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UNITED STATES v. DUBAY AND THE EVOLUTION OF MILITARY LAW

THE FOURTH GEORGE S. PRUGH LECTURE IN MILITARY LEGAL HISTORY[*]

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This is an extraordinary time to serve as a judge advocate. We are at war. Novel legal issues confront you in a highly challenging environment. Many of you have deployed to the combat arena in Iraq and Afghanistan. You have demonstrated great courage in the field, in the courtroom, and in the corridors of power, earning the deep respect of a grateful Nation.

Your leaders place a high value on continuing professional education. The faculty at the Legal Center and School infuses your courses with historical perspective, providing inspiration and guidance for perilous times.[1] Honoring the past, the School has built upon the foundation established by leaders such as Major General (MG) George S. Prugh (1920–2006), who initiated this lecture series.[2]

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[*] This article expands upon remarks delivered on April 28, 2010, to members of the staff and faculty, distinguished guests, and officers attending the 58th Graduate Course and the 53d Military Judges Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia. The chair is named in honor of Major General (MG) George S. Prugh (1920–2006).

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[1] *Cf.* JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 20 (2007) (emphasizing enduring constitutional values in the context of addressing contemporary national security issues).

[2] General Prugh's many contributions to the law, our national defense, and the Judge Advocate General's Corps (JAGC) included service as The Judge Advocate General (TJAG) of the Army from 1971–1975, and a distinguished career on the faculty of the McGeorge School of Law. *See infra* Appendix A (biographical summary).

This morning we shall discuss a case from the Vietnam era that has continuing contemporary significance, *United States v. DuBay*.[3] I thank the Regimental Historian, Fred L. Borch III, the faculty, and the Prugh family for the great privilege of presenting the Prugh lecture.[4]

Part I. Prologue

> *"Although many reasons dictate that cases such as* DuBay *should be given the highest visibility,* DuBay *is characterized by near obscurity."*[5]

In appellate proceedings, attorneys and judges frequently refer in shorthand terms to "*DuBay* hearings"—the procedure for post-trial factfinding—much as they might cite a statute or rule.[6] Notwithstanding its current practical import, *DuBay* at first blush would appear to offer little of historical interest. The text of the short per curiam decision in *DuBay* does not even occupy two pages in volume 17 of the decisions published by the Court of Military Appeals. The content of *DuBay*, which is closer to an order than an opinion, simply describes the mechanism to be used in post-trial factfinding proceedings. The case does not set forth any groundbreaking legal analysis. The text barely discusses precedent, and contains only a fleeting reference to litigation leading up to the decision.

But there is more to *DuBay* than appears on the face of the opinion—a point emphasized to me by a former judge advocate I met in Topeka, Kansas, during a Project Outreach visit to Washburn Law School.[7] While

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[3] 37 C.M.R. 411 (C.M.A. 1967). In treating *DuBay* as an example of evolutionary change in military law, I have drawn upon the approach to military law suggested in Walter T. Cox, III, *The Army, The Courts, and the Constitution: The Evolution of Military Justice,* 118 MIL. L. REV. 1 (1987).

[4] I thank Rose Bennett, Fred L. Borch III, John S. Cooke, William A. DeCicco, Scott Goldman, Francis A. Gilligan, Captain (CPT) Madeline Gorini, Elizabeth Parker, Michele Pearce, Mary Rohmiller, Kevin Scott, Scott L. Silliman, Charles J. Strong, and Malcolm H. Squires, Jr., for helpful comments during the preparation of the lecture and this article.

[5] HOMER E. MOYER, JR., JUSTICE AND THE MILITARY 767 (1972).

[6] *See* 2 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 25-12.20, at 25-7 (3d ed. 2006); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE, § 15-2[B][3], at 820 (7th ed. 2008).

[7] *See* United States v. Macomber, 67 M.J. 214, 215 n.1 (C.A.A.F. 2009) (noting the Project Outreach hearing at Washburn Law School). The Dean of Washburn, Thomas J.

in Topeka, the Justices of the Kansas Supreme Court graciously invited us to a meeting in their courthouse. One of our hosts, Justice Robert Davis, mentioned his service as a judge advocate in the 1960s, which included a tour in Korea and a later assignment with the Government Appellate Division. He told us that he had worked on command influence litigation that established a new form of post-trial proceeding. When we asked if the case might have been named *DuBay,* he broke into a big smile and told us that it was, indeed, *DuBay*—a case that generated national controversy and consumed more than a year of his legal career.[8] When Fred Borch kindly mentioned the Prugh lecture, I thought of the excitement in the eyes of Justice Davis when he described *DuBay* and decided to explore the history behind that two-page opinion.[9]

Romig, served as TJAG of the Army from 2001–2005, retiring in the grade of MG. *See* Biography of Thomas J. Romig, http://www.washburnlaw.edu/faculty/romig-thomas.php (last visited Aug. 17, 2011).

[8] *See DuBay,* 37 C.M.R at 411 (listing Robert Davis as one of the counsel for Appellee, United States). Robert Davis served in the Army from 1964–67, and returned to his home state of Kansas to practice law. He was appointed to the bench in 1984, and served on the Kansas Supreme Court for seventeen years, serving as Chief Justice at the time of his death on August 4, 2010. *See* www.kscourts.org/kansas-courts/supreme-court/justice-bios/davis.asp; http://www.kscourts.org/Court-Administration/News-Releases/Davis-Services-2010.pdf.

[9] MOYER, *supra* note 5 (containing substantial information and commentary about the *DuBay* litigation). *See id.* at 701–02, 715–16, 745–46, 755–68. In discussing the "near obscurity" of *DuBay* in 1972, Moyer attributed that condition to "the near-total lack of a reported, public record," and to the issuance of a brief appellate opinion that did not set forth the underlying facts or circumstances of the case pertinent to the decision. *Id.* at 767–68. *See also* Luther C. West, *Military Justice—Fort Leonard Wood Style in* CONSCIENCE & COMMAND 122–35 (J. Finn ed. 1971) (relating his observations about the litigation, supplemented with extracts from various filings in the *DuBay* cases).

The obscurity of the underlying facts and circumstances of the *DuBay* litigation has been compounded by the difficulty in assembling official records of the pertinent proceedings. During the 1966–68 period, *DuBay* and the litigation would encompass nearly one hundred cases. *See infra* Part VII. The appellate proceedings primarily involved three lead cases: (1) United States v. Phenix, No. CM 414832 (A.B.R. Mar. 17, 1967) (unpublished) (discussed *infra* Part III.A); (2) United States v. DuBay, 37 C.M.R 411 (C.M.A. 1967) (remanding *Phenix*, *DuBay*, and twelve other cases for further proceedings) (discussed *infra* Parts III–IV); and (3) United States v. Berry, 37 C.M.R 428 (C.M.A. 1967) (remanding for further proceedings), 39 C.M.R. 541 (A.B.R. 1968) (review following remand) (discussed *infra* Part VII.A). The Clerk of Court for the U.S. Army Judiciary, who serves as the official custodian of the pertinent records of trial and intermediate appellate records, has advised the author that the Army cannot locate the official copies of the proceedings and decisions at trial and before the board of review in *Phenix*, *DuBay*, and *Berry*. E-mail from Malcolm Squires, Clerk of Court for the U.S. Army Judiciary, to the author (25 January 2011, 16:55:00 EST) [hereinafter Squires e-mail] (copy on file with author). Fortunately, the clerk's office was able to locate the records in a number of other cases coming out of Fort Leonard Wood at the same time, in

Part II. The Path to *DuBay*: The Military Justice Environment from World War II to Vietnam

> *I can recall hearing conversations between members of boards along this line: "What does the Old Man want us to do?" Now, that only illustrates the fact that these court-martial boards are not attempting to decide one way or another—is the man guilty or innocent. They are only trying to find out what the captain of a ship, or the commanding officer of a station, wants done with the man.*
>
> —Rep. Gerald R. Ford (1949)[10]

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> *You see, the difficulty is you just cannot legislate good conduct; and if a commander is going to do something that is illegal, anything that the Congress can put out in the way of law—it would be very difficult to stop him. If you prohibit the general from talking or influencing his subordinates he would not act directly but if he wanted to do it he would do it through his aide or something of that sort. But I want to assure you that that is not the disposition of commanders.*
>
> —Major General Thomas A. Green (1949)[11]

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which the parties had filed extensive extracts of the transcripts and documents from the three leading cases. *See infra* note 257. In addition, the Court of Appeals for the Armed Forces retains custody over the record of appellate documents filed before the Court of Military Appeals in the *Phenix, DuBay,* and *Berry* cases. E-mail from William DeCicco, Clerk of Court, U.S. Court of Appeals for the Armed Forces, to the author (11 Mar. 2011, 09:06 EST) [hereinafter DeCicco e-mail] (copy on file with author). The records of trial and appellate proceedings available at the U.S. Army Judiciary and the Court of Appeals for the Armed Forces have provided an extensive but incomplete picture of the *DuBay* litigation. In that context, the observations made herein may well be subject to clarification and modification should the complete underlying records become available in the future.

[10] *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong. 825–26 (1949) [hereinafter 1949 House Hearings] (testimony of Rep. Gerald R. Ford). Representative Ford noted that he based his testimony "upon my experience of some 46 months in the United States Navy during World War II and on . . . the treatment that a constituent of mine has received since I took office on January 3, 1949." *Id.* at 825. Representative Ford subsequently served in the House for twenty-five years, rising to become the Minority Leader; and he later served as Vice President and President of the United States. *See* http://www.whitehouse.gov/about/presidents/geraldford.

The *DuBay* litigation focused on an acrimonious dispute between the commander of Fort Leonard Wood, Missouri, and his staff judge advocate.[12] The conflict, which surfaced during appellate litigation, primarily involved differing views on relative responsibilities of two officials: (1) the president of the court-martial; and (2) the law officer—a position held by the predecessor of today's military judge.[13] The appellate litigation, which would encompass nearly one hundred appellate cases coming out of Fort Leonard Wood, ignited a controversy that included front-page headlines in the national media.[14]

At the time of the *DuBay* litigation, the great military justice controversies of the World War II era remained fresh in the minds of many experienced officers. In the aftermath of World War II, longstanding disagreements about the nature of military justice had become the subject of a significant national debate, which led to passage of the Uniform Code of Military Justice (UCMJ) in 1950.[15] Enactment of

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[11] *Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong. 265–66 (1949) [hereinafter 1949 Senate Hearings] (testimony of MG Thomas A. Green, Judge Advocate General of the Army). Major General Green served as the Judge Advocate General from December 1945 through November 1949. *See* THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 189–91 (1975) [hereinafter JAGC HISTORY] (summarizing MG Green's career).

[12] *See* MOYER, *supra* note 5, at 701–02.

[13] *See id.* at 702. The position of president—the senior officer at the court-martial—dated from the earliest days of American military law. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 170, 967 (Government Printing Office 2d ed., 1920) (1895). By contrast, the law officer occupied a relatively new position created by Congress in the aftermath of World War II as part of the Uniform Code of Military Justice (UCMJ). Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 108, 117 (art. 26) [hereinafter UCMJ 1950]. *See* MOYER, *supra* note 5, at 534–36; Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century,* 199 MIL. L. REV. 49, 52–55 (2009).

A number of contemporary treatises provide informative overviews of the broader historical development and current status, authority, and jurisdiction of courts-martial, including 1 GILLIGAN & LEDERER, *supra* note 6, at 1-1 to -37; SCHLUETER, *supra* note 6, at 3-51. *See also* John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1 (2000) (providing a concise description of the history and purposes of military law).

[14] *See infra* Parts IV.D, IV.E, V.B, VII.B.

[15] The post-World War II reforms occurred in two stages. Congress first amended the Articles of War, focusing solely on the legislation governing the Army. Act of June 24, 1948, Pub. L. No. 80-759, ch. 625, tit. II, 62 Stat. 627. *See* Andrew S. Effron, *The Fiftieth Anniversary of the UCMJ: The Legacy of the 1948 Amendments*, THE REPORTER, December 2000, at 3–5, *reprinted in* EVOLVING MILITARY JUSTICE 169 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002) [hereinafter Effron, *1948 Amendments*]. Over the next two years, the Department of Defense developed a proposal, which Congress considered

the legislation did not end the debate about the relative roles of lawyers and commanders in the military justice system, which continued well into the Vietnam era, setting the stage for the *DuBay* litigation. We begin by summarizing the post-World War II UCMJ debate, focusing on two issues critical to the *DuBay* cases: first, the development of judicial authority through separation of the law officer from the court-martial panel; and second, the establishment of appellate bodies with the power to issue authoritative judicial rulings.[16]

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and modified, to reform and unify military justice in a single law applicable to all the armed forces—the Uniform Code of Military Justice. UCMJ 1950, *supra* note 13. In the UCMJ, Congress enacted major reforms (such as restrictions on command influence, enhanced participation by lawyers in representing the parties, and performing judicial functions at trial and on appeal) while retaining the core disciplinary features of military law (such as providing for criminal proscription of unique military offenses, and preserving the role of the commander in exercising prosecutorial discretion, selecting of the court-martial panel, and taking action on the results of trial). *See* 1 GILLIGAN & LEDERER, *supra* note 6, at 1-14 to -15; SCHLUETER, *supra* note 6, at 40–41; ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 10–13 (1956); Edmund M. Morgan, *The Background of the Uniform Code of Military Justice,* 6 VAND. L. REV. 169 (1953); Andrew S. Effron, *Military Justice: The Continuing Importance of Historical Perspective*, ARMY LAW., June 2000, 1 at 3–4 [hereinafter Effron, *Historical Perspective*].

[16] The following focuses on procedures applicable to general and special courts-martial under the UCMJ as enacted, and as in effect during the *DuBay* litigation in the mid-1960s. A general court-martial during that period consisted of a law officer and a panel composed of at least five members of the armed forces, and could impose any punishment, including death, authorized for the charged offenses. Both the prosecution and the defense were represented by qualified counsel before general courts-martial. *See* JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 89, 96–106, 191–92 (1953). A special court-martial during that period consisted of a panel composed of at least three members of the armed forces, and could adjudge a sentence including confinement and forfeitures for not more than six months, a bad-conduct discharge, and a number of other punishments. In a special court-martial, if the prosecution was represented by qualified counsel, the defense was entitled to similar representation. Otherwise, the parties could be represented at a special court-martial by non-attorneys. *See id.* at 89–90, 97–106, 192–93. *See also infra* Part VIII.A (noting legislative changes pertinent to general and special courts-martial enacted shortly after completion of the *DuBay* litigation). *See generally* UCMJ arts. 16–19, 25a, 26, 27, 38 10 U.S.C. § 816–819, 825a, 826, 827, 838 (2006) (regarding the current structure and jurisdiction of general and special courts-martial and qualifications of counsel).

A. Establishment of Judicial Authority: Transformation of the "Law Member" under the Articles of War into the "Law Officer" under the UCMJ

Congress enacted the UCMJ to address widespread concern about the administration of military justice during World War II.[17] The massive expansion of the armed forces during the war subjected more than 16 million individuals to court-martial jurisdiction.[18] The services conducted over 1.7 million trials, carried out over 100 executions, and held over 45,000 members of the armed forces in prison at the end of the war.[19] A variety of studies during and after the war identified significant problems, primarily involving undue command influence and insufficient use of qualified counsel.[20]

Notwithstanding a general consensus about the need for change, the debates about the proposed legislation produced competing proposals, ranging from minor adjustments to complete civilianization of the military justice system.[21] Within the Department of Defense, an interservice group chaired by Professor Edmund Morgan prepared draft military justice reform legislation.[22]

The drafting committee in the Department of Defense began by reviewing the existing, separate laws pertinent to the Army and Navy, as well as the numerous reports on the operation of those laws during World War II.[23] For each matter of procedure or substantive law, the Committee then decided whether the new uniform law should adopt the language followed by the Army or the Navy, or whether a new or modified text should be employed.[24]

Although the drafting group reached consensus on most issues, the group divided sharply on a number of points. Two areas of disagreement directly related to the *DuBay* litigation—allocation of the responsibility

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[17] *See, e.g.,* S. REP. NO. 81-486, at 3 (1949) [hereinafter 1949 S. REP.].
[18] John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation, and Future*, 55 MIL. L. REV. 39 (1972).
[19] *See* JONATHAN LURIE, ARMING MILITARY JUSTICE 128 (1992).
[20] *See id.* at 128–49; WILLIAM T. GENEROUS, JR., SWORDS AND SCALES 14–21 (1973).
[21] *See* Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 28–38 (1970).
[22] *See* LURIE, *supra* note 19, at 157–70; Felix Larkin, *Professor Edmund M. Morgan and the Drafting of the Uniform Code*, 28 MIL. L. REV. 7, 8–9 (1965).
[23] *See* GENEROUS, *supra* note 20, at 40–42.
[24] *See id.*

for deciding legal issues at trial, and establishment of appellate bodies with judicial powers.[25]

1. Divided Views on the Power to Decide Legal Issues at Trial

a. Pre-UCMJ Practice

In reviewing the procedure for deciding legal issues at trial, the drafting committee focused on the pre-UCMJ procedure employed by the Army. Under the Army's procedure, one of the officers detailed as a panel member in a general court-martial served as the "law member."[26] The law member, who did not preside over the court-martial, sat as a member of the panel for all purposes, including deliberation and voting on findings and sentence.[27] The president of the court-martial, not the law member, served as the presiding officer at all phases of the trial.[28] Although the law member issued rulings on interlocutory matters other than challenges, the panel members, by majority vote, could overrule the law member except on certain evidentiary issues.[29] As noted in one commentary, the law member "was not a judicial officer, but merely an 'evidentiary referee.'"[30]

In the pre-UCMJ Navy, courts-martial did not have a law member. The court-martial panel as a whole ruled on the admissibility of evidence

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[25] *See id.*
[26] Act of June 4, 1920, ch. 227, 41 Stat. 787, 788 (art. 8); MANUAL FOR COURTS-MARTIAL, U.S. ARMY ¶ 40 (1928 ed.) [hereinafter 1928 *MCM*]. Although the Articles of War expressed a preference for appointment of a judge advocate to serve as law member, the convening authority could appoint an officer from another branch to serve as the law member if a judge advocate was not available. *Id.* In the initial post-war amendments to the Articles of War, popularly known as the Elston Act, Congress mandated appointment of a lawyer as the law member for courts-martial in the Army. Act of June 24, 1948, Pub. L. No. 80-759, ch. 625, tit. II, 62 Stat. 627, 628–29 (art. 8).
[27] *See* MOYER, *supra* note 5, at 534; Henry A. Cretella & Norman B. Lynch, *The Military Judge: Military or Judge?*, 9 CAL. W. L. REV. 57, 73 (1972).
[28] 1928 *MCM*, *supra* note 26, ¶ 39.
[29] *See* MOYER, *supra* note 5, at 534. In the 1948 amendments to the Articles of War, Congress limited the power to overrule the law member under the Articles of War in three matters: a ruling on a motion for a finding of not guilty, a ruling as to the accused's sanity, and challenges. *See* Cretella & Lynch, *supra* note 27, at 72.
[30] Cretella & Lynch, *supra* note 27, at 69.

and other interlocutory matters.[31] The panel received legal advice from the judge advocate—the officer assigned to prosecute the case.[32]

b. Internal Divisions

During the drafting of the proposed UCMJ, the services were divided on the question of whether to retain the Army's practice (a law member who deliberated with the panel) or whether to provide for a law officer who acted solely in a judicial capacity.[33] The Army and Air Force favored retention of the Army's practice of having a "law member" who deliberated with the panel, while the Navy and Professor Morgan favored creation of a new position, a "law officer" separate from the panel with the power to issue authoritative rulings. Secretary of Defense Forrestal included the position of "law officer" separate from the panel in the official legislative proposal forwarded to Congress.[34]

c. Congressional Consideration

During congressional hearings, the most vigorous opposition to the proposed new law officer position came from the Judge Advocate General of the Army, MG Thomas H. Green, who expressed concern that the law officer would likely be junior in rank to the president of the court-martial—the "senior line officer in charge of the court."[35] In his view, providing for a law officer who might be junior to the court-martial president ran the danger of producing tensions that would "not be in the best interests of the Army, either the line or my department."[36] The

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[31] *See id.* at 70.
[32] *See* NAVAL COURTS AND BOARDS § 465, at 241 (1937).
[33] *See* LURIE, *supra* note 19, at 166–69, 192; Cretella & Lynch, *supra* note 27, at 76–77; 1949 Senate Hearings, *supra* note 11, at 57, 308–09 (testimony of Mr. Morgan); *id.* at 160–61 (testimony of Mr. Larkin); *id.* at 257, 261–62 (testimony of MG Thomas H. Green, Judge Advocate General of the Army); *id.* at 286–87 (testimony of Rear Admiral George L. Russell, Judge Advocate General of the Navy); *id.* at 288 (testimony of Major General Reginald C. Harmon, Judge Advocate General of the Air Force).
[34] *See* Cretella & Lynch, *supra* note 27, at 77.
[35] *See* 1949 Senate Hearings, *supra* note 11, at 261.
[36] *Id.* The Judge Advocate General of the Air Force also favored retention of the authority for a law member to deliberate and vote with the court-martial, and opposed creation of the new law officer. *See* Cretella & Lynch, *supra* note 27, at 78. *See also id.* at 77–78 (summarizing a variety of views from other witnesses who opposed creation of the law officer position).

congressional proceedings indicate that his views, as well as those of numerous other witnesses, received serious consideration in Congress; but, in the end, both the House and Senate decided to eliminate the position of law member and establish the position of law officer.[37]

The UCMJ, as enacted, mandated appointment of a law officer for each general court-martial with the authority to issue final rulings of law on most interlocutory matters and to take other authoritative judicial actions.[38] In contrast to the role of the law member under the Articles of War, the law officer of a general court-martial under the UCMJ would occupy a position similar to a judge in civilian proceedings and would not participate as a voting member of the court-martial panel.[39]

d. Seeds of Conflict: The Simultaneous Presence of the Law Officer and the President of the Court-Martial

Although Congress took a step toward creating a military judiciary by establishing the position of law officer, the UCMJ did not expressly place the law officer in charge of trial proceedings at a general court-martial. Congress retained the position of "president" of a court-martial without clearly specifying the nature of the relationship between the law

[37] UCMJ 1950, *supra* note 13, arts. 16(1), 26. *See* 1949 House Hearings, *supra* note 10, at 1152–54; 1949 Senate Hearings, *supra* note 11, at 308–09; H.R. REP. NO. 81-491, at 6, 16, 18, 26–27 (1949) [hereinafter 1949 H. REP.]; 1949 S. REP., *supra* note 17, at 6, 15, 18, 22–23. During consideration of the proposed UCMJ on the floor of the Senate, Senator Kem, who played a leading role in promoting the 1948 amendments, vigorously questioned Senator Kefauver, the floor manager of the bill, regarding the proposed transformation of the Army's law member into a judicial law officer; ultimately, Senator Kem did not offer an amendment to strike the new position of law officer. 96 CONG. REC. 1359–61 (1950). Senator Tobey filed, but did not offer, an amendment providing for a law member along the lines of the Army's system under the Articles of War. 96 CONG. REC. 1293–94 (1950); UCMJ 1950, *supra* note 13 (arts. 16(1); 26).

[38] UCMJ 1950, *supra* note 13 (arts. 16(1), 26); *see* SNEDEKER, *supra* note 16, at 96–97.

[39] *See id.*; 1949 House Hearings, *supra* note 10, at 607 (testimony of Edmund M. Morgan, Jr., Chair of the Dep't of Def. interservice committee that drafted the proposed uniform code); *id.* at 1154 (testimony of Mr. Larkin, representing the Dep't of Def.); 1949 Senate Hearings, *supra* note 11, at 40–41, 57 (testimony of Mr. Morgan). The UCMJ, however, did not authorize the law officer to rule on challenges, motions for a finding of not guilty, and rulings regarding the accused's sanity, nor did it authorize judge-alone proceedings before the law officer. *See* SNEDEKER, *supra* note 16, at 96–97, 396, 402. The law officer lacked a variety of other powers typically possessed by a civilian judge. In the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, Congress created the military judiciary and provided additional powers over these and other matters. *See* Part VIII.A *infra.*

officer of a general court-martial and the president of the court-martial.[40] For special courts-martial, no such clarification was needed. Because the legislation did not provide for assignment of a law officer to special courts-martial, the rulings on interlocutory matters and other matters of law remained within the responsibility of the special court-martial president.[41]

As a result of these developments, the legislation produced a situation in which an officer might serve in one case as the president of a special court-martial with broad powers over the proceedings, while serving in another case as the president of a general court-martial with limited, vaguely defined powers.[42] Over time, the existence of two distinct roles would contribute to the tensions that culminated in the *DuBay* litigation.

2. The Debate over Appellate Review under the UCMJ

The *DuBay* cases also involved another controversial innovation under the UCMJ—legal review by appellate bodies empowered to issue authoritative judicial rulings.[43] Prior to enactment of the UCMJ, the review of courts-martial largely relied on review by commanders and

[40] The UCMJ, as enacted, identified a number of duties for the president of a court-martial. When the accused was represented by civilian counsel, and did not wish to have detailed military counsel act as additional counsel, the president of the court-martial would excuse the detailed counsel. UCMJ 1950, *supra* note 13 (art. 27(b)). In addition, the legislation provided for authentication of a general court-martial record by the president and the law officer. *Id.* at 125 (art. 54). When Congress established the position of military judge in the Military Justice Act of 1968, 82 Stat. 1335, 1338, the legislation provided that in cases in which a military judge had been detailed, these responsibilities would be exercised solely by the military judge. *See* 10 U.S.C. §§ 837(b), 854(a) (2006) (arts. 37(b), 54(a)).

[41] *See* SNEDEKER, *supra* note 16, at 293. The members of the special court-martial panel, by majority vote, could overrule the president. *See id.* at 293–94.

[42] *See infra* Part II.B.

[43] *See* UCMJ 1950, *supra* note 13 (art. 66) (providing for appellate proceedings within each military department by a board of review for all cases in which the sentence included capital punishment, a punitive separation, confinement for a year or more, and certain other cases (codified as amended at 10 U.S.C. §§ 866 (designating the intermediate court as the Court of Criminal Appeals))); *id.* (art. 67) (providing for appeal of board of review decisions to an Article I civilian court, the Court of Military Appeals, composed of judges appointed by the President and confirmed by the Senate (codified as amended at 10 U.S.C. §§ 867, 941–946 (designating the court as the U.S. Court of Appeals for the Armed Forces))).

senior civilian officials, and each service employed different procedures.[44]

During the drafting of the UCMJ, significant differences emerged from within the Department of Defense regarding establishment of appellate courts. The disagreements focused primarily on two proposals that were ultimately endorsed by Secretary of Defense Forrestal and enacted by Congress: first, empowering the Boards of Review to issue judicial rulings binding on the Judge Advocate General and executive branch officials, and second, creating a civilian court that would review the legality of decisions made by the Boards of Review.[45]

Although the congressional hearings contained numerous expressions of support for the proposed reform of the appellate process, the hearings also reflected the continuing opposition within some elements of the Department of Defense.[46] Major General Raymond H. Fleming, presenting the views of the National Guard Bureau, opposed the establishment of new Boards of Review under Article 66 because "the Judge Advocate General is excluded from participation in their decisions . . . ."[47] He advocated retention of the Army's "highly

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[44] *See* William F. Fratcher, *Appellate Review in Military Law*, 14 MO. L. REV. 15, 44–55, 62–67 (1949); R. Pasley & F. Larkin, *The Navy Court-Martial: Proposal for Its Reform,* 33 CORNELL L.Q. 195, 217–29 (1947); Willis, *supra* note 18, at 51–54. Following well-publicized military justice controversies during World War I, the Army developed a regulatory procedure for obtaining opinions from a board of judge advocates prior to completing action in cases involving significant punishments. *See* LURIE, *supra* note 19, chs. 3, 4; Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 32 (1967); Fratcher, *supra*, at 40–43; Sherman, *supra* note 21, at 15–28; Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy,* 123 MIL. L. REV. 109 (1989). Subsequently, in the 1920 Articles of War, Congress provided statutory authority for the Army's review process, requiring the Judge Advocate General of the Army to establish one or more Boards of Review to review specified types of cases. Act of June 4, 1920, ch. 2, 41 Stat. 759 (art. 50½). Although these Boards employed procedures similar to those of appellate courts, their opinions could be treated as advisory by the Judge Advocate General. *Id. See* Morgan, *supra* note 15, at 181. In the 1948 amendments to the Articles of War, Congress established a body above the board of review, known as the Judicial Council, composed of judge advocates at the general officer level, whose opinions also could be treated as advisory in nature by the Judge Advocate General. Act of June 24, 1948, Pub. L. No. 80-759, ch. 625, tit. II, 62 Stat. 627, 635–37 (art. 50); *see* Fratcher, *supra*, at 62–67 (discussing the functions of the Judicial Council).

[45] *See* LURIE, *supra* note 19, at 169–206; Willis, *supra* note 18, at 57–63.

[46] *See* Willis, *supra* note 18, at 65–68.

[47] 1949 House Hearings, *supra* note 10, at 772. Major General Fleming noted that the testimony had been prepared by MG Kenneth F. Cramer, Chief, National Guard Bureau,

efficient" appellate structure which, in his view, "insures compliance with the law" and which, "through participation in action by the Judge Advocate General, insures justice and prevents undue interference with disciplinary powers of troop commanders."[48]

Major General Fleming also contended that establishment of a civilian appellate court to review decisions from the Boards of Review would constitute "a diversion from present procedures which would endanger the security of our country in time of war."[49] A civilian appellate court "would be a hazardous interference with the duties of the proper military authorities" and would constitute "a deterrent to swift and sure justice in the armed forces."[50] In his view, if Congress decided to create an avenue to appeal board of review decisions, the appellate court should be composed of general and flag officers with a legal background, not civilians.[51]

Major General Thomas Green, the Judge Advocate General of the Army, advocated limiting the powers of the Boards of Review to questions of legal sufficiency.[52] He recommended retention of then-current provisions in the Army's Articles of War under which decisions of the boards would not be treated as authoritative rulings but would instead be subject to concurrence by the Judge Advocate General.[53] In his view, the power to take authoritative action should reside with the Judge Advocate General and other senior officials, "all of whom have far greater responsibility with respect to the accomplishment of the military mission than do the boards of review."[54] Major General Green also strongly opposed creation of a civilian Court of Military Appeals and advocated that Congress revise the proposed Article 67 so that the Court would be composed of three military officers—the Judge Advocates General of the Army, Navy, and Air Force.[55]

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and that it represented the views both of the Bureau and the National Guard Association. *Id.* at 771.
[48] *Id.* at 772.
[49] *Id.*
[50] *Id.* at 773.
[51] *Id.* 773–74.
[52] 1949 Senate Hearings, *supra* note 11, at 262.
[53] *Id.* at 271–72.
[54] *Id.* at 258–59.
[55] *Id.* at 260. He added that if Congress were to conclude that civilian review should be established, he would prefer review in the U.S. Court of Appeals for the District of Columbia Circuit, as opposed to creating a new court. *Id.* at 264. The Judge Advocates General of the Navy and Air Force expressed varying degrees of support for and concern

Ultimately, the views in opposition to appellate reform did not prevail in the legislative process.[56] In the UCMJ, Congress provided the newly established Boards of Review and Court of Military Appeals with the authority to issue binding judicial decisions on a wide range of issues, including the legality of court-martial proceedings.[57] The tenor of the opposition to the legislation, however, underscored the challenges that lay ahead in implementing the new appellate structure.

B. Implementing Rules

During the year between the enactment of the UCMJ[58] and the effective date of the new law,[59] a working group within the Department of Defense prepared for presidential consideration a draft *Manual for Courts-Martial* (*MCM*) containing implementing rules and guidance.[60] The published drafting history of the 1951 *MCM* set forth a brief discussion of the relationship between the law officer and the president of a general court-martial.[61] After quoting extracts from the hearings on

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about the proposed changes in the appellate process, but did not present their views with the degree of opposition or level of detail expressed by General Green. *See, e.g.*, *id.* at 279–88 (testimony of Rear Admiral Russell, Judge Advocate General of the Navy); *id.* at 288–92 (testimony of Major General Harmon, Judge Advocate General of the Air Force).

[56] *See* GENEROUS, *supra* note 20, at 142–53; LURIE, *supra* note 19, at 206–55; Willis, *supra* note 18, at 63–71. Senator Tobey filed a series of amendments that included a provision reflecting the views of MG Green with respect to the boards of review, as well as a provision that would place civilian review in the U.S. Court of Appeals for the District of Columbia Circuit rather than in the proposed Court of Military Appeals. *See* LURIE, *supra* note 19, at 249–50. He did not offer these proposals as amendments to the bill during the debate on the UCMJ. *See id.*

[57] *See* UCMJ 1950, *supra* note 13, arts. 66, 67 (codified as amended at 10 U.S.C. §§ 866, 867). Review of courts-martial under the UCMJ also includes the initial review of courts-martial by commanders and staff judge advocates, *see* Article 60, UCMJ, 10 U.S.C. § 860; review of cases not subject to automatic appeal under Article 66, *see* Articles 65, 69, UCMJ, 10 U.S.C. §§ 865, 869; and review of certain types of cases that require action by senior civilian officials following the completion of judicial review, *see* UCMJ art. 71, 10 U.S.C. § 871 (2006).

[58] UCMJ 1950, *supra* note 13

[59] *Id.* § 2. *See* Executive Order 10,214 (1951).

[60] *See* UCMJ 1950, *supra* note 13 (art. 36) (current version at 10 U.S.C. § 836 (2006)) (authorizing the President to promulgate rules of evidence and procedure similar to the rules applicable to the trial of criminal cases in federal district court to the extent that they would "not be contrary to or inconsistent with" the UCMJ); CHARLES L. DECKER ET AL., DEP'T OF DEFENSE, LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, at v–vi (1951); GENEROUS, *supra* note 20, at 56–57.

[61] DECKER ET AL., *supra* note 60, at 69–70.

the UCMJ analogizing the law officer to a judge, the drafting history stated: "Because the legislative intent is so clear on this point, the law officer has been charged generally with the responsibility for the fair and orderly conduct of the proceedings."[62] By contrast, the drafting history described the president of a general court-martial as occupying "a position similar to that of the foreman of a jury" except for a "few listed" duties under paragraph 40b(1) of the 1951 *MCM*.[63] Reflecting the potential for tension between the law officer and the president of a general court-martial, the drafting history noted that the diminished status of the president might be viewed by some as an affront to the "dignity" of the officer.[64] Notwithstanding this concern, the drafters concluded that the change was desirable "to eliminate the embarrassing possibility that a ruling of the president, purportedly as presiding officer, would be overruled by the law officer by virtue of his power to rule finally on almost all interlocutory questions."[65]

The rules, promulgated in the 1951 *MCM*,[66] incorporated the statutory duties of the law officer of a general court-martial[67] and the statutory duties of the president of a special court-martial.[68] The 1951 *MCM* also provided guidance on the duties of the president of a general court-martial, as well as the president's relationship to the law officer. The *MCM* described the president of the court-martial—not the law officer—as "the presiding officer of the court," and set forth a number of specific duties regarding the management of the proceedings:

> (a) After consultation with the trial counsel and, when appropriate, the law officer, he sets the time and place of trial and prescribes the uniform to be worn.
>
> (b) As the presiding officer of the court, he takes appropriate action to preserve order in the open sessions of the court in order that the proceedings may be conducted in a dignified, military manner, but, except for his right as a member to object to certain rulings of the law officer, he shall not interfere with those rulings

[62] *Id.* at 69.
[63] *Id.*
[64] *Id.* at 69–70.
[65] *Id.*
[66] MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951 ed.) [hereinafter 1951 *MCM*].
[67] *Id.* ¶¶ 39, 57, 73, 74.
[68] *Id.* ¶¶ 41, 57.

> of the law officer which affect the legality of the proceedings.
>
> (c) He administers oaths to counsel.
>
> (d) For good reason, he may recess or adjourn the court, subject to the right of the law officer to rule finally upon a motion or request of counsel that certain proceedings be completed prior to such recess or adjournment, or that a continuance be granted. Whether a matter of recess or adjournment has become an interlocutory question will be finally determined by the law officer.[69]

In short, the 1951 *MCM* provided for a system in which the "law officer" of a general court-martial would exercise many of the powers vested in a civilian judge, but would not serve as the "presiding officer" of the court-martial. The responsibility for "presiding," including specific duties in the management of the proceedings, would be vested in the "president," who would likely be a line officer with substantial contemporary experience in the exercise of judicial powers in special courts-martial. Although the 1951 *MCM* provided a framework for resolving conflicts between the law officer and president, the military justice system under the UCMJ, as implemented by the 1951 *MCM*, retained the potential for a clash of wills between individuals with differing personalities, perspectives, and experiences.

C. The Debate Continues

During the 15-year period between the effective date of the UCMJ and the initiation of the *DuBay* cases, debate continued over the underlying structure and purposes of military justice—particularly with respect to the constitutional rights of military personnel and the relative balance of command and judicial roles.[70] In that period, differences

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[69] *Id.* ¶ 40(b)(1)(b) (internal cross-references omitted). The *MCM* also sets forth the duties of the president with respect to the closed deliberations of the court-martial panel and as spokesman for the panel. *Id.* ¶ 40(b)(1)(e)–(f).

[70] *See*, *e.g.*, *Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, *Hearings Pursuant to S. Res. 260, Constitutional Rights of Military Personnel,* 87th Cong. *passim* (1962) [hereinafter 1962 Senate Hearings]; GENEROUS, *supra* note 20, at 122–54; Gordon D. Henderson, *Courts-Martial and the Constitution:*

among the services regarding the training and assignment of law officers—as well as decisions by the Court of Military Appeals enhancing the judicial role of law officers—generated appreciation, apprehension, and congressional attention.[71]

The interest of Congress in military justice intensified in the mid-sixties as our Nation's deepening involvement in Vietnam produced a major increase in the size and impact of the armed forces, as reflected in the following table.[72]

The Original Understanding, 71 HARV. L. REV. 293 (1957); Frederick B. Wiener, *Courts-Martial and the Constitution: The Original Practice* pts. 1 & 2, 72 HARV. L. REV. 1, 266 (1958). *See also* 1962 Senate Hearings, *supra*, at 859–64 (setting forth then–contemporary bibliographies regarding military law and constitutional rights). Commentators on the first two decades under the UCMJ have described the tense and sometimes acrimonious disagreements over judicial decisions issued during that era. *See, e.g.*, LURIE, *supra* note 19, at 154–56; GENEROUS, *supra* note 20, at 133–45.

[71] *See, e.g.*, Cretella & Lynch, *supra* note 27, at 79–87; Robert E. Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 39, 64–77 (1959); MOYER, *supra* note 5, at 535–36. *See generally* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE S. COMM. ON THE JUDICIARY, 88TH CONG., CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL, SUMMARY REPORT OF HEARINGS 26–32 (1963); *Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, U.S. Senate*, 87th Cong. *passim* (1962). The Subcommittee staff included an Air Force veteran, Robinson O. Everett, who would assist Senator Ervin with a second set of hearings in 1966, and later became Chief Judge of the U.S. Court of Military Appeals. *See* 1962 Senate Hearings, *supra* note 70, at 1; Memorial Proceedings for the Honorable Robinson O. Everett, 68 M.J. LXIII, LXIV, LXIX, LXXIX–LXXX, XCIII–XCIV (2009) [hereinafter Memorial Proceedings]

[72] The laws applicable to veterans' benefits define the Vietnam era, for purposes of service in Vietnam, as covering the period from February 28, 1961, to May 7, 1975. 38 U.S.C. § 101(29)(A) (2006). The year 1964, in the chart, represents the year prior to the major buildup of American forces in Vietnam. *See* LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANCE AND CIRCUMSTANCE, THE DRAFT, THE WAR, AND THE VIETNAM GENERATION 3 (1978). The year 1966 represents the year in which the appellate courts commenced review of the *DuBay* cases, and 1968 represents the year in which the appellate courts completed review of those cases. *See infra* Part VII.

	1964	1966	1968
Active Duty End Strength[73] (Annual Draft Inductions)[74]	2,690,141 (112,386)	3,229,209 (382,010)	3,489,588 (296,406)
American Forces in Vietnam[75]	17,280	317,007	537,377
Casualties in Vietnam[76] (Deaths)	1,186 (147)	35,101 (5,008)	107,412 (14,592)
General and Special Courts-Martial[77]	43,668	41,780	65,114

In January 1966 Senator Sam Ervin, a senior member of a series of both the Armed Services and Judiciary Committees of the Senate, conducted detailed hearings on the rights of military personnel.[78] At the outset of the hearings, Senator Ervin introduced a number of military justice reform bills that proposed a significant restructuring of the roles

[73] Dep't of Def., Statistical Information Analysis Div., DoD Personnel & Procurement Statistics (Sep. 9, 2010, 08:32 AM), http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/309hist.htm [hereinafter DoD Personnel & Procurement Statistics].

[74] Selective Serv. Sys., Induction Statistics (Sep. 9, 2010, 09:34 AM), http://www.sss.gov/induct.htm.

[75] Dep't of Def., Statistical Information Analysis Div., DoD Personnel & Procurement Statistics (Sep. 9, 2010, 08:32 AM), http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/309hist.htm.

[76] Office of the Sec'y of Def., Directorate for Statistical Servs., Selected Manpower Statistics 54 (1969).

[77] Compiled from COURT OF MILITARY APPEALS, ANNUAL REPORT PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE (1964, 1966, 1968). In comparison, for the Fiscal Year 2009, with an active duty end strength of 1,488,511 and 230,500 deployed in Iraq and Afghanistan, there were a total of 2,950 general and special courts-martial. Compiled from U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE (2009) and Dep't of Def. Statistical Info. Analysis Div., DoD Personnel & Procurement Statistics. DoD Personnel & Procurement Statistics, *supra* note 73.

[78] *Military Justice: Joint Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary and a Special Subcomm. of the S. Comm. on Armed Services, U.S. Senate*, 89th Cong. (1966) [hereinafter 1966 Senate Hearings]. Lawrence Baskir, who served as counsel to the Judiciary Subcommittee, would later co-author one of the leading studies of military service in the Vietnam era. *See supra* note 72. He would also serve as General Counsel of the Army, and currently serves as a judge on the U.S. Court of Federal Claims. *See* Biography of Lawrence M. Baskir, http://www.uscfc.uscourts.gove/node/21. Robinson O. Everett also provided consulting and staff assistance for the hearings. *See supra* note 15.

of lawyers and commanders in the system.[79] The proposed bills included legislation "to enhance the independence, impartiality and competence of law officers who preside over courts-martial by creating in each service an independent 'field judiciary' made up of experienced, full-time legal officers assigned and responsible directly to the Judge Advocate General of the service."[80] Although the Ervin legislation reflected a positive view of contributions that law officers could make to the administration of military justice, the tenor of the proposals and the hearings underscored concern that law officers under the UCMJ lacked sufficient judicial authority and independence.[81]

Part III. *Dubay* and the Fort Leonard Wood Cases at the Army Board of Review

> *Manifestly the issues raised by the assignment of errors are of grave importance not only to the appellants in this case but also to other accused tried before courts similarly appointed at Fort Leonard Wood.*[82]

The *DuBay* litigation took place during the middle years of the Vietnam era, 1966-1968. Force levels and court-martial rates were on the rise as America's involvement in Vietnam deepened.[83] There were many courts-martial, but no military judges.[84] The transformation of military

[79] *See* 1966 Senate Hearings, *supra* note 78, at 3–8 (remarks of Senator Ervin summarizing the proposed legislation).
[80] *Id.* at 3. *See* S. 746, S. 749, S. 752, S. 757, 89th Cong. (1966), *reprinted in* 1966 Senate Hearings at 475, 508, 558, 601. *See also* S. 748, *reprinted in* 1966 Senate Hearings, at 497 (transforming the Boards of Review into Courts of Military Review). These bills provided the foundation for the establishment of the military judiciary in the Military Justice Act of 1968. *See infra* Part VIII.B.
[81] *See* 1966 Senate Hearings, *supra* note 78, at 3.
[82] United States v. DuBay, No. 415047, slip op. at 12 (A.B.R. Mar. 17, 1967) (emphasis omitted). A copy of the opinion is on file at the U.S. Court of Appeals for the Armed Forces in the records of the proceedings before the U.S. Court of Military Appeals for the cases consolidated with *United States v. DuBay*. 37 C.M.R 411 (C.M.A. 1967) [hereinafter USCAAF *DuBay* Records]. *See supra* note 169 (listing the cases consolidated with *DuBay*). MOYER, *supra* note 5, at 755–63, summarizes the proceedings in *DuBay* before the Board of Review, and includes a significant portion of the Board's opinion.
[83] *See supra* Part II.C.
[84] The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, which established the military judiciary, took effect on August 1, 1969. Exec. Order No. 11,476 (June 19, 1969).

law, as mandated by Congress in the aftermath of World War II, remained incomplete—a work in progress.[85]

In the Nassif Building, located just outside Washington, D.C., in the area known as Bailey's Crossroads, the Defense and Government Appellate Divisions litigated numerous appeals before the Army Board of Review.[86] The docket of cases before the Board in late 1966 included the court-martial of a soldier, Private DuBay, whose appeal ultimately would serve as the lead case in the landmark decision by the Court of Military Appeals.[87] As we shall see, the appellate history of the Fort Leonard Wood cases did not begin with the appeal filed by Private DuBay, nor did it end with the final disposition of his case.[88] The appellate history of *DuBay* began when another case tried at Fort Leonard Wood, *United States v. Phenix,*[89] landed on the desk of an appellate defense counsel in late 1966.[90]

A. The *Phenix* Inquiry

On first reading, appellate defense counsel may well have viewed the *Phenix* record as an ordinary guilty plea case involving a routine

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[85] *See supra* Part II.C.

[86] *See* JOINT REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF TRANSPORTATION FOR THE PERIOD JANUARY 1, 1967 TO DECEMBER 31, 1967, at exhibit A (noting that the Army Board of Review considered 1,424 cases during the period July 1, 1966 to June 30, 1967).

[87] *DuBay*, 37 C.M.R 411.

[88] *See infra* Part VII.B.

[89] United States v. Phenix, No. CM 414832 (A.B.R. Mar. 17, 1967) (copy on file with USCAAF *DuBay* Records, *supra* note 82). As described in note 9, above, the Army cannot locate the records in *Phenix*. The description herein of the proceedings in *Phenix* at the Board of Review is taken primarily from the discussion of *Phenix* in briefs filed by the parties at the Court of Military Appeals in *DuBay* (copies on file with the USCAAF *DuBay* Records, *supra* note 82).

[90] The available records do not include the briefs filed at the Board of Review in *Phenix*, and the filings do not otherwise identify the initial counsel assigned to the case. The initial Board of Review decision in *Phenix* identifies three counsel for *Phenix* (Major (MAJ) David J. Passamaneck, Lieutenant Colonel Martin S. Drucker, and Colonel (COL) Daniel T. Ghent) and three counsel for the Government (CPT Louren R. Wood, MAJ John F. Webb, Jr., and COL Peter S. Wondolowski). In the *DuBay* proceedings before the Board, the same counsel represented the Government, while the defense had two different counsel (CPTs Anthony F. Cilluffo and Frank J. Martin, Jr.) and two of the same counsel as in *Phenix* (Drucker and Ghent). *See DuBay*, Army Board of Review, *supra* note 82, at 1.

disciplinary matter, a standard plea inquiry, and an unremarkable sentence.[91] A more detailed examination of the documents attached to the record, however, revealed something that piqued the interest of appellate defense counsel—the use of a nonstandard format in the convening order.[92]

The typical convening order from that era listed the personnel of the court-martial under three headings in the following order: (1) "LAW OFFICER"; (2) "MEMBERS"; and (3) "COUNSEL."[93] By contrast, the Fort Leonard Wood convening order, which deviated from the standard format, included a new heading—"PRESIDENT"—at the top of the list.[94]

The Fort Leonard Wood order contained a further unique feature, designating a specific officer by name to serve as president.[95] The Fort Leonard Wood order differed from the standard court-martial convening

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[91] At his 1966 court-martial, Private Phenix pled guilty to two periods of unauthorized absence. United States v. Phenix, Commander, Fort Leonard Wood, Fort Leonard Wood, Missouri, Gen. Court-Martial Order No. 71 (Oct. 18, 1966) (on file with USCAAF *DuBay* Records, *supra* note 82). The adjudged sentence included a dishonorable discharge, total forfeitures, two years' confinement, and grade reduction to the lowest enlisted grade. *Id.* The convening authority approved the findings and reduction, and reduced the balance of the sentence to a bad-conduct discharge, confinement for one year, and forfeitures of $75 per month for twelve months. *Id.*

[92] At the time of the *DuBay* litigation, the *Manual for Courts-Martial* (*MCM*) used the term "appointing order" to refer to the official document establishing a court-martial and its membership. 1951 *MCM*, *supra* note 66, ¶ 36a. For ease of reference, this article employs the term currently used in military practice, "convening order." *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 504(d) (2008 ed.) [hereinafter 2008 *MCM*). In this article the terms "Fort Leonard Wood convening order" and "*DuBay* convening order" refer to the orders contained in the USCAAF *DuBay* Records, *supra* note 82.

The briefs of the parties before the Court of Military Appeals indicate that appellate defense counsel at the Board of Review in *Phenix* raised the initial concern about the text of the convening order employed at Fort Leonard Wood. *See* Brief for Appellant at 14, United States v. DuBay, 27 C.M.R. 411 (C.M.A. 1967) (on file with USCAAF *DuBay* Records, *supra* note 82) [hereinafter Government CMA *DuBay* Brief]; Brief for Appellee at 3, 6, United States v. DuBay, 27 C.M.R. 411 (C.M.A. 1967) (on file with USCAAF *DuBay* Records, *supra* note 82) [hereinafter Defense CMA *DuBay* Brief]. The Government CMA DuBay Brief, at 14, refers to the similarity between the convening order in *Phenix* and the order in *DuBay*. The unpublished Board of Review decision in *DuBay*, note 82 *supra*, contains the text of the convening order.

[93] 1951 *MCM, supra* note 66, app. 4, para. a.

[94] *DuBay* convening order, *supra* note 92 (on file with the USCAAF *DuBay* Records, *supra* note 82).

[95] *Id.*

order for that era, which did not list the president by position or name.[96] Under standard practice, as set forth in the MCM, the position of president was not designated by the convening authority.[97] Under the *MCM*, the most senior member of the panel present at trial served as president—even if not the most senior member listed on the convening order.[98] The *MCM*'s focus on the most senior member present, rather than the most senior member listed on the convening order, recognized the potential for removal of the most senior member listed on the convening order due to excusals or challenges.

The Fort Leonard Wood convening order included an additional nonstandard provision stating that the court-martial would be convened "at the call of the president."[99] This provision inexplicably omitted the requirement in the 1951 *MCM* for the president to confer with the law officer prior to fixing a date and time for the court-martial.[100]

Did these anomalies have any legal significance? Appellate defense counsel might well have wondered whether the nonstandard convening order raised any legal issue warranting an appellate challenge. Did the variations constitute anything more than cosmetic changes in the text of a routine order? Did Appellant suffer any prejudice from inclusion of these provisions in the convening order?[101] In the context of a guilty plea case with no indication of a defect in the plea proceedings, and where the convening authority had granted considerable sentence relief, did the convening order in *Phenix* warrant any further inquiry?

An appellate counsel who did not appreciate the historical background and controversies over the relationship between the law officer and the president of a general court-martial might well have viewed the nonstandard entries in the convening order as inconsequential and as not prejudicial. In the context of the then-recent history of military justice, however, the novel use of a nonstandard convening order from

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[96] 1951 *MCM, supra* note 66*,* app. 4, para. a.
[97] *See id.*
[98] *See id.* (providing a standard form for general court-martial convening orders); *id.* para. 40a (recognizing the possibility that the most senior member listed on the convening order might be excused, the *MCM* noted that "the senior member present at a trial, whether or not he is the senior member appointed to the court, is president of the court for the trial of that case").
[99] *DuBay* convening order, *supra* note 92 (on file with the USCAAF *DuBay* Records, *supra* note 82).
[100] 1951 *MCM*, *supra* note 66, para. 40b.
[101] *See* UCMJ art. 59(a) (2008).

Fort Leonard Wood apparently sparked appellate defense counsel's curiosity. Appellate defense counsel, who apparently determined that the anomalies at least warranted further inquiry into the relationship between law officers and court-martial presidents at Fort Leonard Wood, requested that Fort Leonard Wood provide documentation explaining the basis for the pertinent convening orders.[102] The answer from the Staff Judge Advocate (SJA) at Fort Leonard Wood did not allay counsel's concern. According to the SJA's response, the Fort Leonard Wood order had been prescribed on a Disposition Form by the Assistant Chief of Staff, G-1.[103] The SJA further stated that he could not provide appellate defense counsel with a copy of the Disposition Form because it was an "intra-staff paper."[104]

The nature of the response from Fort Leonard Wood apparently convinced appellate defense counsel in *Phenix* that the issue warranted further attention. After receiving the response, appellate defense counsel filed a supplemental assignment of errors at the Board of Review, focusing on the failure of an official at Fort Leonard Wood to provide a substantive response to the inquiry regarding the unusual convening order.[105]

B. The *Dubay* Impasse

During the period in which the Board of Review was considering the record in *Phenix,* the Board also had under review a number of other cases from Fort Leonard Wood containing similar convening orders, including *United States v. DuBay*.[106] After the defense in *Phenix*

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[102] *See* Defense CMA *DuBay* Brief, *supra* note 92, at 3–4 (chronicling requests for documents).
[103] *See id.*
[104] *See id.*
[105] *See id.* at 5–6.
[106] *See DuBay*, Army Board of Review, *supra* note 82, at 1. *Cf.* United States v. Phenix, Army Board of Review, *supra* note 89 (treating *Phenix* as a trailer to *DuBay*). Pursuant to his pleas of guilty, DuBay had been convicted of absence without leave (AWOL), escape from confinement, wrongful appropriation of a shotgun, and assault of a military police officer. The adjudged sentence included a dishonorable discharge, confinement for eighteen months, total forfeitures, and reduction to the lowest enlisted grade. The convening authority, in taking action on the case, changed the dishonorable discharge to a bad-conduct discharge, and otherwise approved the balance of the sentence. United States v. DuBay, Commander, Fort Leonard Wood, Missouri, Gen. Court-Martial Order, No. 85 (Nov. 25, 1966) (on file with USCAAF *DuBay* Records, *supra* note 82). The available

informed the Board of the unsuccessful attempt to obtain information from Fort Leonard Wood, the Board in *DuBay* ordered the Government to produce the Fort Leonard Wood Disposition Form and any other related documents prescribing the format of court-martial convening orders.[107] The Government complied and filed copies of the requested documents with the Board.[108]

In the interval between the Board's order and the production of documents, the defense filed an assignment of errors in *DuBay*.[109] The defense contended that the convening authority had exercised unlawful command influence over the law officer and the panel members through a series of actions, including by his alteration of the format of the convening order.[110]

After considering the defense filings and the documents provided by the Government, the Board concluded that the record of trial contained "little or no evidence" on the purpose or effect of the non-standard convening order.[111] The Board determined that it was necessary to obtain "additional evidence, outside the entire record of trial, in order to make a full and complete disposition of the assigned errors."[112] Although the Board identified nine specific areas of inquiry that required factual development, the Board concluded that it did not have the authority under then-existing law either to conduct a hearing at the Board level or to order a court-martial to conduct a hearing to resolve factual disputes on matters outside the record of trial.[113]

The Board then took the unusual step of returning the record of trial in *DuBay* to the Judge Advocate General without reaching a decision on

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appellate records do not indicate why the Board of Review chose *DuBay* as the lead case for addressing the command influence issues at Fort Leonard Wood.

[107] *See* Government CMA *DuBay* Brief, *supra* note 92, at 3 (quoting a portion of the Board's order dated December 21, 1966); *DuBay*, Army Board of Review, *supra* note 82, at 9–10 (recounting the order for information to supplement the record).

[108] *See* Government CMA *DuBay* Brief, *supra* note 92, at 3 (summarizing documents filed on January 5 and January 16, 1967, in response to the Board's order).

[109] *See id.* (describing defense filing on January 13, 1967).

[110] *See DuBay*, Army Board of Review, *supra* note 82, at 3–4 (listing Appellant's assigned errors).

[111] *Id.* at 9.

[112] *See id.*; Government CMA *DuBay* Brief, *supra* note 92, at 3 (describing the Board's order issued on January 16, 1967). MOYER, *supra* note 5, at 755–56.

[113] *DuBay*, Army Board of Review, *supra* note 82, at 9–11.

the merits of the findings and sentence.[114] The Board directed the Judge Advocate General to obtain statements from witnesses at Fort Leonard Wood to illuminate factual issues regarding the origin, purpose, intent, and effect of the novel convening orders.[115]

At that point, the Board of Review and the Judge Advocate General of the Army entered into an unprecedented confrontation. Treating the Board's transmission as a mere "request" and not as a court order, the Judge Advocate General returned the record to the Board, asserting that the Board must first consider the Government's response before taking any action.[116] Shortly thereafter, the Government unsuccessfully sought an enlargement from the Board for the purpose of obtaining affidavits on the issues raised by the Board.[117] Subsequently, the Government filed its response to the defense assignment of errors.[118] Thereafter, the Board once again transmitted the record to the Judge Advocate General "for such action as is necessary to accomplish the taking of testimony and receiving evidence consistent with the intent of the [prior] Order of the Board of Review . . . ."[119]

The terse transmissions between the Board of Review and the Judge Advocate General raised a number of questions. Did the Board have the authority to conduct factfinding proceedings at the Board level? Did the Board have authority to order the Judge Advocate General to conduct factfinding as part of a UCMJ proceeding? Did the Judge Advocate General have the authority to conduct such independent factfinding? If so, what procedures would be used?

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[114] *See id.* at 11.

[115] *See id.* (setting forth an extract from the Board's order dated January 16, 1967). MOYER, *supra* note 5, at 755 (stating that the Board directed an inquiry "by a panel composed of the commissioner of the board and the directors of the Defense and Government Appellate Divisions"). According to Moyer, the Board's order may have been stimulated not only by the unusual convening order, but also by an affidavit prepared by a defense counsel at Fort Leonard Wood. *See id.* (citing West, *supra* note 9, at 128, 133).

[116] *See* Government CMA *DuBay* Brief, *supra* note 92, at 4 (describing the Judge Advocate General's response, dated January 24, 1967).

[117] *Id.* (describing the Government's filing on January 26, 1967, and the Board's action on January 27). The Board also rejected the Government's motions for reconsideration and oral argument on the motion. *See id.*

[118] *Id.*

[119] *Id.* (quoting the Board's order dated January 31, 1967).

For several weeks, the record and the unanswered questions remained with the Judge Advocate General.[120] Eventually, the Government filed a motion asking the Board to recall the record from the Judge Advocate General and reach a decision on the merits of the appeal.[121] In a further effort to address the Board's substantive concerns about courts-martial at Fort Leonard Wood, the Government also moved to file affidavits from some of the participants at the command level.[122] Defense counsel objected, contending that the use of affidavits would deprive the defense of the opportunity to cross examine the affiants about matters exclusively within their knowledge.[123] The Board denied the Government's motion to file the affidavits as well as the motion to recall the record from the Judge Advocate General.[124]

At that point, the Office of the Judge Advocate General once again returned the record to the Board.[125] After stating that the Judge Advocate General had "denied" the Board's factfinding request, the Chief of Military Justice, on behalf of the Judge Advocate General, added the following blunt directive: "The record of trial . . . is returned for review pursuant to . . . Article 66, in accordance with the initial referral of 15 December 1966."[126]

C. The Board's *Dubay* Decision

In March 1967, the Board of Review concluded that any further attempt to enlist the cooperation of the Judge Advocate General would be unavailing.[127] At that point, the Board faced a dilemma. How could it decide critical appellate issues involving disputed facts if it could not order post-trial factfinding?

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[120] *See id.*
[121] *See id.* at 5 (describing the Government's motions filed on February 21, 1967).
[122] *See id.*
[123] *See DuBay*, Army Board of Review, *supra* note 82, at 10.
[124] *See* Government CMA *DuBay* Brief, *supra* note 92, at 5–6, (describing the filings by the parties on February 23, 24, and 27, and the Board's order issued on March 1, 1967).
[125] *See DuBay*, Army Board of Review, *supra* note 82, at 12.
[126] *See* MOYER, *supra* note 5 at 755–56 (describing events leading up to the Board's decision in *DuBay* as an "institutional tug of war" involving "friction" between the Board and the Judge Advocate General).
[127] *DuBay*, Army Board of Review, *supra* note 82, at 12–13.

1. The Absence of a Factfinding Procedure

After recounting the development of the command influence issue on appeal, the Board of Review focused on the need to reach a decision on the merits, noting the "grave importance" of the issues not only to the appellant, but also to all other servicemembers tried under similar orders at Fort Leonard Wood.[128] The Board then focused on post-trial factfinding:

> An examination of the record before us, together with a limited consideration of the affidavits offered by the government, convinces us that the issues are real and warrant a hearing on the matter where sworn testimony can be taken, with each party enjoying the right of cross-examination in matters which are largely subjective in nature and exclusively within the personal knowledge of the respective witnesses.[129]

The Board determined, however, that it lacked the authority to either hold or order such a hearing under then applicable case law.[130] In the Board's view, "we have been denied the tools with which to work."[131] Recognizing that a different approach would be needed to resolve the merits of the appeal, the Board employed the only power that it viewed as viable—the application of an appellate standard of review to assess the alleged error:

> Under these circumstances, we have no choice but glean what we can from the record before us and resolve all doubtful issues in favor of the appellants.[132]

2. The Merits of the Appeal

With respect to the merits of the appeal, the Board characterized the nonstandard convening order as improper, noting that the *MCM* made no provision for naming a "president" in convening orders.[133] After

[128] *Id.* at 12.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 6–7.

comparing the orders recently issued at Fort Leonard Wood with those previously issued at that installation, the Board determined that the new orders constituted a "radical and sudden change"[134] and that the change "was deliberate and with intent."[135]

The Board next considered whether issuance of the improper orders constituted unlawful command influence. The Board observed that the convening order had elevated the status of the presiding officer, which permitted an inference "that the convening authority intended to subordinate the law officer to the president and make the 'PRESIDENT' the dominant figure of the court-martial."[136] Noting that the president "on at least six different occasions interjected himself into matters normally considered to be within the province of the law officer," the Board addressed the underlying issue presented by the record by asking, rhetorically: "Could [the president's] conduct be mere coincidence? We think not. He was simply exercising what he thought to be the prerogative of his newly emphasized status."[137] The Board added a pointed observation about the consolidated cases from Fort Leonard Wood: "Interestingly, the sentence imposed on each appellant was the maximum authorized pursuant to the law officer's instructions."[138]

Underscoring the unique procedural setting of the case, the Board concluded: "[W]e are constrained to find, under the total circumstances with which we are faced and on the record before us, that improper command influence so permeates this record of trial as to require the setting aside of the findings of guilty and the sentence."[139] The Board set aside the findings and sentence and authorized a rehearing.[140]

3. The Systemic Deficiency

To ensure that both the Judge Advocate General and the Court of Military Appeals would focus on the underlying problem for the military justice system posed by this type of case, the Board added a postscript. The Board's *DuBay* opinion expressly observed that "a different result

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[134] *Id.* at 7.
[135] *Id.*
[136] *Id.* at 13.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*

might be reached had we been able to secure the sworn testimony of the various witnesses who could shed some light on the issues involved . . . ."[141]

D. The Government Requests a Factfinding Hearing

With further review likely at the Court of Military Appeals, the parties continued to focus on the underlying developments at Fort Leonard Wood. In the course of making further inquiries, the defense obtained an affidavit from the recently retired Fort Leonard Wood Staff Judge Advocate (SJA), James C. Starr.[142]

The affidavit described a series of disagreements between Colonel (COL) Starr and the installation commander, Major General T.H. Lipscomb, about the administration of military justice, including the circumstances leading to the development of the unique format for convening orders at Fort Leonard Wood.[143] In the affidavit, COL Starr stated that he "was of the opinion that the format of the . . . order conflicted with the pertinent Army regulation," but he believed that his opinion would have no impact on the commanding general "because he had informed me on a number of occasions that the violation of Army regulations did not concern him as long as it did not constitute a violation of statute."[144] Colonel Starr viewed the convening order as "an undisguised attempt to warn the law officer not to overstep the duties and prerogatives of his position and to impress upon the law officer, counsel, and the other members of the court the importance and influence of the president."[145]

Although COL Starr stated that he had been troubled by these developments, he decided to not voice his objections because he assumed that no law officer "would be cowed into abdicating any of the duties imposed on him by the law and I believed that the influence exercised by a president over the other members depended more on his personality than on his rank or position."[146]

[141] *Id.*
[142] *See* First Affidavit of Colonel James C. Starr (Mar. 24, 1967) (No. CM 415047) [hereinafter First Starr Affidavit] (on file with USCAAF *DuBay* Records, *supra* note 82).
[143] *Id.* at 1–4.
[144] *Id.* at 3.
[145] *Id.*
[146] *Id.*

Colonel Starr also attached affidavits from a trial counsel at Fort Leonard Wood and a panel member presenting differing recollections as to whether the commanding general had encouraged members to return maximum sentences so that he would have "plenty of room to operate when making deals."[147] The balance of the affidavit reflected the commanding general's dissatisfaction with the state of military justice at Fort Leonard Wood, COL Starr's concern about the potential impact of those mattters particularly in the area of sentencing, and his efforts to avoid implementing actions that would result in unlawful command influence.[148]

The Starr affidavit, and its attachments, prompted a major change in the Government's position regarding the nature of the Fort Leonard Wood cases. Up to that point, the Government sought to focus attention on the written record, suggesting that the format of the convening orders involved nothing more than an inconsequential administrative alteration. The Starr affidavit, however, placed the issue in a different context because it raised significant questions of fact that could not be answered on the face of the record. Did the actions of the commanding general constitute an attempt to improperly influence the conduct of the law officer or members of the court-martial panel? Did the Staff Judge Advocate succeed in ensuring that the actions of the convening authority would not prejudice the rights of the accused servicemembers? If not, did any of those actions inject unlawful command influence into particular cases?

Faced with those questions, and more, the Government filed a motion requesting that the Board of Review reconsider its decision in *DuBay* in light of the Starr affidavit.[149] The Government "conceded that this additional information 'raises the possibility of the appearance of command influence and warrants further inquiry into the issue of whether or not in fact there was command influence in the case at bar.'"[150] In its petition for reconsideration, the Government contended that the circumstances did not call for setting aside the findings and

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[147] *Id.* Appendix B (Affidavit from Captain Glover setting forth the allegation); *id.* (Affidavit from COL Wilson denying the allegation). *See also* First Starr Affidavit, *supra* note 142, at 9–10 (relating COL Starr's partial agreement with some but not all aspects of the allegations).

[148] First Starr Affidavit, *supra* note 142, at 4–10.

[149] *See* Government CMA *DuBay* Brief, *supra* note 92, at 18 (describing Government Motion for Reconsideration before the Board of Review).

[150] *See id.* (quoting Government Motion for Reconsideration at the Board of Review).

sentence, but instead warranted a limited hearing upon remand to decide whether command influence existed as a matter of fact.[151] The Board denied the Government's motion for reconsideration.[152]

Acting through Panel No. 2, which issued the decision in *DuBay*, the Board subsequently acted on a number of other cases involving similar convening orders from Fort Leonard Wood, including the case that had ignited the controversy, *United States v. Phenix*.[153] As in *DuBay*, the Board set aside the findings and sentence in each case and authorized a rehearing.

E. The *Moore* Alternative

On April 24, 1967, five weeks after Panel No. 2 issued *DuBay*, a different panel, Panel No. 3, issued an opinion in *United States v. Moore*,[154] presenting an alternative perspective on the events at Fort Leonard Wood. The Board in *Moore* viewed the Starr affidavit and the related filings as reflecting "friction" between the SJA and the commanding general.[155] *Moore* concluded that such evidence, without specific allegations of improper actions, did not demonstrate that the "appearance of unlawful command influence" had been "factually, reasonably raised."[156] *Moore* perceived that the convening authority had been "think[ing] out loud" with his legal adviser as to matters under the

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[151] *See id.* at 18–19.
[152] *See id.* at 7 (providing *DuBay* chronology).
[153] Among the cases remanded under the Board's *DuBay* order, the Clerk of Court, U.S. Army Judiciary, has located the records in *United States v. Scott*, No. 415325 (A.B.R. Apr. 7, 1967) and *United States v. Farmer*, No. 415214 (A.B.R. Apr. 18, 1967), but has been unable to locate the records in *United States v. Baxter*, No. 415530 (A.B.R. Apr. 21, 1967); *United States v. Johnson*, No. 415354 (A.B.R. Apr. 18, 1967); *United States v. Buchanan*, No. 415138 (A.B.R. Apr. 7, 1967); *United States v. Richmire*, No. 414957 (A.B.R. Apr. 7, 1967); *United States v. Jones*, No. 414896 (A.B.R. Mar. 17, 1967); *United States v. Phenix*, No. 414832 (A.B.R. Mar. 17, 1967); *United States v. Tell*, No. 414862 (A.B.R. Mar. 17, 1967). Squires e-mail, *supra* note 9.
[154] United States v. Moore, No. 414897, slip op. at 6 (A.B.R. Apr. 24, 1967) (on file with USCAAF *DuBay* Records, *supra* note 82).
[155] *Id.* at 2.
[156] *Id.* at 3. *See id.* at 5–6. The opinion distinguished the Board's decision to order a rehearing in another Fort Leonard Wood case, *United States v. Christmas*, CM 415475, (A.B.R. Apr. 7, 1967), in which the Government had conceded prejudicial error based upon case-specific post-trial evidence from the trial counsel concerning unlawful command influence in the form of communication by the commanding general to a panel member. *Moore*, No. 414897, slip op. at 6.

convening authority's control, which fell short of taking an action that would result in unlawful command influence.[157] *Moore* also described the defense view of the convening orders as a "previously unnoticed molehill" that "cannot be converted to resemble a constitutional Mount Everest."[158]

In the course of rejecting the issues raised by the appellant, the Board in *Moore* offered the following view of the defense case: "[W]e decline the implied invitation to imagine an impropriety and then act fearlessly on the basis of an assumption apparently spun out of the purest gossamer."[159] The opinion gave even less attention to the opinion issued by Panel No. 2 in *DuBay*, treating that case as not worthy of substantive analysis: "This Board is aware of the decision in the case of CM 415047, *DuBay*, et al., but declines to follow its rationale."[160] In that light, the Board affirmed the findings and sentence in *Moore*.[161]

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[157] *Id.* at 3–4.
[158] *Id.* at 6.
[159] *Id.* at 3.
[160] *Id.* at 6.
[161] *Id.* Panel No. 3 affirmed the findings and sentence in at least one other Fort Leonard Wood case that has been located by the Clerk of Court for the U.S. Army Judiciary. United States v. Keller, No. CM 414830, slip op. at 6 (A.B.R. May 4, 1967) (on file with the Clerk of Court, U.S. Army Judiciary). In *Keller*, the Board rejected a defense motion to take sworn testimony on the command influence issue. Following receipt of the First Starr Affidavit, the defense sought reconsideration. Although the Government opposed the motion for reconsideration, the Government's response stated that the Board should order a factfinding hearing by a different convening authority if the Board viewed the filing as raising the issue and if the Board viewed the factual record as inadequate. Government Reply, April 4, 1967 (attached to the *Keller* record retained by the Clerk of Court, U.S. Army Judiciary). Subsequently, the Government filed a Supplemental Reply, stating: "The information contained in the affidavit of Colonel James C. Starr, together with the inclosures thereto, raises the possibility of the appearance of command influence and warrants further inquiry into the issue of whether or not in fact there was command influence in the case at bar." Supplemental Reply for Reconsideration of the Board's Denial of Motion to Take Sworn Testimony and Other Evidence and for Stay of Proceedings (Apr. 10, 1967) [hereinafter Supplemental Reply] (attached to the *Keller* record retained by the Clerk of Court, U.S. Army Judiciary). The Government, in *Moore*, also submitted a supplemental filing with the Board of Review, stating that the Starr affidavits and related materials warranted further factual inquiry into the issue of unlawful command influence. *See* Brief for Appellee before the Court of Military Appeals in *Moore*, at 2 n.1 (June 5, 1967) [hereinafter Government CMA Moore Brief] (on file with USCAAF *DuBay* Records, *supra* note 82). The Board, in both *Keller* and *Moore*, disagreed with both the Government and the Defense and affirmed the findings and sentence without authorizing any further factual inquiry.

Part IV. *DuBay* at the Court of Military Appeals

> *In the nature of things, command control is scarcely ever apparent on the face of the record . . . .*[162]

A. The *DuBay-Moore* Split and the Government's Dilemma

The sharply divergent panel decisions in *DuBay* and *Moore* appeared to provide good candidates for review by the Court of Military Appeals, either upon petition filed by the accused or upon certification by the Judge Advocate General.[163] In *DuBay*, the decision as to whether an appeal should be filed in that case rested primarily with the Judge Advocate General.[164] In *Moore*, where the Board of Review ruled against the accused, further review of the case would depend on whether: (1) the accused filed a petition for review, or (2) the Judge Advocate General decided to certify the case irrespective of the action taken by the accused.

The differing evaluations in *DuBay* and *Moore* of the events at Fort Leonard Wood provided the Judge Advocate General with both an opportunity and a dilemma. The opportunity: to select an approach that would meet the best interests of the Army. The dilemma: how to define the best interests of the Army in the face of the following considerations.

First, was it possible to identify an outcome that satisfactorily addressed the immediate Fort Leonard Wood cases while also furthering

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[162] United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967), *quoted in* Calley v. Callaway, 519 F.2d 184, 214 (5th Cir. 1975).

[163] At the time of the *DuBay* litigation, the Boards of Review did not have statutory authority for en banc reconsideration by the full Board of decisions made by individual panels, such as the divergent opinions by the separate panels in *DuBay* and *Moore*. *See* United States v. Henderson, 52 M.J. 14, 19–20 (C.A.A.F. 1999) (describing developments leading to the enactment of such en banc authority in the Military Justice Act of 1983, Pub. L. No. 98-209, § 7(b), 97 Stat. 1402 (art. 66(f)). In that context, if the Judge Advocate General wished to obtain further review of the panel decisions, the opportunity to do so would come through direct review by the Court of Military Appeals either upon petition by the accused or upon certification by the Judge Advocate General. UCMJ 1950, *supra* note 13, art. 67. Similar procedures apply under current law. *See* UCMJ art. 67 (2008) (concerning appeals from the Courts of Criminal Appeals to the Court of Appeals for the Armed Forces).

[164] As the prevailing party before the Board of Review, it was unlikely that Private DuBay would have sought further review. DuBay could have sought review of the Board's decision to authorize a rehearing rather than dismiss the charges, but he did not do so.

the long-term interests of the Army in the administration of military justice? Second, would the interests of the Army be served best by focusing solely on the competing analyses offered by the different panels in *DuBay* and *Moore*, or should the Judge Advocate General recommend an approach not taken by either panel? Third, should the Judge Advocate General promptly certify the cases to the Court of Military Appeals, or should that decision be deferred pending clarification as to whether the accused would file a petition in *Moore* and, if so, whether the Court of Military Appeals would grant review of any issues in that case?

These questions, in turn, presented the Judge Advocate General with at least three significant options.[165] First, the Judge Advocate General could decide to not certify any case, with a view toward confining the impact of the litigation to the Board of Review, where the views expressed by Panel No. 3 in *Moore*, rather than the views of Panel No. 2 in *DuBay*, might prevail in future cases. This option would require the Government to oppose successfully the anticipated defense petition for review in *Moore* at the Court of Military Appeals. As a practical matter, it would also require the Government to accept the result in *DuBay* and the trailer cases decided by Panel No. 2, while enabling the Government to focus its efforts on persuading the Board of Review to reject *DuBay* and apply *Moore* as a precedent in future cases.

As a second option, the Judge Advocate General could certify both *DuBay* and *Moore*, an attractive option if it appeared likely that the Court of Military Appeals would grant the petition in *Moore*. Under this option, the Government would attempt to persuade the Court of Military Appeals to apply the reasoning in *Moore* to affirm *Moore* and reverse *DuBay*.

The third option also would involve certification of both *DuBay* and *Moore*, but with use of the briefs to underscore the Government's position on the desirability of further factfinding in the event that the Court viewed the cases as raising the issue of unlawful command influence.[166]

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[165] The following illustrates various options and is not meant to suggest that the Judge Advocate General focused either directly or exclusively on these particular options.
[166] The Government had taken a similar position in *Keller*, a case reviewed by Panel No. 3—the Panel that rejected the defense position in *Moore*. *See supra* note 161.

B. The Judge Advocate General's Choice

The responsibility for sorting through these variables and options rested with Major General Robert McCaw, the Judge Advocate General of the Army.[167] Major General McCaw, who was no stranger to the military justice controversies at Fort Leonard Wood,[168] settled upon a certification strategy that maximized the Government's flexibility in litigating the various Fort Leonard Wood cases before the Court of Military Appeals. Seizing upon the differing results in *Moore* and *DuBay*, the Judge Advocate General certified different issues in each case.

In *DuBay*, the certified issue asked: "Was the Board of Review correct in denying the government the opportunity to litigate the interlocutory issue of improper command influence in an appropriate judicial forum?"[169] In *Moore*, the issue certified by the Judge Advocate

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[167] Major General McCaw served as the Judge Advocate General from January 1964 through June 1967. *See* JAGC HISTORY, *supra* note 11, at 238–39 (summarizing MG McCaw's career).

[168] According to testimony during subsequent proceedings in the *DuBay* cases, MG McCaw had discussed the developing military justice problems at Fort Leonard Wood with the installation commander, MG Lipscomb, and the SJA, COL Starr. *See Berry* Record, *infra* note 257, at 440–43 (recording testimony of MG McCaw). Additionally, MG McCaw had dispatched the Chief of the Military Justice Division in the Office of the Judge Advocate General to undertake an on-site examination of the ongoing military justice issues at Fort Leonard Wood. *See id.*

[169] Certificate for Review (May 4, 1967) (filed by the Judge Advocate General of the Army in the Court of Military Appeals on May 4, 1967, in *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967)) (capitalization omitted) (on file with USCAAF *DuBay Records*, *supra* note 82). On the same day, the Judge Advocate General filed a similar certificate in the following cases, which subsequently were consolidated with *DuBay* at the Court of Military Appeals: United States v. Lieurance, No. 20,149 (docketed with *DuBay*); United States v. Liverar, No. 20,149 (docketed with *DuBay*); United States v. Fitzgerald, No. 20,150; United States v. Jones, No. 20,151; United States v. Phenix, No. 20,153; United States v. Tell, No. 20,154; United States v. Buchanan, No. 20,158; United States v. Richmire, No. 20,161; United States v. Scott, No. 20,163; United States v. Baxter, No. 20,174; United States v. Farmer, No. 20,175; and United States v. Johnson, No. 20,177. *See* Order, *DuBay, supra* (May 29, 1967) (consolidating the aforementioned cases with *United States v. Moore*, No. 20,179). Subsequently, the defense, which had filed a cross-petition for grant of review, withdrew its petition and the proceedings focused solely on the certified issue. *See* Order, Dubay (June 19, 1967) (granting motion) (on file with USCAAF *DuBay* Records, *supra* note 82).

General asked: "Was the board correct in affirming the findings and sentence?"[170]

The dual certification approach created two different scenarios under which the Government might prevail. Under the issue certified in *Moore*, if the Court of Military Appeals decided to affirm the conclusion of Panel No. 3—that the Fort Leonard Wood situation did not reasonably raise the issue of unlawful command influence—such a conclusion would end the litigation on terms favorable to the Government. If, however, the Court viewed the record as establishing an open question, the issue certified in *DuBay* would provide a vehicle for the Government to demonstrate in a post-trial factfinding hearing that the circumstances either did not amount to unlawful command influence, or that such actions had not tainted the cases at issue. Although the dual certification strategy ran the risk that the Court of Military Appeals would agree with Panel No. 2 and set aside the findings and sentence in both cases, the Judge Advocate General apparently decided that the circumstances warranted the risk in view of the opportunity to obtain appellate approval of a factfinding procedure to address the number of cases still on appeal from Fort Leonard Wood.

The issue certified in *DuBay* also reflected an opportunity for the Judge Advocate General to focus attention on the ongoing systemic concern identified by the Board of Review—how to address issues central to the fairness of the military justice system, such as allegations of unlawful command influence, in which critical information often did not emerge until after the completion of the trial. In such cases, the absence of a factfinding procedure, combined with the application of appellate standards of review, could result in Board decisions setting aside the results of trial in a significant number of cases. Each rehearing resulting from such a decision would require an extensive commitment of time on the part of commanders, staff judge advocates, panel members, law officers, counsel, and witnesses. If, however, the post-trial questions of fact could be resolved in a carefully circumscribed proceeding before a single decision-maker—the law officer—the proceedings would be less burdensome than full rehearings on findings and sentence. In the midst of the Vietnam War, with its huge commitment of manpower and resources, the *DuBay* litigation provided

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[170] Certificate for Review of the Judge Advocate General of the Army filed with the Court of Military Appeals in *United States v. Moore*, No. 20,179 (May 4, 1967) (capitalization omitted) (on file with USCAAF *DuBay Records*, *supra* note 82).

the Judge Advocate General with an opportunity to obtain appellate approval of a procedure for conducting limited post-trial hearings restricted narrowly to specific issues before a single factfinder.

C. Briefing *Moore* and *Dubay* at the Court of Military Appeals

1. High Stakes, Swift Action

The Judge Advocate General filed the certified issues in both *Moore* and *DuBay* on May 4, 1967. On May 26, the Government filed a consolidation motion that underscored the significance of the case to the Army.[171] In the motion, which requested consolidation of *Moore*, *DuBay*, and the related cases certified by the Judge Advocate General, the Government also requested "an order advancing the oral argument" so that the cases could be "heard in the present term."[172]

In support of the motion, the Government focused attention on the volume of cases affected by the certified issues:

> The allegation of unlawful command influence is being leveled at every court-martial tried since 1 August 1966 at Fort Leonard Wood, Missouri, and it is anticipated that said allegation will continue[] to be leveled at all subsequent cases coming out of the Fort Leonard Wood jurisdiction. Fort Leonard Wood is one of the most active general court-martial jurisdictions in the country.[173]

The Government also addressed the broader impact of the certified issues, contending:

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[171] Motion for Leave to Consolidate for Purposes of Oral Argument and for an Order Advancing the Oral Argument so it may be Heard in the Present Term [hereinafter Motion for Leave] (filed May 24, 1967) (on file with USCAAF *DuBay Records*, *supra* note 82).

[172] *Id.* at 1. The Judge Advocate General also filed a "petition for writ in the nature of certiorari and mandamus" in an effort to compel the different panels within the Army Board of Review to employ a uniform approach in addressing the *DuBay* litigation. *See* United States v. Board of Review Nos. 1, 2, 4, 37 C.M.R. 414 (C.M.A. 1967); MOYER, *supra* note 5, at 763. *See infra* note 247 (noting the Court's disposition of the writ petition).

[173] *Id.* at 2.

> If this cause is not heard during the present term, and an orderly disposition made of the question of unlawful command influence at Fort Leonard Wood, disruption of chaotic proportions will be visited upon . . . the orderly administration of military justice in the Army.[174]

Defense counsel did not dispute the significance of the cases, but offered a different perspective on the question of consolidation. Appellate defense counsel in *Moore*, for example, urged the Court to reject the consolidation motion, contending that *DuBay* and *Moore* rested upon different factual and legal grounds.[175]

The Court granted the Government's motion to consolidate.[176] In the order, the Court called for separate briefing in the two lead cases, treating the Government as the appellant in *DuBay* and the defense as the appellant in *Moore*.[177] Reflecting the time sensitivity of the cases, the Court established a briefing schedule providing for all submissions by June 22, and set June 30, 1967, as the date for oral argument.[178] The schedule enabled the Government to tailor its arguments to fit the differing Board decisions in each case, and enabled the defense to shape the arguments to meet both the differing Board decisions and any unique interests of the separate clients.

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[174] *Id.*

[175] Opposition to Motion, *supra* note 171, at 2 (filed May 24, 1967) (on file with USCAAF *DuBay* Records, *supra* note 82). The Defense contrasted the Board's final decision in *Moore* with the interlocutory posture of *DuBay* in an effort to separate the two cases. The Defense, however, did not oppose hearing the case during the present term of the Court, and suggested scheduling oral argument in both sets of cases on the same day. *Id*.

[176] Order, May 29, 1967, at 2 (on file with USCAAF *DuBay* Records, *supra* note 82). The Order, which applied to all of the Fort Leonard Wood cases certified by the Judge Advocate General, stated that briefs would be filed only in *Moore* and *DuBay*. *Id.*

[177] *Id.*

[178] Under the schedule, each party would have the opportunity to submit an initial brief (the Government in *DuBay* and the Defense in *Moore*), and each party would have an opportunity to submit a responsive brief (the Government in *Moore* and the defense in *DuBay*). *See id.*

2. The Government's First Brief—A Preference for Factfinding

On June 2, 1967, the Government filed its brief as Appellant in *DuBay*.[179] The Government first sought to undermine the legal basis for the Board's decision to disapprove the findings and sentence, asserting that the Board had improperly exhibited a "fixed and inflexible" attitude;[180] that it had acted hastily; and that the Board's orders reflected a bias against the Government.[181] In particular, the Government argued that the Board had erroneously rejected the Government's appellate affidavits;[182] conflated weight with admissibility;[183] presumed error instead of placing the burden on the defense;[184] erred in precluding the Government from showing an absence of prejudice;[185] acted on the basis of "suspicion, innuendo, and speculation";[186] and improperly sought to "embroil" the Judge Advocate General "in the internal operations of the Boards of Review on interlocutory matters."[187] In the Government's view, the Board had acted in an arbitrary and imperious fashion, as exemplified by its repeated rejection of the Government's motions to file certain documents, to obtain additional time for briefing, and to proceed through oral argument.[188]

Although the Government viewed the Board of Review as without authority to conduct a post-trial factfinding hearing,[189] the brief contended that the Board's authority to order such a hearing at the court-martial level presented a different question.[190] In that regard, the Government took the position that the Board could order a limited rehearing on the question of unlawful command influence at the court-martial level without first setting aside both the findings and sentence. After noting that the UCMJ did not contain express statutory authority

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[179] Four counsel signed the Government's brief: Captains William R. Steinmetz and Robert E. Davis; MAJ John F. Webb; and COL Peter S. Wondolowski. Government CMA *DuBay* Brief, *supra* note 92.
[180] *Id.* at 8–9.
[181] *Id.* at 19–20.
[182] *Id.* at 9–10.
[183] *Id.*
[184] *Id.* at 23–24.
[185] *Id.* at 24–25.
[186] *Id.* at 26.
[187] *Id.* at 39.
[188] *Id.* at 7–20.
[189] *Id.* at 27–40.
[190] *Id.* at 41.

for such a remand,[191] the Government contended that ample authority could be found in the Court's decisions authorizing the Board to remand cases for sentence-only rehearings even though the UCMJ did not have express statutory authority for such limited rehearings.[192] The Government also relied on cases in which the Court of Military Appeals had ordered post-trial factfinding by Boards of Review in cases involving allegations of inadequate representation by counsel and defective post-trial processing.[193] In addition, the Government cited two cases in which the Supreme Court ordered limited rehearings when post-trial developments warranted further consideration of discrete issues.[194]

The Government urged the Court to take the following action in *DuBay* and the related cases that had granted similar relief: (1) reverse the decisions of the Board of Review; (2) order the Board to consider pertinent affidavits and the Government's concessions in those cases; (3) direct the Board to determine whether "as a matter of fact an issue of unlawful command influence is raised which requires further inquiry"; (4) authorize the Board, if it determined that such an inquiry is required, to order "a rehearing for the limited purpose of determining whether command influence did exist"; and (5) authorize the Judge Advocate General to remand the case to a new convening authority for a limited hearing before a new court-martial.[195] Under the procedure proposed by the Government for a limited rehearing, the factfinding would "be conducted by the law officer with the accused present."[196] The convening authority would be empowered to take a variety of actions based upon the results of the limited hearing.[197]

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[191] *Id.*
[192] *Id.* at 41–42 (citing, inter alia, United States v. Miller, 27 C.M.R. 370 (C.M.A. 1959)).
[193] *Id.* at 32–33 (citing United States v. Allen, 25 C.M.R. 8 (C.M.A. 1957) and United States v. Hardy, 29 C.M.R. 337 (C.M.A. 1960)).
[194] *See id.* at 43 (citing Giles v. Maryland, 386 U.S. 66 (1967) (remanding to consider impact of evidence previously undisclosed by the Government); Jackson v. Denno, 378 U.S. 368 (1964) (remanding for state court to hold limited hearing on the voluntariness of a confession)).
[195] *See* Government CMA *DuBay* Brief, *supra* note 92, at 45–46.
[196] *Id.* at 46.
[197] *Id.* (recommending that, upon a finding of unlawful command influence, the convening authority could dismiss the charges or order a full rehearing; and if the hearing did not result in such a finding, the case would be forwarded to the Board of Review for the completion of appellate proceedings).

Emphasizing that the litigation involved an "active general court-martial jurisdiction" where the issue of command influence involved "numerous cases" and "many witnesses," the Government urged the Court to view a limited rehearing as "the only feasible and practicable solution."[198] The Government contended that the proposed procedure was "in conformity with the law"; that it would employ "all attendant powers" of a court-martial for acquiring and evaluating evidence; and, most important, that it would establish a procedure for addressing authoritatively the facts concerning allegations of command influence, "an issue which the Government has the right to have . . . litigated."[199] In that context, the Government emphasized the value of a limited rehearing in circumstances where the issue of command influence was "raised for the first time on appeal," where affidavits were "insufficient to determine whether an issue is raised requiring further inquiry," and where the Board of Review otherwise lacked the means to obtain and evaluate additional evidence.[200]

Beyond the position advocated by the Government in *DuBay*, the brief is particularly notable for what it did not say. The Government did not cite or otherwise discuss the decision by the Board in *Moore;* it did not assert that the Board erred by considering post-trial submissions; nor did it assert, as did Panel No. 3 in *Moore*, that the post-trial filings did not warrant a further inquiry into the issue of unlawful command influence.

3. The First Defense Brief: A Preference for Dismissal of Charges

Three days after the Government filed its brief as the appellant in *DuBay*, the defense filed its brief as the appellant in *Moore*.[201] In contrast to the Government's approach in *DuBay*, defense counsel in *Moore* sought to tie the two cases together. Not surprisingly, the defense in *Moore* asserted that developments in the *DuBay* case required reversal of the *Moore* decision by Panel No. 3. The defense cited the Government's recognition, in the supplementary pleading filed with the Board of

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[198] *Id.* at 44.
[199] *Id.* at 46.
[200] *Id.* at 45.
[201] Brief for Appellant (Defense) at 46, United States v. Moore, 27 C.M.R. 411 (C.M.A. 1967) [hereinafter Defense CMA Moore Brief] (on file with USCAAF *DuBay* Records, *supra* note 82). The following counsel signed the defense brief: Captains Anthony F. Cilluffo and Paul V. Melodia; and COL Daniel T. Ghent.

Review, that the convening order and the post-trial affidavits warranted a factual inquiry on the subject of unlawful command influence.[202] The defense brief in *Moore* set forth a detailed analysis of the Starr affidavit and other post-trial filings to illustrate the disintegrating relationship between the staff judge advocate and commanding general at Fort Leonard Wood on military justice matters, including remarks that led the staff judge advocate to have concern that the commanding general had engaged in improper discussions with court-martial panel members regarding the severity of sentences.[203]

The defense, which described the affidavits submitted by the Government from the commanding general and others as incomplete and misleading, suggested that the existence of unlawful command influence had been demonstrated by the "coincidence of complaints by general courts-martial presidents against the law officer, threats against challenging counsel, the belligerency between president and law officer, and the General's actual contact with a court president . . . ."[204]

The defense in *Moore*, having cited with approval the Government's concession of the need for a factfinding inquiry into the possibility of command influence, did not expressly reject the possibility of addressing the situation in *Moore* through further factfinding, noting that "[m]inimally, these affidavits raise the issue of command influence which may be resolved by further inquiry."[205] The defense, however, declined to request factfinding as a form of relief, and instead focused on the consequences of the proceedings, particularly the fact that Moore had already completed his adjudged sentence.[206] In that context, the defense contended that the charges should be dismissed on the grounds that Appellant's "state of military limbo should not be perpetuated by a belated investigation and ultimately a rehearing at this late date."[207]

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[202] *Id.* at 2 n.1.
[203] *Id.* at 4–8.
[204] *Id.* at 13. Later in the brief, the defense offered a detailed list of alleged instances of unlawful command influence. *Id.* at 17–19.
[205] *Id.* at 20.
[206] *Id.* at 22.
[207] *Id.*

4. The Government's Answer in Moore*: Preserving the Potential for Affirming the Findings and Sentence with or without Factfinding*

On June 22, 1967, the Government, as Appellee, filed its brief in *Moore*.[208] The Government's position reflected an unwillingness to express agreement with the analysis of the Board of Review in *Moore*, in which Panel No. 3 had held that the facts alleged in the post-trial filings were insufficient to warrant further inquiry into the issue of unlawful command influence.[209] Instead, the brief reminded the Court that in the aftermath of the Starr affidavit, the Government had urged the Board of Review in *Moore* to undertake a further inquiry into the issue of unlawful command influence.[210] The brief then cited the Government's brief in *DuBay*, noting that the "Government has urged and continues to urge in this case and other cases in which further inquiry into the issue of unlawful command influence is warranted, that inquiry be by a limited hearing at the trial level before properly constituted court[s]-martial."[211]

Although expressing a preference for factfinding, the Government sought to keep alive the possibility that the Court would affirm the Board of Review in *Moore*, thereby affirming the findings and sentence. The Government observed that the Court of Military Appeals was not bound to accept the Government's earlier concession before the Board that the issue of command influence had been raised by the Starr affidavit, nor was the Court required to agree with the Government's position in other cases that a limited hearing was required.[212] In the Government's view, the Court was bound to accept the decision of the Board in *Moore* so long as "it cannot be said that . . . no reasonable man could reach the conclusion reached by the intermediate appellate court."[213] On that basis, the Government contended that the Court could affirm the Board's decision in *Moore* without the necessity of agreeing with the Board's view of the evidence, so long as "the decision reached can be sustained by the operation of reasonable minds."[214] The Government endeavored to

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[208] The following counsel signed the brief: Captain William R. Steinmetz, MAJ John F. Webb, and Lieutenant Colonel David Rarick. Government CMA Moore Brief, *supra* note 161, at 34.
[209] The Government argued that the convening order, although irregular, did not establish the existence of unlawful command influence, *id.* at 7–8; but also recognized that the Starr affidavit had raised the issue. *Id.* at 9.
[210] *Id.* at 2
[211] *Id.* at 2 n.1.
[212] *Id.* at 3–4.
[213] *Id.* at 5 (citations, capitalization, and internal quotation marks omitted).
[214] *Id.* at 13.

portray the Board's view of the facts as within the realm of reason, even if both the Government and the Court might not agree with the Board's view of the facts.[215]

Recognizing, however, that the Court might reject the Board's decision in *Moore* if the Court determined that "reasonable men could not differ on the import of the matters placed before them in the post-trial proceedings," the Government argued in the alternative that the Court should order a limited factfinding hearing on the issue of unlawful command influence.[216] Seeking to counter the defense request for dismissal of charges, the Government emphasized that it had not conceded the existence of unlawful command influence and had agreed only that the information in the Starr affidavit warranted "further inquiry into the issue of whether or not in fact there was command influence in the case at bar."[217] In short, the Government's brief sought to preserve two options for upholding the findings and sentence: (1) a decision by the Court of Military Appeals affirming the Board's decision in *Moore*; and (2) a decision by the Court of Military Appeals to order a factfinding hearing in *Moore* that might produce a result favorable to the Government.

5. The Defense Opposes Factfinding in DuBay

On June 22, the same day that the Government filed its *Moore* brief, the defense filed its answer in *DuBay*.[218] The defense in *Moore*—the losing party before the Board—had sought to preserve the option of a factfinding hearing. By contrast, the defense in *DuBay*—the prevailing party in a Board decision dismissing the charges—vigorously opposed the Government's suggestion that the Court of Military Appeals could order a factfinding hearing.

In language reflecting the increasingly tense nature of the litigation, the defense sharply criticized the Government's suggestion that the Board's approach in *DuBay* demonstrated a lack of impartiality—describing that portion of the Government's brief as an "attempted back-

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[215] *Id.* at 30.
[216] *Id.* at 6, 30.
[217] *Id.* at 31 (capitalization omitted).
[218] Defense CMA *DuBay* Brief, *supra* note 92.

door assassination by innuendo" that was "baseless" and that had "no place before this Honorable Court."[219]

The defense launched two substantive challenges to the Government's proposal for a limited hearing on command influence. First, the defense contended that factfinding by the Board of Review could not include any matters external to the record of the court-martial submitted to the Board under Article 66.[220] The defense, however, did not address the merits of the Government's reliance on cases in which the Court of Military Appeals had authorized post-trial factfinding where adequacy of counsel and post-trial processing issues were involved.[221] Instead, the defense simply noted that the Government had opposed factfinding in those cases, and that the refusal of the Judge Advocate General to engage in factfinding in *DuBay* as ordered by the Board reflected a pattern of treating the Board as lacking judicial powers.[222] The defense characterized the actions of the Judge Advocate General as constituting an illegal effort to "set himself up as a supervisory authority" over the Board.[223]

The defense described the Government's proposal for a limited factfinding hearing before a law officer as a "pseudo-court" for which there was no precedent.[224] The defense added that a hearing limited to factfinding on the issue of command influence would constitute a waste of time because it would address only one narrow question without addressing the remaining issues in the case.[225] The defense also rejected the Government's reliance on case law permitting sentence-only rehearings on the grounds that command influence at Fort Leonard Wood had infected both the findings and the sentence.[226]

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[219] *Id.* 6.
[220] *Id.* at 13–15.
[221] *See supra* Part IV.C.2.
[222] Defense CMA *DuBay* brief, *supra* note 92, at 13–15.
[223] *Id.* at 16.
[224] *Id.* at 18.
[225] *Id.*
[226] *Id.* at 19.

In terms of relief, the defense asserted that the Government's approach to the case had resulted in unlawful appellate delay, warranting dismissal of the findings in the sentence without any further proceedings.[227] In the alternative, the defense asked the Court to affirm the decision of the Board, which had set aside the findings and sentence and ordered a full rehearing.[228]

6. The Second Starr Affidavit

Following the submission of briefs, the appellate counsel in both *DuBay* and *Moore* each filed a second affidavit from COL Starr, the retired judge advocate who had been the SJA at Fort Leonard Wood during the trial of the cases at issue in the pending appellate proceedings.[229]

The new affidavit provided additional details of an incident, briefly mentioned in the prior affidavit, in which the SJA stated that he had been directed by the commanding general to provide specific instructions to court-martial members and counsel at special courts-martial regarding the standards and procedures for the disposition of speedy trial motions.[230] After much consternation, the SJA provided such guidance, only to be informed that the General subsequently rescinded his guidance.[231] The defense did not draw a direct link between the guidance and any particular court-martial, but instead contended that the affidavit provided further information on matters previously briefed by the parties.[232]

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[227] *Id.* at 21.
[228] *Id.*
[229] James C. Starr, Affidavit (June 14, 1967) [hereinafter Second Starr Affidavit]. The second Starr Affidavit is attached to the Motion to File Additional Appendices (June 23, 1967) (filed in *DuBay* and in *Moore*). The Court granted the motion to file in each case on June 26, 1967 (copies of the pertinent documents are on file with USCAAF *DuBay Records*, *supra* note 82).
[230] Second Starr Affidavit, *supra* note 229, at 1–2. Colonel Starr provided additional details concerning this incident during his testimony in subsequent proceedings. *See* Part V.B.5.e *infra*.
[231] *Id*. at 2.
[232] Motion to File Additional Appendices (June 23, 1967) (on file with USCAAF *DuBay* Records, *supra* note 82).

D. Oral Argument at the Court of Military Appeals

The oral argument, held on June 30, 1967, received significant press attention.[233] In a front page story, *New York Times* legal correspondent Fred Graham offered the following summary of the case: "The commander of the Army base at Fort Leonard Wood, Mo., was accused today of using his rank to influence court-martial officers to impose generally heavy sentences."[234] Graham reported that defense counsel told the Court that the commander "had admitted as much" to Army investigators.[235] The story recounted defense assertions to the Court that the Secretary of the Army and the Judge Advocate General of the Army had been aware of the problems "and had not acted to stop them."[236]

Graham further reported that the defense had submitted an affidavit from counsel at Fort Leonard Wood containing evidence of conversations between the convening authority and a panel member to the effect that the convening authority was pleased with heavy sentences because it put him in "a much better position to grant deals in future cases."[237] According to Graham, other issues explored at trial included allegations of threats to censure defense counsel for challenging senior panel members and systemic exclusion of junior officers from court-martial panels.[238]

Graham added that he had contacted the commanding general at Fort Leonard Wood who "admit[ted] getting in touch with court-martial officers about their sentences, but he said 'there is no truth whatsoever that I tried to influence the court.'"[239] The commanding general told Graham that he contacted the court members after reducing sentences in accordance with pretrial agreements so that the officers would

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[233] The Clerk of Court for the U.S. Court of Appeals for the Armed Forces advises that the Court does not have in its files a recording or transcript of the oral argument in *DuBay*. DeCicco e-mail, *supra* note 9.
[234] *See* Fred P. Graham, *Pressure on Courts Charged to General*, N.Y. TIMES, July 1, 1967, at A1. *The Washington Post* carried a similar, but less detailed story. *Lawyer Says General Demanded Harsh Courts Martial Rulings*, WASH. POST, July 2, 1967, at A10.
[235] Graham, *supra* note 234. at Al.
[236] *Id.* at A7.
[237] *Id.*
[238] *Id.*
[239] *Id.*

understand that he had not acted out of displeasure with their heavier sentences.[240]

E. The Court of Military Appeals Decides *United States v. Dubay*[241]

The differing Board of Review decisions in *DuBay* and *Moore*, as well as the variety of views expressed in the briefs, provided the Court of Military Appeals with an array of choices in deciding the case. The primary options included: (1) follow the approach taken by Panel No. 3 in *Moore* on the grounds that none of the activity at Fort Leonard Wood constituted error, or that none of the errors constituted material prejudice to the substantial rights of the accused in any particular case;[242] (2) affirm the decision issued by Panel No. 2 in *DuBay*, which would set aside the findings and sentence, without further factfinding, by applying a presumption of prejudice to the allegations of unlawful command influence; (3) follow the approach suggested by Government in *DuBay* by concluding that the issue of command influence warranted factfinding, and by deferring a decision on the validity of the findings and sentence pending completion of a limited factfinding hearing at the trial level into the factual aspects of the unlawful command influence allegations.

The Court also needed to consider the manner in which it would set forth its decision. The primary options included: (1) a full opinion discussing the court-martial proceedings, the Board of Review decisions, the arguments of the parties, and other pertinent points of law; (2) a short opinion focusing on the primary legal issues in the context of the appeals; or (3) a short order or per curiam decision announcing the result and any further actions that might be required.

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[240] *Id.* In the aftermath of the oral argument, the parties engaged in a vigorous dispute as to the accuracy of various accounts of the events at Fort Leonard Wood. In the course of this disagreement, the defense filed an affidavit from Fred Graham of the *New York Times* recounting further details of his conversations with the commanding general. Motion to File Instanter Affidavit (July 7, 1967) (attaching affidavit executed July 3, 1967). The Court granted the motion on July 20, 1967 (copies of the pertinent documents are on file with USCAAF *DuBay* Records, *supra* note 82)).
[241] 37 C.M.R. 411 (C.M.A. 1967).
[242] *See* UCMJ art. 59(a), 10 U.S.C. § 859(a) (2006) (setting forth the appellate test for prejudicial error).

The decision was not long in coming. Three weeks after oral argument, on July 21, 1967, the Court of Military Appeals issued *United States v. DuBay*,[243] a short per curiam opinion. The court made three brief points. First, "Both parties are agreed that, at the very least, a serious issue is raised concerning whether there was such command interference with these judicial bodies."[244]

Second,

> In the nature of things, command control is scarcely ever apparent on the face of the record, and, where the facts are in dispute, appellate bodies in the past have had to resort to the unsatisfactory alternative of settling the issue on the basis of ex parte affidavits, amidst a barrage of claims and counterclaims.[245]

Third, the Court ordered a limited factfinding hearing in the command influence cases from Fort Leonard Wood and "in future cases in which a similar issue may be raised either here or before a board of review."[246]

The Court, which did not take action on the findings and sentence, set forth the following procedure for use in a limited hearing: (1) a remand to a convening authority higher than the one who referred the case to trial; (2) the new convening authority would send the case to a new court-martial, where the law officer would hold an out-of-court hearing, take testimony, and render findings of fact and conclusions of law; (3) if the law officer determined that the case was "infected with command control," the law officer could dismiss the findings, sentence, or both "as the case may require" and proceed with a rehearing; (4) if the law officer determined that command influence did not exist, the law officer would return the case to the convening authority, who would review the case and forward it for appellate review; and (5) in the alternative, if the convening authority determined a rehearing to be impractical, the convening authority could dismiss the case.[247]

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[243] *DuBay*, 37 C.M.R. 411.
[244] *Id.* at 413.
[245] *Id.*
[246] *Id.*
[247] *Id.* The Court stated in a footnote:

The brief per curiam opinion did not address the specific nature of the command influence allegations, nor did the opinion discuss most of the issues raised by the parties in the appeal, such as the alleged retaliatory actions, the tension between the Board of Review and the Judge Advocate General, and the competing views of the parties regarding the authority to order factfinding hearings.

Why did the Court issue such a bare-bones opinion in a case that had attracted significant national attention? The public record does not contain an express answer, but it is not unusual for appellate courts to decide, from time to time, that a case is best handled without much discussion, particularly when it involves an interim action such as an order for a limited hearing. Although the Court did not explain why it chose to issue a brief opinion, it is likely that in this hotly contested case, with so many ancillary issues and where further proceedings would enable both parties to have their say, the brief opinion served to resolve the issues at hand and set the tone for future proceedings in the same case as well as in future litigation.[248]

The press treatment of the *DuBay* decision reflected the austere tone of the Court's opinion. Fred Graham's page one story in the New York Times largely tracked the content of the opinion, along with a summary of the developments that led to the decision.[249] According to Graham,

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> Normally, collateral issues of this nature would, on remand in civil courts, be settled in a hearing before the trial judge. The court-martial structure, under the Uniform Code of Military Justice, however, is such that this cannot be accomplished. Accordingly, it is necessary to refer the matter to a court as such, although it is to be heard by the law officer alone.

Id. at 413 n.2. The Court's mandate, issued on the same day as the opinion—July 21, 1967—briefly recited the procedural history of the case and then ordered the case to be remanded to the Judge Advocate General of the Army "for proceedings not inconsistent with the opinion attached." (Mandate on file with USCAAF *DuBay* Records, *supra* note 82). Part VI.B *infra* discusses the subsequent modification of the mandate.

On the same day as the Court issued its decision in *DuBay*, the Court disposed of the Judge Advocate General's petition for extraordinary relief, see *supra* note 172, by ordering the Board of Review "to follow the procedures outlined in *United States v. DuBay* . . . ." United States v. Bd. of Review Nos. 1, 2, 4, 37 C.M.R. 414 (C.M.A. 1967).

[248] MOYER, *supra* note 5, at 767–68 (suggesting that the opinion should have set forth the facts and circumstances so as to deter future incidents of unlawful command influence).

[249] *See* Fred P. Graham, *Court Orders Army to Weigh Charges Against a General*, N.Y. TIMES, July 22, 1967, at A1. *See also Courts-Martial Hearings Slated*, BALT. SUN, July 22, 1967, at A2; *Court Orders Hearings on Army Trials*, CHI. TRIB., July 22, 1967, at B8.

Army sources indicated that the hearings would likely be held under the authority of the Fifth Army Commander, located at Fort Sheridan, Illinois.[250] The identification of a potential hearing site at that point indicated that the Army had undertaken the necessary preparations in the event that the Court granted Government's request for a limited rehearing.

Part V. The First *Dubay* Hearing

> *"When proceedings resumed this morning, Maj. David J. Passamaneck, attorney for the soldiers, said General Lipscomb confronted him in a hall outside the courtroom an hour earlier and 'sought to intimidate defense counsel by use of his rank.*
>
> *"'He gestured with his right index finger,' Major Passamaneck told the court, 'and said, "I want you to know, young man, that many of your questions yesterday did not conform to ethics set forth in the manual."*
>
> *"'The general advised me,' the major said in the hushed courtroom, 'that he did not want to bring this up in court and that was why he was speaking to me privately.'*
>
> *"The 54-year-old general, called to the witness chair, received a lecture from Col. John Barr, the law officer who is conducting the hearing.*
>
> *"'Defense counsel is entitled to be aggressive in exploring every possibility, including reliability of witnesses,' he said. 'I must consider you as any other witness and permit counsel to be forceful in questioning and probing.'*
>
> *"'Counsel was engaging in trickery yesterday,' the general responded, 'by deliberately misquoting what I had said and then asking if I had said it. I met him in the hall and told him that this was not the candor and fairness required by the manual."'*

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[250] Graham, *supra* note 249, at 4.

> *The Army's Manual for Courts-Martial requires that 'the conduct of counsel before the court and with each other should be characterized by candor and fairness.' It admonishes counsel to 'treat adverse witnesses . . . with fairness and due consideration.'*
>
> *"Colonel Barr instructed the general that the law officer was responsible for enforcing proper conduct at the hearing.*
>
> *"'The defense counsel has not in any way overstepped his bounds,' he said.*[251]

A. Selecting Cases for the Limited Factfinding Hearing

The responsibility for supervising the implementation of *DuBay* fell to Major General Kenneth J. Hodson, the newly appointed Judge Advocate General of the Army.[252] Major General Hodson, an expert in military law, was well-suited to supervising the task through his temperament and experience.[253] The requirement in *DuBay* for factfinding hearings not only addressed the named parties in the proceedings before the Court of Military Appeals, but also expressly referenced other similarly situated cases—thereby potentially involving scores of courts-martial tried at Fort Leonard Wood.[254] As the defense in *Moore* had noted in its brief before the Court of Military Appeals during the consolidated hearing, "the lives and fortunes of many soldiers [were]

[251] Donald Janson, *Accused General Rebuked in Court*, N.Y. TIMES, Oct. 13, 1967, at 11. *See Berry* Record, *supra* note 257, at 313–24.

[252] Major General Hodson served as the Judge Advocate General of the Army from July 1967 to June 1971. JAGC HISTORY, *supra* note 11, at 243, 255.

[253] In his previous assignment, MG Hodson had been the Assistant Judge Advocate General for Military Justice. In that capacity, he represented the Army in the 1962 and 1966 congressional hearings on military justice, and represented the interests of the Department of Defense in the development of the Military Justice Act of 1968. *See* JAGC HISTORY, *supra note* 11, at 245; Michael J. Nardotti, *The Twenty-Fifth Annual Kenneth J. Hodson Lecture: General Ken Hodson—A Thoroughly Remarkable Man*, 151 MIL. L. REV. 202, 208–11 (1996).

[254] *See DuBay*, 37 C.M.R. at 413. *See also* United States v. Berry, 37 C.M.R. 428 (C.M.A. 1967) (remanding for proceedings in accordance with *DuBay*); United States v. Keller, 37 C.M.R. 429 (C.M.A. 1967) (same); United States v. Staton, 38 C.M.R. 36 (C.M.A. 1967) (same).

at stake."[255] For the Government, the proceedings not only concerned the findings and sentences in the individual cases, but also involved the impact of the cases on the very public debate regarding the fairness of the military justice system.[256]

The choices facing the Army included: (1) providing a separate fact-finding hearing in each case; (2) providing a single consolidated hearing for all cases; or (3) providing an initial consolidated hearing for a selected number of cases while deferring action on the balance of the cases pending the outcome of the hearing. In considering these options, the Army faced the potential for hearings in which numerous officers who had exercised command and staff responsibilities at Fort Leonard Wood during 1966 would be called to testify—including witnesses who had moved to other assignments or left the Army by the time of the 1967 proceedings.

The Army chose the third approach, designating six cases for a limited consolidated factfinding hearing.[257] Of note, the parties to the first *DuBay* hearing did not include either Private DuBay, whose court-martial had served as the lead case in the appellate proceedings, or Private Phenix, whose case had triggered the appellate inquiry.[258]

B. The Hearing at Fort Sheridan

As anticipated, the Army sent the cases to the Commanding General of Fifth Army Headquarters, Lieutenant General Michaelis, Fort Sheridan, Illinois, for a consolidated rehearing limited to the issue of

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[255] *See* Brief for Appellant at 22, United States v. Moore, 27 C.M.R. 411 (C.M.A. 1967) (No. 20,179) (on file with USCAAF *DuBay* Records, *supra* note 82).
[256] *See supra* Parts II.C. IV.B and *infra* VIII.B.
[257] The hearing consolidated the following cases: United States v Berry, Gen. Ct.-Martial, No. 53379538; United States v. Buchanan, Gen. Court-Martial, No. 16748964; United States v. Farmer, Gen. Court-Martial, No. 55866321; United States v. Johnson, Gen. Court-Martial, No. 16868350; United States v. Richmire, Gen. Court-Martial, No. 19852616; and United States v. Stanton, Gen. Ct.-Martial, No. 13853291). *See* Cover Page, Transcript of Record, United States v. Berry, Gen. Court-Martial, No. 53379538 (Ft. Sheridan, Ill., Sept. 26–Oct. 26, 1967) (copy attached to the record in *United States v. Farmer*, Gen. Court-Martial No. 55866321 (on file with the Clerk of Court, U.S. Army Judiciary)) [hereinafter *Berry* Record]. In this article, the citations to the *Berry* Record refer to the hand-entered pagination on the copy contained in the *Farmer* record.
[258] *See Berry* Record, *supra* note 257, on cover page. *See* MOYER, *supra* note 5, at 765.

command influence.[259] The hearing, which was conducted from September 26 to October 26, 1967, drew the attention of newspapers from around the Nation.[260]

Colonel John Barr served as the law officer for the hearing, with a mandate to "hear respective contentions of the parties . . . , permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law based thereon."[261] Each party had multiple counsel.[262] The law officer quickly identified the central question for the limited proceeding: whether the actions of Major General Thomas H. Lipscomb, the Commanding General at Fort Leonard Wood, violated the prohibition against unlawful command influence in Article 37 of the Uniform Code of Military Justice.[263]

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[259] *See* United States v. Farmer, No. 415214, Review of the Staff Judge Advocate at 2 (Ft. Sheridan, Ill., Jan. 10, 1968) (copy on file with Clerk of the Court, U.S. Army Judiciary).

[260] *See, e.g.*, *Courts-Martial Hearings Slated*, *supra* note 249, at A2; *Court Orders Hearings on Army Trials*, *supra* note 249, at B8; *Hearings Set on Influence of Lipscomb*, SPRINGFIELD LEADER & PRESS, July 22, 1967; Donald Janson, *General Admits Procedure Shifts*, N.Y. TIMES, Oct. 12, 1967, at 24; Charles Mount, *General Tells Deals Made at GI Trials*, CHI. TRIB., Oct. 12, 1967, at 14.

[261] *Berry* Record, *supra* note 257, at 151.

[262] Major David Passamaneck, who had represented the defense before the Court of Military Appeals, served as lead defense counsel for all six accused involved in the hearing. Captain Jay J. Madrid appeared as Assistant Defense Counsel on the first day of the hearings. In subsequent proceedings, Captain James A. Badami served as Assistant Defense Counsel. Captain Michael Davis served as Trial Counsel, and Captain Arthur M. Sussman served as Assistant Trial Counsel. *Id.* at 6, 11, 12. At the beginning of the hearing, the law officer addressed on the record the inherent difficulties and potential conflicts of interest associated with simultaneous representation and conducted an inquiry to determine whether each accused had knowingly waived any objections. *Id.* at 17.

[263] *Id.* at 152–53. Article 37, as then in effect, provided:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to this chapter shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . .

1. Pretrial Motions

Early in the proceedings, the defense filed numerous motions, including motions to dismiss the charges; to disqualify the new SJA and convening authority; to disqualify the original convening authority; to obtain discovery; to sever individual accused from the joint proceeding; and to suppress or exclude evidence.[264] The defense also challenged the authority of the law officer to conduct the proceeding on the grounds that a rehearing could not be conducted unless appellate authorities set aside the findings and sentence, which had not been done in this case.[265]

The defense then urged the law officer to dismiss the "novel proceeding," contending that the hearing was "an empty ceremonial" exercise because the law officer did not have authority either to determine the guilt or innocence of the accused or to act on the sentence.[266] In response, the Government characterized the defense as attempting to reargue issues that had been addressed by the Court of Military Appeals, contending that the law officer was "without the power to question the validity" of the appellate court's legal conclusions.[267] The Government added: "The mandate of the Court of Military Appeals is clear. We are here to do one thing and one thing only—to decide whether the Commanding General, Fort Leonard Wood, did violate Article 37 of the Uniform Code of Military Justice in that he did exercise unlawful command influence."[268]

The Government further asserted that the new convening authority at Fort Sheridan was not bound by the actions taken by the convening authority at Fort Leonard Wood because the Board of Review in *DuBay* and the related cases had set aside the actions by the convening authority at Fort Leonard Wood on the findings and sentence.[269] As such, the

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[264] *See Berry* Record, *supra* note 257, at 23–24 (listing defense motions). The copy of the *Berry* record, as attached to the *Farmer* record, does not contain the text of the various motions.
[265] *Id.* at 38–40, 45, 69.
[266] *Berry* Record, *supra* note 257, at 48, 69.
[267] *Id.* at 50–52. The Government, during argument, highlighted the fact that their brief, the amicus brief, and the defense reply brief all commented on this issue. In the defense argument on rebuttal, MAJ Passamaneck noted the irony that the Government's position was contrary to the position taken by the amicus representing the Judge Advocate General in the *DuBay* appellate litigation which the defense submitted as an exhibit to the motion. *Id.* at 62.
[268] *Id.* at 52–53.
[269] *Id.* at 55.

doctrine of res judicata did not apply, and the factfinding hearing had legal authority to address the issues mandated by the Court of Military Appeals without being bound by the actions of the prior court-martial.[270] Most significantly, the Government contended that the procedure adopted by the Court of Military Appeals properly incorporated the constitutional requirements for further proceedings established by the Supreme Court in cases such as *United States v. Wade*.[271] According to the Government, the defendants at the rehearing would not be denied any pertinent protections.[272]

The law officer agreed with the Government and denied the defense motion.[273] At that point, having determined that the limited hearing could take place, the law officer deferred ruling on the remaining defense motions in order to "proceed with the matter, the principle matter, that this hearing [was] intended for."[274]

2. Allocation of the Burden of Going Forward and the Burden of Proof

At the conclusion of the motions proceeding, the law officer asked for views on the question of which party had the burden of producing evidence, a matter not expressly addressed by the Court of Military Appeals in its *DuBay* decision.[275] The question involved an assessment of the prior appellate proceedings: had the defense in the prior proceedings established sufficient evidence to shift the burden on to the Government? If so, the Government would be required to either disprove the existence of unlawful command influence or demonstrate that there was no prejudicial effect. If not, then the defense would have to produce

[270] *Id.* at 57. The Government cited *United States v. Kepperling*, for the proposition that the law officer lacked authority to "alter, reverse, modify or change [the] mandate" of the Court of Military Appeals. 29 C.M.R. 96, 101 (C.M.A. 1960). *Kepperling* held that when an appellate court has ordered a rehearing, "[T]he usual rule in civilian jurisdictions is to the effect that unless and until the appellate court releases the trial forum from the obligation imposed, there is no power residing in the lower tribunal except to enforce the mandate."

[271] 388 U.S. 218 (1967).

[272] *See Berry* Record, *supra* note 257, at 55.

[273] *Id.* at 74.

[274] *Id.* at 137–38. The law officer advised the defense that he would entertain the motions later if the defense so requested. At the conclusion of the hearing, the law officer considered and denied the remaining motions.

[275] *Id.* at 141–43.

evidence on the record as to the existence of unlawful command influence.

At a pretrial session on October 4, 1967, the defense asserted that the prior appellate record established that there was "a concerted and consistent pattern of behavior on the part of General Lipscomb . . . to control the operation and the administration of military justice at Fort Leonard Wood according to his own ideas and views of how they should be done."[276] The defense cited five instances of unlawful command influence which they viewed as improperly impacting the independent administration of military justice. According to the defense, the convening authority engaged in deliberate efforts to: (1) increase or ensure maximum sentences were adjudged at courts-martial; (2) control defense counsel; (3) deemphasize the role of the law officer and to elevate the role of the president beyond the authority provided in the UCMJ; (4) control the admissibility of evidence in courts-martial; and (5) apprise panel members of his desires and wishes.[277] The defense contended that its submissions during the appellate proceedings had fulfilled the defense burden, and that the burden of going forward at the limited hearing now rested with the Government.[278]

The novel procedural questions regarding the allocation of burdens of proof and persuasion at a limited rehearing presented the law officer with a set of difficult issues. After a brief period of consideration, he decided not to set forth a detailed legal analysis of the issues, but to instead offer a practical approach. He advised the defense:

> I intend to consider this, more or less, as a clean slate and . . . I will rule that you are to proceed. . . . [T]his gives you . . . the opportunity to present any matters you desire to present and are pertinent to the issues. The government will be able to answer those, and, of course, you may rebut[] any matters the government presents.[279]

In response to a defense question regarding matter previously presented during appellate review, the law officer said:

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[276] *Id.* at 143–44.
[277] *Id.* at 144.
[278] *Id.* at 154–55.
[279] *Id.* at 174.

> I will take into consideration any matters that you place before me, but . . . just as a matter of vehicle here to get this thing under way, and to afford both sides the opportunity to . . . support their contentions, I'm asking you to go forward with the evidence, then the burden, the real burden, falls on the government to show that there was no such command influence. Your burden is only to go forward.[280]

When the defense expressed concern that the ruling might shift the "burden of proof" to the defense, the law officer responded:

> [Y]ou only have to present your case . . . go forward with the evidence, present some evidence, some substantial evidence, in support of your contention.[281]

3. Parties and Witnesses

At the request of MG Lipscomb, who had been the convening authority at Fort Leonard Wood, the Government presented a motion requesting that the law officer designate the General as a party to the proceedings.[282] The Government stated that MG Lipscomb had requested to be designated as a party to the proceedings in view of the broad challenge to his conduct of military justice affairs under his command.[283] The Government made it clear that the presentation had been made at the General's request and did not reflect the position of the Government.[284] Counsel for both parties noted that there was no precedent for designating a person as a party to a court-martial proceeding absent referral of charges.[285] The law officer agreed and denied the motion.[286] The law officer then turned to the presentation of witnesses, and reached an understanding with the parties that after several days recess the

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[280] *Id.* at 175.
[281] *Id.* at 177.
[282] *Id.*
[283] *Id.* at 178–79.
[284] *Id.*
[285] *Id.*
[286] *Id.* The military judge noted that his ruling did not preclude MG Lipscomb from requesting a Board of Inquiry under proper channels. *Id.* at 178. *See* UCMJ art. 135, 10 U.S.C. § 935 (2006).

defense would begin its case with the testimony of COL Starr, who had been the SJA at Fort Leonard Wood during most of the trials at issue.[287]

4. A Claim of Privilege and a Shift in the Burden of Going Forward

The hearing reconvened on October 11, 1967.[288] As agreed at the prior session, the defense called the former SJA, COL Starr as its first witness.[289] The Government, however, interjected a new issue into the proceedings. The Government asked the law officer to restrict the questioning of COL Starr on the grounds that all of the conversations between the SJA and the convening authority were subject to the attorney-client privilege.[290] The Government asserted that the convening authority, MG Lipscomb, held the privilege, and that COL Starr could not testify as to any of his conversations with MG Lipscomb unless MG Lipscomb waived the privilege.[291] The law officer temporarily excused COL Starr so that MG Lipscomb could address the question of privilege.[292]

Major General Lipscomb took the stand and stated that he viewed his conversations with the SJA as privileged, citing not only his personal situation, but also the interests of commanding generals and staff judge advocates "all over the Army" who would benefit from a ruling clarifying the opportunity to engage in communications protected by the privilege.[293] After excusing MG Lipscomb, the law officer received a legal memorandum from the defense and provided trial counsel with an opportunity to review the defense position.[294]

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[287] *See Berry* Record, *supra* note 257, at 203–05. The hearing covered a wide variety of witness requests from the defense and disagreements between the prosecution and defense as to the necessity for certain witnesses, including those that had retired and had been assigned overseas. The law officer granted a number of the requests and deferred others pending the development of evidence at the hearing. *See id.* at 180–204.

[288] At the outset of the proceedings on October 11, the trial counsel noted the apparent absence without leave of two of the accused, and the law officer engaged in a detailed inquiry regarding the procedure for moving the hearing forward in their absence. *Id.* at 207–08. The law officer, after addressing several other preliminary matters, invited the defense to proceed with its case. *Id.* at 212.

[289] *Id.* at 212.

[290] *Id.* at 212–13.

[291] *Id.* at 213.

[292] *Id.* at 214

[293] *Id.* at 217.

[294] *Id.* The memorandum is not attached to the record of the Berry proceedings attached to the Farmer record. *See supra* note 257. *Cf.* STEPHEN A. SALTZBURG, LEE D. SCHINASI,

When the proceeding reconvened, the law officer advised the parties that the Government's motion on the question of privilege had caused him to reconsider his earlier and separate ruling in which he had held that the defense bore the burden of going forward in the presentation.[295] Upon reconsideration, he stated that that evidence proposed to be presented by the defense essentially replicated the evidence that the defense had submitted to the Board of Review and Court of Military Appeals in the prior appellate proceedings.[296] From that perspective, and in light of the claim of privilege by MG Lipscomb, the law officer decided that it would be inappropriate to place the burden of going forward on the defense.[297]

The Government, perhaps realizing that its belated request to treat COL Starr's testimony as privileged had constituted one motion too many, asked the law officer if he would take a different position on the burden of going forward if MG Lipscomb withdrew his claim of privilege.[298] The law officer responded that he would "reconsider my decision again if he [MG Lipscomb] wanted to take a complete reversal at this time."[299] At that point, he asked whether the Government would be "prepared to reconvene this afternoon and either present your position or your witnesses," and the Government responded that they would be "prepared to go forward this afternoon."[300]

DAVID A. SCHLUETER, 2 MILITARY RULES OF EVIDENCE MANUAL 5-21 (2006) and GILLIGAN & LEDERER, *supra* note 6, at 5-54 to 5-58 (discussing the definition of "client" in an organizational setting). Although the law officer proceeded on the assumption that MG Lipscomb might seek to invoke the privilege during the hearing, he permitted extensive examination of MG Lipscomb regarding his interaction with the SJA on military justice issues, while limiting certain questions without ruling expressly on the claim of privilege. *See, e.g.*, *Berry* Record, *supra* note 257, at 226, 228–29, 231–33, 235–49. *See also id.* at 463 (statement by the law officer that he had not yet ruled on the claim of privilege).

[295] *Id.* at 281.

[296] *Id.*

[297] *Id.* at 217–18. *See also id.* at 305–11 (setting forth a further dialogue between the parties and the law officer regarding the decision to place the burden of going forward on the prosecution, and the implications of that decision with respect to the scope of issues that the prosecution would be required to address).

[298] *Id.* at 219.

[299] *Id.*

[300] *Id.*

5. Presentation of Evidence

Over the next two weeks, the parties would call over twenty witnesses, record hundreds of pages of testimony, and present dozens of documents in support of their respective positions.[301] The primary focus of the testimony involved the views of the two key participants at Fort Leonard Wood: MG Lipscomb, the Commanding General, and COL Starr, the Staff Judge Advocate.[302]

a. The Testimony of the Installation Commander

On the afternoon of October 11, 1967, the preliminaries came to an end and the Government accepted the responsibility of going forward.[303] The Government called MG Lipscomb as the Government's first witness.

Major General Lipscomb emphasized the substantial challenges he faced in commanding one of the Army's largest training centers in the midst of the personnel turbulence caused by the Vietnam buildup and its impact on the Army and the Nation.[304] From the time he took command in 1965 until the time he issued the convening orders at issue in the litigation, the Army had grown from 980,000 to 1,500,000, with Fort Leonard Wood's military population increasing from 25,000 to 38,000—including many draftees or, as he described his trainees—"people who

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[301] *Id.* at 1–5 (listing the witnesses and exhibits).

[302] A useful summary of the testimony and documentary evidence appears in the post-hearing memorandum prepared by the Staff Judge Advocate at Fort Sheridan, which is appended to the record in *United States v. Farmer*. *See supra* note 259. As reflected in that summary, the law officer heard testimony from a wide variety of witnesses, including the Commanding General, his staff judge advocate, law officers, counsel, panel members, and others, including MG McCaw, the recently retired Judge Advocate General of the Army. The testimony presented differing accounts and perspectives regarding a series of incidents involving the Commanding General that reflected his deep interest in the details of court-martial proceedings and outcomes, as well as his interactions with his legal staff, panel members, and others. The record contains extensive material concerning the conduct of military justice proceedings during that era, as well as detailed accounts of interactions between installation officials and the Judge Advocate General and his staff, that would appear to be worthy of further review and historical analysis. A detailed account or evaluation of the factual issues is beyond the scope of this article. The following material highlights aspects of the hearing, reflecting the tenor of the proceedings and matters addressed in subsequent appellate proceedings.

[303] *Id.* at 220.

[304] *See Berry* Record, *supra* note 257, at 229, 267, 286–88.

had joined the Army involuntarily and who might then be inclined to go absent without leave."[305]

The post's stockade population increased from 300 in 1965 to 437 in May 1967, and included not only soldiers assigned to Fort Leonard Wood, but also many assigned to other posts who had been picked up in Detroit, Chicago, and St Louis, and who were awaiting trial at Fort Leonard Wood.[306] Major General Lipscomb also testified that a shortage of trained officers compounded these challenges.[307]

In the midst of this buildup, MG Lipscomb became concerned about the pace of military justice actions, as well as complaints from officers about the impact of courts-martial service on their other duties.[308] Major General Lipscomb stated that he decided to address the role of the president in courts-martial proceedings as a means of improving efficiency.[309] Major General Lipscomb testified that—

> I was not very familiar with the court martial manual up to that time, but I got a copy and I read it and I kept it on my desk . . . and I learned that many of the responsibilities of the convening authority explicitly may not be delegated. I then began to execute them to a greater degree personally.[310]

He viewed his issuance of unique convening orders as necessary under the circumstances, and as consistent with the *MCM*.[311]

The defense vigorously questioned MG Lipscomb during cross-examination about adherence to Army Regulations; military justice lectures; exclusion of junior officers from court-martial panels; his statements about military justice during an Army Inspector General investigation into military justice practices at Fort Leonard Wood; his

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[305] *Id.* at 287–88.
[306] *Id.* at 287, 289.
[307] *Id.* at 286–88.
[308] *Id.* at 251.
[309] *Id.* at 293.
[310] *Id.*
[311] *Id.* Major General Lipscomb further explained, "I relied on my Staff Judge Advocate but I could not delegate to him the power and responsibility which had been assigned to me as the convening authority and I feel that this was a necessary thing to do, although I regret that it has caused me to be here today." *Id.*

communications with court-martial members after the conclusion of cases about the nature of the sentences; alleged negative comments to the staff judge advocate about the performance of defense counsel; and the increase in severity of sentences following implementation of various military justice initiatives from the convening authority.[312]

b. Revisiting the Claim of Privilege

During defense counsel's cross examination of MG Lipscomb, one of the most contentious areas involved his role in detailing defense counsel to particular cases.[313] Major General Lipscomb indicated that he typically deferred to the recommendations of his staff judge advocate. Defense counsel asked MG Lipscomb if he had expressed displeasure to his SJA about the trial tactics of defense counsel at Fort Leonard Wood—particularly the instances of challenges to presidents of general courts-martial.[314] The prosecution objected that the questions improperly asked MG Lipscomb to reveal discussions with his SJA that, in the prosecution's view, were protected by the attorney-client privilege.[315] At that point, the law officer advised the parties that he needed further time to review application of the privilege to the questions raised by the defense, and he recessed the proceedings until the next day.[316]

c. The Hallway Confrontation

The next morning, the law officer announced that he had decided to excuse MG Lipscomb temporarily while he gave further consideration to the claim of privilege.[317] The law officer then noted that Major Passamaneck, the defense counsel, had a matter that he wished to place

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[312] *See id.* at 225–78, 293–311, 572–80.

[313] *See, e.g., id.* at 295–305. Under the UCMJ as enacted, and as in effect during the *DuBay* cases, the responsibility for appointing trial and defense counsel rested with the convening authority. UCMJ 1950, *supra* note 13 (art. 27(a). Congress later amended the statute to provide for appointment of counsel under departmental regulations, see Military Justice Act of 1983, Pub. L. No. 98-209, 3(c)(1)(A), codified at 10 U.S.C. § 827 (art. 27). Under current practice, the detail of counsel to a court-martial typically occurs through judge advocate channels rather than through command authorities. *See* SCHLUETER, *supra* note 6, at 435.

[314] *See Berry* Record, *supra* note 257, at 300.

[315] *Id.*

[316] *Id.* at 311.

[317] *Id.* at 312.

on the record.[318] At that point, Major Passamaneck reported to the law officer that MG Lipscomb, in a confrontation outside the hearing, had challenged Major Passamaneck's courtroom behavior as unethical.[319] The law officer then provided an opportunity for MG Lipscomb to give his version of the incident, and the General explained that he viewed counsel's cross-examination as inconsistent with the degree of candor and fairness required of counsel by the *MCM*.[320] The law officer emphasized that he, as the law officer, was responsible for the conduct of proceedings, that the defense counsel was entitled to aggressively explore the reliability of witnesses, and that defense counsel had not exceeded the bounds of propriety in questioning the General.[321]

d. The Balance of the Prosecution's Case

The prosecution proceeded to present the balance of its case. In an effort to demonstrate that MG Lipscomb's actions had not produced improper influence in any courts-martial at Fort Leonard Wood, the prosecution offered testimony from a variety of witnesses involved in military justice matters at the installation.[322]

One of the prosecution witnesses, a law officer who had presided over cases at Fort Leonard Wood, testified as to the highly challenging environment facing law officers in that era. The law officer described his

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[318] *Id.* at 313.
[319] *Id.*
[320] *Id.* at 323. *See* 1951 *MCM*, *supra* note 66, para. 42.
[321] *Berry* Record, *supra* note 257, at 323.
[322] *See, e.g.*, *id.* at 326–57, 358–77, 495–513, 537–51 (testimony of COLs Martin, Jensen, Piper, and Wilson concerning their military justice experiences, including service as presidents of general courts-martial); *id.* at 377–422 (testimony of (COL) Tobin regarding his experiences as a law officer); *id.* at 423–36 (testimony of COL Morrell concerning his role as the assistant chief of staff, G-1, responsible for administrative functions, including court-martial assignments); *id.* at 514–17, 551–67 (testimony of former CPT Glover concerning his experiences as a trial counsel and Chief of Military Justice at Fort Leonard Wood); *id.* at 520–28 (testimony of MAJ Cook concerning his experiences as a general court-martial panel member). The testimony of former CPT Glover involved an incident in which CPT Glover, as trial counsel, engaged in a conversation with a court-martial president that left him with concern about possible improper conversations between the president and the convening authority about court-martial sentences. *See also id*. at 673–75 (testimony of the former SJA, COL Starr, regarding the issues raised by CPT Glover); *id.* at 699–700 (testimony of LTC McDonough, Deputy SJA at the time of the incident, and the current SJA at the time of the hearing, regarding the issues raised by CPT Glover).

experience in dealing with the court-martial president who had "difficulty" in receiving instructions from the law officer;[323] the court-martial president who acted "mad at the world";[324] and the court-martial president who filled "the voids with the golden tones of his own voice, which is a danger in our system of jurisprudence."[325] In one case, the law officer found it necessary to document his difficulties with the court-martial president by placing the following comment on the record: "I am getting sick and tired of having to fight to keep control of the bench when the man across from me just will not accept the fact that he is nothing but a jury foreman."[326] He also described in detail the repeated efforts of the command, over his objection, to provide the court-martial president with an elevated platform in the courtroom.[327] When asked whether these problems were unique to Fort Leonard Wood, he responded: "I have had trouble with presidents of courts just about everywhere."[328]

The issue of privilege arose once again when the prosecution presented the testimony of the recently retired Judge Advocate General, MG Robert McCaw, who had discussed the Fort Leonard Wood situation with the installation commander, MG Lipscomb.[329] Major General McCaw stated that he had dispatched COL Waldemar Solf, his chief military justice officer, to Fort Leonard Wood "to help unscramble" the problems at the installation and that COL Solf also had participated in discussions with MG Lipscomb.[330]

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[323] *Id.* at 387.
[324] *Id.* at 393.
[325] *Id.*
[326] *Id.* at 397.
[327] *Id.* at 413–16. He eventually obtained success in precluding the command from physically elevating the president above the other court members by ordering installation officials to remove the president's raised lectern. *Id.* at 416.
[328] *Id.* at 400. Contrasting his views with those of COL Starr, the former SJA, COL Tobin, indicated that he viewed the difficulty of dealing with court-marital presidents as part of the environment in which he operated, rather than as expressions of unlawful command influence. *Id.* at 400–12.
[329] *Id.* at 442–43.
[330] *Id.* at 443–44.

During defense counsel's cross-examination, MG McCaw stated that he could not discuss his conversations with MG Lipscomb in view of MG Lipscomb's claim of privilege.[331] The defense proceeded to question the former Judge Advocate General on a variety of matters, but when it became clear that the claim of privilege substantially limited defense counsel's ability to cross-examine the witness, the law officer apparently realized that he could no longer defer addressing the scope of the privilege.[332]

After temporarily excusing the witness and engaging the parties in a detailed discussion, the law officer noted that the existence of the privilege would be highly contextual, but it could potentially affect the testimony of key witnesses, including the current and former SJAs at Fort Leonard Wood, MG McCaw, COL Solf, and a variety of other judge advocates.[333] He then outlined the consequences for the case, taking note of the Government's contention that MG Lipscomb had not exercised unlawful command influence, and further noting that MG Lipscomb's claim of privilege addressed conversations that "would be very important in determining the issue before us today, whether there was, in fact, any improper command influence."[334]

The law officer advised the trial counsel that "unless the government is willing to disclose all these matters, and here air them before this court, I will have to take the position that it must be strongly inferred, and rule[] for the defense, that there was improper command influence."[335] After stating that he would give the Government an opportunity to discuss the situation with MG Lipscomb and the various attorneys, he added:

> [I]f they're willing to come in and present the evidence to me, I'll listen to it and make my determination on all of the evidence presented. If they [are] not willing to open up and give me the information I will have to say that the government has failed to meet the burden of

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[331] *Id.* at 444–45.
[332] *Id.* at 446–47.
[333] *Id.* at 455–56.
[334] *Id.* at 456.
[335] *Id.* at 456–57.

> proof that there is no command influence, and hold for the defense.[336]

At the next session, the law officer ruled that the conversations between MG Lipscomb and his SJA were not privileged.[337] He also ruled, as a preliminary matter, that MG Lipscomb could claim the privilege with respect to his discussions with MG McCaw and COL Solf, subject to receiving further evidence on the circumstances of the conversations.[338] After considering the impact of the law officer's ruling, Major General Lipscomb stated that he would waive the privilege regarding his discussions with MG McCaw and COL Solf.[339] At that point, the defense completed its cross-examination of MG Lipscomb, and the Government completed the presentation of its case.[340]

e. The Defense Perspective[341]

The defense began its case with testimony from COL Starr, the former SJA to MG Lipscomb.[342] Colonel Starr provided an extensive description of his interactions with MG Lipscomb on military justice matters.[343] One incident illustrated the difficulty faced by the SJA in convincing the commander that the responsibility for ascertaining the

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[336] *Id.* at 457. In further dialogue with the prosecution, the law officer noted that his ruling did not preclude the Government from presenting its case, and that he would reserve final judgment until hearing the presentations by both parties. *Id.* at 460. The law officer also emphasized that he had not yet ruled as to whether MG Lipscomb had established the existence of a valid attorney-client relationship for purposes of claiming the privilege. *Id.* at 463–64. The hearing then received further testimony from MG McCaw, focusing largely on MG Lipscomb's claim of privilege, *id.* at 469–76. Following that testimony, the parties and the law officer engaged in a lengthy discussion regarding the procedure for addressing the privilege, including the question of whether MG Lipscomb should be provided with counsel to advise him on the question of privilege. *Id.* at 476–89.

[337] *Id.* at 491–92. The military judge's written ruling is not included in the version of the *Berry* record that is attached to the Farmer record. *Supra* note 257.

[338] *Berry* Record, *supra* note 257, at 491–92.

[339] *Id.* at 571.

[340] *Id.* at 579–80.

[341] Although the following discussion focuses primarily on the evidence presented during the defense case on the merits, it also includes information that the defense developed during cross-examination of the prosecution's witnesses.

[342] *Id.* at 583–685.

[343] *Id.* at 583–685. Colonel Starr's Deputy SJA, LTC McDonough, who succeeded Starr as SJA, testified that he had the "best of relations" with MG Lipscomb, and did not have problems with MG Lipscomb in terms of communicating legal advice. *Id.* at 704–07.

admissibility of evidence rested with the law officer, not the chain of command. COL Starr had advised MG Lipscomb of the weakness of a case due to the likely inadmissibility of certain test results.[344] According to COL Starr, when he told MG Lipscomb that it was likely that the law officer would not permit admission into evidence of the test results at issue, the following dialogue ensued: "He [MG Lipscomb] said 'Well, then I'll order him [the law officer] to do so' and I said, 'Well, General, he's not in your command. He's not a member of your command and I'm sure he'll not do so.' He said 'Whose command is he in" and I said 'Well, I suppose you'd say he's under the Judge Advocate General's Command.' He said, 'Well, I'll write him and tell him to do so and have it admitted.' I said, 'General McCaw [the Judge Advocate General] wouldn't do that, General. I feel certain,' at which time he said 'Who's the Judge Advocate General's boss' and I said 'Well, I suppose the Chief of Staff of the United States Army.' He said 'All right. I'll write him and have it done.'"[345]

Another dispute involved differing views on the effect of Army regulations regarding military justice. Colonel Starr described a proposal from MG Lipscomb that the SJA give a lecture to the officers at the installation on the subject of court-martial sentences.[346] According to COL Starr, he advised MG Lipscomb that the proposed lecture, even if permissible under applicable case law, contravened pertinent Army regulations.[347] The General responded that he was free to disregard the regulation: "I showed the regulation to him. However, he told me that he was well aware of the regulation and that the regulation prohibited this. He said he wasn't concerned and that if anybody should inquire as to why I was giving these [lectures] contrary to the regulations, I was to tell them that this was "directed by the General; that he considered it to be a matter of military discipline and that military discipline was a matter of his concern and nobody else's, as Commanding General at Fort Leonard Wood."[348]

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[344] *Id.* at 584–98.

[345] *Id.* at 587–88. Colonel Starr's testimony indicates that although the case in question went to trial, MG Lipscomb did not communicate his views to the law officer either directly or through the SJA, Judge Advocate General, or the Chief of Staff. According to COL Starr's testimony, the law officer excluded the evidence, and the trial resulted in an acquittal. *See id.* at 589–94, 680–81.

[346] *Id.* at 598–604, 640–44.

[347] *Id.* at 599–600.

[348] *Id.* at 599.

Colonel Starr added that MG Lipscomb "told me on various occasions, and this was primarily in the field of military justice, by the way, that regulations did not concern him. . . . Unless the regulation . . . [was] an implementation of statute . . . he felt free to violate them, if necessary, because he was the Commanding General."[349] Colonel Starr testified that he handled the situation by giving the lectures in a manner that, in his view, avoided any issues that might raise the specter of unlawful command influence.[350] In a similar manner, he managed to avoid implementing direction from MG Lipscomb that he discuss with court-martial presidents the relationship between sentences and pretrial agreements in particular cases.[351]

A further disagreement arose out of MG Lipscomb's insistence that the SJA issue a directive to both trial counsel and defense counsel as to how they should address the burden of proof in speedy trial cases.[352] Major Genral Lipscomb's concern grew out of a case in which the law officer had dismissed the charge based upon a speedy trial motion.

According to COL Starr, MG Lipscomb disagreed with COL Starr's view that the law officer properly placed the burden of proof on the Government.[353] The General then directed COL Starr to issue an instruction to all trial and defense counsel that the burden of proof in cases involving unauthorized absences would fall on the defense to prove that the Government had not used all reasonable care in preparing the necessary documentation in such cases.[354] Colonel Starr testified that he "went home that night and worked on a draft until 12 o'clock or one or so. I wasn't satisfied with it, but I went to bed and I couldn't sleep so I got up about four and did a complete new draft, based on the old one. This was a Saturday morning. . . . I handed it to him [the General] and asked him if this was the order he wanted. He read it carefully and he said no. He said, 'Let me dictate it.'"[355]

Colonel Starr stated that when he attempted to explain the legal issues associated with the order and further attempted to obtain a delay in

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[349] *Id.* at 600.
[350] *Id.* at 600–01.
[351] *See, e.g.*, *id.* at 678–79.
[352] *Id.* at 629–40. Colonel Starr had referred to this matter in his second affidavit. *See supra* Part IV.C.6.
[353] *Berry* Record, *supra* note 257, at at 629–30.
[354] *Id.*
[355] *Id.* at 631.

issuing the order so that he could discuss it with the Judge Advocate General, MG Lipscomb responded: "No, you cannot delay. The Judge Advocate General is not the commander of this post; I am."[356] In the midst of attempting to obtain assistance from the Office of the Judge Advocate General, COL Starr received a further direction from MG Lipscomb's deputy to issue the order, and he did so.[357] Shortly thereafter, MG Lipscomb reversed himself. Based upon advice he had received directly from the Judge Advocate General, MG McCaw, MG Lipscomb directed COL Starr to rescind the order.[358]

A primary subject of COL Starr's testimony concerned the complaints he received from court-martial presidents who "felt that they were being bypassed [by law officers] and treated as an inferior by what was—or maybe I should say a Junior, a junior officer . . . [and] [t]his bothered them."[359] Colonel Starr testified that he was "quite surprised" by the issuance of the unusual convening orders regarding the role of the court-martial president, particularly because the orders had not been coordinated with his office.[360] At the time the orders were issued, he did not express concern to MG Lipscomb because he viewed the orders as sufficient to confer jurisdiction on a court-martial.[361] Although he subsequently became concerned with a noticeable increase in the severity of court-martial sentences following the various actions taken by MG Lipscomb, he did not raise this concern in view of MG Lipscomb's prior comments that he did not feel bound by regulations unless required by statute.[362]

Following COL Starr's testimony, the defense presented testimony from others regarding issuance of the unusual convening orders,[363]

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[356] *Id.* at 632.
[357] *Id.* at 634–36.
[358] *Id.* at 636. The record does not indicate that this controversy ripened into a legal issue at any of the Fort Leonard Wood courts-martial.
[359] *Id*. at 607. *See id*. at 604–09, 644–48, 661–65, 673. During the presentation of the prosecution's case, an officer said, "I felt in fact that I was perhaps the guest of the legal system as opposed to being presiding officer in a court." *Id.* at 501–02.
[360] *Id.* at 610–11.
[361] *Id.*
[362] *Id.* at 616–17, 659–61, 668, 679–80. Colonel Starr also testified as to changes ordered by MG Lipscomb in the criteria for appointing court-members, including the exclusion of Lieutenants. *Id.* at 611–13, 622–24, 648–56, 669–72. Lieutenant Colonel McDonough, the Deputy SJA, and later SJA at the time of the hearing, subsequently testified that he did not notice an increase in the severity of sentences during this period. *Id.* at 711–13.
[363] *Id.* at 687–94 (testimony of COL Starke).

comments regarding counsel who challenged court-martial presidents,[364] and direction from MG Lipscomb to a defense counsel to provide information regarding defense counsel's investigation into potential unlawful command influence.[365]

6. The Law Officer's Findings and Conclusions

After receiving the extensive testimony offered by the defense and the Government, and after disposing of the remaining motions, Colonel Barr, the law officer, issued his ruling regarding command influence. The law officer prefaced his ruling by stating: "The factors most important for the success of the court-martial system employed by the Armed Forces are the complete independence of individual court members and the law officer and the integrity of all persons exercising a role within the system . . . ."[366]

The law officer specifically addressed each of the major points of contention, summarized the testimony, and outlined the perspective of the convening authority, his lawyers, court-martial participants, and the various defendants.[367] He did not endeavor to resolve the points in dispute as to the underlying factual circumstances, but instead issued a ruling that took the different perceptions into account. In addition, he sought to put the matter into perspective by describing with care the underlying purposes of military law, the vital application of civilian principles of justice, and the importance of the protections against unlawful command influence.[368]

The law officer offered the following observation regarding the convening authority's actions:

> [I]t is apparent from the evidence presented that General Lipscomb, in his endeavor to maintain the discipline and morale of the thousands of trainees under his command, took an active role in the administration of military justice, and that the concepts he had acquired from his

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[364] *Id.* at 702–04, 708–10, 714 (testimony of LTC McDonough).
[365] *Id.* at 731–44 (testimony of CPT Beck).
[366] *Id.* at 850.
[367] *Id.* at 850–60.
[368] *Id.*

> early experience and training in military justice were not easily shaken. It was difficult for him to visualize the importance of the law officer and the limited role of the president in trials by general courts-martial. Although he had several misunderstandings and disagreements with his staff judge advocate, he fully understood his role as convening authority and at all times respected the right and duty of each member of a court-martial to arrive at his decision on the findings and sentence in each case based upon the member's understanding of the evidence, the law, as explained by the law officer, and his own conscience.[369]

He concluded:

> [F]or the vast majority of reasonable persons who realize the first and most important interest of any commander is for the well being of his troops, the evidence presented would establish beyond all doubt that General Lipscomb properly exercised his duties as a convening authority and did not exercise unlawful command influence in any case during the time he was in command at Fort Leonard Wood.[370]

On that basis, the law officer held that the court-martial proceedings in the six underlying cases were "properly appointed by competent authority," that the General "did not violate Article 37 of the Uniform Code of Military Justice, and that the proceedings by which the accused [were] originally tried [were] not infected with command control."[371]

The ruling made national news, with headlines in both the *New York Times* and *Chicago Tribune* reporting that the proceedings had "cleared" the General on the allegations of unlawful command influence.[372] Both papers quoted extensively from COL Barr's ruling.[373]

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[369] *Id.* at 859.
[370] *Id.* at 860.
[371] *Id.*
[372] Donald Janson, *General Is Cleared of Swaying Courts*, N.Y. TIMES, Oct. 27, 1967, at 1; Charles Mount, *Army Review Board Clears Gen. Lipscomb*, CHI. TRIB., Oct. 27, 1967, at 14.
[373] *See* sources cited *supra* note 372.

Part VI. The Court of Military Appeals Modifies *DuBay*

A. The Government's Request for Modification

In December 1967, the Army confronted two separate phases of the *DuBay* proceedings. The six cases considered in the consolidated post-trial hearing at Fort Sheridan now were subject to appellate consideration by the Board of Review. In addition, the Army had to decide what to do about the remaining cases from Fort Leonard Wood, which now amounted to more than seventy cases that had been remanded for post-trial hearings at Fort Sheridan in the aftermath of *DuBay*.[374]

In the course of considering the cases pending further action at Fort Sheridan, the Army realized that the mandate from the original *DuBay* decision, as requested by the Government before the Court of Military Appeals, may not have provided a sufficiently broad range of options for dealing with the remaining cases. Under the original *DuBay* decision issued by the Court of Military Appeals on July 21, 1967, the convening authority had only two options for addressing the remaining cases: (1) ordering a rehearing on unlawful command influence, or (2) dismissing the charges if the convening authority determined such a limited hearing would be impractical.[375] As a consequence, unless the Government moved to dismiss the charges in the remaining cases, it would have to go through lengthy factfinding hearings in all remaining cases. Although some consolidation might have been possible, the reality faced by the Government at this point involved the likelihood of dozens of lengthy factfinding hearings with extensive testimony from commanders, staff officers, defendants, administrative personnel, and judge advocates.

To resolve the dilemma, the Government filed a motion with the Court of Military Appeals on December 19, 1967, to modify the Court's original mandate and provide two additional options in situations where the convening authority determined that it would be impractical to order a limited factfinding hearing on the issue of unlawful command influence.[376] First, the Government asked the Court to permit the

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[374] *See* Motion for Appropriate Relief, United States v. DuBay, 27 C.M.R. 411 (filed Dec. 19, 1967) (on file with USCAAF *DuBay* Records, *supra* note 82).
[375] *See DuBay*, 37 C.M.R. at 413.
[376] *See* Motion for Appropriate Relief, United States v. DuBay, at 1–2, 27 C.M.R. 411 (filed Dec. 19, 1967) (on file with USCAAF *DuBay* Records, *supra* note 82).

convening authority to order a completely new rehearing on the findings and sentence in cases where the accused had pled not guilty at trial. Second, the Government asked the Court to permit the convening authority to order a new sentencing proceeding in cases where the accused had pled guilty at trial. The Government contended that these options would put the accused in as favorable a position as the accused would be in if the accused prevailed at a limited factfinding rehearing on the issue of unlawful command influence.[377] The Government would not gain a litigation advantage, but would forego the costs of the factfinding hearing and move directly to a proceeding focused on the merits of the underlying case. The Government's request reflected its reluctance to engage in repeated post-trial proceedings for each of the seventy-one accused.[378] The Government subsequently expanded its request to provide an additional option for guilty plea cases so that the convening authority could return the case to the Board of Review for sentence reassessment, an option that the Court had authorized in other command influence cases involving sentencing issues in the context of a guilty plea cases.[379]

While the defense had some reservations, it also faced a dilemma. At that point in time, many of the accused apparently had completed their terms of confinement, with a strong interest in leaving the Army, not in having another hearing. Therefore, the defense added the following paragraph to the Government's motion: "To avoid further delay in the disposition of 'guilty plea' cases such as that which further rehearings on sentence would entail, appellants join in only so much of the Government's Motion to Amend as provides for remand to boards of review for reassessment of the sentences."[380]

B. The Court of Military Appeals Amends the *Dubay* Mandate

The Court, in response to the Government's request, issued an order on January 3, 1968, modifying the July 21, 1967, mandate in *DuBay*.[381]

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[377] *Id.*
[378] *Id.*
[379] Motion for Leave to File Instanter Amendment at 2 (filed on December 27, 1967) (on file with USCAAF *DuBay* Records, *supra* note 82) (citing United States v. Cole, 38 C.M.R. 94 (C.M.A. 1967) and United States v. Kitchens, 31 C.M.R. 175 (C.M.A. 1961)).
[380] *Id.* at 3 (portion of motion signed by defense counsel).
[381] United States v. DuBay, 17 C.M.A 678 (1968) (amending the mandate). Although reported in Volume 17 of the DECISIONS OF THE UNITED STATES COURT OF MILITARY

The order provided a series of options if the convening authority determined that it was impracticable to conduct a limited post-trial rehearing on command influence in any of the remaining cases.[382] In cases involving a plea of not guilty, the convening authority could: (1) order a rehearing on the merits and the sentence; or (2) dismiss the charges. In cases involving a guilty plea, the convening authority could: (1) order a rehearing on the sentence; (2) terminate the proceedings with no sentence; or (3) send the case to the Board of Review, which would have the further options of reassessing the sentence or ordering a rehearing.[383]

Part VII. Completion of Appellate Review

> *The Army has closed the books on its most extensive case of "command influence" by reducing the court-martial sentences of 93 soldiers who charged that their base commander had used his rank to see that they received stiff sentences.*[384]

APPEALS (the official reporter of the Court's decisions from 1951–1975, cited as "C.M.A."), the amended mandate does not appear in the more widely available COURT MARTIAL REPORTS (popularly known as the "Red Books," cited as "C.M.R."), and is not currently available on either Westlaw or Lexis. Appendix B contains excerpts of the pertinent portions of the original decision in *DuBay*, the first mandate, and the amended mandate.

[382] *Id.*

[383] *Id. E.g.*, In *United States v. Keller*, No. 414830, slip op. at 6 (A.B.R. May 4, 1967), a case involving a not guilty plea at the original trial, the convening authority at Fort Sheridan determined that a rehearing was impracticable and provided relief by dismissing the charges. Headquarters, Fifth U.S. Army, Gen. Court-Martial Order, No. 35 (Dec. 19, 1967). In a number of cases involving guilty pleas at the original trial, the convening authority chose the option of returning the case to the Board of Review. *See, e.g.*, United States v. Jacobson, 39 C.M.R. 516, 517 (1968) (addressing the remand through reassessment of the sentence). In *Jacobson*, the defense challenged the convening authority's action on the grounds that Jacobson had not received the assistance of counsel during the period in which the convening authority was considering the various options under *DuBay*. 39 C.M.R. at 517–18. The Board rejected the defense position, relying, *inter alia*, on the subsequent availability of counsel to address all issues in the appellate process. *Id.* at 518.

[384] Fred P. Graham, *93 Who Said General Swayed Trials Win Appeals*, N.Y. TIMES, June 25, 1968, at 3.

A. The First Appellate Review of a *DuBay* Hearing

The Board of Review, in *United States v. Berry,*[385] addressed the issues raised on appeal by the defense in the aftermath of the post-trial factfinding hearing at Fort Sheridan. Private First Class Berry had been convicted of absence without leave. The approved sentence included a bad-conduct discharge, confinement for one year, total forfeitures, and reduction to pay grade E-1. On initial appeal, the Board of Review had affirmed the findings and sentence, and on further review the Court of Military Appeals had remanded the case for further proceedings under the initial *DuBay* decision.[386] The convening authority at Fort Sheridan, acting pursuant to the remand, had consolidated *Berry* with the five other cases considered at the initial post-trial factfinding proceeding in the fall of 1967.[387]

The Board's discussion of unlawful command influence focused on the treatment of command influence by Congress and the courts, noting the developments in the post-World War II legislation, the enactment of the prohibition on unlawful command influence in Article 37, and the precedent applicable to the appearance as well as the existence of unlawful command influence.[388]

The Board chose not to recount the full details of the Fort Leonard Wood cases, as developed in the prior proceedings, but simply observed:

> We have most carefully reviewed the record of the original trial and the record of rehearing, and have taken judicial notice of the other cases from Fort Leonard Wood with this same issue before the boards of review.[389]

Based on that review, the Board stated:

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[385] 39 C.M.R. 541 (A.B.R. 1968).
[386] *See id.* at 541–42.
[387] *See supra* Part V. The Clerk of Court, U.S. Army Judiciary, who serves as the custodian of the pertinent records, reports that the records in *Berry* cannot be located. *See supra* note 9. As a result, we do not have the benefit of the arguments made by the parties upon appeal of the *DuBay* officer's ruling in *Berry*. Our consideration of *Berry* is based on the reported decision and the material contained in the related records of the consolidated post-trial fact-finding hearing at Fort Sheridan in the companion case, *United States v. Farmer*, as discussed above. *Supra* note 257.
[388] *Berry*, 39 C.M.R. at 543–55.
[389] *Id.* at 545–46.

> We find, as a matter of fact, that the appearance of unlawful command influence exists in this case and provides a presumption of prejudice; and that the prosecution has not met its burden to rebut the presumption of prejudice.[390]

In terms of relief, the Board noted that in the context of a guilty plea case, it would focus on the sentence.[391] The Board disapproved the punitive discharge, reduced the forfeitures, and cut the confinement period in half to six months.[392] In taking its action, the Board observed that the appellant was a two-year draftee who encountered family problems after the death of his father, that he expressed remorse for his misconduct, and that he had been restored to duty in July 1967, and had "served honorably since his restoration, even past his adjusted ETS."[393]

B. Review of the Remaining Fort Leonard Wood Cases

At the time of the *Berry* decision, many other cases from Fort Leonard Wood were pending before the Board of Review, including the *DuBay* cases remanded from the Court of Military Appeals and new cases arriving from Fort Leonard Wood in the aftermath of *DuBay*. Following the release of *Berry*, the Board of Review provided relief in the pending Fort Leonard Wood cases.[394]

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[390] *Id.* at 546. The appeal of the factfinding proceeding in panel was considered by the full Board of Review sitting as a panel. Six Board members concurred in the decision. Two Board members concurred in the decision on the grounds that the appearance of unlawful command influence required the relief ordered by the Board, but wrote separately to note their view that the actions at issue were not intended to influence the court-martial and did not actually influence the trial. *Id.* One member concurred in the finding of an appearance of unlawful command influence, but would have denied relief on the grounds that the Government could rebut the presumption of prejudice by demonstrating the absence of actual command influence, and that the Government had done so in this case. *Id.* at 546–47.

[391] *Id.* at 546. Appellant was originally sentenced to a dishonorable discharge, reduction to the grade of E-1, total forfeitures, and confinement at hard labor for one year. *Id.* at 541. The convening authority reduced the discharge to a bad-conduct discharge and approved the sentence. *Id.*

[392] *Id.* at 546.

[393] *Id.*

[394] *See* MOYER, *supra* note 5, at 765. In *DuBay*, the convening authority decided that a rehearing would be impracticable and transmitted the case to the Board of Review for sentence reassessment under the provisions of the amended *DuBay* mandate. See Part VI.B. *supra*. The Board reassessed the previously approved sentence, *see* note 106 *supra*,

The actions by the Board of Review, which were published in late June, received widespread national media attention. On June 25, 1968, Fred Graham reported in the *New York Times* that the actions affected 93 cases and that a "Pentagon spokesman said it was the largest number of trials that had been declared prejudiced by the actions of a single commander" since enactment of the UCMJ.[395] An Associated Press story carried by *The Baltimore Sun* noted that Board of Review had reduced the sentences in 53 cases thus far and that "[f]orty other cases are expected to be affected by an Army Board of [R]eview."[396]

Before the Board of Review actions in *Berry* and the related cases could "close the books" on the *DuBay* litigation, one more decision remained. The Judge Advocate General of the Army had to decide whether to appeal the Board's actions to the Court of Military Appeals. He could have certified one or more of the cases to the Court of Military Appeals, asking the Court to determine, for example, whether the Board should have overruled the decision of the law officer who conducted the *DuBay* hearing at Fort Sheridan.[397] The Judge Advocate General, however, accepted the actions of the Board, bringing the *DuBay* litigation to a close.

Part VIII. Epilogue

As we have seen, *DuBay* is not just a two-page order. It is but one part of a fully litigated set of proceedings, from *Phenix* to *Berry*, under the glaring lights of national publicity. With the understanding that the

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by reducing the punishment to a bad-conduct discharge, confinement for nine months, and total forfeitures. United States v. DuBay, No. 415047 (A.B.R. June 12, 1968) (copy on file with USCAAF *DuBay* Records, *supra* note 82).

[395] Graham, *supra* note 384, at 3.

[396] *Court Terms Cut by Army*, BALT. SUN, June 26, 1968, at A4. The *Chicago Tribune* carried a similar story from the UPI (United Press International). *Army Reduces Sentences of 53 Soldiers*, CHI. TRIB., June 26, 1968, at A4. The Board of Review in *Jacobson*, 39 C.M.R. at 517 stated that ninety-three cases had been remanded to the Board pursuant to *DuBay*. In view of the missing Army records, it is not possible to identify with precision the number of cases actually affected by the *Berry* decision. *See supra* note 9.

[397] *See* UCMJ 1950, *supra* note 13, art. 67 (current version codified as UCMJ art. 67(a)(2), 10 U.S.C. § 867(a)(2) (2006) (setting forth the authority of the Judge Advocate General to certify cases for review by the Court of Appeals for the Armed Forces)).

full story remains to be told,[398] let me offer a few concluding observations.

A. Aftermath

As the *DuBay* cases were winding down, Congress turned to the subject of military justice reform.[399] The Judge Advocate General of the Army—Major General Kenneth Hodson—served as the primary representative of the Department of Defense in the legislative process, working with Congress on the pending legislation growing out of Senator Ervin's hearings on Military Justice.[400]

The eventual legislative product—the Military Justice Act of 1968—transformed the law officer into the military judge and recast the Boards of Review into the Courts of Military Review.[401] The legislation, which was not controversial, made important changes, but the changes were largely evolutionary rather than revolutionary in nature. The 1968 reforms evolved from the firm foundation established by the Board members and law officers who had demonstrated the value of performing judicial functions in the military justice system, as illustrated in the *DuBay* litigation.[402] Although not denominated as a "court," the Army Board of Review that heard the Fort Leonard Wood cases demonstrated in cases such as *DuBay*, *Moore*, and *Berry* that judge advocates could

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[398] *See supra* note 9 (regarding missing records).
[399] *See* Sam J. Ervin, Jr., *The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 78–82 (1969); Joseph E. Ross, *The Military Justice Act of 1968: Historical Background*, 23 JAG J. 125, 128 (1969).
[400] *See supra* note 253.
[401] Military Justice Act of 1968, Pub. L. No. 90-632. *See* Homer E. Moyer, Jr., *The Military Justice Act of 1968: Its Content and Implementation*, 23 JAG J. 131, 132, 135 (1969). In addition to establishing the military judiciary at the trial and appellate level, the legislation included a number of other significant changes, such as enhanced power of the military judge to issue authoritative rulings, the opportunity to request judge-alone trials in non-capital cases, provisions for court-martial sessions on interlocutory matters without the participation of the panel members, the requirement for certified counsel and military judges at most special courts-martial, authority to defer the running of sentences, and additional protections against unlawful command influence. *See id.* at 132–36; Ervin, *supra* note 399, at 83–84.
[402] The legislation also built upon the administrative structure created by the Army and Navy in the late 1950s and early 1960s to enhance the independence of law officers. *See* John Jay Douglass, *The Judicialization of Military Courts*, 22 HASTINGS L.J. 213, 214–15 (1971) (noting the administrative actions taken by the Army and Navy in 1958 and 1962 to strengthen the law officer program).

exercise a wide range of judicial powers in the interests of justice. Likewise, although the law officer at the post-trial factfinding hearing in *Berry* was not designated as a "military judge," COL Barr demonstrated that a judge advocate could preside over a hotly contested high-profile hearing with the skill, dignity, and authority of a seasoned judicial officer.

B. Subsequent Developments

When the Government asked the Court of Military Appeals to approve post-trial factfinding in *DuBay*, it was apparent that the Government sought not only to address the case at hand, but also to provide a procedure that could be used to address similar problems in the future. In that regard, the case has fulfilled the initial expectations and continues to provide the mechanism used for post-trial factfinding.[403] As is typical with an opinion that provides a framework for addressing procedural issues, the *DuBay* opinion does not resolve the question of whether any particular case requires post-trial factfinding, nor does it resolve the numerous questions that may arise concerning the conduct of such a proceeding.[404]

C. Historical Perspective

The *DuBay* narrative underscores the evolution of the military system through the interaction of individual servicemembers, commanders, lawyers, and judges. A commander of a large military installation sought to maintain good order and discipline among large numbers of conscripts and draft-motivated volunteers in the midst of a massive increase in basic training requirements during an increasingly controversial war. An appellate defense counsel initiated a simple inquiry

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[403] *See, e.g.*, SCHLUETER, *supra* note 6, § 17-15[B], at 1115; Jerry W. Peace, *Post-Trial Proceedings*, ARMY LAW., Oct. 1985, at 20, 22–23.

[404] *See, e.g.*, Grace M.W. Gallagher, *Don't Panic!* DuBay*s and Rehearings Are Not the End of the World*, ARMY LAW., June 2009, at 5–6. *Cf.* United States v. Denedo, 129 S. Ct. 2213, 2229 (2009) (Roberts, C.J., dissenting) (noting the difficulties that may occur when military appellate courts "resort to the procedures invented by *United States v. DuBay* . . . ."). From time to time, questions are raised as to whether the procedures for post-trial factfinding should be addressed by judicial decision, congressional enactment, or regulatory treatment in the *MCM*. *See, e.g.*, H.F. Gierke, *Five Questions About the Military Justice System,* 56 A.F. L. REV. 249, 255 (2005); REPORT OF THE COMMISSION ON MILITARY JUSTICE 11 n.9 (Oct. 2009). Such matters are beyond the scope of this article.

in a guilty plea case that generated relief in scores of appellate proceedings. A Government counsel developed a creative proposal to provide fair treatment for all parties during post-trial factfinding. A law officer conducted the limited factfinding proceeding with a sense of dignity and fairness that engendered considerable respect for military justice at a time when the system was under intense public scrutiny. Members of a Board of Review, in the final act, put the proceedings in perspective and reached a decision that achieved finality in the litigation. Their examples stand as a reminder of our solemn responsibility, on a daily basis, to put forth our best efforts to provide the men and women of the armed forces with a military justice system worthy of their service and their sacrifices.

Appendix A

Major General George S. Prugh[405]

Major General George S. Prugh was born in Norfolk, Virginia, on June 1, 1920. In 1941, he graduated from the University of California at Berkeley, receiving a B.A. in Political Science. From January 11, 1939, until August 6, 1940, he served as an enlisted soldier in the 250th Coast Artillery Regiment, California National Guard, but was discharged to enter ROTC at the University of California. At Berkeley, he commanded the Coast Artillery ROTC Regiment and received his commission as a second lieutenant, Coast Artillery Corps, Officer Reserve Corps, in March 1942, while in law school at Boalt Hall, University of California. He entered active duty on July 10, 1942, at San Francisco, California.

Then–Lt. Prugh's initial assignment was with a 155-mm gun battery, 19th Coast Artillery Regiment, located at Fort Rosecrans, San Diego, California. In 1944, he joined the 276th Coast Artillery Battalion as a battery commander in New Guinea and served there and on Leyte and Luzon in the Philippine Islands. He returned to the United States in February 1945, was separated from active duty in May, and entered Hastings College of the Law, University of California, in San Francisco. While still a student, he accepted a Regular Army commission in November 1947. In May 1948, he received his J.D. and, after admission to the California Bar, reported for duty in the Office of the Judge Advocate General (OTJAG), at the Pentagon. After a year's duty with the Military Justice and Claims and Litigation Divisions, he was reassigned to the Wetzlar Military Post in Germany. In 1951, he became the Executive Officer and subsequently the Staff Judge Advocate, Rhine Military Post, Kaiserslautern, Germany. He returned to OTJAG in June 1953, where he served as a member of the Board of Review, and then in the Opinions Branch, Military Justice Division.

In 1956–57, then–Major Prugh attended Command and General Staff College, Fort Leavenworth, Kansas, and upon graduation reported for duty as Deputy Staff Judge Advocate, 8th U.S. Army, Korea. In 1958, he began a three-year tour as Deputy Staff Judge Advocate, Presidio of San

[405] The program for the Fourth Annual George S. Prugh Lecture in Military History (April 28, 2010) included the following biographical summary prepared by Mr. Fred L. Borch III, Regimental Historian and Archivist, The Judge Advocate General's Corps, United States Army.

Francisco, California, and then attended the U.S. Army War College, Carlisle, Pennsylvania, graduating in 1962. In that same year, he became Chief of OTJAG's Career Management Division (today's Personnel, Plans and Training Office), and then Executive to The Judge Advocate General in 1963.

In November 1964, then–Colonel Prugh became Staff Judge Advocate, U.S. Military Assistance Command, Vietnam. During his tenure in Saigon, he persuaded his South Vietnamese counterpart that applying the Geneva Prisoners of War Convention to Viet Cong captives was in South Vietnam's best interest—a key factor in that government's subsequent decision to construct prison camps for enemy captives and to ensure their humane treatment during imprisonment. Prugh also authored the first-ever directive on how violations of the Law of War should be investigated and who should conduct them.

In August 1966, he assumed duties as Legal Advisor, U.S. European Command, in St-Germain-en-Laye, France, and later Stuttgart, Germany. On May 1, 1969, he became the Judge Advocate, U.S. Army, Europe and 7th Army, Heidelberg, Germany. Later that year, he was promoted to Brigadier General.

Then–Brigadier General Prugh returned to Washington, D.C., in June 1971 and became The Judge Advocate General on July 1, 1971. During his four years in office, he provided legal advice to the Army's leadership on the Calley war crimes trial, appeals, and presidential pardon. In 1972, he was a member of the U.S. delegations to two conferences of experts meeting in Geneva, Switzerland, to review the Geneva Conventions Relative to the Law of Armed Conflict. In 1973, he participated in the Diplomatic Conferences on the Law of War that resulted in the two Additional Protocols to the Geneva Conventions. General Prugh retired from active duty in the summer of 1975 and returned to California. He subsequently taught law at the Hastings College of the Law, University of California, until retiring in 1982. General Prugh died on July 6, 2006.

Shortly before his death, General Prugh provided The Judge Advocate General's Legal Center and School with a generous donation that permitted the establishment of this annual Lecture in Military Legal History.

Appendix B

Excerpt from the July 21, 1967 decision in *United States v. DuBay*, 17 U.S.C.M.A. 147, 149, 37 C.M.R. 411, 413 (1967):

> "[T]he record will be remanded to a convening authority other than the one who appointed the court-martial concerned and one who is at a higher echelon of command. That convening authority will refer the record to a general court-martial for another trial. Upon convening the court, the law officer will order an out-of-court hearing, in which he will hear the respective contentions of the parties on the question, permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law based thereon. [footnote omitted] If he determines the proceedings by which the accused was originally tried were infected with command control, he will set aside the findings or sentence, or both, as the case may require, and proceed with the necessary rehearing. If he determines that command control did not in fact exist, he will return the record to the convening authority, who will review the findings and take action thereon, in accordance with Code, supra, Articles 61 and 64, 10 USC §§ 861, 864. The convening authority will forward the record, together with his action thereon, to the Judge Advocate General for review by a board of review, in accordance with Code, supra, Article 66, 10 USC § 866. From the board's decision, the accused may appeal to this Court on petition, or the decision may be certified here by the Judge Advocate General, under the provisions of Code, supra, Article 67, 10 USC § 867."
>
> "In each of the above-styled cases, such disposition is ordered, without prejudice to the new convening authority's right to take appropriate action under Code, supra, Article 67(f) or Code, supra, Article 66(e), if he deems a rehearing on the issue of command control impracticable."

Excerpt from the unpublished mandate in *DuBay,* July 21, 1967 (retained in the appellate files at the U.S. Court of Appeals for the Armed Forces):

> "[T]his case . . . is hereby remanded to The Judge Advocate General of the Army for proceedings not inconsistent with the opinion attached."

Excerpt from the amended mandate in *DuBay,* January 3, 1968, published at 17 C.M.A. 678:

> "ORDERED, that the mandate of the Court in United States v DuBay et al., is hereby amended to provide:
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> "In the event the Commanding General, Fifth Army, or other superior convening authority to whom these cases may be referred for action, deems a rehearing limited to the issue of command control impracticable, he may, in the case of those records involving pleas of not guilty, order a rehearing on the merits and sentence, or dismiss the charges. In those cases involving pleas of guilty, he may order a rehearing on the sentence; terminate the proceedings without approval of any sentence; or return the case to the Judge Advocate General, who will refer the record to the board of review in order that the error may be purged of prejudice by reassessment of the sentence, or in the board's discretion, by ordering a rehearing thereon."