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### Military Justice Without Military Control

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# Military Justice Without Military Control

Edward F. Sherman\*

After World War II many western nations experienced popular dissatisfaction with their wartime military justice.<sup>1</sup> The need for reexamination was most critical in Germany whose World War II court-martial system reflected both Prussian severity and Nazi arbitrariness.<sup>2</sup> However, military justice in other western nations was also heavily disciplinary; and as a result of war-generated criticism, Western Germany, Sweden, Austria, and Denmark abolished their court-martial systems.<sup>3</sup> Other western nations, such as Great Britain, retained the court-martial, but adopted more judicial procedures and expanded civilian control over certain of its functions.<sup>4</sup> However, American reforms were more limited. The Uniform Code of Military Justice (UCMJ),<sup>5</sup> enacted in 1950, extended a number of new procedural rights to servicemen, but retained the traditional structure of the court-martial. The tri-tiered hierarchy of commander-convened courts was left unchanged;<sup>6</sup> and,

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1. For example, there were 1.7 million American courts-martial during World War II with procedures which lacked such basic due process rights as legally-trained counsel and judges, freedom from command influence, and appeal to a judicial tribunal. Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 3-28 (1970). When the war ended there was such a public outcry that eighty-five percent of the sentences of the 27,500 servicemen still imprisoned were remitted or reduced. Farmer & Wels, *Command Control—Or Military Justice?*, 24 N.Y.U. L.Q. 263, 265 (1949).

2. For an account of Nazi court-martial abuses, see R. GRUMBERGER, *THE TWELVE-YEAR REICH: A SOCIAL HISTORY OF NAZI GERMANY, 1933-1945*, at 161 (1971).

3. See INTERNATIONAL SOCIETY OF MILITARY LAW AND THE LAWS OF WAR, *THE SAFEGUARD OF INDIVIDUAL RIGHTS IN THE APPLICATION OF MILITARY LAW AND DISCIPLINARY REGULATIONS (LES GARANTIES DES DROITS INDIVIDUELS DANS LA REPRESSION DISCIPLINAIRE ET PENALE MILITAIRE)* 10, 46 (1966) [hereinafter cited as INTERNATIONAL SOCIETY OF MILITARY LAW, *THE SAFEGUARD OF INDIVIDUAL RIGHTS*].

4. In addition to the nations discussed in this article, France, Belgium, the Netherlands, Luxembourg, Switzerland, Italy, Norway, and Canada all adopted reforms which resulted in fairer courts-martial with expanded civilian court jurisdiction and review powers. INTERNATIONAL SOCIETY OF MILITARY LAW, *THE SAFEGUARD OF INDIVIDUAL RIGHTS*, *supra* note 3, at 5-158.

5. 10 U.S.C. §§ 801-940 (1970). The UCMJ was amended by the Military Justice Act of 1968, Pub. L. No. 90-632 (Oct. 24, 1968).

6. There are three levels of court-martial: general, special, and summary. A general court-martial may only be convened by high-level commanders. Art. 22, Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 822. It may prescribe any punishment allowed for the offense by the Table of Maximum Punishments promulgated by the President and contained in the MANUAL FOR COURTS-MARTIAL UNITED STATES (rev. ed. 1969) [hereinafter cited as MCM 1969]. Art. 18, UCMJ. A special court-martial may be convened by intermediate-level commanders, art. 23, UCMJ, and its maximum sentence is six months' confinement at hard labor, six months' forfeiture of 2/3 pay, demotion, and a bad conduct discharge. Art. 19, UCMJ. A summary court-martial may be convened by lower-level commanders, art. 24, UCMJ, and its maximum punishment

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with the exception of the civilian Court of Military Appeals, all court-martial functions were left to military men.<sup>7</sup> Thus, the American court-martial compares unfavorably with civilian courts which divide judicial functions among independent officials,<sup>8</sup> and the Supreme Court

is one month's confinement at hard labor, forty-five days' confinement without hard labor, and one month's forfeiture of 2/3 pay. Art. 20, UCMJ.

Procedures and rights differ with each type of court-martial. For example, the accused is guaranteed legally-trained counsel in a general and in a special court-martial "unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies," art. 27(c)(1), UCMJ, but not in a summary court-martial, which is essentially an administrative disciplinary proceeding in which the commander acts as judge, jury, and counsel. However, after the Supreme Court's decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), a federal court ruled that a serviceman could not be tried in a summary court-martial in which confinement could be given unless represented by counsel. *Daigle v. Warner*, 348 F. Supp. 1074 (D. Hawaii 1972). The Army Judge Advocate General ordered that sentences of confinement be prohibited in summary courts unless the accused were represented by lawyer counsel. DAJA-MJ 1972/12338. Subsequently, the U.S. District Court for the Southern District of California enjoined the Navy and Marine Corps from holding courts-martial anywhere in the world without lawyer defense counsel. Wash. Post, Apr. 15, 1973, at 1, col. 1. A verbatim transcript must be made in a general court-martial, but not in a special (unless a bad conduct discharge is given) or a summary court-martial. Art. 54(a) & (b), UCMJ.

Commanders can also give disciplinary punishments by imposing non-judicial punishment under Article 15(b), UCMJ. A field-grade officer (major or naval lieutenant, or above) may impose correctional custody for up to thirty days, forfeiture of up to one-half of one month's pay for two months, reduction in rank, restrictions, and extra duties. An officer below field grade can impose correctional custody for up to seven days, forfeiture of up to seven days' pay, reduction of one rank, restrictions, and extra duties. A serviceman may, however, refuse non-judicial punishment and demand a summary or special court-martial. MCM 1969, *supra* note 6, para. 132, at 26-8.

7. The commander can (1) bring court-martial charges against one of his men, arts. 22-24 UCMJ; (2) appoint an investigating officer and reject any recommendation by him that the court-martial not be brought, art. 32, UCMJ, MCM 1969, *supra* note 6, para. 34, at 7-9; (3) select the court members from his subordinates and the prosecutor and defense counsel from the legal officers in his Staff Judge Advocate's office, arts. 25, 27, UCMJ; and (4) reverse the conviction or reduce the sentence, art. 64, UCMJ. In addition, the commander can (1) bargain with the accused in return for a guilty plea, *see United States v. Villa*, 19 U.S.C.M.A. 564, 42 C.M.R. 166 (1970); (2) grant immunity to accomplices and witnesses in return for testimony favorable to the prosecution, MCM 1969, para. 150b, at 27-58-9; and (3) exercise general administrative control over the trial, such as excusing court members before, and, in certain situations, even after the trial has begun, *see United States v. Allen*, 5 U.S.C.M.A. 626, 18 C.M.R. 250 (1955). A commander, as convening authority, is prohibited from censuring, reprimanding, or admonishing any court member, judge, or counsel concerning the findings or sentence or from attempting, by unlawful means, to influence the action of a court-martial or member. Art. 37, UCMJ. But there has never been a prosecution under Article 37 despite a number of cases claiming command influence. *See note 8 infra*.

All court-martial functions are performed by servicemen unless the accused hires his own civilian attorney. Military judges, required in a general court-martial and detailed in a special court-martial if the convening authority determines the case is sufficiently complex, are officers under a separate judicial command from that of the commander. Although civilian employees of the service can be appointed to the courts of military appeals, there is now but one civilian who is on the Naval Court of Military Review. The highest military court, the Court of Military Appeals, which hears only about two hundred discretionary appeals a year, provides the only civilian forum in the entire system.

8. For example, the Court of Military Appeals reversed ninety-three court-martial convictions from Ft. Leonard Wood because of the possibility of command influence. *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). A partial list of individual accounts and cases charging command influence in the Vietnam War period is contained in Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25, 40 n.82 (1971). For a discussion of Court of Military Appeals decisions

has repeatedly cut back on military jurisdiction on the grounds that the court-martial provides an inferior forum for the protection of constitutional rights.<sup>9</sup>

Today, more than twenty-one years after the UCMJ took effect, issues of command control and the civilianization of military justice are still very much alive. Legislative reforms have been proposed, ranging from decreasing court-martial jurisdiction and limiting commander control through an independent military judiciary<sup>10</sup> to the complete abolition of the court-martial for offenses committed within the United States.<sup>11</sup> Especially relevant to the American debate on military justice is the experience of European countries which have either civilianized or abolished their court-martial systems. This article will evaluate three of the principal systems of civilianized military justice and will indicate to what degree greater or complete civilianization of the court-martial is a feasible alternative to the present American military justice system.

## I. Theoretical Justifications for a Separate System of Military Justice

Military justice developed as a separate legal system under command control because military units were often isolated from both civilians and each other. Commanders needed the power to convene a court-martial staffed with their own officers so that a quick determination of guilt could be made. However, modern transportation and communication have ended the isolation of military units, and trial of servicemen in civilian courts is now feasible in most situations.

Nevertheless, for several reasons, the military still maintains that a

dealing with command influence, see *Hearings on S. Res. 260 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess., 780-81 (1962). See also West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A. L. REV. 1 (1970).

9. The UCMJ purported to establish a total criminal law system applicable to all military and civilian offenses committed by a serviceman at any place or under any circumstances. This proposition was rejected by the Supreme Court in *United States ex rel. O'Callahan v. Parker*, 395 U.S. 258 (1969), holding court-martial jurisdiction cannot be extended to non-"service-connected" offenses of servicemen because of the absence of a number of basic constitutional rights in courts-martial. The Court has also declared unconstitutional court-martial jurisdiction over offenses committed by civilians such as discharged servicemen, dependents overseas in peacetime, and civilian employees of the military not in the field. See *McElroy v. United States ex rel. Guarigliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

10. Over the past three years bills have been introduced by Senators Bayh, S. 1127, 92d Cong., 1st Sess. (1971); Hatfield, S. 4168-4178, 91st Cong., 2d Sess. (1970); and Ervin, S. 1266, 91st Cong., 1st Sess. (1969); and Congressman Bennett, H.R. 579, 92d Cong., 1st Sess. (1971), and H.R. 291, 93d Cong., 1st Sess. (1973), which would, *inter alia*, abolish court-martial jurisdiction over a number of military and civilian offenses and transfer commanders' control over courts-martial to an independent military judiciary command under the Judge Advocate General.

11. *The Congressional Black Caucus Report, Racism in the Military: A New System for Rewards and Punishment*, 118 CONG. REC. E 8674-8688 (Oct. 14, 1972).

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separate system of justice free from civilian control is essential to efficiency and discipline. First, it is argued that "civilian courts cannot react to the needs of the service."<sup>12</sup> The fear that the military would be hampered by civilian courts may have been justified when military camps were frequently impermanent and when civilian officials antagonistic to the military<sup>13</sup> could not always be relied upon for a fair or efficient trial. But today it seems clear that civilian courts can dispose of charges against servicemen as quickly and efficiently as courts-martial. A relatively easy augmentation of judicial personnel and facilities should enable certain civilian courts near military installations to handle the additional load of military cases. Even in overseas combat zones servicemen can normally be transported to other locations for trial. During the early part of the Vietnam War, for example, servicemen were flown to Japan for general courts-martial, and a number of Vietnam cases, including the My Lai massacre, were tried in the United States.

Second, it is argued that the military is a society apart from civilian life which requires different legal standards the civilian courts cannot appreciate or adequately enforce.<sup>14</sup> However, today when most servicemen perform technical jobs,<sup>15</sup> large numbers of them live off-base,<sup>16</sup> and the armed forces are moving toward a greater degree of individuality and privacy for their members,<sup>17</sup> the distinctiveness of military life is questionable at best. Sociologists have noted the gradual convergence of military and civilian social structures due to technology and the bureaucratization of military functions.<sup>18</sup> Many jobs in civilian life

12. Senior Officer's Legal Orientation, Criminal Law, part B, at 8 (Judge Advocate General's School, United States Army, Charlottesville, Virginia, 1971). See also H. MOYER, JUSTICE AND THE MILITARY 11-19 (1972).

13. For accounts of clashes between troops and townspeople, see *Hearings on S. 5320 Before the Senate Comm. on Military Affairs*, 65th Cong., 3d Sess. 39-42 (1919); J. WEAVER, THE BROWNSVILLE RAID (1971).

14. See Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 7 (1971); INTERNATIONAL SOCIETY OF MILITARY LAW, THE SAFEGUARD OF INDIVIDUAL RIGHTS, *supra* note 3, at 137.

15. Fifty-four percent of American enlisted men perform technical specialties such as electronics and mechanics, and thirty-two percent have service specialties, e.g., food, administration, clerical. J. SHELBURNE & K. GROVES, EDUCATION IN THE ARMED FORCES 37 (1965).

16. In a number of European armed forces, servicemen in many jobs live at home or away from the military installation. In the American military, servicemen who have completed basic training may be permitted by their commanding officer to live off-post in the United States and abroad.

17. See, e.g., *The New Army: A Ft. Benning Brigade of Volunteers Indicates Nixon Plan Will Work*, Wall St. J., Nov. 13, 1972, at 1, col. 1; *Humanizing the U.S. Military*, TIME, Dec. 21, 1970, at 16.

18. See M. JANOWITZ, THE PROFESSIONAL SOLDIER (1964); THE NEW MILITARY (M. Janowitz ed. 1967); Biderman & Sharp, *The Convergence of Military and Civilian Occupational Structures*, 73 AM. J. OF SOCIOLOGY 381 (1968). But see Moskos, *The New Estrangement: Armed Forces and American Society*, in PUBLIC OPINION AND THE MILITARY ESTABLISHMENT (C. Moskos ed. 1971).

—such as police and fire department work—are analogous to the military in their need for precise execution of duties during occasionally dangerous missions; yet such departments are governed by civilian legal standards. Similarly, while the military does have certain unique offenses,<sup>19</sup> such as AWOL, desertion, and insubordination, civilian courts should be able to balance the peculiar competing policies in military cases just as they do in other legal specialties such as juvenile or regulatory agency law.

Third, because military justice has traditionally been viewed as partly judicial and partly disciplinary,<sup>20</sup> the court-martial is said to be essential for the enforcement of command discipline.<sup>21</sup> However, recent changes in the armed forces dispute the necessity or even desirability of using the court-martial primarily as a vehicle for the enforcement of discipline. Military leadership doctrine now favors persuasion over authoritarian domination and views the commander's objective as instilling high initiative and morale rather than rigid discipline.<sup>22</sup> Moreover, non-judicial punishment powers presently permit commanders to enforce discipline by imposing a variety of effective but less serious punishments than those given by a court-martial.<sup>23</sup> Finally, the move of most western armed forces toward civilian court procedures and policies which limit command influence on courts-martial indicates the growing acceptance of the court-martial as an impartial judicial proceeding rather than a disciplinary mechanism.<sup>24</sup>

Thus, the traditional theoretical arguments do not justify separate military justice systems free from civilian control. However, whether civilianization or abolition of courts-martial is workable in practice

19. However, substantive military law incorporates most civilian legal offenses. *See, e.g.*, Articles 118-31 of the UCMJ, containing civilian felonies such as murder, rape, larceny, assault, and perjury. Moreover, Article 134 of the UCMJ, referring to "crimes and offenses not capital," has been interpreted as incorporating by reference all non-capital federal crimes. MCM 1969, *supra* note 6, para. 213, at 28-71.

20. U.S. Air Force Reserve Officers' Training Corps, *The Military Justice System*, in H. MOYER, *supra* note 12, at 17-18; Westmoreland, *supra* note 14, at 6, 8.

21. For example, General Eisenhower argued, "Division of command responsibility and the responsibility for the adjudication of offenses and of accused offenders cannot be as separate as it is in our own democratic government." Quoted in Letter from New York State Bar Association to Committee on Military Justice, Jan. 29, 1949, at 5, in VI Morgan Papers, Harvard Law School Library.

22. *See, e.g.*, Office of the Deputy Chief of Staff for Personnel and the United States Military Academy, PROCEEDINGS FOR THE JUNIOR OFFICER LEADERSHIP WORKSHOP ON CONTEMPORARY PROBLEMS (1972); M. JANOWITZ, *THE MILITARY IN THE DEVELOPMENT OF NEW NATIONS* 119-20 (1964).

23. After Congress amended Article 15 of the UCMJ in 1962 to expand the non-judicial punishment powers of officers, there was an immediate increase in the use of non-judicial punishments. *See* Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37 (1965).

24. *See* INTERNATIONAL SOCIETY OF MILITARY LAW, *THE SAFEGUARD OF INDIVIDUAL RIGHTS*, *supra* note 3, at 19.

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and feasible in the American armed forces is a further question the experience of western European nations may help to answer.

### II. British Reforms Through the Separation and Civilianization of Court Martial Functions

In 1946 a special committee appointed by the British War Office<sup>25</sup> recommended dramatic changes for the separation of functions in army and air force courts-martial.<sup>26</sup> These reforms were implemented by (1) the extension in 1947 of the legal aid program for representing servicemen in courts-martial by civilian lawyers,<sup>27</sup> (2) the establishment in 1948 of an independent military prosecutorial agency along with a separate civilian organization to provide judicial officers for courts-martial,<sup>28</sup> and (3) the creation in 1951 of a civilian Courts-Martial Appeal Court.<sup>29</sup>

#### A. *Court-Martial Trials*

Prosecutions are conducted by military lawyers in the Directorates of Army and Air Force Legal Services.<sup>30</sup> When a commanding officer files charges against a serviceman, he determines if the case should be disposed of by court-martial; if so, a Directorate lawyer is assigned to provide pre-trial advice, help frame the charges, and prosecute the case.<sup>31</sup> An accused serviceman can hire his own lawyer, or request the

25. REPORT OF THE ARMY AND AIR FORCE COURTS-MARTIAL COMMITTEE, 1946, CMD. NO. 7608 (1946).

26. The recommendations did not affect the hierarchical structure of the court-martial system, retaining the three types of courts-martial: general, field-general, and district, convened by commanders at different echelons and carrying different maximum punishments.

27. Army Council Instruc. 603, July 19, 1947; Air Force Ministry Order A716, Sept. 4, 1947.

28. The Committee's recommendation, adopted by the Government, was implemented by Army Council Instruc. 880 (1948) and Air Ministry Order A798 (1948). F. WIENER, CIVILIANS UNDER MILITARY JUSTICE 231 n.11 (1967). The provisions are contained in 33 Halsbury's Laws of England §§ 1819 *et seq.*; Queen's Regulations for the Army, 1955, para. 219.

29. Courts-Martial (Appeals) Act 1951, 14 & 15 Geo. 6, c.46; 33 Halsbury's Laws of England §§ 1847-66.

30. The Directorates are composed of some sixty barristers and solicitors who are military officers serving at bases at home and abroad in a separate chain of command from the Minister of Defense through the Under-Secretary of State, the Adjutant General of the Army or the Air Member for Personnel, to the Directors of Army and Air Force Legal Services. In describing the British court-martial system, the author relies in part on interviews in London in July 1971 with various British officials engaged in the administration of courts-martial, including Brian A. Duncan, QC, the Judge Advocate General; Vernon Harington, Assistant Judge Advocate General; Brigadier D. S. Appleby, Directorate of Army Legal Services; D. A. Smart, Clerk of the Court of Appeals, Courts-Martial Division, and upon later correspondence with Major D.H.D. Selwood, Directorate of Army Legal Services, and F. H. Dean, QC, the Judge Advocate General since July 1972.

31. I THE MINISTRY OF DEFENSE MANUAL OF MILITARY LAW ch. 11, para. 14, at 11 [hereinafter cited as MANUAL OF MILITARY LAW].

appointment of one through the legal aid program, provided he meets the minimum income and wealth tests.<sup>32</sup> In a district court-martial, if the accused does not hire a lawyer, and if the Director of Legal Services determines that an appointed lawyer is unnecessary because the issues are not complex, a non-lawyer military "defending officer" will be appointed.

Courts-martial are presided over by members of the Judge Advocate General's office, an independent *civilian* agency despite its retention of the traditional military title. The Office is composed of the civilian Judge Advocate General and some twenty judicial officers or "judge advocates," all of whom must be barristers with prior legal or judicial experience. On appointment by the Crown these judge advocates are given a full orientation on military structure, history, and traditions. A judge advocate is appointed for every general court-martial and for district courts-martial when a legally-trained presiding official is deemed necessary. In 1972, twenty-eight percent of the courts-martial had a judge advocate.<sup>33</sup> The judge advocate controls the conduct of the trial, ruling on procedural motions, the admissibility of evidence, and motions that the prosecution has failed to establish a *prima facie* case. He also gives a summation to the court at the trial's end. However, he is not a full judge, and it is the officers on the court who are the sole judge on questions of law, fact, and sentence.

Judge advocates assigned to the Judge Advocate General (JAG) office in London normally officiate at courts-martial held in the British Isles. They are also located abroad where sizable numbers of British troops are stationed: Germany, Cyprus, Hong Kong, and, until recently, Singapore. Where there is no resident judge advocate, such as in Gibraltar and the West Indies, one is generally sent from the London office.<sup>34</sup> Judge advocates abroad may receive housing and other services from the local military commander, but they are otherwise independent of all military control.

## B. *Appeals*

In addition to separating court-martial functions at trial, the British also civilianized military appellate functions. Following a trial, the

32. If a serviceman meets the minimum income and wealth tests for eligibility for legal aid, he may choose a lawyer or select one from lists made available to the Directorates of Legal Services by the Bar Council (for barristers) and the Law Society (for solicitors) containing the names of lawyers experienced in military law.

33. Statistics provided by the Office of the Judge Advocate General.

34. Similarly, if a serviceman is tried abroad at a place where a British lawyer who can serve as defense counsel is not available, a lawyer, either from Great Britain or a nearby British colony, may be brought in at government expense.



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convening commander consults with the JAG office on whether the charges were proper, the evidence sufficient, and the sentence legal.<sup>35</sup> The commander (referred to as the "confirming authority") need not follow such advice, but in practice normally does, for he has to, as a matter of law, justify disregarding it.<sup>36</sup> If the conviction is confirmed by the commander, it is forwarded to a higher "reviewing authority." Acting with or without legal advice, this officer may set aside the conviction, reduce the sentence, or take any action the confirming authority could have taken. If again affirmed, the papers are sent to the JAG office for yet another review.

After these administrative reviews have been completed, the accused may submit an "appeal petition" to the Army or Air Force Board, which is composed of certain political officers (such as the Secretary of State for Defense), high-ranking civil servants, and military officers.<sup>37</sup> The Judge Advocate General advises the Board on how to dispose of the petition, and again the Board may set aside the conviction, reduce the sentence, or take any action which the confirming officer could have taken. If the accused is still not satisfied, he may petition for an appeal to the Courts-Martial Appeal Court. This court is composed of three civilian judges assigned from the judges of the Court of Appeal and the Queen's Bench of the High Court of Justice. The Lord Chief Justice or one of the Lord Justices of the Court of Appeal is usually presiding officer. The court must grant leave to appeal before a case can be heard. It reviews questions of fact and law, but cannot grant a new trial or revise court-martial sentences. It can, however, indicate displeasure at unduly harsh sentences, and this may result in a reduction of sentence by the service Board.<sup>38</sup> The case load is extremely light; from 1966 through 1972, there were only fifty-seven requests for appeal, thirteen of which were heard by the court.<sup>39</sup> The right to counsel continues through the submission of the request for appeal, and the court has authority to grant legal aid for the appeal itself.

### C. *Jurisdiction*

The Army Act of 1955 extended court-martial jurisdiction over members of the military for all offenses committed overseas and for all

35. Queen's Regulations for the Army, 1955, para. 819. Advice need not be sought after a district court-martial unless the commander is in doubt.

36. Karlen, *Court-Martial Appeals in England*, 20 MIL. L. REV. 65 (1963).

37. Rules of Procedure (Army) 1956, R. 101.

38. Karlen, *supra* note 36, at 74.

39. \*Statistics provided by Directorate of Army Legal Services. Following the court's decision, there is a possibility of a further appeal to the House of Lords. Since the judges will only certify to the House of Lords a legal point of general public importance, such appeals are extremely rare: only one in the first ten years of the court.

offenses committed in the United Kingdom, except murder, manslaughter, treason, and rape.<sup>40</sup> However, the Queen's Regulations provide that "an offense, whether committed on Ministry of Defense premises or not, which affects the person or property of a civilian should normally be dealt with by a civil court," though "an offense which involved only service personnel, their property or service property should normally be dealt with by the military authorities."<sup>41</sup> Thus, most offenses committed by servicemen off-post are tried in civilian courts.<sup>42</sup>

#### D. *Assessment*

In the over twenty years since the adoption of these reforms, Britain has maintained a substantial number of troops abroad and has been involved in a number of limited wars and military operations without experiencing serious administrative difficulties in the conduct of its courts-martial. There is no apparent movement in the army or air force hierarchy for a return to the old system, and consideration has recently been given to changing the naval code of justice to render it closer to the army and air force. However, commanding officers can still decide what charges will be preferred, whether a court-martial will be convened, and who will serve as members of the court,<sup>43</sup> and these powers may

40. Army Act 1955, § 70(4); O'Connell, *The Nature of British Military Law*, 19 MIL. L. REV. 141, 151 (1963).

41. Queen's Regulations for the Army, 1955, para. 734; MANUAL OF MILITARY LAW, *supra* note 31, ch. VII, para. 4, at 167.

42. By contrast, the U.S. Court of Military Appeals has found sufficient "service-connection" as required by United States *ex rel.* O'Callahan v. Parker, 395 U.S. 258 (1969), *see* note 9 *supra*, for court-martial jurisdiction over various offenses committed off-post involving: (1) possession of drugs, United States v. Rose, 19 U.S.C.M.A. 3, 41 C.M.R. 3 (1969); United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969); *but see* United States v. Morley, 20 U.S.C.M.A. 179, 43 C.M.R. 19 (1970); (2) use of military rank or status in committing offense, United States v. Haagenson, 19 U.S.C.M.A. 332, 41 C.M.R. 332 (1970); United States v. Fryman, 19 U.S.C.M.A. 71, 41 C.M.R. 71 (1969); United States v. Morrisseau, 19 U.S.C.M.A. 17, 41 C.M.R. 17 (1969); (3) offenses perpetrated against other servicemen, United States v. Lovcjoy, 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970); United States v. Rego, 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969); *but see* United States v. Wills, 20 U.S.C.M.A. 8, 42 C.M.R. 200 (1970); and (4) offenses committed in foreign countries not cognizable in civilian courts, United States v. Ortiz, 20 U.S.C.M.A. 21, 42 C.M.R. 213 (1970); United States v. Keaton, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969). However, American courts have not uniformly accepted the Court of Military Appeals' liberal interpretation of court-martial jurisdiction since *O'Callahan*. *See* Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969); *Flemings v. Chafee*, 458 F.2d 544 (2d Cir.), *cert. granted sub nom.* Warner v. *Flemings*, 408 U.S. 919 (1972). *Contra*, *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970).

43. The commander or convening authority appoints the members of the court who are required to be officers, coming when possible from a different unit (in the case of a district court-martial) or corps (in the case of a general court-martial). A general court-martial consists of a president of the rank of field officer and not less than four other officers above the rank of captain. A district court-martial consists of a president (normally a major or above) and at least two other officers, each of whom has held a commission for at least two years. *See* 33 Halsbury's Laws of England, §§ 1820-24. Thus, the rank and length of service requirements for court members insure

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limit the civilianizing effects of the reforms and account in part for the lack of criticism by commanders. On the other hand, court-martial statistics since the introduction of the reforms indicate decreased use of the court-martial, and increased reliance on non-judicial punishment.<sup>44</sup> This trend reduces the need for expensive and time-consuming courts-martial while saving minor offenders from the potentially higher sentence and social stigma of a court-martial conviction.<sup>45</sup>

While it is more difficult to assess the impact of the reforms on discipline and efficiency in the British armed forces, the British record for order and discipline clearly compares favorably with other western armed forces.<sup>46</sup> With about ten percent of the British army having been engaged for years in the difficult peace-keeping operation in Northern Ireland, the English can claim with some justification, that "no other army, faced with the riots and gunmen of Ulster, would have kept its temper so well."<sup>47</sup> Of course, other military reforms, including the better pay, improved living conditions, and greater individual freedom provided to attract volunteers when Britain adopted a volunteer force in 1963, have undoubtedly contributed to this record. But while Britain has been plagued by some of the same personnel problems which have confronted other western nations in recent years, *e.g.*, a lack of enthusiasm for military service and dissatisfaction with routine military jobs,<sup>48</sup> the court-martial reforms appear to have improved the quality of British military justice without impairing discipline or efficiency.

that control of the function of determining guilt or innocence will be in ranking officers.

By contrast, the UCMJ provides that, upon request of an enlisted accused, at least one-third of the court members must be enlisted men. However, commander or convening authorities have generally selected high ranking NCO's who are considered to be more disciplinarian and prosecution-minded than junior officers, and the election to have one-third enlisted men is only made in about two percent of court-martial cases. See Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 *IND. L.J.* 193, 194-97 (1972).

44. In 1972, only four percent of the 1,969 courts-martial involved general courts. Statistics provided by the Office of the Judge Advocate General. The British court-martial rate is quite low, about 2,000 out of an army and air force active duty force of 313,000 in 1969-1970, *THE MILITARY BALANCE 1969-1970*, at 19 (International Institute for Strategic Studies, London) or about 6.4 per 1,000. By contrast, there were 109,355 courts-martial in the American armed forces in 1969-70, with an active duty force of 3,460,162, or a rate of 31.56 per 1000. Statistics provided by Department of Defense.

45. For a discussion of the impact of court-martial convictions and less-than-honorable discharges on veterans in later life, see *Joint Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary and a Special Subcomm. of the Comm. on Armed Services on S. 745-62, S. 2906-7*, 89th Cong., 2d Sess., at 833-34 (1966) [hereinafter cited as *Joint Hearings*]; 115 *CONG. REC.* 136 (1969) (Remarks of Senator Ervin); Fairbanks, *Disciplinary Discharges Restricting the Commander's Discretion*, 22 *HASTINGS L.J.* 291 (1971). See generally *Special Project, The Collateral Consequences of a Criminal Conviction*, 23 *VAND. L. REV.* 929 (1970).

46. See Lee, *Britain's Professionals*, *ARMY*, July 1971, at 28.

47. *Id.* at 30.

48. Great Britain has had some difficulty in obtaining sufficient numbers of recruits since it abolished the draft in 1963, despite increased pay, relaxation of discipline, and improved working conditions. The number of recruits fell from 40,000 in 1966-67 to

### III. West German Reforms Through Abolition of Courts-Martial and Creation of Civilian Service Courts

Following the bitterness of World War II, most West Germans felt that the court-martial had helped foster Nazi authoritarianism and that military justice reform was essential to achieve the goal of a democratic army of "citizens in uniform" (*Staatsbürger in Uniform*).<sup>40</sup> Pursuant to a 1954 amendment to the West German Constitution permitting the reestablishment of the armed forces,<sup>50</sup> the West German Parliament in 1956 enacted the Soldiers Act (*Soldatengesetz*), which provides that servicemen have the same rights and duties as other citizens, subject only to specified restrictions justified by military necessity.<sup>51</sup> The Act also provided for "soldiers' representatives" in each unit who consult with the commander regarding certain disciplinary matters.<sup>52</sup> In 1957, the Military Disciplinary Regulations (*Wehrdisziplinarordnung*) established limited disciplinary powers in commanders and in newly created service courts.<sup>53</sup> At about the same time, the Military Penal Code (*Wehrstrafgesetz*) was enacted, making the usual military offenses crimes triable in civilian courts.<sup>54</sup> Finally, also in 1957, the office

32,000 in 1967-68 and 28,000 in 1968-69. N.Y. Times, Jan. 3, 1971, at 12, col. 3. However, enlistments improved with 34,000 recruits in 1969-70. The drop in enlistments was attributed by Ministry of Defense officials to the "inactivity" of British forces, resulting from the pullback of forces from some parts of the old British empire. While there was an emergency in Cyprus, jungle fighting in Malaya, or a crisis at Suez, the army had the appeal of an active force. N.Y. Times, May 31, 1960, at 8, col. 4.

49. The concept of the new German army resulted in part from a group of former Wehrmacht officers known as the *Dienststelle Blank* after its head Theodore Blank, appointed by Conrad Adenauer to report on proposals for German rearmament. Included were former General Count Gerhard von Schwerin, Colonel Wolf von Baudissin, General Hans Speidel, and General Adolph Heusinger, and its report reflected Baudissin's concept of a democratic military with appropriate structures and training which would insure conformity to democratic ideals. See D. GENSCHER, *WEHRREFORM UND REAKTION: DIE VORBEREITUNG DER INNEREN FÜHRUNG 1951-1956* (1972); Forstmeier, *The Image of the German Officer*, 64 ROYAL UNITED SERVICES INSTITUTION J. 52 (1969).

50. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, art. 73, translated in A. PEASLEE, 3 CONSTITUTIONS OF NATIONS 361-98 (1968) [hereinafter cited as BASIC LAW].

51. *Gesetz über die Rechtsstellung der Soldaten (Soldatengesetz)*, Vom 19. März 1956 (BGBl. I S. 114). Section 15 establishes the right of servicemen to participate while off-duty in political activities, such as holding public office, but not including wearing the uniform to political meetings or distributing political and propaganda materials in barracks. Section 10 states that orders can be given, and need only be obeyed, if related to official purposes and not violative of human dignity. The right of a serviceman to develop his personality is also guaranteed and has been applied to permit the wearing of civilian clothes off-duty, and the expression of opinions and criticisms, even of the military and commanders. FEDERAL MINISTRY OF DEFENSE, WHITE PAPER 1970 ON THE SECURITY OF THE FEDERAL REPUBLIC OF GERMANY AND ON THE STATE OF THE GERMAN FEDERAL ARMED FORCES 122 [hereinafter cited as FEDERAL MINISTRY OF DEFENSE, WHITE PAPER].

52. Procedures for election of representatives were established in the Soldiers Representatives Election and Term Act of 1957 (*Vertrauensmännerwahlgesetz*, Vom 26. Juli 1957 (BGBl. I 1052)). Military Disciplinary Regulations (*Vorgesetztenverordnung*, Vom 23. Dezember 1956 (BGBl. I 1966)), adopted in 1956 also placed distinct limitations upon the powers of military superiors.

53. *Wehrdisziplinarordnung*, Vom 15. März 1957 (BGBl. I 189), pursuant to BASIC LAW, *supra* note 50, art. 96a(4).

54. *Wehrstrafgesetz*, Vom 30 März 1957 (BGBl. I 298), Vom 1 September 1969 (BGBl. I 1502).

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of the Parliamentary Military Commissioner (*Wehrbeauftragte des Deutschen Bundestages*) was established to enhance parliamentary control over the armed forces and to serve as an *ombudsman* to protect servicemen's rights.<sup>55</sup>

### A. Abolition of Courts-Martial

West German servicemen are subject to both the civilian Penal Code (*Strafgesetzbuch*) and the Military Penal Code (*Wehrstrafgesetz*) which contains solely military offenses such as mutiny, desertion, AWOL, mistreatment of subordinates, and abuse of command and disciplinary powers.<sup>56</sup> Since there are no courts-martial, servicemen are tried for offenses under either code in the appropriate civilian court. When a commanding officer determines, pursuant to guidelines in regulations, that an offense is sufficiently serious, he refers the military or civilian case to the local civilian prosecutor. Such referral does not prevent the commander from taking disciplinary action against the offender, but disciplinary action is usually postponed until completion of the criminal proceedings.<sup>57</sup>

The offenses in the Military Penal Code generally permit sentences of a fine, confinement, or both, although Parliament has abolished confinement for a number of less serious offenses. Servicemen may be sentenced to "disciplinary arrest" (generally involving confinement during only the evening), and those under twenty-one may be sentenced to the even less onerous "juvenile arrest." Judges have, in fact, tended to impose fines, rather than confinement, for servicemen.

### B. Disciplinary Powers in Commanders

Under the Military Disciplinary Regulations a company commander may give disciplinary punishments for minor offenses,<sup>58</sup> including a

55. BASIC LAW, *supra* note 50, art. 45b; *Gesetzüberden Wehrbeauftragten, Vom 26. Juni 1957* (BGBl. I 652). See also *Wehrbeschwerdeordnung* (Regulations governing complaints), *Vom 23. Dezember 1956* (BGBl. I 1006). There are three principal channels for complaints by a serviceman: his superior officer; directly to the Minister of Defense; or to the Parliamentary Commissioner. See also *N.Y. Times*, Apr. 29, 1969, at 2, col. 4. The Commissioner dealt with 62,500 complaints from 1958 to 1970, 2.1 percent regarding violations of basic rights, 21 percent infringements of leadership, 13 percent penal or disciplinary matters, and 61 percent social problems. FEDERAL MINISTRY OF DEFENSE, WHITE PAPER, *supra* note 51, at 123.

56. *Wehrstrafgesetz*, *supra* note 54, at paras. 30-41.

57. *Wehrdisziplinarordnung*, *supra* note 53, § 8. Since 1972, double punishment under both civilian proceedings and discipline is only permitted in cases of grave breaches of military order.

58. In describing the West German system of disposition of charges against servicemen, the author relies in part on interviews in August 1971 with German officials, including Dr. Hans-Günter Schwenck, Ministerialrat, and later correspondence with Herr Peter Zimmerman, Oberregierungsrat, and Dr. Dietrich Genschel, Oberstleutnant, Bundesministerium der Verteidigung.

reprimand, fine of up to one month's pay, imposition of a curfew from one day to three weeks, minor restrictions, and seven days' disciplinary arrest. Battalion and higher commanders may, in addition to the company commander's sanctions, impose disciplinary arrest for up to twenty-one days.

A commander imposes disciplinary punishment by informing the accused of the charge, giving him and his soldiers' representative an opportunity to be heard, and then imposing the punishment after at least one night has passed since he learned of the case. Punishment is stayed until any appeal has been completed. The only appeal available from a punishment not involving disciplinary arrest is to the next higher commander. Punishment involving disciplinary arrest, on the other hand, must be approved by a judge of a service court (*Truppendienstgericht*).<sup>59</sup> If the judge approves the punishment, the serviceman may then appeal to the full service court.

The service courts are civilian courts created to hear certain military cases and appeals, much as other administrative courts in West Germany deal with specialized areas such as labor, civil service, welfare, or finance. There are presently six service court districts with twenty-six judges who are civilian lawyers trained for civil judicial positions and appointed for life by the Minister of Justice. Service court proceedings are held in a courtroom generally located in a civilian community near a military installation.

Procedure in service courts is similar to that found in other German courts. The commander's legal advisor (*Rechtsberater*) is the prosecutor.<sup>60</sup> The accused may hire his own civilian attorney, or a state legal aid lawyer may be appointed to represent him. However, in many appeals from disciplinary punishment, the serviceman is not represented by a lawyer, unless the service judge decides the case is sufficiently complicated. The relatively nonadversarial nature of German judicial proceedings often decreases the need for legal counsel. If the judge decides a lawyer is not necessary, he will appoint a commissioned officer to represent the accused. The court has a jury of sorts, composed of the judge and two "assessors," one from the same rank group as the accused,<sup>61</sup> the other a staff officer. Each of the assessors and the judge has

59. When a service judge is not available on a ship, a commanding officer may execute a sentence of confinement, but, upon docking, must refer the case to a service judge for review.

60. There are presently ninety-four full-time legal advisors to commanders, all civilian civil-service attorneys. Kreuger-Sprengel, *The German Military Legal System*, 57 *MIL. L. REV.* 17, 25 (1972).

61. There are three rank groups: enlisted men, noncommissioned officers, and officers.

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one vote, and a majority determines the verdict. At the beginning of each year assessors are selected at random from lists supplied by the commander.

A serviceman who is dissatisfied with the decision of the service court may appeal to the Service Senate (*Wehrdienstsenate*) if the court certifies the case for appeal. This is normally granted when the judge feels the case is legally complicated or precedent-making. There are two Service Senates composed of three federal judges (*Bundesrichter*) and two military assessors (one a staff officer, one from the same rank-group as the accused). Their composition reflects a conscious attempt to permit the military some role, but not a dominant position, in the ultimate appeal from disciplinary punishments.

### C. Career Disciplinary Punishments

Either in place of, or in addition to, imposing simple disciplinary punishment and referring the case to the civilian prosecutor, a commander at or above the division level may seek career disciplinary punishment (*Laufbahnstrafen*) against a career serviceman by filing charges in the service court. In such a case the service court functions as a trial court. The court can impose forfeiture of pay, delay of promotion, reduction in grade, and dishonorable discharge. Such career punishment provides an appropriate punishment for a career serviceman along with due consideration of the impact of the offense on his career potential. Career punishment may be appealed to the Service Senate under the same circumstances as regular disciplinary punishment.

### D. Military Courts in Time of War or National Emergency

The West German Constitution provides that military criminal courts may be established "as federal courts" under the Minister of Justice with general criminal jurisdiction over servicemen in situations involving defense of servicemen abroad or on warships.<sup>62</sup> The Parliament has provided that such courts (*Wehrgerichte*) may be established in time of war or national emergency, and the Government has contingency plans for the establishment of military courts with civilian judges under the control of the Minister of Justice.<sup>63</sup> There are approximately 400 civilian judges, lawyers, and non-lawyers who would become military judges under such circumstances. They are specially

62. BASIC LAW, *supra* note 50, art. 96a(2).

63. See Krueger-Sprengel, *supra* note 60, at 24.

trained for the assignment, attend a one-week course biennially, and have continuing contact with military personnel in the command to which they would be attached. Such courts would have three judges, one a lawyer. The accused would have a right to appeal to special military courts of appeal composed of five judges, three of whom would be lawyers. The structure of these special federal, military courts—with civilian judges, under the control of the Ministry of Justice rather than the Ministry of Defense—suggests the reluctance of West Germany, even in time of war or national emergency, to return to the court-martial system.

#### E. *Assessment*

The West German abolition of courts-martial and establishment of limited commanders' punishments appealable to civilian courts seem to have worked well.<sup>64</sup> But because of West Germany's relative compactness and the absence of troops abroad, the administrative success of the present system cannot indicate whether the West German system would work with other armed forces. The fact that West Germany has provided, in time of war or emergency, for military courts, albeit ones more civilianized than Anglo-American courts-martial, indicates some nagging doubts as to the adaptability of their new system.

It is rather difficult to assess the impact of the military justice reforms on discipline, morale, and efficiency of the West German armed forces as those revisions were only a small part of a far broader program to remake the German military along democratic lines.<sup>65</sup> Yet reform

64. This result is due in no small part to careful planning. The legal division of the Ministry of Defense established a program of continuing education in military law and military matters for civilian judges, prosecutors, and lawyers. Six lawyers from the Ministry serve as liaison with civilian legal personnel, and some thirty lawyers are involved in the administration of military justice and discipline. Law teachers instruct officers and noncommissioned officers in military law, and service judges are given special training in military law. Care was taken to locate service courts near major military installations to reduce travel time of service personnel.

65. The new *Bundeswehr* has been criticized by both the left and right. The left's position has been that the *Bundeswehr* is a carbon copy of the old *Wehrmacht* and that the democratization reforms have not curbed militaristic tendencies. In 1964, the Parliamentary Commissioner claimed that soldiers' rights were being neglected and that the *Bundeswehr* was returning to Prussian militarism. *N.Y. Times*, June 16, 1964, at 2, col. 7. In 1967, Karl Jaspers criticized the *Bundeswehr* as becoming an "indirect type of military dictatorship." K. JASPERS, *THE FUTURE OF GERMANY* 49 (1967). On the right, in 1969, the Vice Inspector of the West German Army charged that undue control by the civilian bureaucracy and the institution of Parliamentary Commissioner were undercutting command authority. *N.Y. Times*, April 29, 1969, at 2, col. 4. In late 1969, a memorandum from Army Chief of Staff, General Schnez, urged Parliamentary modification of the provisions of the Constitution and laws which had restructured the *Bundeswehr*. *N.Y. Times*, Jan. 6, 1970, at 8, col. 1. Other lower-ranking officers responded in support of the democratic reforms, and in May, 1970, the *White Paper*, *supra* note 51, issued by the Minister of Defense reiterated the Government's support for the reforms, contending that Germany's role in the defense of the West could best be met with a basically anti-militaristic military.



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of military justice has not been a particularly criticized aspect of that generally controversial program;<sup>66</sup> and despite some problems, the *Bundeswehr* has a good record as a disciplined and efficient armed force.<sup>67</sup> And while West Germany has not had the United States' problems of an unpopular war, far-flung troops, or racial unrest, it has had to overcome the unwillingness of German young men to enter the military,<sup>68</sup> and yet has been able to develop a relatively stable group of career NCO's and officers. Thus, the West German experience at least suggests that in peacetime, order and discipline can be maintained without courts-martial through the relatively minor disciplinary powers of commanders subject to limited civilian review.

### IV. Swedish Reforms Through Abolition of Courts-Martial and Disciplinary Powers

In 1949 Sweden abolished its court-martial system; military offenses previously found in the court-martial code were added to the civilian criminal code, but made applicable only to servicemen.<sup>69</sup> Thus, servicemen are subject to prosecution in the civilian courts for both civilian and military offenses.<sup>70</sup>

66. *But see* charge by Major George Pemler, candidate for Parliament of the right-wing National Democratic Party, that making troops subject to civilian courts for discipline had undermined the efficiency of the military. *N.Y. Times*, April 11, 1969, at 12, col. 1.

67. In NATO comparative evaluations, the West German forces have consistently scored high in competition with the United States and other NATO nations in such diverse areas as infantry, tank gunnery, paratroopers, air defense, destroyers, and missiles. FEDERAL MINISTRY OF DEFENSE, WHITE PAPER, *supra* note 51, at 43. There seem to be no serious morale or disciplinary problems. In 1969, 65,000 West German troops participated in "Operation Knight's Move," and a reporter found that the "most impressive elements were the easy cooperation between the United States, French, and Belgian units and the Germans . . . and the high elan among the young German troops." *N.Y. Times*, Sept. 13, 1969, at 7, col. 1.

68. When the *Bundeswehr* was reconstituted in 1956, only five percent of German young men polled indicated a desire to enter the military. *N.Y. Times*, Sept. 2, 1956, at 10, col. 1. There have been over 65,000 applications for conscientious objector status from 1956 to 1970, eighty percent of them granted. There has been a rise in CO applications since 1967 with almost 20,000 in 1970. FEDERAL MINISTRY OF DEFENSE, WHITE PAPER, *supra* note 51, at 83-84; A. GROSSER, *GERMANY IN OUR TIME: A POLITICAL HISTORY OF THE POSTWAR YEARS 225* (1971).

69. MINISTRY OF JUSTICE, 9 *THE PENAL CODE OF SWEDEN* ch. 21 (T. Sellin transl. 1965) [hereinafter cited as *THE PENAL CODE OF SWEDEN*].

70. In describing the Swedish system of disposition of charges against servicemen, the author relies in part on observation of four trials of servicemen for disciplinary offenses in a civilian court in Stockholm in August 1971; on interviews in August 1971 with Radman Böre, Stockholm *Tingsrätt*, a civilian judge whose court has jurisdiction over military offenses, Radman Ingvar Agren, a civilian judge who is "auditor" for three Air Force Flotillas in the Stockholm area, Hans Göran Franck, an attorney who has been engaged in cases involving members of the military, and attorneys in the military section of the office of the Swedish *Ombudsman*; and on an unpublished report issued by the *Ombudsman's* office, *Survey of Swedish Military Penal Law and Judicial Procedure*, April 20, 1971.

### A. Correction and Disciplinary Punishment

While a few serious offenses, such as abandoning a post during combat *must* be prosecuted in the civilian courts,<sup>71</sup> minor military offenses, such as intoxication or disorderly conduct, are subject to minor "correction" and "disciplinary punishment" imposed by the commander.<sup>72</sup> Intermediate military offenses, such as absence without leave or desertion, can either be prosecuted in the civilian courts or handled by the commander with minor punishments.<sup>73</sup> A company commander can only impose "correction": a warning, reprimand, extra duties for seven days, and denial of leave for seven days. A regimental commander or a commander of a separate unit, post, camp, or station can impose correction and "disciplinary punishment" consisting of a limited fine and/or denial of leave for eight to fifteen days. A fine usually of \$1.50 per day is widely used by Swedish commanders in disciplinary punishment.<sup>74</sup>

The commander imposes correction or disciplinary punishment by informing the serviceman of the charges and asking him if he admits his guilt. Another enlisted man (a "comrade-conscript") may be present as a witness, and a record of the hearing must be made. The commander may proceed with the punishment only if the serviceman admits his guilt. If the serviceman is given a disciplinary punishment, the unit's "auditor," a civilian lawyer, reviews the legality of both the judgment and the sentence. The commander is not bound to accept the auditor's recommendation; but, in fact, it is invariably followed. If the auditor agrees with the commander, the serviceman can then appeal the disciplinary punishment to the civilian court. A punishment of correction, following admission of guilt, can only be appealed to a higher military authority.

If the serviceman denies his guilt, the commander can only obtain the auditor's recommendation and forward the charges to the local civilian court designated to hear disciplinary cases of servicemen. The judges of these courts usually have military service experience and some expertise in military law. The court consists of a judge and five citizen "assistants" who are much like a jury and are selected from a

71. THE PENAL CODE OF SWEDEN, *supra* note 69, at ch. 21, §§ 3, 13. Career military men may also be given sentences involving dismissal or suspension.

72. *Id.* at §§ 9, 15, 16.

73. *Id.* at §§ 11, 12, 14.

74. A 1972 act of Parliament, effective July 1, 1973, abolished confinement as a disciplinary punishment. The new act is consistent with the prevailing philosophy in Sweden which opposes use of confinement as a penal sanction in most cases. *See* Marnell, *Comparative Correctional Systems: United States and Sweden*, 8 CRIM. L. BULL. 748, 753 (1972).

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larger group chosen by the councilmen of each area. Each of the six court members has a vote, but it takes at least four citizen assistants to overrule the vote of the judge. As in civilian courts the procedure is informal and investigatorial, with counsel playing a rather subordinate role. The defendant may be represented by his own civilian attorney, or by an attorney appointed through the state legal aid system. In disciplinary cases, which often involve only fact determinations, servicemen seldom have attorneys; but in prosecutions for civilian or non-disciplinary military offenses, they will generally be represented by counsel.

### B. *Special Military Courts in Time of War or National Emergency*

As in West Germany, there are provisions for the creation of Swedish military courts to try servicemen in the case of war or national emergency.<sup>75</sup> A number of judges, many of them presently civilian judges who hear military cases, would be given a military rank and would be assigned to special military courts which would follow civilian court procedures. These judges would be aided by three "assistants," two civilians and one member of the military; a military attorney would serve as prosecutor. When troops were abroad, a military court with all military assistants could be convened to try servicemen, although the present practice of returning servicemen from abroad for trial in Sweden would be continued if the military situation permitted.

### C. *Assessment*

As in West Germany, the Swedish abolition of courts-martial seems to have worked well. Civilian judges in whose courts servicemen are tried receive special training in military law, and the other civilian court personnel seem to have had no particular difficulty in understanding and applying the substantive law of military offenses. Though Sweden has had troops stationed in United Nations peace-keeping operations in Cyprus, the Middle East, and the Congo, it has had no serious difficulty in returning servicemen accused of crimes to Sweden for trial in a civilian court.<sup>76</sup>

75. See Lindeblad, *Swedish Military Jurisdiction*, 19 MIL. L. REV. 123, 126 (1963). Chapter 22 of THE PENAL CODE OF SWEDEN, *supra* note 69, contains "Articles of War" which are only applicable in time of war or grave national emergency.

76. Several years ago the commander of the Swedish troops assigned to the U.N. peace-keeping forces in Cyprus expressed concern over the absence of military justice powers abroad. A Swedish investigator determined that the problem was not serious, but suggested that a civilian judge, district attorney, and, if necessary, defense counsel,

It is again difficult, as it was in the case of West Germany, to assess the impact of Swedish military justice reforms on efficiency or discipline since the abolition of courts-martial was only one of the liberal reforms<sup>77</sup> which have made the Swedish armed forces one of the least traditional militaries in the world today. The Swedish armed forces are, however, generally conceded to be well-disciplined, though they have experienced some of the same problems of lack of interest in military service and boredom which have beset other western forces in recent years.<sup>78</sup> Again, it must be conceded that the Swedish armed forces have not had to face the problems of either internal racial tensions or the global deployment of troops. Thus, although the Swedish experience shows no serious administrative or disciplinary problems with abolition of courts-martial, even when troops are abroad, its experience may not be fully translatable to the American situation.

#### V. Applying the European Experience to American Military Justice

A number of conclusions can be drawn from the British, German, and Swedish reforms. First, and most importantly, performance of key court-martial functions by civilians (Great Britain) and trial of servicemen in civilian courts (West Germany and Sweden) do not appear to have adversely affected military discipline or efficiency, at least so long as commanders retained minor disciplinary powers. Second, given modern transportation and proper education of key personnel, the reforms have not caused insurmountable administrative problems in domestic trials. Similarly, no insurmountable administrative problems have arisen in the prosecution of servicemen for offenses committed abroad, although the experience does not indicate whether such problems could be overcome if large numbers of troops were stationed abroad in time of war or in highly unstable or inaccessible locations. West Germany and Sweden have anticipated such problems by providing for the establishment of special military courts in time of declared war or national emergency, but they have not yet had occasion to invoke these excep-

be flown to Cyprus periodically from Sweden to hear cases and thus avoid sending men back to Sweden for trial. This suggestion, however, was not adopted. Interview with Radman Böre, Aug. 2 & 3, 1971 (Stockholm). By contrast, appeals from correction or disciplinary punishment abroad are normally handled by forwarding the papers to a civilian court for determination rather than returning the serviceman to Sweden.

77. For example, Sweden has a civilian *ombudsman* with authority to inspect military units and investigate servicemen's complaints, requires commanders to consult with a board consisting of enlisted men, NCO's, and officers, and places virtually no restrictions upon the length of servicemen's hair.

78. The number of applications for conscientious objector status (requiring alternative civilian service) has increased in the last five years. In 1970, there were over 3,000 applications out of 50,000 men drafted of which about twenty-five percent were granted.

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tions. However, it appears that these exceptions are only intended to refer to a World War II-type situation involving substantial mobilization and dislocation or to a prolonged national emergency which interferes with normal operations, transportation, and functioning of civilian courts. Finally, the experience of these countries suggests general approval of the reforms by both servicemen and commanders along with a generally favorable impact on the quality of military justice.

The degree to which the experience of one nation can be applied to another is, of course, open to question.<sup>79</sup> However, there are strong affinities between the armed forces of Great Britain, West Germany, Sweden and the United States which suggest that their military justice experiences may be relevant to one another. All four are among the world's most modern and advanced armed forces.<sup>80</sup> In terms of manpower, the United States armed forces are first, the West German, fourth, and the British, sixth.<sup>81</sup> Sweden, although not in the top ten, nevertheless also maintains a sizable trained reserve force.<sup>82</sup> The size of the armed forces of all four nations has fluctuated considerably since World War II in response to international crises, national commitments, and changes in Cold War attitudes.<sup>83</sup> They have a similar internal structure, developed from a common western military tradition. Finally, all four have undergone similar liberalizing changes concerning the treatment of military personnel.

Of course, the American military has tended to view our armed forces as unique because of its primary role in the western alliance: It is argued that given its responsibilities, the American military cannot afford civilianizing reforms. However, as the Cold War and Vietnam become less dominant in American military thinking, and as we move toward an all-volunteer army, the parallels between the United States' and other western armed forces are becoming more apparent.

79. Toynbee has noted the interaction and increasing convergence of western cultures since the end of World War II. See A. TOYNBEE, *THE PRESENT-DAY EXPERIMENT IN WESTERN CIVILIZATION* (1962); A. TOYNBEE, *AMERICA AND THE WORLD REVOLUTION* (1962).

80. In a ranking of non-Communist countries according to expenditures for military research and development, the United States is first, Great Britain, third, West Germany, fourth, and Sweden, fifth. INTERNATIONAL INSTITUTE FOR PEACE AND CONFLICT RESEARCH, *SIPRI YEARBOOK OF WORLD ARMAMENTS AND DISARMAMENTS—1972*, at 82, 86.

81. UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, *WORLD MILITARY EXPENDITURES 1971*, at 51 (1972).

82. Sweden has over one million trained reservists, out of a population of about eight million. T. DUPUY, *THE ALMANAC OF WORLD MILITARY POWER* (1970). See also Romaneski, *Sweden and Nordic Balance*, 1 *PARAMETERS* 59, 62 (1971) (the mobilized strength of the Swedish army is 750,000).

83. Compare U.S. DEPT OF DEFENSE OASD (COMPTROLLER), *SELECTED MANPOWER STATISTICS* (April 15, 1971) with INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, *THE MILITARY BALANCE* (1963 through 1972); *WORLD ALMANAC AND BOOK OF FACTS FOR 1954*; *WORLD ALMANAC AND BOOK OF FACTS FOR 1957*.

The European experience suggests that reducing or eliminating military control over such an armed force is feasible if an administrative structure can be devised which does not conflict with American constitutional and jurisdictional requirements.

### A. *The British Model*

Under the British model the American armed forces would continue to maintain a separate court-martial system, with civilian judges appointed by the Attorney General, the Secretary of Defense, or some special civilian agency.<sup>84</sup> Prosecutors would continue to be military JAG officers under a chain of command separate from that of the commander.<sup>85</sup> Defense counsel would be a civilian attorney hired by the serviceman or appointed and paid for by the government.<sup>86</sup> Alternatively, a separate defense agency might be established, under the Attorney General or Secretary of Defense.<sup>87</sup>

For offenses committed overseas servicemen could either be tried there or returned to the United States. Civilian military judges would be assigned to live at or near American bases abroad; defense attorneys would be American lawyers living abroad or flown in for the trial.<sup>88</sup>

84. American military judges are not considered to be exercising the judiciary power under Article III of the Constitution. Military courts were traditionally viewed as agencies of the executive branch pursuant to Articles I and II. *Kurtz v. Moffitt*, 115 U.S. 487 (1885); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857). Even the civilian Court of Military Appeals is an Article I legislative court because its judges lack lifetime tenure and independence in pay, assignments, etc. *Cf. Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). Civilian court-martial judges under a non-military agency could be given life tenure and other requisite elements of independence to become Article III judges. See proposal for Article III status for judges of the Court of Military Appeals, in Comment, *The Military Judicial System: Should It Be Brought Under Article III?*, 2 LAW & SOC. ORDER 329 (1972).

85. The Bayh, Bennett, and Hatfield Bills would establish an independent court-martial command to exercise most of the appointive and administrative functions presently performed by the commander and his subordinates, Sherman, *Congressional Proposals*, *supra* note 8, at 42-44. Two differences from the British model are that the chain of command is to the Judge Advocate General rather than an independent civilian official, and defense counsel are also included within this military legal section.

86. It has always been considered appropriate for the military to provide counsel free of charge to servicemen in courts-martial. Pay increases since 1970 may make many enlisted men, for the first time, able to afford to hire a lawyer. However, the requirement of indigency in order to qualify for free representation might be unduly strict for servicemen, especially in cases involving only disciplinary offenses.

87. The British experience seems to indicate that a separate military or governmental defense agency is not necessary if there is a legal aid scheme to permit private attorneys to be paid by the government when the serviceman cannot afford to do so. The 1970 amendments to the Federal Crimes and Criminal Procedure Act establish a comprehensive structure for indigent legal assistance in federal court criminal prosecutions through reimbursement of appointed attorneys or reliance on Federal Public Defender or Community Defender Organizations. 18 U.S.C. § 3006a (1970). The District of Columbia and Chicago federal court defender programs have become models for other federal courts. See MacCarthy, *The Chicago Federal Defender Program*, 8 AM. CRIM. L.Q. 156 (1970).

88. It is usually impossible for American attorneys to represent clients in court-martial cases abroad if military cooperation and possibly financial support are not

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### B. *The West German and Swedish Model*

Under the West German and Swedish model, the court-martial system established by the UCMJ would be abolished, except in times of declared war or national emergency.<sup>89</sup> The UCMJ offenses would be added to the federal criminal code, but made applicable only to servicemen.<sup>90</sup> Thus servicemen would be subject to trial for both civilian and military offenses in the regular federal district courts.<sup>91</sup> Prosecutions would be conducted by the U.S. Attorney's office, and defense counsel would be a civilian attorney hired by the defendant or appointed by the court.<sup>92</sup> When a serviceman demands a jury trial, the members would be selected from residents of the district, both military and civilian, according to the usual selection procedures of the Federal Jury Selection Act.<sup>93</sup> Thus, the panels would include members of the military, both officers and enlisted men, as well as their adult dependents and other civilians living in the area.

Commanding officers would retain the disciplinary punishment powers they now have under Article 15 of the UCMJ.<sup>94</sup> A serviceman

provided. The Lawyers Military Defense Committee, only after filing suit, received permission for its lawyers to use military transportation, telephones, and other services necessary for representation of clients in Vietnam. *TIME*, Feb. 8, 1971, at 48.

89. The rules of martial law determine when military courts can be substituted for civilian courts, and provide a workable standard for indicating when there are such exigent conditions as to require special military courts to be convened to try servicemen. *See, e.g., Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). *See also* R. RANKIN, *WHEN CIVIL LAW FAILS: MARTIAL LAW AND ITS LEGAL BASIS IN THE UNITED STATES* 200 (1939).

90. Reliance on a federal criminal code, rather than state laws, would seem to be more satisfactory for servicemen's offenses and would be consistent with recent developments in federal criminal law. The proposed Federal Criminal Code would establish a comprehensive statute containing most of the criminal offenses normally found in state penal law, applicable to all citizens when there are grounds for federal jurisdiction and the federal interest is sufficiently strong; to offenses committed on federal enclaves; and to offenses committed by American citizens abroad for which there are adequate grounds for federal jurisdiction. *See* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *STUDY DRAFT OF A NEW CRIMINAL CODE* § 208(f) (1970).

91. For ease of administration, a district court might establish a special division, staffed with a separate federal judge or with rotating federal judges from the district, which would have jurisdiction over all military cases arising within the district. For minor and disciplinary offenses, federal magistrates rather than judges might be used, just as they are now used to try servicemen and civilians for traffic offenses and other misdemeanors on military installations and federal enclaves. 28 U.S.C. § 631 *et seq.* (1970); 18 U.S.C. § 3401 (1970). *See* Franks, *Prosecution in Civil Courts of Minor Offenses Committed on Military Installations*, 51 *MIL. L. REV.* 85 (1971).

92. *See* notes 86 & 87 *supra*.

93. Each district court must devise a plan using voter registration lists or other approved sources. *See* 28 U.S.C. § 1863(b)(3) (1970). The present exemption of members of the armed forces from federal jury service in 28 U.S.C. § 1862 (1972), would have to be removed. In addition, it might be desirable to lower the present age requirement of twenty-one for federal jurors as a number of states have already done. On June 30, 1969, 904,000 out of 3,421,000 servicemen on active duty were under twenty-one. *DEPT OF DEFENSE, DIRECTORATE FOR INFORMATION OPERATIONS SELECTED MANPOWER STATISTICS* 31 (1970).

94. *See* note 6 *supra*. Following the recommendations of a special Task Force on the Administration of Military Justice in the Armed Forces, the Secretary of Defense, in a letter dated January 11, 1973, ordered military departments to revise Article 15 pro-

offered such punishment could, however, refuse it and demand trial in the federal court.<sup>95</sup> Following the West German model, he could be given a right to appeal to a federal court from severe nonjudicial punishments.

There are three feasible structures for trials resulting from crimes committed abroad where there is no court-martial system. First, courts-martial for overseas offenses could be retained.<sup>96</sup> However, such a split jurisdiction would mean that a serviceman tried abroad in a court-martial would not be accorded the due process rights given a "domestic" serviceman tried for the same offense in an American civilian court.<sup>97</sup>

Second, adopting the Swedish model, servicemen could be returned to the United States for trial in a federal court.<sup>98</sup> However, transporting all accused servicemen and necessary witnesses back to America (even assuming foreign witnesses could be brought to the United States)<sup>99</sup> would entail considerable expense. Moreover, a jury chosen

cedures to make legal advice available to an accused prior to punishment, to give him an opportunity to call witnesses, present evidence, and be represented at the hearing before the commander, to advise him of the right to appeal to the next highest commander, and to make the proceedings open to the public unless otherwise requested by the accused, or if military exigencies or security precludes public disclosure. *Task Force Implementation*, 3 ARMY LAWYER 7 (1973).

95. Presently, except in the case of a person attached to or embarked in a vessel, nonjudicial punishment may not be imposed if a serviceman demands trial by court-martial, and trial by summary court-martial may also be refused, permitting trial only by special or general court-martial. Art. 20, UCMJ; MCM, *supra* note 6, para. 132, at 26-28.

96. The fact that American civilians are subject to state and federal criminal laws while in the United States, but not while abroad due to the absence of extraterritorial application of most offenses, might be considered to be analogous to this split-jurisdiction proposal.

97. There is something troubling about the fact that a serviceman who commits an offense in Hawaii or Maine would be entitled to a federal court trial, but would be subjected to a court-martial trial if he committed the same offense in Okinawa or in Iceland. The United States would be subjecting the serviceman to its criminal jurisdiction based on his status as a member of the military, but would be according him entirely different trials depending upon his geographic location. Unlike the case of two different state court trials where the Fourteenth Amendment would at least impose the same basic due process standards, such basic constitutional rights as right to grand jury, trial by jury, and trial before an independent legal forum would be lacking in the court-martial abroad.

98. Presently, federal penal statutes may apply extraterritorially to American citizens for offenses committed on the high seas or in foreign countries if that is found to be the intent of Congress. *United States v. Bowman*, 260 U.S. 94 (1922). *Cf. Blackmer v. United States*, 284 U.S. 421 (1931). See also Bilder, *Control of Criminal Conduct in Antarctica*, 52 VA. L. REV. 231 (1966). See generally *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L LAW, SUPP. 437 (1935).

Venue for the trial of a serviceman for an offense committed abroad could be the federal court district for the first location at which he is returned to the United States, as is presently provided under the U.S. Code for crimes committed abroad. 28 U.S.C. § 3238 (1970). An alternative would be to provide that specified United States district courts would exercise jurisdiction over crimes committed in certain areas.

99. The United States would have no power to compel a foreign citizen to go to the United States to serve as a witness, although he might be persuaded to do so voluntarily or his deposition might be taken abroad. See *Joint Hearings*, *supra* note 45, at 63, 145.



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for a federal court would be totally removed from the conditions abroad under which the offense was committed, raising questions as to whether the serviceman has been accorded a trial by a jury of peers.<sup>100</sup>

The third, and most attractive, solution is trial of American servicemen abroad by U.S. district courts. There appears to be no constitutional bar to the creation of such district courts in a foreign country to exercise jurisdiction over American servicemen.<sup>101</sup> A federal judge and/or magistrate could either reside in the foreign country or fly to it from a nearby American possession, or even the United States, in order to hear trials.<sup>102</sup> Perhaps the best structure would be the establishment of divisions of certain existing district courts. For example, the District Court for Hawaii might establish divisions in Korea, Japan, and Okinawa; the District Court for Guam in Taiwan and the Philippines; the District Court for Massachusetts in Great Britain.<sup>103</sup> As American troop concentrations in foreign countries fluctuate, such divisions could be expanded, contracted, or eliminated without affecting the integrity of the district courts to which they are attached. An appropriate amendment to the Status of Forces Agreements, which now authorizes American courts-martial in foreign countries,<sup>104</sup> would be

100. Although the constitutional right to trial by jury does not guarantee jurymen with similar experiences, it is troubling that a serviceman charged with an offense committed abroad or in a combat zone might be tried thousands of miles from the location of his offense by civilians who are not familiar with the conditions where he committed the offense.

Servicemen have objected to trial in the relatively closed atmosphere of an overseas court-martial, shut off from public exposure and civilian attorneys. See comments of Pvt. Billy Dean Smith that his acquittal in a court-martial in the United States for alleged "fragging" in Vietnam would have been impossible if held in Vietnam, N.Y. Times, Nov. 15, 1972, at 12, col. 3; *Chenoweth v. Van Arsdale*, 22 U.S.C.M.A. 183, 46 C.M.R. 183 (1973) (unsuccessful attempt by sailor charged with sabotage of ship in San Francisco to prevent court-martial from being held in the Philippines where the ship was subsequently dispatched).

101. There are presently four U.S. district courts sitting abroad, in Puerto Rico, Guam, the Canal Zone, and the Virgin Islands, all located on territory over which the United States exercises commonwealth, territorial, or other sovereign jurisdiction. The Supreme Court has upheld congressional power to establish consular courts in foreign countries with jurisdiction over offenses committed there by American citizens. *In re Ross*, 140 U.S. 453 (1891). *Cf. Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). *But see Reid v. Covert*, 354 U.S. 1, 12 (1957). The last American consular court was abolished in 1956. See R. STANGER, *INTERNATIONAL LAW STUDIES 1957-1958: CRIMINAL JURISDICTION OVER VISITING ARMED FORCES* 18-23 (1965).

102. If the judge did not live within the district, § 28 U.S.C. § 134(b) (1970), requiring that all judges, except in the District of Columbia, live within their district, would have to be amended.

103. The District Court for the District of Columbia exercises habeas corpus jurisdiction over servicemen abroad. *Day v. Wilson*, 247 F.2d 60 (D.C. Cir. 1957); *Cozart v. Wilson*, 236 F.2d 732 (D.C. Cir. 1956); *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949), *rev'd on other grounds sub nom. Johnson v. Eisentrager*, 338 U.S. 877 (1949).

104. See Agreement Among the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S. 1792, T.I.A.S. No. 2846; Note, *Criminal Jurisdiction over American Armed Forces Abroad*, 70 HARV. L. REV. 1043 (1957) (discussing SOFA agreements with forty-nine nations). These agreements typically provide for concurrent jurisdiction over criminal acts of servicemen abroad with the right to exercise primary jurisdiction in the sending or the host nation depending upon the type of offense and the circumstances under which it was committed.

necessary to permit the United States to replace courts-martial with divisions of the district courts. Foreign countries are not likely to find this objectionable since a division attached to a United States district court on American territory should not suggest any permanency nor any invasion of the foreign country's sovereignty.<sup>105</sup>

Prosecutors in such federal trials abroad would be either the U.S. Attorneys appointed for the court, or pursuant to the British model, military attorneys.<sup>106</sup> Defense counsel would again be resident private American attorneys<sup>107</sup> or ones flown in for the trial. If the number of local American attorneys were so small as to deprive a serviceman of a reasonable choice, he might be entitled to the selection or appointment of an American attorney from elsewhere, transported at government expense.

One of the principal objections to the establishment of such courts abroad has been the difficulty of obtaining a representative jury. However, in any overseas location where there are enough American servicemen to produce a significant number of military justice cases, there should be enough servicemen to provide an adequate pool.<sup>108</sup> Moreover, in most overseas installations, there are a sizable number of civilian American citizens, such as military dependents, and private or government employees, who could also be included.<sup>109</sup> In any event, the pool would be larger and more representative than the present all-officer (or one-third enlisted men) court-martial panels; and given the wide divergence in age, race, economic status, and geographic origin of servicemen, it should provide as representative a jury as most federal jury pools. In those rare cases where there are an insufficient number of American servicemen and civilians to compose an adequate pool, a serviceman could be transported elsewhere for trial.

One problem with courts abroad is the limitation on a judge's au-

105. See Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 GEO. WASH. L. REV. 273, 287 (1967). But see *Joint Hearings*, *supra* note 45, at 334.

106. The Posse Comitatus Act, 18 U.S.C. § 1385 (1970), which forbids use of "any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws" without express authorization by the Constitution or Act of Congress would prevent use of military prosecutors.

107. A surprising number of civilian American attorneys reside abroad near American military installations, some of them retired JAG officers, some associated with firms in the United States, and, in the last few years, some working for religious, civil liberties, or anti-war organizations which have established legal offices to assist servicemen. It is also possible that foreign attorneys could represent servicemen in federal courts abroad. The U.S. District Court for the Canal Zone, for example, will admit to practice a foreign attorney if he meets certain residency and educational requirements. CANAL ZONE CODE t. 3, § 541 (1963).

108. But see note 93 *supra*.

109. For statistics showing the number of servicemen and dependents at various overseas installations, see *U.S. Military Personnel in Asia, By Country: 1950 to 1971*, U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1972, at 260 (93d ed.).

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thority to subpoena foreign witnesses and evidence, and issue other forms of mandatory process on foreign citizens. To enforce such orders courts could only exert such authority with the assistance of the foreign government.<sup>110</sup> As under the present court-martial system, the United States would have to utilize the offices of the foreign government in obtaining compulsory process over their citizens. As under the present court-martial system,<sup>111</sup> critical defense witnesses in the United States could be ordered to be returned to the foreign installation if still in the military; or if civilians, their deposition could be taken and introduced into evidence if they would not voluntarily return for the trial.<sup>112</sup> Deposition and other discovery procedures would actually be simpler than under the court-martial system, since the practice would be uniform with all federal courts, and other federal courts could assist the court abroad.<sup>113</sup> In the unusual case where many of the important witnesses are in the United States, the overseas federal court judge could determine that a change of venue to the United States would be proper.<sup>114</sup>

A useful by-product of establishing overseas federal courts would be their possible applicability to overseas offenses by American civilians. The Supreme Court's decisions in the 1950's striking down provisions of the UCMJ which subjected civilian dependents and employees of the military abroad to court-martial jurisdiction left such civilians generally unprosecutable for crimes committed overseas.<sup>115</sup> Numerous

110. Assistance by the host country in the apprehension and trial of offenders of a visiting nation's armed forces is often provided. *See, e.g.*, Air Force Regulation 110-17, May 8, 1967, permitting friendly foreign military forces stationed in the United States to use American military forces in apprehension and confinement of offending foreign servicemen.

In Okinawa, American commanders must request the issuance of a warrant from a judge of the Okinawan Civil Administration or Magistrate Court in order to search off-post dwellings of American servicemen. *United States v. Mitchell*, 21 U.S.C.M.A. 340, 45 C.M.R. 114 (1972).

111. *See* arts. 46 & 49, UCMJ; *United States v. Hodge*, 20 U.S.C.M.A. 412, 43 C.M.R. 252 (1971).

112. *See* FED. R. CRIM. P. 15(e).

113. The assistance which federal courts give to other federal courts concerning service of process, disposition of contempt orders, and the like, is a practical convenience which courts-martial lack. Also, unlike courts-martial, which may have a jurisdictional barrier to imposing compulsory process over civilians, federal courts would have no difficulty in compelling civilians to testify. However, a federal court sitting abroad would probably have to utilize some military facilities and services. Military policemen might be used to conduct investigations, make arrests, serve process, and insure order in the court-room. *See* Ehrenhaft, *supra* note 105, at 302.

114. *See* FED. R. CRIM. P. 21(b).

115. American civilians abroad may be tried by the foreign country, but the host nation frequently refuses to prosecute for minor crimes such as traffic offenses and for offenses involving only Americans or American property. Foreign courts have sometimes given unduly light sentences to American civilians for serious crimes not affecting that country or its citizens. One wife who killed her American serviceman husband in Germany was given only thirty-two days' confinement by a German court. *Joint Hearings*, *supra* note 45, at 67.

proposals have been made to plug this loophole,<sup>116</sup> but Congress has not yet acted. The establishment of overseas courts to try servicemen could solve this problem by providing a judicial structure which would provide a jury and other due process rights sufficient to pass constitutional muster for the trial of civilians abroad.<sup>117</sup>

## VI. Conclusion

The American court-martial, with its command-dominated structure,<sup>118</sup> all military personnel,<sup>119</sup> commander-selected jury primarily from the officer class,<sup>120</sup> inadequate pre-trial procedures,<sup>121</sup> and limited appeals,<sup>122</sup> provides servicemen with an inferior form of criminal jus-

116. See Everett & Hourcle, *Crime Without Punishment—Ex-Servicemen, Civilian Employees and Dependents*, 13 JAG L. REV. 184 (1971); Ehrenhaft, *supra* note 105.

117. Cost is one drawback to proposals for establishing a federal court structure in foreign countries for the relatively small number of offenses committed by civilians abroad. The number of criminal offenses, both military and civilian, committed by servicemen abroad is more substantial, warranting the expense. There would also be concomitant savings from the dissolution of the presently costly JAG legal establishment.

118. For accounts of the adverse impact which command control has had upon the quality of justice in the military, see P. BARNES, PAWNS, *THE PLIGHT OF THE CITIZEN-SOLDIER* 185-91 (1972); R. RIVKIN, G. I. RIGHTS AND ARMY JUSTICE: *THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW* 241-66 (1970); R. SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 40-178 (1970); West, *Command Influence*, in *CONSCIENCE AND COMMAND* 73 (J. Finn ed. 1971); Fuchsberg, *Command Influence on Military Justice*, 7 TRIAL 36 (1971); Rothblatt, *Military Justice or Injustice: The Green Beret Case*, 75 CASE & COM. 3 (1970). *But see* De Giulio, *Command Control: Lawful Versus Unlawful Application*, 10 SAN DIEGO L. REV. 72 (1972); Hodson, *Courts-Martial and the Commander*, 10 SAN DIEGO L. REV. 51 (1972).

119. Military defense attorneys may be subjected to pressures, both direct and subtle, by the command or by the fact of their military status. *See, e.g.*, F. GARDNER, *THE UNLAWFUL CONCERT, AN ACCOUNT OF THE PRESIDIO MUTINY CASE* 99, 143 (1970); Benson, *Military Justice in the Consumer Perspective*, 13 ARIZ. L. REV. 595, 601-06 (1971); Fairbanks, *Disciplinary Discharges—Restricting the Commander's Discretion*, 22 HASTINGS L.J. 291, 305 (1971). *But see* De Giulio, *Command Control*, *supra* note 118; Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 MAINE L. REV. 105, 133-38 (1970).

120. For analysis of the deficiencies in court-martial selection procedures, see Larkin, *Should the Military Less-Than-Unanimous Verdict of Guilt Be Retained?*, 22 HASTINGS L.J. 237 (1971). Remcho, *supra* note 43; Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 CORNELL L. REV. 363 (1972); Comment, *Stacked Juries: A Problem of Military Injustice*, 11 SANTA CLARA LAWYER 362 (1971). *But see* Everett, *Military Justice Is To Justice As*, 12 A.F. JAG L. REV. 202 (1970); Hodson, *supra* note 118, at 60-65.

121. For discussion of deficiencies and discrimination in court-martial pre-trial procedures, see NAACP SPECIAL CONTRIBUTION FUND, *THE SEARCH FOR MILITARY JUSTICE: REPORT OF AN NAACP INQUIRY INTO THE PROBLEMS OF THE NEGRO SERVICEMEN IN WEST GERMANY* 8-12 (1971); Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9, 17-19; *Report of the DOD Task Force on the Administration of Military Justice in the Armed Forces*, 1 MILITARY L. DIG. 1 (1972); Sherman, *supra* note 1, at 85-87. *But see* Everett, *supra* note 120; McCoy, *Due Process for Servicemen—The Military Justice Act of 1968*, 11 WM. & MARY L. REV. 66 (1969).

122. For discussion of inadequacies in appellate review of court-martial convictions, see Burris & Jones, *Civilian Courts and Courts-Martial—The Civilian Attorney's Perspective*, 10 AM. CRIM. L. REV. 139 (1971); Willis, *The Constitution, the United States Court of Military Appeals in the Future*, 57 MIL. L. REV. 27 (1972); Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 (1972). *But see* Ghent, *Military Appellate Processes*, 10 AM. CRIM. L. REV. 125 (1971);

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tice. Proposed reforms of the UCMJ<sup>123</sup> would remedy some of these problems but would leave intact the structure of court-martial, with its intrinsic relationship to military disciplinary policies and control.<sup>124</sup> Reforms along the lines of either the British or West German-Swedish models, resulting in the separation and civilianization of military justice functions, appear to be a feasible way to provide American servicemen with greater justice. Adaptation of the British, or West German-Swedish models to the American military would require considerable structural changes, and some initial cost.<sup>125</sup> However, it appears that these models can be adapted to the American armed forces with no loss of military effectiveness, and the improved quality of justice for the serviceman which they portend suggests that the effort would be well worth it.

Quinn, *Courts-Martial Practice: A View from the Top*, 22 HASTINGS L.J. 201 (1971); Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibility*, 54 MIL. L. REV. 1 (1971).

123. See notes 10 & 11 *supra*.

124. The application of constitutional standards to courts-martial by federal courts is a potential source for substantial restructuring of military justice as indicated by recent federal court holdings of unconstitutionality of the military offense of "disloyal statements," see *Stolte & Amick v. Laird*, 353 F. Supp. 1392 (D.D.C. 1972); art. 134, UCMJ, the "general article" forbidding "all disorders and neglects to the prejudice of good order and discipline" and "conduct of a nature to bring discredit upon the armed forces," *Averch v. Secretary of the Navy*, 41 U.S.L.W. 2497 (D.C. Cir. March 20, 1973); and art. 133, UCMJ, forbidding "conduct unbecoming an officer and a gentleman," *Levy v. Parker*, No. 71-1917 (3d Cir. April 18, 1973). However, the federal courts have generally rejected constitutional attacks upon structural aspects of the court-martial system. See *O'Callahan v. Parker*, 395 U.S. 258, 261 (1969) (dictum that the right to trial by jury does not apply to the military); *Davies v. Clifford*, 393 F.2d 496 (1st Cir. 1968) (no right to appeal court-martial conviction to circuit courts); *Gallagher v. Quinn*, 363 F.2d 301 (D.C. Cir.), *cert. denied*, 383 U.S. 881 (1966) (limitation in UCMJ of automatic appeal to the Court of Military Appeals to generals and flag officers, constitutional).

125. It is difficult to estimate the cost of replacing the court-martial system with federal court trials. However, the court-martial system is itself expensive to operate. In 1970, there were almost four thousand full-time JAG officers in the Army, Navy, Air Force, and Coast Guard, a high percentage of those in the Army and Navy engaged primarily in the administration of military justice. ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES & THE GENERAL COUNSEL OF THE DEPT OF TRANSPORTATION PURSUANT TO THE UCMJ, at 22, 27, 35 (Jan. 1, 1970 to Dec. 31, 1970). The cost of maintaining each JAG officer includes not only base pay, but also allowances and allotments, special benefits such as medical care, post services, and commissary and PX privileges, and considerable education expenses. The operating budget of the United States Court of Military Appeals alone, which does not include the full rental value of the building it occupies in Washington, D.C., is \$874,000 for 1973. *Fiscal Year 1973—Department of Defense—Military*, THE BUDGET OF THE UNITED STATES GOVERNMENT APP. 295. In many cases the military justice system duplicates the court structure and judicial personnel already existing in the local federal court, and only a small increase in personnel would appear to be required if military justice cases were transferred to the federal courts. However, in other cases, particularly in relation to trial of servicemen abroad, new and expensive court structures would have to be devised and new court personnel provided.