential to this subject has been gathered together and placed in a coherent order.

Only two faults could be found; both are minor and one is

inevitable in a book of this type. In common with many legal texts which are compilations of cases and materials, there are places where additional editor commentary would probably have proved helpful to the student. Even so, this is not so evident here as in some other casebooks and hardly detracts from its overall value as a teaching device.

The other problem is that any work dealing with a field or fields of law which are constantly changing becomes increasingly out of date. Dean Schug's book is, of course, no exception. There is really no help for this other than periodic supplementing or new editions or both. In the interim it is up to the teacher to be sure that he is up to date and thus able to supplement the book during the presentation of the course.

In sum, *United States Law and the Armed Forces* is and should continue to be of great value to students and teachers in a course in the fundamentals of military law. It sets out to describe the nature and characteristics of various types of this law and fully accomplishes its purpose.

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BOOKS RECEIVED*

1. Black, Cyril, and Falk, Richard (eds.), *The Future of the International Legal Order, Volume III, Conflict Management*, Princeton University Press, 1971, 413 pp.

2. Brittin, B., and Watson, L., *International Law for Seagoing Officers*, U.S. Naval Institute, Annapolis, Md., 1972, 536 pp.

3. Cleveland, Harlan, *The Future Executive*, Harper & Row, 1972, New York, 144 pp.

4. Coggins, Jack, *The Campaign for Guadalcanal*, Doubleday & Co., New York, 1972, 208 pp.

5. Cooper, Chester, *The Lost Crusade, America in Vietnam*, Fawcett, New York, 1972 (revised), 640 pp.

6. DuPre, Flint O., *Hap Arnold, Architect of American Air Power*, MacMillan Company, New York, 1972, 144 pp.

7. Erickson, Richard, *International Law and the Revolutionary State*, Oceana, Dobbs Ferry, N.Y., 1972, 254 pp.

8. Friedman, L., and Newborne, B., *Unquestioning Obedience to the President: The ACLU Cases Against the Legality of the War in Vietnam*, Norton & Co., New York, 1972, 284 pp.

9. Gatland, Kenneth, *Robot Explorers*, MacMillan Company, New York, 1972.

10. Glines, Carroll V., *Jimmy Doolittle, Daredevil, Aviator, and Scientist*, MacMillan Company, New York, 1972, 183 pp.

11. Hallion, Richard P., *Supersonic Flight*, MacMillan Company, New York, 1972, 248 pp.

12. Heiman, Grover, *Aerial Photography*, MacMillan Company, New York, 1972, 180 pp.

13. Kane, William E., *Civil Strife in Latin America*, The Johns Hopkins Press, Baltimore, 1972, 240 pp.

14. Kutler, Stanley (ed.), *John Marshall*, Prentice-Hall, Inc., Englewood Cliffs, N.J., 1972, 179 pp.

15. Lenton, H. T., *British Battleships and Aircraft Carriers, Navies of the Second World War*, Doubleday & Co., Garden City, New York, 1972, 160 pp.

16. Lenton, H. T., *British Submarines, Navies of the Second World War*, Doubleday & Co., Garden City, New York, 1972, 160 pp.

17. McCoy, Alfred W., *The Politics of Heroin in Southeast Asia*, Harper & Row, New York, 1972, 464 pp.

---

*Mention of a work in this section does not preclude later review in the *Military Law Review*.

18. Reitze, Arnold, *Environmental Law* (2d ed.), North American International, Washington, 1972.

19. Shearer, I. A., *Extradition in International Law*, Oceana Publications, Dobbs Ferry, New York, 1971.

20. Whitehouse, Arch, *Hero Without Honor*, Doubleday & Co., Garden City, New York, 322 pp.

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