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### The Civilianization of Military Law

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# THE CIVILIANIZATION OF MILITARY LAW

*Edward F. Sherman\**

## PART I

### I. INTRODUCTION

Military law in the United States has always functioned as a system of jurisprudence independent of the civilian judiciary. It has its own body of substantive laws and procedures which has a different historical derivation than the civilian criminal law. The first American Articles of War, enacted by the Continental Congress in 1775,<sup>1</sup> copied the British Articles, a body of law which had evolved from the 17th century rules adopted by Gustavus Adolphus for the discipline of his army, rather than from the English common law.<sup>2</sup> Despite subsequent alterations by Congress, the American military justice code still retains certain substantive and procedural aspects of the 18th century British code. Dissimilarity between military and civilian criminal law has been further encouraged by the isolation of the court-martial system. The federal courts have always been reluctant to interfere with the court-martial system, as explained by the Supreme Court in 1953 in *Burns v. Wilson*:<sup>3</sup> "Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it . . . ." <sup>4</sup> As a result, the court-martial system still differs from the civilian court system in such aspects as terminology and structure, as well as procedural and substantive law.

The military has jealously guarded the distinctive aspects of its system of justice. The procedural framework of the court-martial evolved over

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<sup>1</sup> The first Articles of War were adopted by resolution of June 30, 1775. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 90 (Lib. of Cong. ed. 1904-1937). They were repealed and replaced by Articles of War authorized by resolution of September 20, 1776. *Id.* at 435-82. For an analysis of the Articles in relation to the British code see G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 1-12, 339-44 (3d ed. rev. 1918) [hereinafter cited as DAVIS].

<sup>2</sup> DAVIS, *supra* note 1, at 13, 340.

<sup>3</sup> 346 U.S. 137 (1953).

<sup>4</sup> *Id.* at 140.

the years as a practical means of formalizing punishment of soldiers and sailors by their commanders. Its principal characteristic was control by the commander. Since military units were sometimes isolated from other units and the civilian population, it was necessary that court-martial authority be decentralized, with lower echelon commanders possessing the power to convene a court-martial and staff it with their own officers so that a determination could be made quickly and the unit could get back to its main task. Thus, the court-martial had to be a relatively simple proceeding, with few legal formalisms, sometimes conducted in the field with a drum as a desk, hence the term "drum-head justice." There was little pretense at providing an impartial and adversary "judicial" hearing. The purpose was to determine the facts and administer a punishment which would provide deterrence to other men and, if possible, return the individual to his role as a functioning soldier as quickly as possible. Thus, it was not uncommon for crimes which would draw a prison sentence today, such as assault with a deadly weapon, to be punished only by corporal punishment,<sup>5</sup> while crimes which threatened disciplinary order often resulted in harsh sentences, including death.<sup>6</sup> No one blushed in admitting that the court-martial was not a real trial; that the commander used it to enforce his disciplinary policies and inculcate military values in his men; that it was administered by officers alone; that there was no right to review; and that the penalties were calculated to set an example and not to provide equal justice.

Throughout the 19th century and well into the 20th, the court-martial system was still an autonomous legal system with its own distinct procedures and laws relatively unaffected by civilian notions of criminal law and judicial due process. Perhaps the best example of the military's attitude is the statement of General William T. Sherman, Commanding General of the Army from 1869 to 1883, before a congressional committee in 1879:

I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.

The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the

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<sup>5</sup> There was a wide variety of punishments in the 19th century including death, imprisonment, fine, suspension from rank, pay and command, drumming out and cashiering, and such corporal punishments as flogging with cat-o'-nine-tails, marking the letter D (for deserters) on the serviceman's hip, and stripes. See W. DE HART, OBSERVATIONS ON MILITARY LAW, AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 68-70, 245-51 (1846) [hereinafter cited as DE HART].

<sup>6</sup> A number of offenses carried the possible sentence of death, usually executed by shooting or hanging. *Id.* at 247-48. By Act of Congress of May 29, 1830, no deserter could be punished by death in time of peace. *Id.* at 54.

safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.

These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by evengrafting on our code their deductions from civil practice.<sup>7</sup>

General Sherman's view of military justice was consistent with his emphasis upon professionalism in the small volunteer post-Civil War army,<sup>8</sup> and until World War I this view was generally accepted and rarely criticized. However, the nature of the issue changed dramatically with World War I. The Articles of War which applied to the millions of conscripted servicemen in World War I was essentially the same code as that enacted in 1775 by the Continental Congress. Court-martial abuses and outrageously severe sentences led to the first public movement for the civilianization of military law. For the first time the question was asked why members of the military had to be subjected to a system which failed to afford them the constitutional and due process rights to which they would be entitled in civilian courts.

The World War I movement for civilianization was led by General Samuel T. Ansell, the acting Judge Advocate General of the Army. In sharp contrast to the prevailing view as described by General Sherman, General Ansell argued that the military system itself was foreign to our American system of justice and was injuring the effectiveness of the Armed Forces:

I contend—and I have gratifying evidence of support not only from the public generally but from the profession—that the existing system of Military Justice is un-American, having come to us by inheritance and rather witless adoption out of a system of government which we regard as fundamentally intolerable; that it is archaic, belonging as it does to an age when armies were but bodies of armed retainers and bands of mercenaries; that it is a system arising out of and regulated by the mere power of Military Command rather than Law; and that it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from the Army that insists on maintaining it.<sup>9</sup>

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<sup>7</sup> Quoted in *Hearings on H.R. 2498 Before a Spec. Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 780 (1949). This passage was quoted recently with favor in Hansen, *Judicial Functions for the Commander?*, 41 *MIL. L. REV.* 1, 54 (1968).

<sup>8</sup> See S. HUNTINGTON, *THE SOLDIER AND THE STATE* 230-31 (1957).

<sup>9</sup> Ansell, *Military Justice*, 5 *CORNELL L.Q.* 1 (1919).

General Ansell called for major changes in the court-martial system which, had they been adopted, would have removed many of the traditional peculiarities of military law and embraced many of the modes of civilian law. Instead of vaguely defined crimes he called for the drafting of military crimes with definiteness. In place of a court-martial controlled by the commander through his powers to appoint the court members, oversee the administration of the court, and review the sentence, Ansell called for an independent military judge, a court chosen by the judge rather than the commander, and the right of the accused to have a portion of the court chosen from his own rank. Ansell further asked for definite limits on sentences, a mandatory and binding pretrial investigation, right to lawyer counsel, and a civilian court of military appeals. In short, General Ansell urged the partial remaking of the military law system along civilian court lines, and the reworking of substantive laws and due process procedures in conformity with civilian standards.

Most of General Ansell's proposals were rejected by the Congress with only a few reforms reflected in the new Articles of War passed in 1920.<sup>10</sup> The ensuing 50 years have witnessed a continuous civilianization of military justice, with particular acceleration in the post-World War II period and the present Vietnam War era. The argument for distinctly different procedures and due process rights in military law and an overtly disciplinarian approach to justice made by General Sherman, although not totally discredited, has undergone serious reexamination. Chief Justice Warren in his James Madison Lecture at the New York University Law Center in 1962 expressed the view that the autonomy of the military law system could no longer be accepted without question in a day of large scale conscription:

I suppose it cannot be said that the courts of today are more knowledgeable about the requirements of military discipline than the courts in the early days of the Republic. Nevertheless, events quite unrelated to the expertise of the judiciary have required a modification in the traditional theory of the autonomy of military authority.

These events can be expressed very simply in numerical terms. A few months after Washington's first inauguration, our army numbered a mere 672 of the 840 authorized by Congress. Today, in dramatic contrast, the situation is this: Our armed forces number two and a half million; every resident male is a potential member of the peacetime armed forces; such service may occupy a minimum of four per cent of the adult life of the average American male reaching draft age; reserve obligations extend over ten per cent of such a person's life; and veterans are numbered in excess of twenty-two and a half million. When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment

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<sup>10</sup> Act of June 4, 1920, ch. 227, 41 Stat. 759, 787 [hereinafter cited as Articles of War, 1920].

as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.<sup>11</sup>

Interest in further civilianization of military justice in the post-World War II period resulted from continued conscription,<sup>12</sup> and the steady expansion of individual rights in civilian society and law.<sup>13</sup> Substantial civilianization resulted from the passage of the Uniform Code of Military Justice (UCMJ) in 1950,<sup>14</sup> from the decisions of the United States Court of Military Appeals which was established by the UCMJ,<sup>15</sup> and from expanded federal court reviewability of military determinations.<sup>16</sup> However, the UCMJ, as enacted, was a compromise which left commanders in control of court-martial machinery and appointments and, although it extended substantial due process rights to servicemen, it failed to go as far as General Ansell had recommended in remaking the court-martial structure and procedures along civilian court lines. The only major change since the UCMJ, the Military Justice Act of 1968,<sup>17</sup> adopted further civilian court terminology and modes, particularly for military trial and appeal judges, but failed to make basic changes in the court-martial structure and command control of court-martial machinery. Despite an expansion of federal court reviewability of courts-martial, review is still narrowly limited to questions of jurisdiction and denial of constitutional rights on petition for habeas corpus. The Court of Military Appeals, although now accepting the proposition that constitutional safeguards apply to military trials except insofar as they are made inapplicable expressly or by necessary implication,<sup>18</sup> has still failed to ex-

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<sup>11</sup> Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 187-88 (1962) (footnotes omitted).

<sup>12</sup> For a history of conscription during this period see AMERICAN FRIENDS SERVICE COMMITTEE, *THE DRAFT?* 1-9 (1968); *THE DRAFT* (S. Tax ed. 1967).

<sup>13</sup> For commentaries on the expansion of individual rights by the Supreme Court in a variety of areas see Black, *The Supreme Court 1966 Term: Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Mishkin, *The Supreme Court 1964 Term: Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

<sup>14</sup> Act of May 5, 1950, ch. 169, 64 Stat. 107 (1950), as amended, 10 U.S.C. § 801 *et seq.* (1964).

<sup>15</sup> See generally Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1961).

<sup>16</sup> For a discussion of availability of judicial review of military determinations see Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Doctrine*, 55 VA. L. REV. 483 (1969); Comment, *God, The Army and Judicial Review: The In-Service Conscientious Objector*, 56 CALIF. L. REV. 379 (1968).

<sup>17</sup> Pub. L. No. 90-632 (Oct. 24, 1968).

<sup>18</sup> *United States v. Jacoby*, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

tend certain civilian due process rights to servicemen in courts-martial.<sup>19</sup> Thus, the civilianization movement has only achieved a portion of its objectives. This article will consider the growth and development of the civilianization movement from World War I to the present, and those aspects and structures which still remain as targets for reform in light of the conflicting arguments concerning further civilianization of military justice.

## II. PRE-WORLD WAR I RESISTANCE TO CIVILIANIZATION

When the Continental Congress turned to the task of providing for the government of the newly raised continental army, it looked to British military law with which Americans were familiar as a result of their service with the British army during the Seven Years' War.<sup>20</sup> British military law was regulated by the Mutiny Act<sup>21</sup> (a statute passed by Parliament in 1689 which established rules for the offenses of mutiny and desertion) and by the Articles of War (regulations issued by the King, although more often by a military officer specially appointed to issue them in the King's name, pursuant to authority granted by the Mutiny Act, which established crimes, penalties, and procedures for courts-martial). The Mutiny Act of 1689 was part of the limitation on regal power accepted by William and Mary after the "bloodless revolution," and it was significant in establishing parliamentary control over the military, with a distinct preference against standing armies, by requiring that the act be renewed from year to year.<sup>22</sup> Thus, the British military law in effect at the time of the American Revolution contained certain inherent civilianizing aspects. However, the actual crimes and procedures codified in the Articles of War were characteristically military, and despite ultimate control by Parliament, little direct civilian influence was felt in military justice.

The American military development closely paralleled that of the British. The Constitution divided powers over the military between the executive and legislative branches, with the President as Commander in

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<sup>19</sup> *E.g.*, *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963) (right to lawyer counsel in lower courts-martial); *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964) (right to trial by jury of one's peers).

<sup>20</sup> H. CAMPBELL, *AN INTRODUCTION TO MILITARY LAW* 7 (1946).

<sup>21</sup> Mutiny Act, 1 W. & M., c. 5 (1689). *See generally* DAVIS, *supra* note 1, at 2-4; DE HART, *supra* note 5, at 1-2.

<sup>22</sup> W. LUNT, *HISTORY OF ENGLAND* 461-62 (3d ed. 1945).

Chief of the Army, Navy, and militia,<sup>23</sup> but with Congress possessing effective control by virtue of constitutional powers to declare war; raise and support armies; provide and maintain a navy; and to make rules for the government and regulation of the land and naval forces.<sup>24</sup> It has never been doubted that Congress, under its power to make rules for the government and regulation of the land and naval forces, possesses the authority to establish the substantive laws and procedural rules governing courts-martial. However, there was some confusion as to the nature of courts-martial: Were they judicial or semi-judicial bodies subject to the Constitutional limitations placed on the judiciary, or were they administrative bodies not within the scope of the judicial article, article III? It was not until 1857 in *Dynes v. Hoover*<sup>25</sup> that this question was definitively decided with the holding that military courts are not part of the federal judiciary under article III but are agencies of the executive under articles I and II. This decision resulted in a distinct isolation of military law from civilianizing influences. *Dynes* was used to support the propositions that military courts are not bound by the Bill of Rights or other constitutional limitations on the exercise of judicial power;<sup>26</sup> that since courts-martial are not really courts at all but only executive agen-

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<sup>23</sup> U.S. CONST. art. II, § 2 provides: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States . . . ."

<sup>24</sup> U.S. CONST. art. I, § 8 gives Congress the power "[t]o declare War . . . To raise and support Armies . . . To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces . . . ."

<sup>25</sup> 61 U.S. (20 How.) 65 (1857).

<sup>26</sup> Typical of the statements by courts as to the inapplicability of the Bill of Rights to the military are the following:

This is not to say that the members of the military forces are entitled to the procedure guaranteed by the Constitution to defendants in the civil courts. As to them due process of law means the application of the procedure of the military law.

United States *ex rel.* Innes v. Hiatt, 141 F.2d 664, 666 (3d Cir. 1944).

It has been indicated in a number of cases that the powers of Congress in the government of the land and naval forces of the United States are not affected by any of the Constitutional amendments.

*Easley v. Hunter*, 209 F.2d 483, 486 (10th Cir. 1953). *See also* *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Hiatt v. Brown*, 339 U.S. 103 (1950); *Ex parte Quirin*, 317 U.S. 1 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

This view seems to have been rejected by implication by the Supreme Court in *Burns v. Wilson*, 346 U.S. 137 (1953), and was rejected expressly by the Court of Military Appeals in *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960). *See also* *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). However, as late as 1965, the Navy cited the two quotes above for the proposition that the Bill of Rights does not apply directly to the military. Mem-



cies, they need not function as judicial bodies;<sup>27</sup> and that courts-martial, as executive agencies, are independent of the federal judiciary and not subject to review by direct appeal, writ of error, or certiorari.<sup>28</sup> Thus, by the second half of the 19th century, the military's autonomous power over its own legal system was firmly established. The civilian judiciary had no power of review except as to the question of jurisdiction in a habeas corpus action. Although the President, and through him the Secretary of War, possessed nominal authority over the administration of military law, military courts, in fact, operated virtually independent of such authority.<sup>29</sup> Finally, although Congress held the authority to alter the military justice system through legislation, it showed little interest in doing so, and alterations in the Articles of War were few and far between. Revisions of the Articles of War were made in 1806, 1874, 1916, and 1920, but the body of military substantive laws and procedural rules in effect during World War I was still basically the Articles of War passed by the Continental Congress in 1775, as modified upon adoption by Congress in 1789.<sup>30</sup>

The Army was governed by the Articles of War and the Navy by the Articles for the Government of the Navy. The two codes differed in terminology and structure and at times in substantive and procedural law, each being a product of different historical traditions and reflecting the different problems and needs of each service. However, both court-martial systems through World War I possessed the following general characteristics:

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orandum for Respondent at 1-2, 5-9, *LeBallister v. Warden, United States Disciplinary Barracks*, 247 F. Supp. 349 (D. Kan. 1965) (denying writ of habeas corpus).

<sup>27</sup> Winthrop was the chief proponent of this view. For an attack on his position see testimony of General Ansell, *Hearings on S. 5320 Before the Senate Comm. on Military Affairs*, 65th Cong., 3d Sess. 48-52 (1919) [hereinafter cited as 1919 *Hearings*].

<sup>28</sup> *Hiatt v. Brown*, 339 U.S. 103 (1950); *Johnson v. Sayre*, 158 U.S. 109 (1895); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863). See W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 50 (2d ed. 1920). For a discussion of the concept of a "split constitution" see Barker, *Military Law—A Separate System of Jurisprudence*, 36 U. CINN. L. REV. 223 (1967).

<sup>29</sup> See DAVIS, *supra* note 1, at 203:

In acting upon the proceedings of a court martial, the legal reviewing officer acts partly in a judicial and partly in a ministerial capacity. He "decides" and "orders" and the due exercise of his proper functions cannot be revised by superior military authority. Thus a reviewing officer who has duly acted upon a sentence and promulgated his action in orders cannot be required by a higher commander, or by the Secretary of War, to revoke such action.

<sup>30</sup> *Id.* at 342-43.

1. *Statement of Crimes and Punishments*—The Articles of War<sup>31</sup> contained extensive rules<sup>32</sup> which intermixed substantive crimes and procedural regulations. A few crimes were singled out specifically, and there were broad provisions under which various types of unspecified conduct could be punished by court-martial.<sup>33</sup> The crimes denounced were typically military crimes such as making prohibited enlistments,<sup>34</sup> making of false certificates or a false muster by officers,<sup>35</sup> and mutiny.<sup>36</sup> Also denounced was conduct which would not be prohibited under civilian law, such as disobedience of lawful commands of a superior officer,<sup>37</sup> drunkenness on duty,<sup>38</sup> upbraiding another officer or soldier for refusing a challenge,<sup>39</sup> using reproachful or provoking speeches or gestures to another soldier or officer,<sup>40</sup> and use of contemptuous or disrespectful words against the President and other federal and state officials.<sup>41</sup> Until 1863, the Articles of War did not include common-law felonies, such as larceny, murder, assault, battery, and rape, and after 1863 a court-martial had jurisdiction to try such crimes only “in time of war, insurrection, or rebellion.” This limitation was removed in 1916 except that courts-martial could not try servicemen accused of murder or rape committed within the continental United States in peacetime.<sup>42</sup> Thus, when civilian-type crimes were committed which did not constitute mili-

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<sup>31</sup> This discussion focuses only on the Army's Articles of War, but most of the basic characteristics mentioned were also common to the court-martial system established by the Articles for the Government of the Navy.

<sup>32</sup> Act of April 10, 1806, ch. XX, 2 Stat. 359 [hereinafter cited as Articles of War, 1806] (contained 101 articles); Act of June 22, 1874, ch. 5, 18 Stat. 228 [hereinafter cited as Articles of War, 1874] (contained 128 articles); Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 650 [hereinafter cited as Articles of War, 1916] (contained 121 articles); Act of June 20, 1920, ch. 227, 41 Stat. 759 [hereinafter cited as Articles of War, 1920] (contained 121 articles).

<sup>33</sup> *E.g.*, articles forbidding “conduct unbecoming an officer and a gentleman” and “disorders and neglects to the prejudice of good order and discipline in the military.”

<sup>34</sup> Articles of War, 1874, art. 3. By 1920, when enlistments had been taken out of the hands of officers, this article was dropped. Articles of War, 1920, art. 54 specifying the crime of fraudulent enlistment remained.

<sup>35</sup> Articles of War, 1874, arts. 13, 14; Articles of War, 1920, arts. 55, 56.

<sup>36</sup> Articles of War, 1874, art. 22; Articles of War, 1920, art. 66.

<sup>37</sup> Articles of War, 1874, art. 21; Articles of War, 1920, art. 64.

<sup>38</sup> Articles of War, 1874, art. 38; Articles of War, 1920, art. 85.

<sup>39</sup> Articles of War, 1874, art. 28; Articles of War, 1874, arts. 26, 27 made duelling or participation therein a crime. Articles of War, 1920, art. 91 made duelling or participation therein a crime but dropped the express provision concerning upbraiding another for refusing to duel.

<sup>40</sup> Articles of War, 1874, art. 25; Articles of War, 1920, art. 90.

<sup>41</sup> Articles of War, 1874, art. 19; Articles of War, 1920, art. 62.

<sup>42</sup> Act of March 3, 1863, ch. 75 § 30, 12 Stat. 731, 736; Articles of War, 1874, art. 58; Articles of War, 1916, arts. 92, 93.

tary offenses, courts-martial did not attempt to try them, leaving them to the civilian courts.

Most of the crimes in the Articles of War were described without any attempt to define the elements of the offense. The crime of desertion is one example:

Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court martial may direct.<sup>43</sup>

The essential elements of a crime, such as the intent and act required, were matters of custom. Several well-known military law experts in the 19th century, such as De Hart,<sup>44</sup> Davis,<sup>45</sup> and Winthrop,<sup>46</sup> were sometimes consulted, and later the *Manual for Courts-Martial* was developed to provide more detailed information concerning crimes. There was no maximum penalty for any crime, except for a limitation as to the death penalty, and punishments were whatever "a court-martial may direct."

2. *Pretrial Proceedings*—The court-martial process was begun by the preferral of charges by any officer. There was no right to an independent pretrial investigation since the fifth amendment specifically excepts cases arising in the land or naval forces, or in the militia from the right to indictment by a grand jury.<sup>47</sup> However, by the late 19th century the post commander or the commander of a unit in the field was required, upon receipt of charges, "to make such personal investigation as is sufficient to satisfy him (a) whether the case is one in which a trial is necessary to the interests of discipline; [and] (b) if such trial is believed by him to be necessary, whether the evidence in support of the charges is such as to warrant a conviction."<sup>48</sup>

3. *Role of the Commander*—The court-martial was a function of command, and the commander was expected to use it to maintain order and discipline. There was a hierarchy of courts which could be convened by commanders at different levels. The lowest courts, originally called the field-officer's court-martial,<sup>49</sup> and later called summary courts, could

<sup>43</sup> Articles of War, 1874, art. 47.

<sup>44</sup> DE HART, *supra* note 5.

<sup>45</sup> DAVIS, *supra* note 1.

<sup>46</sup> WINTHROP, *supra* note 28.

<sup>47</sup> For a discussion as to the effect of the specific military exemption on interpretation of other amendments not containing such exemption see Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958).

<sup>48</sup> DAVIS, *supra* note 1, at 79.

<sup>49</sup> *Id.* at 211-16.

be convened by lower ranking commanders and could impose only limited sentences. The next courts, originally called regimental and garrison courts-martial,<sup>50</sup> and later called special courts-martial, could be convened by higher commanders and could impose a more severe, although still limited, sentence. Finally, a general court-martial could be convened by commanders of divisions or separate brigades or an officer of higher rank and could impose unlimited sentences. The hierarchy of courts permitted subordinate commanders to discipline their own men, and higher courts-martial were generally used only if the subordinate commander had sent the case up the chain of command, or the superior commander had wanted a court-martial of higher degree.

All court-martial functions were carried out by the commander through his subordinates. The commander made the determination whether to court-martial, appointed all court-martial personnel including the court and counsel, oversaw the administration of the trial, and reviewed the decision and sentence.

4. *Membership and Selection of the Court*—The commanding officer who convened the court selected the members from among the officers under his command and was called the “appointing authority” when acting in this capacity. There were no restrictions on the method of selection used, although originally only line officers could be appointed, with such officers as surgeons and chaplains excluded.<sup>51</sup> Later, the selection process was expanded to allow all commissioned officers to serve but not enlisted men. There was no set number of court members, only a minimum number was required. For example, a general court-martial had to have at least five members and a special court-martial at least three.<sup>52</sup> The commander had the power to remove or replace any court members, even during the trial, so long as the number remained at the minimum or above.

5. *Judicial Functions*—There was no judge in a court-martial. The functions performed by a judge in a civilian court were divided among the prosecutor (originally called the judge advocate), the senior court member (called the president), and the court members themselves. The president presided over the trial. The judge advocate carried out many judicial and administrative duties, such as swearing in the witnesses and advising the court as to legal matters.<sup>53</sup> The court itself determined all issues arising during the trial, such as motions for continuance and objections to the competency of a witness or the admissibility of evidence. The usual procedure was for the court to vote secretly on such issues.<sup>54</sup> Court

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<sup>50</sup> *Id.* at 216-19; DE HART, *supra* note 5, at 61-64.

<sup>51</sup> DE HART, *supra* note 5, at 37-49.

<sup>52</sup> See Articles of War, 1874, art. 75; Articles of War, 1920, arts. 5, 6.

<sup>53</sup> DAVIS, *supra* note 1, at 37-38.

<sup>54</sup> *Id.* at 122.

members or counsel were not lawyers, except for the prosecutor judge advocate in some cases.

6. *Defense Counsel*—There was no right to counsel in a court-martial but, in practice, a nonlawyer officer was often appointed as defense counsel if requested by the accused in a general court-martial. Defense counsel were rarely provided in special and summary courts-martial.<sup>55</sup>

7. *Nature of the Trial*—The court-martial functioned more like an administrative disciplinary proceeding than a judicial proceeding. Although by the second half of the 19th century some of the trappings of civilian courts had begun to appear in courts-martial, the proceedings retained a distinctly nonjudicial appearance. The court members were seated at a long table according to rank with the president in the center. There was strict observance of rank throughout the proceedings with saluting by all participants. There were no rules of evidence. Davis, writing in 1898, observed that courts-martial “should in general follow, so far as they are applicable to military cases, the rules of evidence observed in the civil courts, and especially those applied by the courts of the United States in criminal cases,” but added that “as courts-martial are not bound, however, by any statute in this particular, it is thus open to them, in the interests of justice, to apply these rules with more indulgence than in the civil courts.”<sup>56</sup>

The court members took an active role in the trial. They could question the accused and witnesses, recall witnesses, and call upon the judge advocate to have any uncalled individual ordered to testify as a witness.<sup>57</sup> The decision of the court was not announced since the decision was only considered final after it was reviewed by the appointing authority in his capacity as “reviewing authority,” and he had the power, even if the verdict was acquittal, to return it and require the court to deliberate for a different verdict or a different sentence.<sup>58</sup>

8. *Post-Trial Proceedings*—The commander who convened the court was also the “reviewing authority” and had the power to approve or disapprove the sentence in whole or in part or to return it to the court for revisions.<sup>59</sup> The reviewing authority provided the only available review except in cases involving a sentence of dismissal of an officer, death, or in cases involving generals where it was provided that the sentence should not be executed without the confirmation of the President.<sup>60</sup>

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<sup>55</sup> *Id.* at 38-39.

<sup>56</sup> *Id.* at 251.

<sup>57</sup> *Id.* at 130-31.

<sup>58</sup> Morgan, *The Background of the Uniform Code of Military Justice*, 28 MIL. L. REV. 17, 29 (1965) (reprinted from 6 VAND. L. REV. 169 (1953)); Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 27-28 (1967).

<sup>59</sup> DAVIS, *supra* note 1, at 202-04.

<sup>60</sup> *Id.* at 200, 203.

These characteristics of the court-martial system through World War I were essentially what General Sherman was defending when he protested the emasculation of military law by allowing lawyers to inject into it the principles derived from their practice in civil courts. The movement for civilianization of military law which began during World War I has sought to alter each of these characteristics.

### III. THE WORLD WAR I MOVEMENT FOR CIVILIANIZATION OF MILITARY LAW AND GENERAL ANSELL'S PROPOSALS FOR REFORM

The World War I movement for civilianization of military law resulted from public anger over stories, filtered back to relatives, friends, and congressmen, of severe court-martial sentences and unfair and arbitrary proceedings. "The sentences of courts-martial," General Ansell testified in 1919, "have shocked at least my own sense of justice."<sup>61</sup> He cited a number of cases with unduly severe sentences, for example, 40 years at hard labor for 20 days of absence without leave (AWOL) and escape from confinement; 30 years for insulting a sergeant who had ordered accused to give him his cigarettes; 20 years for a three-month AWOL; and ten years for unlawful possession of a pass.<sup>62</sup> The most extreme case arose out of an alleged mutiny of a company of Negro soldiers at Fort Sam Houston, Texas, in the summer of 1917. Ill will had developed between the Negro troops, who were segregated and assigned to distinctly menial duties, and some of the white civilian population. The Negro soldiers seized rifles and ammunition, and a fight resulted in a number of deaths of both civilians and soldiers. Sixty-three Negro soldiers were court-martialled, 55 were convicted, and 13 were sentenced to death. The commanding general approved the convictions and ordered the death sentences executed.<sup>63</sup> Thus, as General Ansell testified, "the men were executed immediately upon the termination of the trial and before their records could be forwarded to Washington or examined by anybody, and without, so far as I can see, any one of them having had time or opportunity to seek clemency from the source of clemency, if he had been so advised."<sup>64</sup>

Cases like the Fort Sam Houston mutiny trials displayed not only severe sentences but also the basic unfairness of court-martial proceed-

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<sup>61</sup> 1919 *Hearings*, *supra* note 27, at 36.

<sup>62</sup> *Id.* at 37, 79-92.

<sup>63</sup> *Id.* at 39-42.

<sup>64</sup> *Id.* at 39.

ings. General Ansell was particularly disturbed by the large number of cases containing legal errors and insufficient evidence to support conviction, and by the fact that after a commander approved the conviction, no one, including the Judge Advocate General, had the right to review it further. A particularly outrageous case came to Ansell's attention in October 1917, involving the court-martial of a number of noncommissioned officers at Fort Bliss, Texas, on charges of mutiny for refusing to attend drill formation while they were under arrest for a minor infraction. These men were apparently correct in relying upon a regulation which provided that a noncommissioned officer under arrest should perform no duty, but nevertheless the officer persisted in his order and, upon their continued refusal, had them court-martialed for mutiny. The Judge Advocate General's office found no legal support for the mutiny convictions as related by General Ansell:

Those men did not commit mutiny. They were driven into the situation which served as the basis of a charge by the unwarranted and capricious conduct of a young officer commanding the battery who had been out of the Military Academy but two years. Notwithstanding the offense was not at all made out by the evidence of record, notwithstanding the oppressive and tyrannical conduct of the battery commander, notwithstanding the unfair and unjust attitude of the judge advocate which all appeared on the record, these noncommissioned officers were expelled from the Army in dishonor and sentenced to terms of imprisonment ranging from seven to three years.<sup>65</sup>

Despite the findings of patent illegality, the Judge Advocate General had no power to remedy the situation. However, General Ansell drafted an opinion urging that the conviction be set aside. He contended that under a proper interpretation of the statutes, the Judge Advocate General could set aside findings of a court-martial even after the commander had approved such findings and ordered the sentence executed.<sup>66</sup> General Ansell's immediate superior, Major General Enoch H. Crowder, opposed this view and eventually won out when the issue was taken to the Secretary of War. Thus began the famous "Crowder-Ansell Dispute," a controversy arising out of the issue of the power of the Judge Advocate General to reverse court-martial convictions,<sup>67</sup> which led to the first important movement for civilianization of military law in American history. General Ansell was removed from his post and dispatched on a tour of European countries. He returned with the conclusion from comparative studies of military jurisprudence that "notwithstanding [that] our Government in other directions, in the realm of civil jurisprudence, is a far

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<sup>65</sup> *Id.* at 11.

<sup>66</sup> *Id.* at 44-59, where general Ansell's opinions are set out in full.

<sup>67</sup> For a discussion of the dispute see Morgan, *supra* note 58, at 19-21; Brown, *supra* note 58, at 43.

more liberal Government than any one of those named [England, Italy, and France], in the field of military jurisprudence it is a harsher Government.”<sup>68</sup> He thereafter drafted a bill, called the Chamberlain bill<sup>69</sup> for Senator George E. Chamberlain of Oregon who sponsored it, which proposed the first major revision of the substantive and procedural law governing courts-martial.

General Ansell proposed a sweeping reform of military justice. In testifying before the Senate Committee on Military Affairs in February 1919, he spoke as bluntly and critically as any American military man has dared to speak about military justice:

Army officers, acting on a mistaken sense of loyalty and zeal, are accustomed to say, somewhat invidiously, that “courts-martial are the fairest courts in the world.” The public has never shared that view. . . .

This is not a pleasant duty for me to perform. I realize, if I may be permitted to say it, that I am arraigning the institution to which I belong—not the institution, but the system and practices under it—an institution which I love and want to serve honestly and faithfully always. Yet an institution has got to be based on justice, and it has got to do justice if it is going to survive, and if it is going to merit the confidence and approval of the American people. Indeed, if our Army is going to be efficient, justice has to be done within it, whether in war or in peace.<sup>70</sup>

The significant aspect of General Ansell’s proposal was his acceptance of the philosophy of civilianization. He assailed the tradition-honored view that courts-martial could not, because of constitutional limitations and military necessity, conform to the judicial standards followed in civilian courts. He began by attacking Winthrop, whose 1886 treatise on military law had become the bible of military men. He termed Winthrop’s contention that a court-martial is “not a part of the judiciary, but an agency of the executive department,” as “illogical and fallacious.”<sup>71</sup> “It is rather surprising,” Ansell observed,

that an unsupported textbook statement, sustained by so little logic, should have gone so long unexamined by those in military authority, even if judicial decisions had not exposed the fallacy. To be sure, courts-martial are not part of the judicial system referred to as such in the Constitution. The courts of the several territories have never been courts of the United States in the constitutional sense, nor have they ever had any other constitutional basis than the power of Congress to make rules for the government and disposition of the Territory of the United States. But who would contend that they are under the Executive power?<sup>72</sup>

It is odd, as General Ansell remarked, that the argument that courts-

<sup>68</sup> 1919 *Hearings*, *supra* note 27, at 43.

<sup>69</sup> S. 64, 66th Cong., 1st Sess. (1919) (the bill was introduced in the House as H.R. 367, 66th Cong., 1st Sess. (1919)).

<sup>70</sup> 1919 *Hearings*, *supra* note 27, at 49, 81.

<sup>71</sup> *Id.* at 49.

<sup>72</sup> *Id.*



martial were only executive agencies and therefore not judicial in nature had been accepted without question for so long. Even the British system recognized the essentially judicial quality of courts-martial.<sup>73</sup> As Ansell stated before the congressional committee:

The court-martial tries a man not only for the military aspect involved in his act; it tries him for the violation of the law of the land resulting from that act. For instance, if a soldier commits homicide, he is tried, not, as we used to think, for his act, in so far as it is prejudicial to the military establishment. The court-martial passes upon that unlawful homicide and every issue involved in it just exactly as, and concurrently with, a district court of the United States or as any other trial court. Now, when we come to subject a man to a code of penal law which covers every aspect of his conduct, every activity of his life far more generally than does the usual civil penal code, when we try him not only for violation of the military law but of the law of the land, when we give him a punishment that is in every respect the same kind of punishment in quantity, in finality, and in the regard which the law entertains for it, that a civil trial court can give, those functions are necessarily, inherently, and primarily judicial . . . .<sup>74</sup>

Ansell's attack on Winthrop's view of military courts as nonjudicial in nature was an important event in the movement for civilianization of military law because it removed the legal barrier which had always been thought to prevent reform of military procedures along civilian court lines. Of course, the argument is still made today that a court-martial cannot provide all the elements provided in a civilian court because it is limited by the logistic exigencies of the service and must serve the disciplinary needs of the commander. But this is a considerably more liberal position than Winthrop's view that there is something inherently limiting in the nature of the court-martial due to constitutional and statutory mandates, which require it to function as a nonjudicial executive agency. Ansell's attack on the basic "executive agency rather than judicial proceeding" argument was so forceful that his view is now generally accepted.

General Ansell's proposals for changes in the substantive and procedural law of courts-martial (the Chamberlain bill only dealt with the Army Articles of War)<sup>75</sup> covered the entire court-martial proceeding from investigation through appeal. His basic premise was that the exercise of penal power by military courts "should be in keeping with the progress of enlightened government and should not be inconsistent with those fundamental principles of law which have ever characterized An-

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<sup>73</sup> See W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: PRINCIPALLY IN THE ORDER, AND COMPRISING THE WHOLE SUBSTANCE OF THE COMMENTARIES 159-62 (1819).

<sup>74</sup> 1919 *Hearings*, *supra* note 27, at 40-41.

<sup>75</sup> *Id.* at 11.

glo-American jurisprudence.”<sup>76</sup> He did not propose the complete civilianization of military law nor the abolition of all distinctive military structures. However, his proposals were derivative of civilian court standards. His basic proposals, as contained in the Chamberlain bill, will be discussed in relation to the eight characteristics of the court-martial system which have already been examined:

1. *Statement of Crimes and Punishments*—The Chamberlain bill rewrote a number of the punitive provisions of the Articles of War in an attempt to delineate the elements of the crimes and to remove vague and ambiguous language. It also would have established, for the first time, a maximum punishment for each offense. An example of the bill’s attempt to provide more certainty as to the elements of crimes can be seen from its definition of the crime of “mutiny and sedition” which had previously been stated as:

Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.<sup>77</sup>

The bill would have done away with the “sedition” part of the crime and defined “mutiny” as follows:

Any person subject to military law who, in concert with another or others, unlawfully opposes, resists, or defies superior military authority, with the deliberate and fixed intent to usurp or subvert the same, shall be guilty of mutiny and shall be punishable with death or confinement for life or for a fixed period; and any person subject to military law who attempts to create or who begins, excites, causes or joins in any mutiny, shall be punishable with the punishment authorized for mutiny.<sup>78</sup>

General Ansell was particularly disturbed by the general article, called the “devil’s article” by soldiers, because it specified no particular crime and could be used to punish any conduct which displeased a commander.<sup>79</sup> The congressional committee’s comment on the Chamberlain bill stated:

Under the general article, defining neither the crime nor the punishment, more than a fourth of all our trials are had. The man who yesterday was a civilian becoming today a soldier becomes at the same time

<sup>76</sup> Address by General Ansell to the Pennsylvania Bar Association, June 26, 1919, in 25 PA. BAR ASS’N ANNUAL REP. 280, 282 (1919).

<sup>77</sup> Articles of War, 1916, art. 66 (a slight revision of Articles of War, 1874, art. 22).

<sup>78</sup> S. 64, 66th Cong., 1st Sess., art. 66 (1919), printed in SENATE COMM. ON MILITARY AFFAIRS, 66TH CONG., 1ST SESS., ARMY ARTICLES: COMPARATIVE PRINT SHOWING THE BILL (S. 64) TO ESTABLISH MILITARY JUSTICE 29 (Comm. Print 1919). [hereinafter cited as S. 64, 1919].

<sup>79</sup> Nichols, *The Devil’s Article*, 22 MIL. L. REV. 111 (1963). See Hagan, *The General Article—Elemental Confusion*, 10 MIL. L. REV. 63 (1960).

triable and punishable for conduct which the professional soldier holds to be a violation of unwritten or customary military standards.<sup>80</sup>

The bill attempted to make two important changes in the general article. First, it took the catch-all and assimilative crimes portion of the general article ("all crimes or offenses not capital, of which persons subject to military law may be guilty")<sup>81</sup> and adopted in its place an assimilation, for both offenses and punishments, of the criminal statutes of the United States and the District of Columbia.<sup>82</sup> Second, as to misconduct not specifically made a crime either in the articles, the Federal Penal Code, or the District of Columbia Code, it retained the broad definition of the general article ("conduct to the prejudice of good order and military discipline or of a nature to bring discredit upon the military service") but limited the punishment to six months.<sup>83</sup>

2. *Pretrial Proceedings*—The 1917 *Manual for Courts-Martial* had required the officer exercising summary court-martial jurisdiction over the accused to make a preliminary investigation of the charges, and to give the accused an opportunity to make a statement or present evidence.<sup>84</sup> The Chamberlain bill would have made this investigation a requirement of statutory law, and would have required further that the charges could not be referred for trial unless an officer of the Judge Advocate General's department certified in writing that a punishable offense was charged with legal sufficiency, and unless it was apparent that prima facie proof of guilt existed.<sup>85</sup> This was consistent with Ansell's desire to remove from the commander the sole judgment as to when there should be a court-martial and to inject a lawyer, whenever possible, into the process.

3. *Role of the Commander*—The Chamberlain bill would have retained the hierarchy of military courts, with the general, special, and summary courts-martial. However, it did attempt to limit the functions of the commander in the court-martial process. First, it sought to limit the authority to convene a general court-martial.<sup>86</sup> Under existing law, any commanding officer "when empowered by the President" could convene a general court-martial and, in practice, this power was delegated by the President to the War Department and far down the chain of command. It was too easy to court-martial a man. The unlimited power of the President to authorize any commander to appoint general courts unnecessarily increased the number of courts without a corresponding ben-

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<sup>80</sup> Comment, S. 64, 1919, *supra* note 78, at 38.

<sup>81</sup> Articles of War, 1916, art. 96.

<sup>82</sup> S. 64, 1919, *supra* note 78, art. 96 at 38.

<sup>83</sup> *Id.*

<sup>84</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY ¶ 76 (1917).

<sup>85</sup> S. 64, 1919, *supra* note 78, art. 20 at 11.

<sup>86</sup> Articles of War, 1916, art. 8.

efit to the service.<sup>87</sup> The Chamberlain bill would have limited convening authority to the President, Superintendent of the Military Academy, commanding officer of a territorial division, department, corps, tactical division, "or of any isolated body of troops consisting of a regiment or more which by reason of delay and difficulty of communication with it the President shall find it necessary to constitute a separate general court jurisdiction."<sup>88</sup> This was an attempt to set some limiting standards on the delegation of the convening authority and reflected Ansell's belief that there would be a better chance for justice at a higher command where military lawyers would be available.<sup>89</sup> The bill also would have limited considerably the commander's control over courts-martial by removing his power to appoint court members, requiring counsel in general courts to be lawyers, and providing for a military judge in general courts, which provisions will be discussed in detail below.

4. *Membership and Selection of the Court*—Ansell realized that crucial aspects of any court-martial were the personnel sitting on the court and the method of their selection. The Chamberlain bill would have required exactly eight members for a general court-martial and three members for a special court-martial.<sup>90</sup> It also would have altered the commander's power to select the court and to control it during the trial. First, it provided that enlisted men would be tried by courts containing members from their own rank. Three out of the eight members of a general court-martial and one out of three members of a special court-martial would be required to be of the same rank as the accused.<sup>91</sup> The bill also would have increased the requirement for two-thirds concurrence of the court for conviction to three-quarters and would have required unanimity for imposition of the death penalty.<sup>92</sup> Thus, court members of the accused's own rank, constituting more than one-third of the court, would have held the determining votes as to conviction or not. Second, the Chamberlain bill attempted to change, for the first time, the commander's power to handpick the court members, a practice particularly foreign to civilian justice. The appointing authority would be permitted to designate a panel "consisting of those who are by him deemed

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<sup>87</sup> Comment, S. 64, 1919, *supra* note 78, at 6.

<sup>88</sup> S. 64, 1919, *supra* note 78, art. 8 at 6.

<sup>89</sup> Subsequent history raises doubts as to the assumption that higher level commanders will display less interest in using the court-martial to carry out their own disciplinary policies. The use of courts-martial to suppress anti-war dissent during the Vietnam War period, which has been criticized by some, has been almost entirely by high level commanding generals. See, e.g., Sherman, *Dissenters and Deserters*, NEW REPUBLIC, Jan. 6, 1968, at 23; Sherman, *Buttons, Bumper Stickers and the Soldier*, NEW REPUBLIC, Aug. 17, 1968, at 15.

<sup>90</sup> S. 64, 1919, *supra* note 78, arts. 5, 6 at 6.

<sup>91</sup> *Id.*

<sup>92</sup> S. 64, 1919, *supra* note 78, art. 46 at 20.

fair and impartial and competent to try the cases to be brought before them,"<sup>93</sup> but a court judge advocate would be required to sit with each court-martial and would choose the court members from the panel. Again this indicated Ansell's faith in the introduction of legal officers into the court-martial process as a panacea. We now may feel that his faith was unrealistic in light of subsequent experience indicating that legal officers under a commander also have difficulties in functioning with absolute impartiality and devotion to an accused's cause.<sup>94</sup> However, his proposals that members of an accused's rank should hold a decisive number of votes on the court and that selection of the court should be left to someone other than the commander would have been a significant break from the traditional commander control of courts-martial.

The bill also proposed that in selection of the court the accused should be given two peremptory challenges, instead of one as before,<sup>95</sup> and that he should be permitted, for the first time, to challenge the entire court array by submitting an affidavit indicating that its composition or constitution manifested an inability to render justice, or that the appointing officer had acted with prejudice.<sup>96</sup> It is questionable whether this provision would have been adequate to prevent "packing" of the court by the appointing authority, but it would have permitted the accused to raise the issue of an unfair court, and presumably to require disclosure of the method of selection used, and to place the burden on the appointing authority to show that the selection was not unfair.

5. *Judicial Functions*—Ansell disliked the existing court-martial structure with its judgeless court, and with judicial functions being performed by the prosecutor judge advocate. The Chamberlain bill would have required the appointing authority to appoint a lawyer from the Judge Advocate General's Corps or, if not available, an officer recommended by the Judge Advocate General as specially qualified by reason of legal learning or judicial temperament, to serve as court judge advocate for each general and special court-martial.<sup>97</sup> There would be a division of duties along civilian court judge-jury lines. The court judge advocate would attend all sessions of the court but would not be a voting member. He would be given most of the functions held by a civilian judge. He would rule upon motions and questions of law, summarize the evidence and applicable law at the conclusion of the case, review findings of guilt for legal sufficiency, and impose sentence with power to suspend it in whole or in part. He also would have certain other responsibilities as a

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<sup>93</sup> S. 64, 1919, *supra* note 78, art. 10 at 7.

<sup>94</sup> See comments of Professor Keeffe concerning the "independence" of the staff judge advocate at p. 47 *infra*.

<sup>95</sup> S. 64, 1919, *supra* note 78, art. 23 at 12.

<sup>96</sup> *Id.*

<sup>97</sup> S. 64, 1919, *supra* note 78, art. 12 at 7-8.

sort of “ombudsman” to insure that the proceedings were fair, including ruling on challenges and questions related to the competency and impartiality of the court and insuring that the accused would not suffer any disadvantage due to ignorance or incapacity (with the power to call witnesses if necessary “to elicit the truth”).<sup>98</sup> Ansell saw the court judge advocates in the role of genuine judges, and his hopes for fairness in court-martial proceedings were based in large part upon the military creating a respected and independent trial judiciary similar to that of civilian courts.

6. *Defense Counsel*—One of the traditional duties and prerogatives of a commissioned officer, whether a lawyer or not, had always been to act as counsel in courts-martial. This was satisfactory only so long as a court-martial was not really a judicial proceeding and the law played a rather minor role in the outcome. The Chamberlain bill provided that an accused in a special or general court-martial would be represented by the military counsel of his choice.<sup>99</sup> The counsel selected by the accused would have to be appointed “unless the appointing authority shall furnish the court with a certificate which shall be placed in the record that such assignment cannot be made without serious injury to the service and setting forth the reasons therefor.”<sup>100</sup> The bill also provided that if the accused made it appear to the court judge advocate that he needed the assistance of a civilian counsel but could not afford to hire one, the judge advocate would employ civilian counsel and pay for his services. If the accused were found guilty, the judge advocate would be able to order a deduction from the accused’s pay of two-thirds of his monthly pay.<sup>101</sup> Since the military justice system has never looked with favor upon expanded use of civilian lawyers in courts-martial, this was a rather radical civilianizing proposal. The rest of the provisions as to counsel, however, without a requirement that they be lawyers, were not among the stronger provisions of the Chamberlain bill.

7. *Nature of the Trial*—Ansell’s fondest wish was to remake the court-martial into a judicial proceeding. Passage of the Chamberlain bill

<sup>98</sup> *Id.*

<sup>99</sup> S. 64, 1919, *supra* note 78, art. 22 at 7-8.

<sup>100</sup> Note the similar language in The Military Justice Act of 1968, Pub. L. No. 90-632 § 827 (Oct. 24, 1968), 1 U.S. CODE CONG. & AD. NEWS 1570-71 (1968) (article 27 of the Uniform Code of Military Justice) [hereinafter cited as UCMJ] concerning appointment of lawyer counsel in special courts martial.

If counsel having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained.

<sup>101</sup> S. 64, 1919, *supra* note 78, art. 22 at 12.

would have altered many of the distinctive features of the court-martial which gave it the appearance of an administrative hearing. The introduction of a judge, the requirement for counsel of accused's choice, the pre-trial investigations, and the post-trial appeal remedies would have demanded that the administrative flavor of the court-martial give way to a more judicial one. The bill's compromises with military tradition, however, such as leaving the court-martial administration under the individual commander, would have prevented a thoroughly judicial atmosphere. The bill also would have required that the rules of evidence applicable in the United States district courts apply in courts-martial. The 1917 *Manual for Courts-Martial* did contain rules of evidence for courts-martial, written under the direction of Professor Wigmore.<sup>102</sup> However, Ansell argued that military courts too often ignored the *Manual* and proposed that the exact evidentiary rules applicable in civilian courts should govern in courts-martial.<sup>103</sup>

8. *Post-Trial Proceedings*—Among the most criticized features of the court-martial system were the post-trial proceedings. There had been a number of World War I cases in which, after an acquittal by the court-martial, the commander refused to accept the verdict and returned the case to the court-martial, resulting in a conviction the second time around.<sup>104</sup> The Chamberlain bill would have required that an acquittal be announced immediately in open court, and would have taken away from the reviewing authority the power to return an acquittal for reconsideration or to revise a sentence upward.<sup>105</sup>

Especially significant were the bill's proposals for appellate review. Review by the commander was one of the keystones of the court-martial system, and this was the issue which led to the Crowder-Ansell dispute. Ansell felt strongly that civilians not in the chain of command or affected by military loyalty should be involved in reviewing court-martial convictions. The Chamberlain bill would have created a military appeals court of three judges appointed by the President with lifetime tenure during good behavior and the pay and retirement privileges of a federal circuit court judge.<sup>106</sup> The court would have been located "for convenience of administration only"<sup>107</sup> in the office of the Judge Advocate General, an unattractive choice it would appear today. The court would

<sup>102</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. 11 (1917). Articles of War, 1916, art. 38, provided that the President could prescribe the modes of proof used in courts-martial if not inconsistent with the Articles of War.

<sup>103</sup> S. 64, 1919, *supra* note 78, art. 41 at 19. See also testimony of General Ansell, *Hearings on S. 64 Before a Subcomm. of the Senate Comm. on Military Affairs*, 66th Cong., 1st Sess. 268 (1919).

<sup>104</sup> See 1919 *Hearings*, *supra* note 27, at 34.

<sup>105</sup> S. 64, 1919, *supra* note 78, arts. 34, 50 at 24-26.

<sup>106</sup> S. 64, 1919, *supra* note 78, art. 52 at 24-26.

<sup>107</sup> *Id.* at 24.

have reviewed every general court-martial conviction in which the sentence involved death, dishonorable discharge or dismissal, or confinement for more than six months. The scope of review would have extended to "correction of errors of law evidenced by the record and injuriously affecting the substantial rights of an accused, without regard to whether such errors were made the subject of objection or exception at the trial."<sup>108</sup> The court would have been empowered to disapprove a finding of guilty or approve only so much as involved a lesser included offense, or disapprove the sentence in whole or part and to order a new trial, or report to the Secretary of War for transmission of recommendations of clemency to the President. The bill did not attempt to create a hierarchical set of appeal courts or boards as found in civilian courts, and it failed to provide for court review of special or summary courts-martial. However, it did require that after the appointing authority had approved, he would have to forward the records of the trial to general headquarters appointed by the President. There a judge advocate would review the proceedings with the power, in case of error prejudicial to the substantial rights of the accused, to revise the proceedings.<sup>109</sup>

The Chamberlain bill ran into immediate difficulties in Congress. Its advocates, who had themselves invoked the patriotism of Americans against court-martial abuses, found that, with the war over and the boys coming home, patriotism had begun to cut the other way. Professor Wigmore told a 1919 Maryland Bar Association meeting:

The prime object of military organization is Victory, not justice. In that death struggle which is ever impending, the Army, which defends the Nation, is ever strained by the terrific consciousness that the Nation's life and its own is at stake. No other objective than Victory can have first place in its thoughts, nor cause any remission of that strain. If it can do justice to its men, well and good. But justice is always secondary, and Victory is always primary.<sup>110</sup>

Howard Thayer Kingsbury, a New York lawyer and Judge Advocate General of the New York Guard during the war, expressed the traditional military argument in favor of command control of courts-martial in a 1919 article in the *National Service Digest*:

In civil life each individual owes obedience to the organized government of the community, but not to any individual civil officer as such; in the military organization, each member owes obedience to an individual—his commanding officer. The commander is responsible for the conduct of the forces, and in the nature of things he must have all the powers necessary to make his authority effective.

For this reason there should not be in the army a distribution of coordinate powers between executive and judicial authority, and any pro-

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<sup>108</sup> *Id.* at 25.

<sup>109</sup> S. 64, 1919, art. 39, *supra* note 78, at 17, 22.

<sup>110</sup> 24 MD. STATE BAR ASS'N TRANSACTIONS 183, 188 (1919).



posed reform of court-martial procedure which contemplates setting up a military judiciary, independent of executive command, proceeds upon an unsound basis.<sup>111</sup>

Kingsbury closed with the now familiar argument against reform of courts-martial that "it does not appear that the proportion of unjust judgments or excessive penalties is any greater than in the ordinary civil and criminal tribunals," and so "there is no occasion for any drastic or revolutionary changes in the existing system of military justice."<sup>112</sup>

After hearings on the Chamberlain bill were held in November 1919, it became obvious that the proponents of the bill could not muster enough support to overcome the opposition of the military and the War Department. The subcommittee considering the bill failed to report it out of committee, adopting instead a limited revision of the Articles of War which was passed as part of the Army Reorganization Act of 1920.<sup>113</sup> "The Ansell draft," remarked Professor Edmund Morgan years later, "was badly mutilated."<sup>114</sup>

The 1920 Articles of War made no changes in the wording of crimes from the 1916 Articles, but the President was given authority to prescribe maximum punishments for crimes.<sup>115</sup> A pretrial investigation by an investigating officer appointed by the commander would be provided in general courts where the accused could offer evidence and witnesses, but the officer's recommendation would not be binding upon the commander.<sup>116</sup> Virtually all of the Chamberlain bill's proposals for limiting the role of the commander were rejected. The rules with respect to membership and selection of the court remained basically unchanged. Only officers would continue to sit on courts, and the only limitation on the commander's selection would be that he would choose those officers that he considered best qualified "by reason of age, training, experience, and judicial temperament."<sup>117</sup> No definite number of court members was established; general courts would have from five to 13 members, special courts from three to five. A two-thirds vote would still be required to convict, except that a three-quarters vote would be required for a sentence of life or one of more than ten years, and a unanimous vote for death.<sup>118</sup> The number of peremptory challenges would remain at one without any right to challenge the array. There was still

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<sup>111</sup> Kingsbury, *Courts-Martial and Military Justice*, 5 NATIONAL SERVICE WITH THE INTERNATIONAL MILITARY DIGEST 280 (1919).

<sup>112</sup> *Id.* at 281.

<sup>113</sup> Act of June 4, 1920, ch. 227, ch. II, 41 Stat. 759, 787. For description of this legislative history see Brown, *supra* note 58, at 14.

<sup>114</sup> Morgan, *supra* note 58, at 21.

<sup>115</sup> Articles of War, 1920, art. 45.

<sup>116</sup> *Id.* art. 70.

<sup>117</sup> *Id.* art. 4.

<sup>118</sup> *Id.* art. 43.

no provision for a judge, but the appointing authority in a general court-martial would detail one member of the court who had to be a lawyer from the Judge Advocate General's Corps to serve as the "law member."<sup>119</sup> He would rule upon interlocutory questions and instruct the court on the presumptions of innocence and the burden of the prosecution. However, his rulings would be final only as to admissibility of evidence as he could be overruled by a majority vote of the court on all other matters.<sup>120</sup> It was also provided that a defense counsel would have to be appointed for all special and general courts-martial, but he would not be required to be a lawyer.<sup>121</sup> The Chamberlain bill's proposal for a civilian military appeals court was rejected. Commanders would continue to review court-martial convictions and sentences, but could not review sentences upwards or return an acquittal to the court for reconsideration.<sup>122</sup> The reviewing authority would have to refer the records of general courts-martial to his staff judge advocate for review prior to taking final action, but he would not be bound to accept the judge advocate's advice.<sup>123</sup> The Judge Advocate General was required to establish in his office a board of review consisting of three or more officers who would review the records of all sentences requiring confirmation by the President (cases involving generals, dismissal of officers, or cadets), and cases involving death, unsuspended dismissal, dishonorable discharge, or confinement in the penitentiary.<sup>124</sup> However, the board's recommendations were to be given to the Judge Advocate General who could render them advisory by disagreeing with them and forwarding the case to the Secretary of War for action by the President.

The 1920 Articles can hardly be considered an important reform of military justice, and the Chamberlain bill, despite its rejection, continued to provide the principal guidelines for the reform movement. The most unsatisfactory of the Chamberlain bill's provisions, such as the failure to provide that different court-martial functions should be performed by personnel not subject to commander's control, resulted from General Ansell's excessive faith in the salutary effect of military lawyers in court-martial proceedings and his quite understandable lack of appreciation of the logistic potentialities of the modern military. Who, for example, could have foreseen in 1919 the ability of the military to fly judges, counsel, and legal personnel from Okinawa to Vietnam for a court-martial without straining the fighting capacity of the Armed

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<sup>119</sup> *Id.* art. 8.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* art. 17.

<sup>122</sup> *Id.* arts. 40, 47.

<sup>123</sup> *Id.* art. 46.

<sup>124</sup> *Id.* art. 50½.

Forces?<sup>125</sup> However, the Chamberlain bill, with its emphasis upon lessening command control and upon requiring a trial in part by one's peers, still stands as a goal for reformers today.

#### IV. THE POST WORLD WAR II REFORM MOVEMENT AND THE PASSAGE OF THE UCMJ

"When Johnny came marching home again from World War II," wrote Robinson O. Everett, Commissioner of the United States Court of Military Appeals,

he brought with him numerous complaints about justice as then dispensed in the Army and the Navy. Many of these were prompted by a conviction that the administration of military justice had not always lived up to the goals of fairness and impartiality which were accepted as part of the American legal tradition.<sup>126</sup>

More American servicemen than ever before had experienced military justice first hand, and it was clear that they did not like it. There had been over 1,700,000 courts-martial during the war,<sup>127</sup> most of them resulting in convictions. There had been 100 capital executions, and 45,000 servicemen were still imprisoned when the war ended.<sup>128</sup> Some 80 percent of the courts-martial were for acts which would not have been crimes in civilian life, with absence without leave and desertion the most frequent charges.<sup>129</sup> In the Army alone, 20,392 men were convicted of desertion, one of the most serious crimes under the Articles, for an average conviction rate of 3.7 per 1,000 per year.<sup>130</sup> Undue severity of

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<sup>125</sup> The Army Judge Advocate General serviced Vietnam courts-martial from Okinawa until July 1965. *Joint Hearings on S. 754-62, S. 2906-7 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 911 (1966). For a discussion of the various kinds of logistics problems arising in Navy courts-martial see Ochstein, *The Dockside Court: The Dockside Special Court-Martial of Cominlant*, JAG J., December 1957-January 1958, at 19.

<sup>126</sup> R. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 9 (1956).

<sup>127</sup> White, *The Background and the Problem*, 35 ST. JOHN'S L. REV. 197, 200 (1961); Letter from New York State Bar Association to Committee on Military Justice, Jan. 29, 1949, at 5, in VI Papers of Professor Edmund Morgan on the Uniform Code of Military Justice, on file in Treasure Room, Harvard Law School Library [hereinafter cited as Morgan Papers].

<sup>128</sup> *Id.*

<sup>129</sup> Statement of Professor Arthur John Keeffe, *Hearings on H.R. 2498 Before Subcomm. No. 1 of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 780 (1949), in VI Morgan Papers.

<sup>130</sup> N.Y. Times, Feb. 14, 1968, at 4, col. 8.

sentences was still one of the principal complaints. A clemency board, appointed by the Secretary of War in the summer of 1945 to review all general court-martial cases where the accused was still in confinement, remitted or reduced the sentence in 85 percent of the 27,000 cases reviewed.<sup>131</sup> Substantial numbers of servicemen who had never been in trouble with the law served time in military jails, and came home from the war with military records showing court-martial convictions or less than honorable discharges. Senators and Congressmen were flooded with complaints. Rear Admiral Robert J. White described the ground swell of criticism against military justice: "The emotions suppressed during the long, tense period of global warfare were now released by peace, and erupted into a tornado-like explosion of violent feelings, abusive criticism of the military, and aggressive pressures on Congress for fundamental reforms in the court-martial system."<sup>132</sup>

It was obvious that court-martial abuses would not be so easily forgotten as they were after World War I. When Secretary of the Army Patterson slighted court-martial reform in July, 1945, with the familiar argument that military justice compares favorably with civilian justice because of provisions for review and clemency, there was an outburst of public disagreement. Within a short time, he was calling for an "overhauling" of the court-martial system.<sup>133</sup> The Secretary of the Navy had already appointed committees to recommend court-martial changes,<sup>134</sup> since the Navy's court-martial system, without the benefit of the 1920 Army reforms, was even more inadequate than that of the Army.

On March 18, 1946, the Secretary of War appointed the Board on Officer-Enlisted Men's Relationships, headed by General James Doolittle, to investigate the charges of unfairness and arbitrariness in the military.<sup>135</sup> The board considered thousands of letters and held hearings. Although it was not primarily concerned with military justice, it concluded that "the largest differential which brought the most criticism in every instance, was in the field of military justice and courts-martial

<sup>131</sup> Farmer & Wels, *Command Control—Or Military Justice?*, 24 N.Y.U.L.Q. 263, 265 (1949) (citing the War Dep't Advisory Bd. on Clemency Report (1946)).

<sup>132</sup> White, *supra* note 127, at 201.

<sup>133</sup> White, *supra* note 127, at 204 nn.20 & 21.

<sup>134</sup> The Navy studies included the First Ballantine Report, U.S. Navy (1943); Naval War-Time Discipline, Report from U.S. Naval Institute Proceedings, July, August, October 1944 (headed by Vice Admiral Taussig); the Second Ballantine Report, U.S. Navy (1945); Report of the McGuire Comm. to the Secretary of the Navy (1945); Report of General Court-Martial Review Board (1947) (the Keefe Board); Report of Colonel James N. Snedeker, USMC to Judge Advocate General (1946); the White Report, A Study of Five Hundred Naval Prisoners and Naval Justice (1946).

<sup>135</sup> S. Doc. No. 196, 79th Cong., 2d Sess. 7 (1946) [hereinafter cited as Doolittle Report].

procedure which permitted inequities and injustices to enlisted personnel.”<sup>136</sup> The board was particularly concerned with the inequities of rank which appeared even in the court-martial system.<sup>137</sup> It recommended a sweeping recasting of the military structure which would deemphasize rank by such reforms as abandoning the requirements of saluting off base and off duty and removing the prohibitions on social fraternization between ranks.<sup>138</sup> It concluded:

Americans look with disfavor upon any system which grants unearned privileges to a particular class of individuals and find distasteful any tendency to make arbitrary social distinctions between two parts of the Army . . . . There is need for a new philosophy in the military order, a policy of treatment of men, especially in the “ranks” in terms of advanced concepts in social thinking. The present system does not permit full recognition of the dignities of man. More definite protection from the arbitrary acts of superiors is essential.<sup>139</sup>

The board made few specific recommendations as to the court-martial system, but called for a “review of the machinery for administering military justice and the courts-martial procedure with a view to making all military personnel subject to the same types of punishment as based upon infractions of rules and misdemeanors.”<sup>140</sup> The Doolittle Report was, as it now appears in light of the contemporary movement for expanded enlisted men’s rights, ahead of its time. The professional military, faced with tremendous manpower cuts, stoutly resisted abandonment of the prerogatives of rank and restructuring of the military. The report at-

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<sup>136</sup> *Id.* at 18.

<sup>137</sup> A four-year study of the attitudes of American soldiers in World War II, conducted by a group of sociologists for the Research Branch, Information & Education Division, U.S. Army, was published in 1949 and confirmed many of the conclusions of the Doolittle committee:

Few aspects of Army life were more alien to the customary folkways of the average American civilian than the social system which ascribed to an elite group social privileges from which the non-elite were legally debarred and which enforced symbolic deferential behavior toward the elite off duty as well as on duty . . . . The American enlisted man, with his democratic civilian background, resented not so much the fact that superiors could afford certain privileges as the denial of his own right to enjoy them. As one enlisted man in the Persian Gulf Command put it, “Back in the States if a private had the price he could go to the same place that a general could. I bet the people back home don’t know the conditions here.”

1 S. STOFFER, E. SUCHMAN, L. DEVINNEY, S. STAR & R. WILLIAMS, *THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE* 71, 373 (1949).

<sup>138</sup> Doolittle Report, *supra* note 135, at 20.

<sup>139</sup> *Id.* at 25.

<sup>140</sup> *Id.* at 21.

tracted the wrath of the services, and few proposals were even seriously considered for remedial legislation.

The Secretary of War, later in 1946, appointed a committee headed by Arthur Vanderbilt, a former President of the American Bar Association, to advise on changes in the Army court-martial system. The committee held hearings, examined studies and questionnaires, and concluded that there was an absence of sufficient attention to and emphasis upon the military justice system and lack of preliminary planning for it; there was serious deficiency of sufficiently qualified and trained men to act as members of the court or as officers of the court; the command frequently dominated the courts in the rendition of their judgment; defense counsel were often ineffective because of (a) lack of experience and knowledge, or (b) lack of a vigorous defense attitude; the sentences originally imposed were frequently excessively severe and sometimes fantastically so; there was some discrimination between officers and enlisted men, both as to the bringing of charges and as to convictions and sentences; and investigations, before referring cases to trial, were frequently inefficient or inadequate.<sup>141</sup>

Similar committees appointed by the Navy proposed changes in the Navy court-martial system.<sup>142</sup> Meanwhile, support for a drastic reform of the court-martial system, with particular emphasis upon removing the commander's control and providing for civilian review, was building up in bar associations. The Army and Navy both offered bills containing reforms but making few alterations in the basic court-martial system. Hearings were held on the Army proposals, resulting in a somewhat more reformatory draft which was introduced as the Elston Act in the 80th Congress.<sup>143</sup> The Elston Act was passed by the House, but not by the Senate on account of opposition from several quarters. Advocates of broad reform opposed the Act because it had rejected the recommendations of the Vanderbilt committee and various bar groups that command control of courts-martial should be removed. As Arthur E. Farmer, chairman of the Committee on Military Law of the War Veterans Bar Association, and Richard H. Wels, chairman of the Committee on Military Justice of the New York County Lawyers Association, charged:

Despite this uniformity of opinion among those best qualified to pass judgment,<sup>144</sup> the court-martial reform legislation, as introduced and as passed, did not contain provisions which would divorce the court-martial

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<sup>141</sup> REPORT OF WAR DEP'T ADVISORY COMM. ON MILITARY JUSTICE TO THE SECRETARY OF WAR 3 (1946).

<sup>142</sup> Note 134 *supra*.

<sup>143</sup> Act of June 24, 1948, tit. II, 62 Stat. 604.

<sup>144</sup> The Vanderbilt committee had recommended against command control of courts-martial. A poll taken in 1947 of the members of the Judge Advocates Asso-

system from command control. It is not without significance that the bill as introduced had been framed by the War Department, which had ignored the primary recommendations of its own Advisory Committee on Military Justice [the Vanderbilt Committee] by retaining the old method of appointing courts and counsel and placing the initial power of review in the commanding officer who was vested with appointing authority.<sup>145</sup>

There was also opposition from the military establishment since, as Professor Morgan reported, "there seems to have been some sort of agreement that nothing should be submitted to the 80th Congress, because the problems of both services should be considered together."<sup>146</sup> However, a change in strategy was made, and the Elston Act was unexpectedly offered as an amendment to the National Defense Act of 1948 and was quickly passed into law in June 1948.<sup>147</sup> The advocates of broader reform angrily charged that misrepresentations had been made during the limited Senate debate that the Act contained all the recommendations of the Vanderbilt committee.<sup>148</sup> Since the Elston Act applied only to the Army, and presumably to the Air Force which had just become a separate service, Secretary of Defense Forrestal, in an attempt to provide uniform rules for all services, appointed a committee in July 1948, to draft a uniform code of military justice. The struggle for more extensive reform now shifted to this drafting committee.

The military point of view was heavily represented on the drafting committee composed of the assistant and under secretaries of the services with Professor Edmund Morgan of Harvard Law School as chairman. The choice of Professor Morgan was a fortunate one for the cause of broader reform since he was not only highly respected as an expert in evidence and legal procedure (he had served on the drafting committee for the Federal Rules of Civil Procedure ten years before), but he had also served as a major under General Ansell in the Judge Advocate General's office in World War I and was sympathetic to many of Ansell's ideas. A working subcommittee, headed by Assistant General Counsel of the Secretary of Defense, Felix E. Larkin, was staffed with 15 lawyers from the services, five of them civilians.

The committee painstakingly compared the Army and Navy codes, attempting to reconcile their peculiarities and to mold in reforms.<sup>149</sup>

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ciation, comprised of 2,200 of the 2,700 World War II Judge Advocate General's officers, showed a high percentage of those answering in favor of removal of command control over courts-martial and appointing and reviewing authority. Farmer & Wels, *supra* note 131, at 269-70.

<sup>145</sup> *Id.* at 270.

<sup>146</sup> Morgan, *supra* note 58, at 22.

<sup>147</sup> Note 143 *supra*.

<sup>148</sup> Farmer & Wels, *supra* note 131, at 271.

<sup>149</sup> Larkin, *Professor Edmund M. Morgan and the Drafting of the Uniform Code*, 28 MIL. L. REV. 7, 8-9 (1965).

Meanwhile correspondence, particularly from lawyers who had served in the war, poured in with suggestions. The letters, often critical, covered most of the traditional court-martial procedures. Governor James E. Folsom of Alabama called for a court of the same rank as the accused:

When an officer orders a soldier court-martialled, before court-martial he is automatically convicted. I have one recommendation to make, that enlisted men try enlisted men and that officers try officers. This is an old common law which has been handed down for hundreds of years, that every man is entitled to be tried by his peers.<sup>150</sup>

Governor Ernest W. Gibson of Vermont urged that the commander's power to appoint and rate court members and counsel be terminated, referring to his experiences as a military lawyer in the war:

[W]e were advised, not once but many times on the Courts that I sat on, that if we adjudged a person guilty we should afflict the maximum sentence and leave it to the Commanding General to make any reduction . . . I was dismissed as a Law Officer and Member of a General Court Martial because our General Court acquitted a colored man on a morals charge when the Commanding General wanted him convicted—yet the evidence didn't warrant it. I was called down and told that if I didn't convict in a greater number of cases I would be marked down in my Efficiency Rating; and I squared right off and said that wasn't my conception of justice and that they had better remove me, which was done forthwith.<sup>151</sup>

An ex-officer who had served in the review section of the Judge Advocate General's office questioned the fairness of the boards of review:

Boards of Review are mere adjuncts of the Office of the Judge Advocate General . . . . The failure of Boards of Review to provide a "more effective appellate review" of convictions by general court martial is due to several fundamental causes, namely, the members of such Boards are army officers "under the command" of the [Judge Advocate General]. Their appointment and removal are at the will of the individual who happens to be the Judge Advocate General.<sup>152</sup>

The letters covered a number of different aspects of the court-martial system, but most of the stories of unfairness, arbitrariness, misuse of authority, and inadequate protection of rights could be boiled down to the criticism that commanders exercised too much control over court-martial procedures from prosecution through review. It was clear that the central issue in court-martial reform was the commander's role in the court-martial.

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<sup>150</sup> Letter from James E. Folsom to Edmund M. Morgan, Nov. 5, 1948, VI Morgan Papers.

<sup>151</sup> Letter from Ernest W. Gibson to Edmund M. Morgan, Nov. 18, 1948, VI Morgan Papers.

<sup>152</sup> Letter from Charles M. Dickson to Senator Tom Connally, Jan. 31, 1948 (copy), VI Morgan Papers.



A number of prominent bar associations were strongly in favor of court-martial reform which would remove the individual commander's control of court-martial machinery.<sup>153</sup> The *American Bar Association Journal* urged removal of command control in a number of editorials from 1945 to 1948.<sup>154</sup> On November 22, 1948, the committees on military justice of the American Bar Association, the Association of the Bar of New Jersey, the New York County Lawyers' Association, and the War Veterans' Bar Association called on the drafting committee to make certain reforms in military justice, namely, that the judicial systems of the Armed Services be removed from command control; that a simple system of review be adopted; and that in all general courts, and wherever possible in all other cases, both the trial judge advocate and the assigned defense counsel be lawyers.<sup>155</sup>

These committees proposed a plan for removing command control of courts-martial which went beyond that proposed by General Ansell. A commander who wanted one of his men court-martialled would have the power to charge him with the offense and control the prosecution, but the convening and selection of the court, the handling of the defense, the administration of the court-martial, and the post-conviction review would not be under his control or command. The power to convene a general court-martial would be in a ranking member of the Judge Advocate General's department who would be attached to high level commands (such as a territorial department, Army group or Army) or, when empowered by the President, would be attached to lower commands (such as a division or corps). The commander would provide the convening authority with personnel but would not be in the chain of command, and the convening authority would be responsible directly to the Judge Advocate General in Washington. Ordinarily, the convening authority would select court members from the accused's own division or corps, except that, in the interests of justice, he could order the accused to be tried by a court composed of officers and men from a different division or corps.<sup>156</sup>

The military was opposed to any such plan which would limit the individual commander's control over the operation of courts-martial. The

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<sup>153</sup> E.g., American Bar Association; New York County Bar Association; Bar Association of the City of New York; Association of the Bar of New Jersey; War Veterans' Bar Association. However, the New York State Bar Association favored retaining command control, although also favoring civilian review. White, *supra* note 127, at 208; Goulet, *The United States Court of Military Appeals and Sufficiency of the Evidence*, 42 GEO. L.J., 108, 112 (1953).

<sup>154</sup> See, e.g., 34 A.B.A.J. 702, 703 (1948).

<sup>155</sup> Report from the Chairman of the Committees on Military Justice to Felix E. Larkin, Chairman of the Drafting Committee, Nov. 22, 1948, VI Morgan Papers 2-3.

<sup>156</sup> *Id.* at 5.

civilian Secretaries of the services supported the military's position, and the defense establishment presented solid resistance to attempts to broaden the Elston Act so as to remove command control of courts-martial. Secretary of War Patterson had previously expressed the traditional argument that the military could not operate efficiently if commanders could not control courts-martial:

Many of the critics overlook the place of military justice in the army or the navy. An army is organized to win victory in war and the organization must be one that will bring success in combat. That means singleness of command and the responsibility of the field commander for everything that goes on in the field. The army has other functions such as feeding, medical care, and justice, but they are subordinate.<sup>157</sup>

The military undertook an active campaign to counteract the public outcry for limiting command control. A number of prominent generals, including Generals Bradley and Eisenhower, forcefully defended the traditional court-martial structure. At a meeting of the New York Lawyers' Club on November 17, 1948, General Eisenhower said:

I know that groups of lawyers in examining the legal procedures in the Army have believed that it would be very wise to observe, in the Army and in the Armed Services in general, that great distinction that is made in our Governmental organization, of a division of power . . . . But I should like to call your attention to one fact about the Army, about the Armed Services. It was never set up to insure justice. It is set up as your servant, a servant, of the civilian population of this country to do a particular job, to perform a particular function; and that function, in its successful performance, demands within the Army somewhat, almost of a violation of the very concepts upon which our government is established . . . . So this 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.<sup>158</sup>

Although the public debate over court-martial reform centered on removal of command control, there was never much likelihood that the drafting committee would not uphold the military position. A survey of the papers and correspondence of the committee, now part of the Morgan papers at the Harvard Law School Library, indicates that none of the drafts considered by the committee ever contained a provision for removal of command control of courts-martial. Professor Morgan, however, was interested in reducing command control. His handwritten notes indicate that he was attracted by the then recent British court-martial reforms<sup>159</sup> which placed certain court-martial functions in an independent

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<sup>157</sup> Quoted in Statement of John Kenney, Under Secretary of the Navy, *Hearings on H.R. 2498 Before Subcomm. No. 1 of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 780 (1949) in VI Morgan Papers.

<sup>158</sup> Quoted in Letter from New York State Bar Association, *supra* note 127, at 4.

<sup>159</sup> Professor Morgan's copy of Report of the Army and Air Force Courts-

judge advocate's office which was removed from the military structure and civilianized:

The English do not attempt to interfere with the composition of the Court. If Congress is prepared to set up a corps of legal specialists to be assigned by Judicial Council to act as defense counsel and law officers, that would do the trick.<sup>160</sup>

His notes also indicate some sympathy for the type of proposal made by the bar associations that an independent judiciary under the Judge Advocate General be established to administer all court-martial functions except those of prosecution:

To make Corps [Judge Advocate General] effective to accomplish elimination of command control—

1. Impossible to do it so far as court is concerned unless JAG furnishes it;
2. Same as to defense counsel unless JAG furnishes it—as nowhere proposed. Any military officer bound to be rated by his commanding officer;
3. Same as to law officer unless a JAG Corps man.<sup>161</sup>

However, Morgan's sentiments on command control were not shared by enough members of the committee, and he seems to have worked instead for other reforms, principally for a civilian review court. A month before the final draft was completed, a memorandum from Executive Secretary Larkin showed that there was a difference of opinion in the committee on only four issues: a civilian review body; use of enlisted men on courts; vesting the law officer with powers similar to those of a civilian judge; and the right to demand a court-martial in place of non-judicial punishment.<sup>162</sup> Morgan was in favor of the broader reform on

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Martial Committee, Great Britain (Cmd. 7608, 1946) was heavily underlined. Paragraphs 105-113 of that report recommended the transfer of all functions involving pretrial advice and prosecution (and apparently defense under a legal aid scheme) from the Judge Advocate General of the Forces to new civilian Directorates of Legal Services in the War Office and Air Ministry. This was accomplished on Oct. 1, 1948. *See* Wiener, *CIVILIANS UNDER MILITARY JUSTICE* 231 (1967). The Courts-Martial (Appeals) Act. 14 & 15 Geo. 6, c. 46 (1951) created a civilian Courts-Martial Appeal Court which would have direct review over courts-martial. Subsequent legislation involving further civilianization of military justice included: Administration of Justice Act, 8 & 9 Eliz. 2, c. 65 (1960) (permitting court-martial cases to be appealed to the House of Lords); Criminal Appeal Act 1964, c. 43 (authorizing retrials of criminal cases, including courts-martial, where there is fresh evidence); Criminal Appeals Act 1966, c. 31 (enlarging scope of appellate review of courts-martial).

<sup>160</sup> Handwritten notes of Professor Morgan, V Morgan Papers, at 6.

<sup>161</sup> *Id.* at 7.

<sup>162</sup> Memorandum from Felix E. Larkin to Secretaries of the services concerning the points of difference within the committee, Jan. 5, 1949, IV Morgan Papers.

all but the last issue. When the draft of the UCMJ was completed early in February 1949, and introduced in the Senate and the House, Morgan contributed his considerable prestige to obtain its passage.<sup>163</sup> Only later would he comment somewhat ruefully on the failure of the UCMJ to remove or limit command control of courts-martial:

[S]o long as the court consists of officers subject to control by the convening authority or his associates, the possibility of command interference will persist. If the superior officers in the services are determined to exercise improper control over the trial, no safeguard will suffice so long as the trial court is composed of military men. We may have to come to a system where the trial judge, and the members of the Board of Review, as well as the Court of Appeals, are civilians.

If experience under the Code shows that the influence of command control has not been eliminated, it may well be that a new system will have to be established in which the military will have control only over the processes of prosecution, and the defense, trial and review be under the exclusive control of civilians. The services have the opportunity of demonstrating to Congress that the concessions made in the Code to the demands for effective discipline do not impair the essentials of a fair, impartial trial and effective appellate review.<sup>164</sup>

The advocates of broad court-martial reform vigorously dissented from the committee's proposed draft of the UCMJ. The chairmen of two bar association committees which had urged reform observed that

[t]his code embodies further improvements in the system of military justice, but incredible as it may seem, maintains intact the old system criticized by Senators Norris and Chamberlain as far back as 1919, whereby the commanding general appoints from his command the members of the court, the trial judge advocate and defense counsel, refers the case to the court and thereafter reviews the court's findings and sentences.<sup>165</sup>

Professor Arthur Keeffe of Cornell Law School and former president of the Navy's General Court-Martial Sentence Review Board charged that "in contrast with the Chamberlain bill of 1920, for which Professor Morgan once fought so hard, this proposed uniform Code, however, is a sorry substitute."<sup>166</sup> Arthur E. Farmer, chairman of the War Veterans Bar Association committee, testified:

[t]he basic reform which the court-martial system requires and without which no *real* reform is possible—the elimination of command control from the courts—is conspicuously lacking [in the new Code]. Under the Uniform Code the commanding general will still appoint the members

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<sup>163</sup> See Letter to Edmund M. Morgan from Felix E. Larkin, Feb. 2, 1949, II Morgan Papers. "In connection with your appearances before Congressional committees, you appear as a member of the staff of the Secretary of Defense." *Id.*

<sup>164</sup> Morgan, *supra* note 58, at 34-35.

<sup>165</sup> Farmer & Wels, *supra* note 131, at 273.

<sup>166</sup> Statement of Professor Keeffe, *supra* note 129, at 1.

of the court, the trial counsel and the defense counsel from members of his command, and will review the findings and sentence. We will still have the same old story of a court and counsel, all of whom are dependent upon the appointing and reviewing authority for their efficiency ratings, their promotions, their duties, and their leaves.<sup>167</sup>

But however long and hard they talked, the reformers had been outmaneuvered and unless there was substantial popular support for broader court-martial reform forthcoming, it was unlikely that they could obtain amendments of the UCMJ by Congress. Their main problem in marshalling popular support was the timing. Four years had passed since World War II, and even those raw wounds of servicemen who felt that they had received unjust treatment in courts-martial had begun to mend. Besides the country was now caught up in a struggle with a new enemy and aggressor. The anger at the "brass hats" had already been converted into the respect for military might and technology which would characterize the cold war era.<sup>168</sup> The military used the threat that the Armed Forces would be weakened to offset effectively the attacks on command control. Military representatives continued to emphasize that the old court-martial system was tried and true and any changes uncertain, that any new system was unworkable on a practical basis and, most of all, that highly respected military men felt command control was needed to preserve military efficiency.<sup>169</sup> This potpourri was remarkably effective with the public and Congress. Hearings were held on the UCMJ in March and April 1949, and the committee's draft was passed without substantial change. The UCMJ was signed into law by President Truman on May 5, 1950, and took effect on May 31, 1951.<sup>170</sup>

Despite the failure of the UCMJ to make basic changes in the court-martial structure, this was the most far-reaching change in military law in the country's history, providing, for the first time, one criminal code applicable to all the services. The provisions of the UCMJ<sup>171</sup> will be discussed in relation to the categories already used to analyze prior military codes:

1. *Statement of Crimes and Punishments*—The UCMJ did not make

<sup>167</sup> Statement of Arthur E. Farmer, *Hearings on H.R. 2498 Before Subcomm. No. 1 of the House Comm. on Armed Services*, 81st Con., 1st Sess. (1949) in VII Morgan Papers.

<sup>168</sup> See generally SWOMLEY, *THE MILITARY ESTABLISHMENT* 38-90 (1964); NEBLETT, *PENTAGON POLITICS* 1-30 (1953).

<sup>169</sup> See, e.g., Transcript of "On Trial", American Broadcasting Co. broadcast, Feb. 14, 1949 at 7, V Morgan Papers.

<sup>170</sup> 10 U.S.C. §§ 801-940 (1964) (originally enacted as Act of May 5, 1950, ch. 169, 64 Stat. 107).

<sup>171</sup> Some of the changes in the UCMJ had already been passed as part of the Elston Act, *supra* note 143. For a more detailed discussion of the provisions of the Elston Act see Morgan, *supra* note 58.

substantial changes in the wording of military-type crimes from the 1920 code. It tended to follow the Army code, making changes where appropriate for special Navy situations. It did not remove certain traditional military crimes imposing particularly authoritarian limitations on servicemen, such as "contemptuous words against the President" (article 88), and "provoking or reproachful words or gestures towards any other person" (article 117). It also left intact the two open-ended crimes: "conduct unbecoming an officer and a gentleman" (article 133); and "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty" (article 134, the general article).

The UCMJ completed the extension of court-martial jurisdiction over all civilian-type crimes. Until 1863, civilian-type crimes were not included in the Articles of War, and from 1863 to 1916, they could only be tried by court-martial "in time of war, insurrection or rebellion."<sup>172</sup> After 1916, a court-martial could not try individuals for murder and rape "committed within the geographical limits of the States of the Union and the District of Columbia in time of peace,"<sup>173</sup> but trial by court-martial was permitted for manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, perjury, forgery, sodomy, and various assaults.<sup>174</sup> The UCMJ removed the limitations of time and place for murder and rape and defined each of the other civilian crimes in a separate article (adding the crimes of extortion and perjury).<sup>175</sup> This was consistent with the drafters' belief that military law should be a total criminal law system empowered to try servicemen for all crimes committed at any place, a proposition the constitutionality of which has recently been rejected by the Supreme Court in *O'Callahan v. Parker*.<sup>176</sup> The UCMJ also retained the phrase in article 134 (the general article) relating to "crimes and offenses not capital," thus continuing to assimilate all federal crimes into the military code.

The UCMJ did not contain maximum punishments for crimes but provided that the President could, by Executive Order, prescribe a table of maximum punishments. When the UCMJ took effect the President promulgated such a table which has continued, with minor changes, since that time.<sup>177</sup> However, the President has the power to suspend the

<sup>172</sup> Note 42 *supra*.

<sup>173</sup> Articles of War, 1920, art. 92.

<sup>174</sup> *Id.* art. 93.

<sup>175</sup> 10 U.S.C. §§ 918-31 (1964) (arts. 118-31 of the UCMJ).

<sup>176</sup> *United States ex rel. O'Callahan v. Parker*, 390 F.2d 360 (3d Cir. 1968), *rev'd*, 395 U.S. 258 (1969).

<sup>177</sup> Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951); MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 127c (1951) [hereinafter cited as MANUAL].

table at any time or for any particular area or crime, and has done so several times.<sup>178</sup>

2. *Pretrial Proceedings*—The UCMJ provided that any person subject to the Code could prefer charges against another person subject to the Code even though he himself was under charges, in arrest, or in confinement.<sup>179</sup> Thus, the preferral of charges was made similar to a complaint in civilian courts. Essentially the same levels of command as before were permitted to convene summary, special, and general courts-martial, with the power to convene a general court-martial still delegable far down the line.<sup>180</sup> The commander with authority to convene a court was called the “convening authority” rather than the “appointing authority” as under the old Articles of War.

Charges could be referred to a special court-martial without a formal investigation, but before charges could be referred to a general court-martial, the convening authority would have to appoint an investigating officer to make “a thorough and impartial investigation” at which the accused would be afforded an opportunity to present evidence and cross-examine witnesses, and would have to refer the charge to his staff judge advocate “for consideration and advice.”<sup>181</sup> The commander would not be bound by the recommendation of either the investigating officer or the staff judge advocate, but would make his own determination “that the charge alleges an offense under this Code and is warranted by evidence indicated in the report of investigation.”

Especially noteworthy were the revolutionary provisions under article 31 which prohibited interrogation without warning the accused (1) of the nature of the accusation, (2) that he had the right to remain silent, and (3) that any statement which he would make might be used against him. Arthur Farmer, in his congressional testimony, had recommended that the accused should also be advised of his right to counsel.<sup>182</sup> His recommendation was not followed, but the Court of Military Appeals in 1967 held that this additional warning was constitutionally required.<sup>183</sup>

<sup>178</sup> The table was suspended during the Korean War for certain offenses, including desertion and absence without leave, in the Far East theatre. Exec. Order No. 10247, 3 C.F.R. 754 (1953). On December 3, 1966, the President increased the authorized maximum punishment for misbehavior of sentinels in combat zones, namely Vietnam. Exec. Order No. 11317, 3 C.F.R. 170 (1966). The table established under the MANUAL, 1920, was also subject to suspensions during World War II. See MANUAL, ¶ 127c (1951), at 217 n.1. For a discussion of a case involving the “time of war” exception in the statute of limitations and related issues concerning the table of maximum punishments see Note, 82 HARV. L. REV. 483 (1968).

<sup>179</sup> 10 U.S.C. § 830 (1964) (art. 30 of the UCMJ).

<sup>180</sup> 10 U.S.C. §§ 822-24 (1964) (arts. 22-24 of the UCMJ).

<sup>181</sup> 10 U.S.C. §§ 832, 843 (1964) (arts. 32, 43 of the UCMJ).

<sup>182</sup> Statement of Arthur E. Farmer, *supra* note 167, at 3.

<sup>183</sup> 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

The UCMJ made no provision for release or bail from pretrial confinement, although a commander could release a man pending trial if he so desired. In an attempt to encourage speedy trials, it was provided that a commanding officer would have to forward charges to the officer exercising general court-martial jurisdiction within eight days after an accused had been ordered into arrest or confinement "if practicable," and if not, reasons would have to be given in writing.<sup>184</sup> However, there were no express time limitations on the convening authority regarding the referral of charges to a court-martial and the commencement of the trial.

3. *Role of the Commander*—The UCMJ, although placing some additional limitations on the commander, left him essentially in control of court-martial machinery. The commander would still determine whether to prosecute and, although he would be required in general courts-martial to consider the recommendations of an investigating officer and his staff judge advocate, he would not be required to follow such recommendations. He would still have the power to appoint (either by himself or through his subordinates) the investigating officer, the members of the court, both counsel, the law officer (or president in a special court-martial), and the court personnel. Finally, he retained the power to review the conviction and sentence, a practice which had been scored by reformers as the principal reason for unduly severe court-martial sentences.<sup>185</sup>

Provisions were added, however, which were intended to prevent the commander from influencing the trial improperly. A commander would be disqualified from appointing a special or general court-martial if he had a "personal interest" in the case, a limitation which was later strictly applied to cases where the commander had some monetary interest or personal contact with the case, but which was not applied to the usual case where the commander's contacts had been in an official capacity.<sup>186</sup> The UCMJ also disqualified the commander from being "the accuser" who preferred the charges.<sup>187</sup> This technicality, however, could easily be avoided, as described by George A. Spiegelberg in a 1949 *American Bar Association Journal* article:

The fact is that when the convening authority desires to make an example of an officer or an enlisted man, the practice is for him to direct an officer in his command to prefer the charges. The result in such instances is that the convening authority, although in reality the accuser,

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<sup>184</sup> 10 U.S.C. § 833 (1964) (art. 33 of the UCMJ).

<sup>185</sup> See, e.g., text accompanying note 151 *supra*.

<sup>186</sup> *United States v. Noonan*, 4 U.S.C.M.A. 297, 15 C.M.R. 297 (1954); *United States v. Teel*, 4 U.S.C.M.A. 39, 15 C.M.R. 39 (1954); *United States v. Keith*, 3 U.S.C.M.A. 48, 11 C.M.R. 48 (1953); *United States v. Marsh*, 3 U.S.C.M.A. 48, 11 C.M.R. 48 (1953); *United States v. Gordon*, 1 U.S.C.M.A. 255, 2 C.M.R. 161 (1952).

<sup>187</sup> 10 U.S.C. §§ 822(b), 823(b) (1964) (arts. 22(b), 23(b), of the UCMJ).



retains the power to appoint the court because he is not the accuser of the record.<sup>188</sup>

The most important provision, intended to prevent improper command influence, was article 37. It prohibited the convening authority of any court-martial, first, from censuring, reprimanding, or admonishing any court member, law officer, or counsel with respect to the findings or sentence; and second, from attempting to coerce or, by any unlawful means, influence the action of a court-martial or any member thereof. Violation of this provision would be a crime. Thus, overt command influence was forbidden, as described by Robinson O. Everett:

Thus, a commanding officer is not allowed to express to court members an opinion that the accused is guilty of a charge on which he is about to be tried. Nor can he reprimand, "chew out," the court members for having acquitted someone the commander thinks was guilty or for their having given only a token sentence to one, who, in the commander's eyes, deserved hanging. He cannot write the court members "skin letters" telling them what poor jobs he thinks they have done in their court work and that he proposes to make his low view of their efficiency a part of their official military records, ultimately to be considered for promotion purposes.<sup>189</sup>

The reformers attacked these provisions as inadequate to prevent the commander from influencing the court if he desired. The commander would still be permitted to write efficiency reports on and rate court members and other court personnel and to control their job assignments, leaves, etc. It would be easy enough for him to indicate his feelings, which tend to be known by most junior officers anyway, about types of cases, sentences, and discipline.<sup>190</sup> Furthermore, he would be permitted to hold general "informational" lectures which could be used to subtly indicate his feelings about the conduct of courts-martial to his officers.<sup>191</sup> Arthur Farmer summed up the doubts of the reformers over the efficacy of article 37 in preventing command influence:

The provisions of Article 37 which prohibit the censure of the court and counsel and any attempt to coerce the court's actions, will be valueless in a situation where the commanding general desires to circumvent them. It is naive to suppose that it will be necessary for the commanding general to use such direct means of influencing the court that they could form the basis for prosecution under Article 37. And no one who served in any branch of the armed forces would under-estimate the difficulty of obtaining an accuser of the commanding general, or a trial of the charges if

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<sup>188</sup> Spiegelberg, *Reform of Courts Martial: A Reply to Colonel Archibald King*, 35 A.B.A.J. 29 (1949).

<sup>189</sup> EVERETT, *supra* note 126, at 12.

<sup>190</sup> See Keeffe, *JAG Justice in Korea*, 6 CATH. U.L. REV. 1, 16-18 (1957).

<sup>191</sup> *United States v. Albert*, 16 U.S.C.M.A. 111, 36 C.M.R. 267 (1966); *United States v. Davis*, 12 U.S.C.M.A. 576, 31 C.M.R. 162 (1961); *United States v. Litt- rice*, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953).

an accuser could be found. The only method of making effective the prohibitions of Article 37 is to remove from commanders the power to influence the court.<sup>192</sup>

4. *Membership and Selection of the Court*—The UCMJ provided for the first time in the history of American military law that enlisted men could serve on courts-martial. Upon request, an accused enlisted man would be entitled to be tried by a court made up of one-third enlisted men.<sup>193</sup> However, the convening authority still had the power to appoint those enlisted men whom he believed were “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”<sup>194</sup> “Since non-commissioned officers are enlisted personnel,” wrote Professor Morgan later, “they may be selected for the trial of privates. And it seems to be the practice for the appointing authority always to select them. Reported experience shows this provision has not worked to the benefit of the soldier.”<sup>195</sup> Not only has it not worked to the benefit of the soldier; it has hardly worked at all. High ranking noncommissioned officers have invariably been selected by commanders when there was a request for enlisted men, and since noncommissioned officers are considered more severe than officers, enlisted men have rarely exercised the right to have other enlisted men on their court.<sup>196</sup>

The right to be tried by a jury made up, at least in part, of an enlisted man’s peers has been one of the cherished objectives of reformers for 50 years. General Ansell’s proposal that three-eighths of the court must be of the *same rank* as the accused (plus his proposal that a three-quarters vote be required for conviction rather than the two-thirds which was retained by the UCMJ) would have provided a genuine right to a jury made up in part of an enlisted man’s peers. Some of the rhetoric praising the UCMJ gave the impression that it provided a genuine extension of the right to trial by one’s peers. However, it was clear from the very beginning, that the provision for one-third enlisted men was a hollow right. As expressed by Congressman Paul J. Kilday, later a Court of Military Appeals judge, during the debate on the Elston Act:

Of course, the enlisted men will now have the right to have [enlisted] members sit on their courts. I believe our report states that we doubt whether that will be resorted to very frequently. I believe it will be developed as time goes on that it was something that was desired in the

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<sup>192</sup> Statement of Arthur E. Farmer, *supra* note 167, at 2.

<sup>193</sup> 10 U.S.C. § 825(c)(1) (Supp. IV, 1968) (art. 25(c)(1) of the UCMJ).

<sup>194</sup> 10 U.S.C. § 825(d)(2) (Supp. IV, 1968) (art. 25(d)(2) of the UCMJ).

<sup>195</sup> Morgan, *supra* note 58, at 25.

<sup>196</sup> *Hearings on H.R. 2575 Before Subcomm. No. 11 of the House Comm. on Armed Services*, 80th Cong., 1st Sess. 19 (1947).

abstract more than something that would be desired when an enlisted man is facing trial before a court martial.<sup>197</sup>

In 1964 the Court of Military Appeals in *United States v. Crawford*,<sup>198</sup> approved the practice of selecting only senior noncommissioned officers as court members, and rejected the argument that statutory intent and constitutional standards were thereby frustrated. The court did add that the convening authority may not deliberately exclude any group of qualified jurors on "irrelevant, irrational, or prohibited grounds."<sup>199</sup> Thus, under the UCMJ the right to a court composed of at least one-third enlisted men still remains in practice only a right to a court composed of one-third noncommissioned officers selected by the commander, and there are virtually no limitations on the convening authority's method of selection of both enlisted men and officers for court-martial.

5. *Judicial Functions*—The UCMJ provided that every general court-martial would have a law officer appointed by the convening authority (usually from the office of his staff judge advocate) who would not be a member of the court<sup>200</sup> (law officers would not be provided in special courts where the president, who was not required to be a lawyer, would carry out those functions). The law officer would have to be a member of the bar or highest court of a state and certified as legally qualified by the Judge Advocate General. He would instruct the court as to the elements of the offense, the presumption of innocence, and the burden of proof, and would rule on interlocutory questions of law. However, the members of the court would continue to determine, by secret vote, challenges for cause against a member, and if any member objected to the law officer's rulings on a motion for finding of not guilty or on a question of accused's sanity, the court would make the determination. The senior officer, called the president, would continue to preside at the trial and carry out many administrative and judicial functions. For example, he would set the time and place of trial and uniform to be worn, conduct the trial and preserve order, administer oaths to counsel, recess or adjourn the court,<sup>201</sup> preside over closed sessions, speak for the court in announcing findings and sentence and in conferring with the law officer. Likewise, the prosecutor, called the trial counsel, would continue to perform administrative duties, such as notifying court members and personnel as to the date, time, and place of trial, preparing the court room for trial, insuring that members and personnel were properly cared for, opening the trial and administering certain oaths.

Reformers objected that the law officer, although he would perform

<sup>197</sup> 94 CONG. REC. 161 (1947) (remarks of Congressman Kilday).

<sup>198</sup> 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964).

<sup>199</sup> 15 U.S.C.M.A. at 40, 35 C.M.R. at 12 (1964).

<sup>200</sup> 10 U.S.C. § 826 (1964) (art. 26 of the UCMJ).

<sup>201</sup> MANUAL § 40 (1951).

many judicial functions, was not equivalent to a civilian judge, and that his independence was in question since he would be subject to the command of the convening authority. Professor Mullally, writing after the Code took effect, objected that “[t]he law officer of the general court, while he is entrusted with the conduct of the trial and given the authority to make final rulings, is generally an officer on duty with the staff judge advocate of the convening authority. As such, he is inevitably subject to the pressures of command control.”<sup>202</sup>

6. *Defense Counsel*—A significant reform of the UCMJ was the grant to an accused of the right to be represented by a lawyer. The convening authority would appoint as defense counsel a military lawyer certified by the Judge Advocate General as legally qualified (again usually from the office of his staff judge advocate).<sup>203</sup> The accused in a special court-martial could be represented by his own civilian lawyer (as could an accused in a general court),<sup>204</sup> or by a military lawyer of his own selection “if reasonably available”<sup>205</sup> or, if he did not hire a lawyer and a requested military lawyer was not provided, by a nonlawyer officer who would serve as defense counsel. In practice, few of those accused have requested military lawyers, and when they have, lawyers have usually been refused as not reasonably available.<sup>206</sup>

7. *Nature of the Trial*—UCMJ provisions requiring the law officer and counsel to be lawyers, and guaranteeing such due process rights as the right against self-incrimination, contributed to a more judicial proceeding in the general court-martial. The 1951 *Manual* also adopted more of the trappings of civilian court procedure. However, the basic court-martial format retained certain distinctively military overtones. The prosecutor trial counsel still carried out administrative functions for the court, and the trial was conducted not by the law officer but by the president.<sup>207</sup> The court itself still voted on a number of questions normally determined by a judge.

Special courts-martial, which were generally administered without lawyers, did not usually measure up to the judicial standards followed in

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<sup>202</sup> Mullally, *Military Justice: The Uniform Code in Action*, 53 COLUM. L. REV. 1, 5 (1953).

<sup>203</sup> 10 U.S.C. § 827 (1964) (art. 27 of the UCMJ).

<sup>204</sup> 10 U.S.C. § 838(b) (1964) (art. 38(b) of the UCMJ).

<sup>205</sup> *Id.*

<sup>206</sup> The Army testified in 1966 that “requests for appointment of legally qualified counsel at a special court martial are rarely granted in the Army because these counsel are in fact not often reasonably available from their required duties.” *Joint Hearings on S. 745-62, S. 2906-7 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 912 (1966) [hereinafter cited as *Joint Hearings*].

<sup>207</sup> See, e.g., Dep’t of the Army Pamphlet No. 27-15, *Military Justice Handbook: Trial Guide for the Special Court-Martial President*, September 1962.

general courts. Although the *Manual* and service regulations attempted to provide guidelines and even a script for the nonlawyer participants, the result was often less than judicial. As described by this author elsewhere:

The actual special court-martial trial runs according to the script in the back of the *Manual*. The script is helpful to the nonlawyer participants in insuring that they do not forget any of the necessary elements of the trial, but it has the disadvantage of formalizing what should be an adversary proceeding into a static ritual. Thus, it is not uncommon for a special court martial to be reduced to a recitation from the script, the president and counsel reading back and forth to each other, garbling the unfamiliar legal terms, mistakenly reading beyond their appropriate sections and missing the cues for raising objections and defenses.<sup>208</sup>

The summary court-martial which was conducted by a single officer acting as judge, jury, and counsel did not attempt to follow a judicial format, except for the purposes of orderly presentation, and since its maximum penalty was limited (one month's confinement plus demotion and fines), it will not be considered to any extent in this article.<sup>209</sup>

8. *Post-Trial Proceedings*—General Ansell's desire for civilian review of courts-martial was finally met by the UCMJ's provision for the United States Court of Military Appeals composed of three civilians appointed by the President to fifteen year terms.<sup>210</sup> The Court of Military Appeals would stand at the top of a hierarchy of three types of reviews, first, administrative reviews by commanders and legal officers, second, appeal to a board of review, and third, appeal to the Court of Military Appeals.

The lowest type of review would still be performed by the convening authority, called the reviewing authority for this purpose. He would be required to refer the record of general courts-martial to his staff judge advocate or legal officer for a written opinion, but he would not be bound by the opinion. He would then approve those findings and the sentence which he had found "correct in law and fact and as he in his discretion determines should be approved" with the power to remit or reduce, but not to increase, any sentence.<sup>211</sup> As for special courts-martial, he would make his decision without an opinion from his staff judge advocate. If the sentence did not include a bad conduct discharge, it would also have to be reviewed by a judge advocate officer (usually in the office of the commander's staff judge advocate), but there would be no further right to review or appeal. If the sentence did include a bad conduct discharge,

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<sup>208</sup> Sherman, *The Right to Competent Counsel in Special Courts Martial*, 54 A.B.A.J. 866, 869 (1968).

<sup>209</sup> 10 U.S.C. § 820 (1964) (art. 20 of the UCMJ).

<sup>210</sup> 10 U.S.C. § 867 (1964) (art. 67 of the UCMJ).

<sup>211</sup> 10 U.S.C. § 864 (1964) (art. 64 of the UCMJ).

there would be a further review by the officer exercising general court-martial jurisdiction.

The principal objection of the reformers to the continuation of the commander's power to review findings and sentences was that it would still encourage the courts to give the maximum sentence so that the commander would have the option of reducing it. Thus, court members would still be encouraged not to perform their duty of assessing a reasonable and fair sentence. The Vanderbilt committee had criticized this practice:

The Committee is convinced that in many instances the commanding officer who selects the members of the court made a deliberate attempt to influence their decisions . . . . Not infrequently the members of the court were given to understand that in case of a conviction, they should impose the maximum sentence provided in the statute, so that the general who had no power to increase a sentence might fix it to suit his own ideas.<sup>212</sup>

Reformers also questioned the impartiality of reviews and opinions rendered by the commander's staff judge advocate. Since the staff judge advocate would still act as the commander's lawyer in advising him as to court-martial cases, they questioned the independence and disinterestedness of his review. "To all intents and purposes," objected Professor Keeffe, "there is no difference between the judge advocate general and a district attorney in civilian life."<sup>213</sup>

The next level of review would be conducted by boards of review. The Judge Advocate General of each service was directed to constitute boards of review in his office, each composed of three military or civilian lawyers.<sup>214</sup> Since 1920 the Army had boards of review within the office of the Judge Advocate General, but boards would be new for the Navy. All cases would be reviewed by a board where the sentence approved by the convening authority affected a general or flag officer, or extended to death, dismissal, dishonorable or bad conduct discharge, or confinement of a year or more. The board would consider the whole record, and could weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. It would affirm only those findings and sentences which it found correct in law and fact, and could set aside findings or sentence, order a rehearing or, where it found the evidence insufficient, order the charges dismissed. Its determination would be final and binding on the Judge Advocate General who would not have the power, as under the previous law, to disagree and send the case on to the President.

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<sup>212</sup> REPORT OF WAR DEP'T ADVISORY COMM. ON MILITARY JUSTICE TO THE SECRETARY OF WAR 61 (1946).

<sup>213</sup> Statement of Professor Keeffe, *supra* note 129, at 13. See also Keeffe, *supra* note 190, at 18-19.

<sup>214</sup> 10 U.S.C. § 866 (1964) (art. 66 of the UCMJ).

Reformers were not entirely satisfied with the boards. The members would have no tenure and would be subject to rating and job assignments by the Judge Advocate General. If the Judge Advocate General should not like the way a particular member was voting, he could remove him from the board assignment. Professor Keeffe objected that "like the trial court, under the domination of the convening authority, the boards of review will be under the domination of the Judge Advocate General."<sup>215</sup> Reformers also objected that the boards would continue to resemble administrative bodies more than appellate courts, and that their subservient position under the Judge Advocate General would not be consistent with civilian standards for independent appellate courts.<sup>216</sup>

The highest review available would be to the Court of Military Appeals. The court would be required to review all cases in which the sentence affirmed by a board affected a general or flag officer or involved the death penalty and all cases reviewed by a board which the Judge Advocate General decided to forward for review.<sup>217</sup> Any other case would be reviewed only if the accused petitioned for review and the court decided to grant review. Reformers were unhappy with the limitations placed on the availability of review. Professor Keeffe observed that one could be assured of review by the Court of Military Appeals only if he were a general or admiral or had been sentenced to death, unlike the provisions of the Chamberlain bill that "the case of every man was reviewed automatically before a court of judges appointed by the President."<sup>218</sup> He was also skeptical of the provision which permitted the Judge Advocate General, but not the accused, to obtain review:

The Judge Advocate General is not, and by the nature of his office and appointment, cannot be an impartial judicial officer. He is in as inconsistent a position as a commanding officer or convening authority. He is to enforce discipline and he is to give defense. It is for this reason that the English in their reforms have provided that the Judge Advocate General be a civilian appointed on the recommendation of the Lord Chancellor and be responsible to him. Significantly, in order to reduce this conflict the English have removed the Judge Advocate General from the control of the Secretaries for State and Air.<sup>219</sup>

Limitations were also placed on the scope of review of the Court of Military Appeals. The court would be limited to acting on appeals from

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<sup>215</sup> Statement of Professor Keeffe, *supra* note 129, at 9. *See also* Keeffe, *supra* note 190, at 20-21.

<sup>216</sup> *See, e.g.*, ACM 20016, Dunn, 38 C.M.R. 917 (1968) in which an Army board of review disclaimed power in military tribunals to review administrative determinations as to a discharge on grounds of conscientious objection.

<sup>217</sup> 10 U.S.C. § 867(b) (1964) (art. 67(b) of the UCMJ).

<sup>218</sup> Statement of Professor Keeffe, *supra* note 129, at 9. *See also* Keeffe, *supra* note 190, at 21-25.

<sup>219</sup> Statement of Professor Keeffe, *supra* note 129, at 13. *See also* Keeffe, *supra* note 190, at 18-20.

court-martial convictions, and therefore would lack the traditional writ powers of appellate courts, a limitation which only recently has been rejected by the court.<sup>220</sup> The court also would be limited to reviewing questions of law, a result of a compromise by the drafters. Some reformers had opposed establishing an appellate court within the military system, urging instead that federal courts should be empowered to review court-martial determinations.<sup>221</sup> Others urged that an appellate court staffed by civilians should review a wider category of cases both as to questions of law and fact.<sup>222</sup> In opposition to these views, the military argued that civilian review of any kind was a threat to military order as civilians would lack the background necessary for understanding disciplinary matters and undercut the authority of the commander.<sup>223</sup> As a compromise, the drafters established the civilian Court of Military Appeals but limited its review to questions of law in the belief that the court should not overrule a court-martial's determinations of factual questions or challenge convictions on the evidence. However, the Court of Military Appeals, by judicial decision, has placed a wide variety of fact questions in the category of questions of law, so that, in effect, its scope of review is no longer limited to questions of law.<sup>224</sup> The UCMJ also provided for the appointment of legally qualified counsel to represent the accused, upon request, before boards or the Court of Military Appeals.<sup>225</sup> No provision was made for post-conviction release or bail pending appeal.

#### V. THE MOVEMENT FOR CIVILIANIZATION SINCE THE UCMJ AND THE PASSAGE OF THE 1968 MILITARY JUSTICE ACT

The UCMJ took effect on May 31, 1951, during the Korean War. The military warnings of manpower difficulties in providing lawyers in all general courts-martial, and breakdowns of discipline due to the new

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<sup>220</sup> *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968); *Jones v. Ignatius*, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968); *Gale v. United States*, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

<sup>221</sup> See Letter from Senator Patrick McCarran, *Joint Hearings on S. 857 and H.R. 4080 Before a Subcomm. on Armed Services*, 81st Cong., 1st Sess. 102 (1949). See also Goulet, *supra* note 153, at 112.

<sup>222</sup> See Goulet, *supra* note 153, at 112.

<sup>223</sup> *Id.*

<sup>224</sup> *United States v. O'Neal*, 1 U.S.C.M.A. 138, 2 C.M.R. 44 (1952). See generally Goulet, *supra* note 153.

<sup>225</sup> 10 U.S.C. § 870 (1964) (art. 70 of the UCMJ).



availability of review by a civilian court did not materialize. The transition into lawyer-conducted general courts was smooth, and there was no noticeable adverse effect upon military discipline or effectiveness. Perhaps the most revolutionary provision of the UCMJ turned out to be the creation of the Court of Military Appeals. The court quickly indicated that it intended to act like an independent appellate court and that, as the supreme court of the military, it was the highest authority as to interpretation and application of the UCMJ. It considered itself bound by the standards of due process provided in the UCMJ and originally took the position that courts-martial were not subject to constitutional limitations. In an early case, *United States v. Clay*,<sup>226</sup> it coined the term "military due process" to describe those due process rights, derived not from the Bill of Rights but from Congress in its enactments concerning the military, which were considered requisite to fundamental fairness in a court-martial. However, this attempt to avoid direct application of the Constitution to military trials was not satisfactory, particularly after the Supreme Court's 1953 decision in *Burns v. Wilson*<sup>227</sup> upholding the right of federal courts on habeas corpus to consider denials of constitutional rights which the military had manifestly refused to consider. In 1960 in *United States v. Jacoby*, the Court of Military Appeals stated that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."<sup>228</sup> The list of those rights which have been found to be applicable to the military has grown steadily from decisions of the Court of Military Appeals over the last 18 years, so that most procedural due process rights which are constitutionally required in civilian courts have now been applied to courts-martial.<sup>229</sup>

An important by-product of the creation of the Court of Military Appeals has been the development, for the first time, of a judicial process in military criminal law. The only available appeals from court-martial convictions prior to the Court of Military Appeals were appeals to mili-

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<sup>226</sup> 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

<sup>227</sup> 346 U.S. 137 (1953).

<sup>228</sup> 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

<sup>229</sup> The Court of Military Appeals has extended to servicemen such due process rights as the right to a speedy trial, *United States v. Schalck*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964); right to confront witnesses, *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); right of protection against unreasonable searches and seizures, *United States v. Vierra*, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963); *United States v. Nowling*, 9 U.S.C.M.A. 100, 25 C.M.R. 362 (1958); privilege against self-incrimination, *United States v. Kemp*, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962); right to a public trial, *United States v. Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956); right to compulsory process, *United States v. Sweeney*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964); and the right to preinterrogation warnings, *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). See generally *Quinn*, *supra* note 15.

tary officers, and in certain limited cases, to boards of review, to the Judge Advocate General, to the Secretary of the particular service, or to the President for clemency. Some of the opinions and rulings were published, but since they were of questionable precedential value and courts-martial were generally administered by nonlawyers, they never had the effect of a body of case law. Since 1951, the decisions of the Court of Military Appeals, supplemented by the boards of review, have created a body of military "common law" interpreting and applying the statutory commands of the UCMJ and increasingly accepting civilian constitutional law standards. The expansion of habeas corpus and other extraordinary relief by federal courts to servicemen claiming that their constitutional rights have been violated by the military has provided an added impetus for the Court of Military Appeals to provide relief for servicemen against wrongful and arbitrary military actions.<sup>230</sup> Thus, the court has recently proclaimed that it possesses the all writs power, although it has yet to provide meaningful relief thereunder.<sup>231</sup> The Court of Military Appeals has felt its way carefully and, due to its small membership, the attitudes of individual judges have particularly affected its willingness to expand due process rights and grant relief. It still provides only a limited remedy for servicemen, but it has accomplished more reform in the field of procedural due process than all the prior congressional military codes put together.

The UCMJ established a committee, composed of the Judge Advocate Generals of the services and the judges of the Court of Military Appeals, which was required to make annual reports to Congress concerning the workability of the UCMJ and suggested amendments. The committee has never shown much interest in considering changes in the basic structure of the court-martial as provided by the UCMJ, such as removal of command control of courts-martial or broadening of the personnel for courts. However, it has recommended increasing the judicial features and, therefore, reducing the disciplinary features of the court-martial. In 1953 it proposed 17 changes in the UCMJ, including an expanded role for the law officer, and more judicial aspects.<sup>232</sup> These proposals were worked over by various congressional committees in the 1950's and 1960's and served as the basis for the reforms which were finally passed in the Military Justice Act of 1968.

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<sup>230</sup> See Sherman, *supra* note 16, at 526-40; Comment, *God, the Army, and Judicial Review*, *supra* note 16; Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO ST. L.J. 193 (1966); Quinn, *supra* note 15.

<sup>231</sup> See note 222 *supra*. For survey of the court's action on suits seeking extraordinary relief see Sherman, *supra* note 16, at 532 n.228.

<sup>232</sup> ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES & THE GENERAL COUNSEL OF THE DEP'T OF TRANSPORTATION PURSUANT TO THE UCMJ, 3-11 (June 1, 1952-Dec. 31,

By the late 1950's, when the passage of time had allowed evaluation of the UCMJ, criticism of military justice began to increase again. In 1959, the American Legion proposed a bill which addressed itself particularly to the problem of command influence.<sup>233</sup> It indicated that the UCMJ compromise had not removed the pall of improper command influence over courts-martial and that the only way to achieve this end was to reduce significantly the commander's control over court-martial operations. It proposed that lawyers be required in inferior courts as well as in general courts and be placed under the rating authority and command of the Judge Advocate General rather than the commander; that law officers be granted the status of judge; that boards of review be taken from the control of the Judge Advocate General and put under the civilian Secretary of Defense; that the Court of Military Appeals be authorized to prescribe rules of procedure for courts-martial so that needed changes could be made without having to go to Congress; and that jurisdiction over civilian-type felonies in time of peace be removed from courts-martial. The military reacted unfavorably to these proposals, saying they proposed "sweeping changes to correct a relatively minor evil,"<sup>234</sup> and the bill languished in Congress.

The next piece of legislation was proposed by an official committee, called the Powell committee, appointed by the Secretary of the Army in 1959 to study problems of order and discipline in the Army.<sup>235</sup> The committee, composed of one lieutenant general, six major generals, and two brigadier generals, offered a number of changes, indicating a distinctly disciplinarian philosophy and a predisposition for "decentralization" of military justice to lower command levels. Command influence, it suggested, was only objectionable if it was "wrongful," and the UCMJ and subsequent Court of Military Appeals decisions, far from permitting too much command influence, were reaching the point of allowing too little:

Even some of our senior commanders have formed the opinion that rules against illegal command influence prevent proper training, particularly of the officers of their command. The danger of this belief is that it can lead to failure on the part of a commander to carry out his responsibilities to develop the highest possible standards of conduct among officers and enlisted men. It can lead to a feeling that disciplinary matters are purely a judicial problem rather than a command problem.

A program should be begun at once to counteract the confusion and frustration that is becoming evident. This program should emphasize the

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1953). See also Mott, *An Appraisal of Proposed Changes in the Uniform Code of Military Justice*, 35 ST. JOHN'S L. REV. 300, 301 (1961).

<sup>233</sup> H.R. 3455, 86th Cong., 1st Sess. (1959).

<sup>234</sup> Mott, *supra* note 232, at 302.

<sup>235</sup> COMM. ON THE UCMJ, GOOD ORDER AND DISCIPLINE IN THE ARMY (1960) (report to W. M. Brucker, Secretary of the Army).

importance and value of command influence of the right type. It should emphasize the responsibility of command for the proper handling of disciplinary problems and clear up in the mind of commanders any idea that the courts have condemned this kind of command activity.<sup>236</sup>

The committee recommended: (1) expansion of a commander's non-judicial punishment powers so that he could impose ninety days correctional custody (usually stockade confinement) and a one-half pay forfeiture without court-martial; (2) abolition of all courts but general courts, and the streamlining of certain court procedures; (3) removal of the convening authority's power to act on findings; (4) removal of the boards of review's power to act on sentences; (5) an increase in the number of Court of Military Appeals judges to five; and (6) creation of a "sentence control board" for review. Although the committee's philosophy was weighted in favor of command control and, as such, represented an undesirable regression, its proposals for expanding nonjudicial punishment were not necessarily opposed to those of reformers. Reformers generally admitted the need for a commander to maintain discipline through the use of minor punishments which could be dispensed without the necessity of a formal court-martial under article 15.<sup>237</sup> Most reformers would have objected to giving the commander power to apply sentences as high as 90 days without a court-martial and, in fact, when this proposal of the Powell committee was passed as an amendment to the UCMJ in 1962, nonjudicial punishment authority was extended to only 30 days correctional custody plus forfeiture of one-half pay for two months and demotion.<sup>238</sup> However, this increase in a commander's nonjudicial punishment power has established a useful line which might now be drawn between "discipline" where judicial procedures need not be followed and "court-martial" where they should be followed. Some of the other Powell committee proposals, such as streamlining court-martial proceedings by permitting trial by a law officer alone, if requested, were incorporated into the Military Justice Act of 1968.

A third proposal for legislation was contained in the report of the Special Committee on Military Justice of the Association of the Bar of the City of New York in 1961.<sup>239</sup> It agreed with many of the sentiments expressed by the American Legion bill but suggested that the basic court-martial structure need not be altered. It proposed that the role of law officers be increased so that they more closely resembled civilian

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<sup>236</sup> *Id.* at 13.

<sup>237</sup> See Sherman, *Military Injustice*. 73 CASE & COM., July-August 1968, at 40, 42-43.

<sup>238</sup> For a discussion of the effect of the amendment see Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37 (1965).

<sup>239</sup> See Mott, *supra* note 232, at 304-05.

judges; that the special court-martial not be empowered to adjudge a bad conduct discharge; that trial be permitted, on request, by a single officer-lawyer in a special court-martial; and that summary courts-martial be abolished.

These three proposals, the 17 changes recommended by the UCMJ committee, and the many suggestions which had been made to Congressmen and Senators were worked over by congressional committees in the late 1950's and 1960's. Hearings were held by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, headed by Senator Sam J. Ervin (D. N.C.) in 1962 and 1965.<sup>240</sup> However, there was no significant support in Congress for broad reforms which would alter the basic UCMJ court-martial structure, and most of those asked to testify were interested only in such limited reforms as the UCMJ committee's 17 proposed changes. The reform movement had never really recovered from its defeat on the UCMJ and, at least in the peaceful late 1950's and early 1960's, there was little public interest in court-martial reform. Thus, the American Legion bill and such broad proposals for civilianization of court-martial juries as had been accomplished by recent English reforms were never seriously considered.<sup>241</sup> The bill which finally passed Congress, known as the Military Justice Act of 1968, left out the provisions for reform of administrative discharge procedures and made no basic changes in court-martial structure, but embodied many of the proposals of the UCMJ committee, the Powell committee, and the Bar of the City of New York committee. The Act, which took effect on August 1, 1969,<sup>242</sup> contained changes affecting three of the categories under which prior laws have already been discussed—judicial functions, defense counsel, and post-trial proceedings, and made minor changes as regards the role of the commander.

1. *Judicial Functions*—The Act replaced the law officer with a military judge who is given a number of new duties and powers making him more comparable to a civilian judge. First, he has the power to try the case by himself if "before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge and the military judge approves . . . ." <sup>243</sup> Trial may be by a military judge alone in both general and special courts-martial (the convening authority may detail a judge to a special court if he feels the legal issues are particu-

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<sup>240</sup> *Hearings on the Rights of Military Personnel Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963) (a summary report); *Joint Hearings*, *supra* note 206.

<sup>241</sup> Note 159 *supra*.

<sup>242</sup> Pub. L. No. 90-632 (Oct. 24, 1968).

<sup>243</sup> 10 U.S.C. § 816(1)(b) (1964) (art. 16(1)(b) of the UCMJ).

larly complicated). The report of the Senate Committee on Armed Services estimated that "the vast majority of the cases in which an accused pleads guilty would probably be tried by a military judge alone."<sup>244</sup> It also appears likely that many servicemen pleading not guilty, particularly in cases such as AWOL where their defenses may be weak, will desire to submit their cases to a single judge rather than to a court of officers who may be less understanding and harsher in sentencing. Servicemen in cases involving complicated legal issues may also feel it to their advantage to submit their cases to a trial by a single judge. Trial by a military judge alone is made more attractive due to the fact that, in a high percentage of cases, court-martial members are chosen by the commander from officers who, as a class, tend to view a court-martial in the context of the overall disciplinary needs of the unit. Until Congress is willing to extend to servicemen some right to trial by jury of peers chosen on some kind of random basis, it may be that in many cases an accused will be wiser to request court-martial by a military judge alone.

The act transferred to the military judge a number of functions which, under the UCMJ, were performed by the court. The military judge may now call the court into session without the attendance of the members for the purpose of disposing of interlocutory motions raising defenses and objections, ruling on pertinent legal matters, and arraigning the accused and receiving his plea.<sup>245</sup> He, rather than the court, determines the relevancy and validity of challenges for cause against court members, removing the undesirable practice of having the court (minus the challenged member) vote on challenges to its members. The military judge's rulings on all questions of law and all interlocutory questions, other than the factual issues of the accused's mental responsibility, are final. The rulings of the president of a special court-martial without a military judge upon any question of law, other than a motion for a finding of not guilty, are also final.<sup>246</sup>

Another provision of the Act contributing to the independence of military judges is the requirement that the Judge Advocate General of each service establish a field judiciary from which military judges will be assigned for court-martial cases.<sup>247</sup> The significance of this provision is that military judges are appointed from a field judiciary under the command of the Judge Advocate General rather than from the commander's staff judge advocate office, and so they are not subject to rating, assignment or other controls by the commander convening authority. The Army and Navy already had established field judiciaries by

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<sup>244</sup> INCREASING THE PARTICIPATION OF LAW OFFICERS AND COUNSEL ON COURTS-MARTIAL, S. REP. NO. 1601, 90th Cong., 2d Sess. 4 (1968).

<sup>245</sup> 10 U.S.C. § 839(a) (1964) (art. 39(a) of the UCMJ).

<sup>246</sup> 10 U.S.C. § 851(b) (1964) (art. 51(b) of the UCMJ).

<sup>247</sup> 10 U.S.C. § 826(c) (1964) (art. 26(c) of the UCMJ).

regulation,<sup>248</sup> but this provision insures that military judges of all services will be drawn from a field judiciary for all courts-martial. Thus, the Act has approximated the objective of General Ansell in making the presiding judge independent of the convening authority. Of course, military judges will still be subject to the command control of the Judge Advocate General.

2. *Defense Counsel*—The UCMJ did not require that special court-martial counsel be lawyers, and although the Air Force voluntarily provided lawyers in all special courts, the Army and Navy did not.<sup>249</sup> The Military Justice Act of 1968 provided that the accused “shall be afforded the opportunity to be represented at the trial” of special courts-martial by a lawyer “unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies.”<sup>250</sup> If a lawyer cannot be obtained, the convening authority must make “a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained.”<sup>251</sup> The Act also provided that a bad conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made, lawyer counsel has been detailed to represent the accused, and a military judge has been detailed to the trial (except in a case in which the military judge could not be detailed to the trial because of physical conditions or military exigencies).<sup>252</sup>

3. *Post-Trial Proceedings*—In keeping with the attempt to upgrade the status of the law officer by calling him a judge and giving him additional judicial powers, the Act also changed the name of the boards of review to courts of military review and called the members judges.<sup>253</sup> The courts of military review are still constituted under the Judge Advocate Generals of each service, but there is a chief justice who divides the judges

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<sup>248</sup> See Wiener, *The Army's Field Judiciary System: A Notable Advance*, 46 A.B.A.J. 1178 (1960); *Joint Hearings*, *supra* note 208, at 908-11, 935-36.

<sup>249</sup> *Joint Hearings*, *supra* note 208, at 916-18, 940-43, 965-66. However, Army special courts cannot adjudge bad conduct discharges since article 19 of the UCMJ requires a verbatim transcript for such a discharge, and Army regulations provide that reporters will not be used in special courts without authority from the Secretary of the Army. Army Reg. 27-145.

<sup>250</sup> A similar exception under article 38(b) of the UCMJ which provides that an accused's choice of counsel must be provided only if “reasonably available” has been subject to abuse. A Senate subcommittee concluded that “few commanders could fail to justify the unavailability of a lawyer to aid the accused if the commander did not wish to provide him with legally trained counsel.” *Hearings on the Rights of Military Personnel Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 44 (1963) (a summary report).

<sup>251</sup> 10 U.S.C. § 827(c) (1964) (art. 27(c) of the UCMJ).

<sup>252</sup> 10 U.S.C. § 819 (1964) (art. 19 of the UCMJ).

<sup>253</sup> 10 U.S.C. § 866 (1964) (art. 66 of the UCMJ).

into panels of not less than three and appoints a senior judge to preside. The court may sit *en banc* or in panels. The fact that there is only one court with a number of panels rather than a number of separate boards as under the original UCMJ, should provide for more consistency and, hopefully, a higher quality of legal decision. However, it is doubtful that these provisions are going to make the courts of military review any more independent than they were before the change of name. The members still have no tenure and are subject to be transferred at any time. They are still under the command of the Judge Advocate General and dependent upon him for ratings and assignments. At least they are not subject to the control of the convening authority, but the many roles of the Judge Advocate General hardly make his office the ideal location for an independent appellate court.

The Act also made some improvement in the availability of post-trial review by the Judge Advocate General. The Judge Advocate General is authorized in any court-martial case that has been finally reviewed to vacate or modify the findings and sentence because of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or offense, or error prejudicial to the substantive rights of the accused.<sup>254</sup> The last ground—error prejudicial to the substantive rights of the accused—is important, for this means that, for the first time, a person convicted in a special court-martial who did not receive a bad conduct discharge (this type of case accounts for almost two-thirds of the total military courts-martial) can obtain a review of prejudicial errors by someone other than the convening authority and his staff judge advocate's office. However, this is not a very satisfactory type of review. No standards are provided as to how the Judge Advocate General will conduct it; the term "error prejudicial" is unclear; and it provides only another administrative review rather than an appeal to an independent court. However, at least a serviceman, who might have received six months confinement plus forfeitures and demotion in a special court-martial, can now seek review apart from the review of the commander who tried him and the commander's lawyer. The Act also extended to all cases the right to petition for a new trial on the basis of newly discovered evidence or fraud (not just those involving sentences of death, dismissal, punitive discharge, or a year or more confinement as under the original UCMJ), and the time within which the accused may petition was extended from one to two years.<sup>255</sup>

Perhaps the most significant new due process right provided by the Act was a provision for post-conviction release or bail pending appeal. The military practice has been to require convicted servicemen to begin

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<sup>254</sup> 10 U.S.C. § 869 (1964) (art. 69 of the UCMJ).

<sup>255</sup> 10 U.S.C. § 873 (1964) (art. 73 of the UCMJ).



serving their sentences immediately after conviction.<sup>256</sup> Thus, it is not uncommon for servicemen to have served their entire sentence before their appeal has been decided by a board of review and the Court of Military Appeals. A reversal of conviction is slim consolation to one who has already served his sentence. The Act gave the convening authority or the officer exercising general court-martial jurisdiction over the accused, if he has been moved, power to defer the serving of the sentence until the appeals have been completed.<sup>257</sup> However, no standards were provided to insure uniformity of application and preclude discrimination, and the convening authority was given absolute discretion as to the granting of a release pending appeal. It is hoped that regulations will establish definite guidelines which will guarantee a general right to release pending appeal.

4. *Role of the Commander*—The issue of command control and influence which had dominated the debates over the UCMJ was, in effect, ignored by the Military Justice Act of 1968. This was not because experience with the UCMJ had shown that unlawful command influence was no longer a problem. Indeed, the most serious case of command influence in years arose in 1967 when the commanding general of Fort Leonard Wood, Major General Thomas Lipscomb, was charged with attempting to influence courts-martial, resulting in the reversal of almost 100 court-martial convictions and the adoption of a new procedure by the Court of Military Appeals for raising complaints of command influence.<sup>258</sup> However, throughout most of the 1950's and 1960's while the Military Justice Act of 1968 was gestating, no one really knew one way or the other about the extent of improper command influence and, since it was a period of reduced conscription, there was little public outcry against such influence. Therefore, the Act made only two minor changes affecting the role of the commander, one of them urged by reformers and one by the military. It provided that performance as a member of a court-martial or defense counsel cannot be considered in the preparation of an effectiveness, fitness, or efficiency report or in the report used in

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<sup>256</sup> *Noyd v. Bond*, 395 U.S. 683 (1969). The lower court granted a writ of habeas corpus directing that petitioner, who had been convicted in a court-martial, not be transferred to the disciplinary barracks at Fort Leavenworth to begin serving his sentence because such order violated article 71(c) of the UCMJ which provides that no sentence of a punitive discharge or one year confinement may be executed until affirmed by a board of review. The tenth circuit and the Supreme Court reversed on grounds of failure to exhaust remedies and so did not reach the merits.

<sup>257</sup> 10 U.S.C. § 871 (1964) (art. 71 of the UCMJ).

<sup>258</sup> See *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). See also *N.Y. Times*, July 22, 1967, at 1, col. 5; *N.Y. Times*, June 25, 1968, at 3, col. 3.

determining promotion, retention, or assignment.<sup>259</sup> This added little to the caveats already telling commanders not to attempt overtly to affect court-martial decisions. The Act also provided that the prohibition against attempting to influence the action of a court-martial would not apply to general instructional or information courses in military justice.<sup>260</sup> This provision was recommended by the Powell committee and sought by the military in order to reverse a Court of Military Appeals decision.<sup>261</sup> Unfortunately, no standards or limitations were provided regarding the type of courses and lectures which are permissible, and so a broad area of potential command abuse has been opened up.

## VI. CONCLUSION

Major military justice reform acts were passed in 1920, 1950, and 1968 in response to the demands for increased civilianization of military justice. However, the basic court structure, the method of selection of the court, the commander's control of the court machinery, the statement of certain crimes, and the heavy reliance on administrative reviews rather than judicial appeals have not been substantially altered. The second portion of this article will consider what further civilianization of military justice is desirable and will offer suggestions for accomplishing such results by statutory changes and judicial development.

# PART II

## I. INTRODUCTION

The movement for reform of 17 years' duration which finally resulted in the Military Justice Act of 1968 brought valuable changes and additions to military justice. However, the Act did not affect the basic structure of the court-martial system. When President Johnson signed the Act, he stated: "We have always prided ourselves on giving our men and women in uniform excellent medical service, superb training, the best equipment. Now, with this, we're going to give them first-class legal service as well."<sup>262</sup> To those who knew that the Act had made only a few reforms of a relatively uncontroversial nature<sup>263</sup> and had not ad-

<sup>259</sup> 10 U.S.C. § 837(b) (1964) (art. 37(b) of the UCMJ).

<sup>260</sup> 10 U.S.C. § 837(a) (1964) (art. 37(a) of the UCMJ).

<sup>261</sup> S. REP. NO. 1601, *supra* note 244, at 9.

<sup>262</sup> N. Y. Times, Oct. 25, 1968, at 4, col. 1; 115 CONG. REC. 12,630 (daily ed. Oct. 15, 1969) (remarks made at creation of the United States Navy Court of Military Review, Washington, D. C., Aug. 1, 1969).

<sup>263</sup> The committee report stated:

The bill is not intended to be an overall revision of the court-martial

dressed itself to the most highly criticized areas such as command control, court-martial structure, and administrative discharges, this statement was passed off as no more than the usual political puffing attendant to the passage of a legislative enactment. However, the military has not been so quick to drop the hyperbole. Within months, articles began to appear in legal magazines referring to the "sweeping reforms" of the Military Justice Act of 1968 and concluding that the military justice system had now achieved a state of virtual perfection.<sup>264</sup>

There has always been a tendency within the military to exalt the virtues of the present military justice system and to discount the need for reform. In 1919, when "drum head justice" was still a reality, Colonel Howard Thayer Kingsbury wrote that "there is no occasion for any drastic or revolutionary changes in the existing system of military justice."<sup>265</sup> In 1943, when there was no right to review beyond the commander for summary and special courts-martial and only to a further review by the Judge Advocate General (and, in some limited cases, to a board of officers whose opinion could be rendered advisory by the Judge Advocate General) for a general court-martial, Lieutenant Colonel Frederick Bernays Wiener wrote that "it is virtually impossible for an innocent man to be finally convicted by court-martial. The system of automatic appellate review . . . makes the court-martial system in this respect as nearly foolproof as any human institution can be."<sup>266</sup> Even as recently as 1968 the military maintained that a requirement for legally trained counsel in special courts (finally incorporated in the Military Justice Act of 1968) was unnecessary and probably impossible to accomplish.<sup>267</sup>

The fact that the military has often failed to recognize the need for reform within the military legal system does not, of course, prove that further reform is needed today. The burden must be on the critics to prove the need and the workability of further reforms. However, the failure of members of the military to recognize and admit flaws in their system of justice should serve as a warning against accepting official

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system. Rather it is an attempt to make a few changes that can be agreed upon by the Congress and the armed services in an attempt to improve some of the procedures and increase the substantive safeguards in courts-martial.

S. REP. NO. 1601, 90th Cong., 2d Sess. 3 (1968).

<sup>264</sup> Mounts & Sugarman, *The Military Justice Act of 1968*, 55 A.B.A.J. 470 (1969); O'Malley, *Broader Justice for Military Personnel*, 5 TRIAL, December 1968-January 1969, at 45.

<sup>265</sup> Kingsbury, *Courts-Martial and Military Justice*, 5 NATIONAL SERVICE WITH THE INTERNATIONAL MILITARY DIGEST 280 (1919).

<sup>266</sup> WIENER, *MILITARY JUSTICE FOR THE FIELD SOLDIER* 24 (1943).

<sup>267</sup> *Joint Hearings in S. 745*, *supra* note 206, at pt. 1, 16-17, 50-51, 357; pt. 2, 524-26.

pronouncements without question. The military, like any ingrown, highly traditional bureaucracy, displays tremendous resistance to change. This resistance has been particularly strong in the area of military justice because of the importance which the military places on sanctions intended to preserve the system of discipline under which the military continues to operate. Since the military is in control of most of the information concerning the operation of military law and, like any large and powerful agency, possesses the resources and manpower to present that information in a manner favorable to its official position, it has been at a decided advantage in turning back attempts to alter its system.

Two questions come to mind in considering whether further civilianization of military justice is desirable: Does the military justice system now provide as fair and just a system of criminal law as it should and, if not, what reforms can be made without endangering the effectiveness of the military forces? Very little analysis has been made as to what standards of justice should be required of a military law system and as to what the actual effects on the military would be of adapting to civilian standards. Most of the writing on military justice, both by the military and its critics, has focused on a comparison of the military and civilian systems. In those instances in which military law differs from civilian criminal law, little attention has been given to the reasons behind the differences. Military apologists have tended to either ignore the shortcomings of military procedures or simply to justify them as required by "military necessity," and the critics have tended to concentrate solely on the shortcomings without considering the reasons for the particular procedure.

One difficulty encountered in speculating on the policy considerations behind the differences between military and civilian justice is that there are often valid policy reasons for both the military and the civilian positions. As in so many other legal problems, one is often forced to weigh competing policy considerations in attempting to determine whether a particular military procedure should be made to conform with a civilian procedure. For example, the policy justification for maintaining command control of court-martial machinery and appointments relates to the traditional military concept of singleness of command and the necessity for a commander to exercise plenary powers over all operations within his command. This policy is quite different from the policy behind the civilian court emphasis on dividing up various administrative and judicial functions in a criminal prosecution among different and independent individuals to limit the possibility of arbitrariness and abuse of power. Whenever possible, this article will attempt to raise the competing policy considerations behind different procedures in military and civilian law and, in those situations where the article recommends

that the military procedure be civilianized, the considerations which led to that viewpoint will be indicated.

Once the different policy considerations are identified, it is necessary to determine if, in fact, they are competing or can be reconciled by compromise and, if not, whether the military system can still function effectively by adopting the civilian model. Obviously this analysis may be affected by one's basic philosophy as to the proper function of a criminal law system in the military and the role the military should play in contemporary American society. There has been an unfortunate tendency in the Vietnam War period for "hawks" to equate military justice reform with anti-war and anti-military sentiments and for "doves" to view military justice in overly critical terms as simply a tool of the "military industrial complex."<sup>268</sup> However, there have also been hopeful signs that the issue of military justice reform will not be polarized into an ideological controversy. The Pueblo and Green Beret cases, both arising in 1969, displayed weaknesses in the court-martial structure in a nonideological context.<sup>269</sup> Those interested in military justice reform represent a wide spectrum of political and ideological views, including such diverse individuals as George Spiegelberg, a Wall Street attorney who has argued for broad court-martial reform for more than 20 years<sup>270</sup> and George W. Latimer, a Salt Lake City lawyer who served on the Court of Military Appeals from 1951 to 1961, and is chairman of the A.B.A. military justice committee; Victor Rabinowitz, who served as counsel in the case of *O'Callahan v. Parker*,<sup>271</sup> Senator Sam J. Irvin, Jr. (D. N.C.) and Congressman Charles E. Bennett (R. Fla) who were primarily responsible for the passage of the Military Justice Act of 1968<sup>272</sup> and Senator Mark Hatfield (R. Ore.) who has recently proposed changes in the UCMJ,<sup>273</sup> Melvin Wulf,<sup>274</sup> Charles Morgan,<sup>275</sup> and Marvin

<sup>268</sup> See generally Shoup, *The New American Militarism*, 223 ATLANTIC, April 1969, at 51, 54.

<sup>269</sup> See Finer, *The Second Ordeal of the Pueblo Crew*, 55 A.B.A.J. 1029 (1969); Sherman, *Military Justice: Learning from the Green Berets*, 209 THE NATION, Oct. 20, 1969, at 399.

<sup>270</sup> See Spiegelberg, *Reform of Courts Martial: A Reply to Colonel Archibald King*, 35 A.B.A.J. 29 (1949).

<sup>271</sup> 395 U.S. 258 (1969).

<sup>272</sup> See Ross, *The Military Justice Act of 1968: Historical Background*, 23 JAG J. 125 (1969).

<sup>273</sup> Statement by Senator Mark Hatfield, Sept. 9, 1969.

The basic structure of the UCMJ was instituted in 1951, its latest revision being in 1968. There have been steps taken to improve due process, but this and other deficiencies are in need of structural change. Among them are: command influence in courts martial, the need for standards for sentencing uniformity, the lack of a randomly chosen jury, and limited right to appeal and the acceptance of vaguely worded crimes.

<sup>274</sup> Mr. Melvin Wulf, Legal Director of the American Civil Liberties Union

Karpatkin<sup>276</sup> of the American Civil Liberties Union, whose representation of servicemen in conflict with the military has raised significant questions concerning the administration of military justice; Judges Robert E. Quinn, Homer Ferguson, and William H. Darden of the Court of Military Appeals whose court has been responsible for the bulk of military justice reform since the UCMJ was passed; and members of the military itself, both high ranking and lower ranking officers of the Judge Advocate General Corps, who have quietly made administrative improvements and worked for broader reforms. Although they represent a wide variety of views about the Vietnam War and the military establishment, they are fundamentally in agreement on the need for judicialization of military justice, that is, that military justice must function as a judicial system which provides a fair and impartial trial to servicemen. They would, no doubt, differ on the specifics for further reform of military justice, but they all have a basic sympathy for continued attempts to insure that military justice functions primarily as a judicial system. If, indeed, the current public sentiment in favor of a reexamination of our military justice system does develop into a genuine movement for reform, these types of individuals will play an important role in weighing the competing policy considerations behind the military and civilian systems of justice, and in working out the compromises necessary for achieving legislative reform. The process of judicialization of military justice, which was only partially achieved with the passage of the UCMJ in 1950, appears to be in motion once again, and the military justice system, still possessing certain of its traditional nonjudicial trappings, will have to be assessed in light of the legal and judicial standards of contemporary American society.

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(ACLU), has served as counsel in a number of military cases, including those of Lieutenant Henry Howe (court-martialed for carrying a sign derogatory to the President in an off-post rally while wearing civilian clothes), Private David Brown (court-martialed for challenging military refusal to grant a conscientious objector discharge), Corporal William Harvey and Private George Daniels (court-martialed for making anti-war statements in an informal discussion and encouraging other black marines to request mast), Private First Class Ken Stolte and Private Dan Amick (court-martialed for distributing anti-war leaflets on post), and Corporal Thomas Met and Private Claude Gray (court-martialed, *inter alia*, for statements made while absent without leave in a sanctuary).

<sup>275</sup> Mr. Charles Morgan, Southern Director of the ACLU, served as chief counsel for Captain Howard Levy in his court-martial and collateral proceedings. Levy was court-martialed for making anti-war statements and refusing to teach medicine to Green Berets.

<sup>276</sup> Mr. Marvin Karpatkin, General Counsel of the ACLU, served as chief counsel for Captain Dale Noyd in his court-martial and collateral proceedings. Noyd unsuccessfully challenged the Air Force's refusal to grant him a conscientious objector discharge, was court-martialed for refusing to obey an order to train pilots for Vietnam, and challenged the military's policy of not granting release pending appeal.

## II. PROCEDURAL DUE PROCESS UNDER MILITARY JUSTICE

In focusing on the two questions previously stated (whether military justice provides as fair and just a system of criminal law as it should and, if not, what reforms are feasible) it may be helpful to distinguish, for purposes of orderly discussion, between what might be classified as procedural due process and substantive due process under the court-martial system. By procedural due process the author means those procedural guarantees such as the right against self-incrimination, double jeopardy, and other rights guaranteed to an accused pursuant to criminal prosecution. By substantive due process is meant those aspects of the general structure of the court-martial which particularly affect the determination of the court as to the guilt or innocence of the accused.<sup>277</sup>

Although there are some differences between the procedural due process rights guaranteed in military and civilian trials,<sup>278</sup> they are today very similar, and therefore this is not the principal area in which the court-martial system is vulnerable to attack. In fact, the UCMJ provided a number of due process guarantees which were not available in most civilian courts at the time it was enacted. However, the Warren Court's revolution of criminal due process in the 1950's and 1960's brought civilian court standards generally into line with the UCMJ and, in some areas, instituted more demanding due process requirements. Military spokesmen, rightly proud of the fact that the UCMJ provided servicemen certain rights before civilian courts did and proud that it played a pioneering role in criminal due process, still claim that military due process guarantees are ahead of those provided in civilian courts.<sup>279</sup> There is a list of due process guarantees which mili-

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<sup>277</sup> These categories are not exact terms of art and may overlap. They are used in this article only to provide a means of discussing fifth amendment due process rights separately from rights relating to the basic structure of the court-martial system.

<sup>278</sup> Although differences exist among state jurisdictions, differences in criminal procedure have diminished in recent years as a result of decisions by the Supreme Court imposing federal constitutional standards on the states. Thus, it is often misleading to select specific cases from state jurisdictions, tried prior to the imposition of these standards, which show weak procedures without indicating whether there would be a similar result under current due process standards. The procedure followed in federal courts will usually be referred to in this article for purposes of comparison with military law.

<sup>279</sup> Virtually every article on military justice written by a military man since 1951 has made this claim. See, e.g., *Symposium*, 15 FED. B.J. 275 (1955); *A Symposium on Military Justice*, 12 MIL. L. REV. 1 (1961); *Symposium—The Uniform Code of Military Justice—Its Promise and Performance (The First Decade: 1951-1961)*, 35 ST. JOHN'S L. REV. 197 (1961); *Symposium—Is There Justice in the Armed Forces?*, 4 TRIAL, February-March 1968, at 10; *Symposium*, 11 U.S.A.F. JAG L. REV. 175 (1969).

tary justice enthusiasts have been reeling off for years to show that military law provides broader guarantees than do civilian courts. A typical example is taken from the remarks of Captain Richard J. Selman, Judge Advocate General Corps, United States Navy, at the swearing-in of the new Navy Court of Military Review in Washington, D.C. on October 15, 1969:

[1] Courts-martial were excluding evidence obtained by unreasonable search and seizure or by wiretapping long before the Supreme Court decision in *Mapp v. Ohio*, 367 U.S. 643 (1961).

[2] In courts-martial qualified military lawyers were provided without cost to defend service personnel indigent or otherwise in all general courts-martial long before *Gideon v. Wainwright*, 372 U.S. 336 (1963).

[3] Article 31 of the Uniform Code of Military Justice enacted a warning requirement to military investigators long before the Supreme Court decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). Indeed Chief Justice Warren relied on the military practice in justifying the warning requirement.

[4] Defense counsel in courts-martial are in far better position to obtain pretrial discovery of the prosecution's case than would be true in Federal District Courts under Rule 16 or in most all State Courts.

[5] Verbatim records of trial by courts-martial were provided as a matter of course and without cost to the accused long before *Griffin v. Illinois*, 351 U.S. 12 (1956) imposed this burden on State Courts.

[6] Appellate review of appropriateness of sentence takes place in the military justice system but is still unavailable in the Federal Courts and in almost all State Courts.

[7] The Court of Military Appeals has made clear that most constitutional safeguards are fully applicable to service personnel even though admittedly courts-martial do not proceed on the basis of indictment by grand jury.

I think it fair to say that for an accused in the military today, many of his rights exceed those of his civilian counterpart.<sup>280</sup>

Like much of what has been written and said about military justice, these statements, if taken on their face, are rather misleading. The lead of the military in relation to the first three and the fifth claim has long since been lost and, in fact, the military rule is now slightly inferior to the federal court rule in all but one case (article 31 is, in some respects, broader than the *Miranda* rule).<sup>281</sup> The other three claims are exaggerated and again, in a comparison between the military and civilian guarantees concerning pretrial discovery, appellate review, and other constitutional safeguards, the civilian courts come out slightly ahead.<sup>282</sup> Probably the most objective assessment of military and civilian court procedural due process rights would find them roughly

<sup>280</sup> 115 CONG. REC. 12,632 (daily ed. Oct. 15, 1969) (paragraph numbers added).

<sup>281</sup> See note 302 and accompanying text *infra*.

<sup>282</sup> Section III *infra*.



equal, with perhaps a slight edge for the civilian procedures, primarily because of the command control aspect which still affects certain military rights.

#### A. *Right Against Unreasonable Searches and Seizures*

The Executive Order implementing the UCMJ directed that the federal exclusionary rules respecting evidence obtained from an unreasonable search and seizure would apply in courts-martial.<sup>283</sup> Since the exclusionary rule was not applied to the states until 1961 in *Mapp v. Ohio*,<sup>284</sup> the military, which had the rule as far back as 1924 for the Army and 1929 for the Navy, was in advance of most state jurisdictions.<sup>285</sup> However, the power to authorize the search of military persons or property on a military installation is exercised by the commanding officer (or one of his subordinates if he delegates the authority), rather than by an independent magistrate as in a civilian situation. Thus, the commanding officer who suspects an individual of a crime, determines whether to prosecute, controls the court-martial machinery, and reviews the findings and sentence, has the power to authorize a search. For years no one ever questioned the impartiality of an authorization to search by a commanding officer who is frequently directing the search for the wrongdoer. The military apologists have made glowing statements about the guarantee against unreasonable searches and seizures without mentioning that the commander, rather than an independent magistrate, authorizes the search. However, an Army publication has recently raised the question:

The traditional view of the commanding officer as a person empowered to authorize and conduct searches, Para. 152, MCM; *U.S. v. Harisook*, 15 USCMA 291, 35 CMR 263 (1965), seems constitutionally questionable. The procedure of antecedent justification for a search before a magistrate has been categorized as "central to the Fourth Amendment." . . . Whether a commanding officer in pursuit of criminal activity satisfies the constitutional criterion is highly questionable. Since 1 August 1969, most commands have military judges readily accessible who may be proper persons to authorize searches based upon probable cause. . . . We encourage defense counsel to explore this method of insuring their client's rights have been fully protected.<sup>286</sup>

There is no direct authority for the new military judges to issue warrants, but this suggestion deserves consideration since until the power to authorize searches is taken out of the commander's hands, the impartiality of the warrant process will continue to be subject to question.

In defense of the military procedure it should be noted that the com-

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<sup>283</sup> Exec. Order No. 10214, 3 C.F.R. 90 (Supp. 1951).

<sup>284</sup> 367 U.S. 643 (1961).

<sup>285</sup> See O'Malley, *Mapp, Miranda, and the Accused*, 4 TRIAL, February-March 1968, at 10, 11.

<sup>286</sup> 1 THE ADVOCATE, August 1969, at 8.

mander must have probable cause to issue a warrant, and the standards established by the Court of Military Appeals have been especially demanding, exceeding in some respects the requirements of civilian courts.<sup>287</sup> However, the military procedure does not require that a request to the commander for authorization to search be in writing or be upon oath or affirmation, as is required in civilian courts. "As a result of these differences," Chief Judge Quinn of the Court of Military Appeals has written,

a defense challenge to the sufficiency of the showing of probable cause is complicated. While the accused in the civilian community can look to the affidavits submitted to the officer issuing the warrant to determine whether sufficient evidence of probable cause was presented to justify issuance of the warrant, no such convenient reference is available in the military. Instead, defense counsel must consult the officer authorizing the search and the agent applying for the authority to search.<sup>288</sup>

One aspect of military search and seizure which causes unfavorable comparison with civilian law arises from the power of commanders to conduct administrative searches, such as routine inspections and "shakedowns," which are not considered to be searches subject to the fourth amendment.<sup>289</sup> A "shakedown" may be conducted when a crime has been committed but the identity of the criminal is not known, and "every person assigned to the room or barracks to be searched is directed to place his effects on his bunk and to stand alongside, or to open his locker and stand by it."<sup>290</sup> Obviously, this is an effective means for the commander to search and seize, and thieves are often detected in this way. The need for a commander to make a quick response to morale-endangering barracks thefts is a strong policy reason for immunizing "shakedowns" from the requirements of the fourth amendment. However, it is a power which can be abused. In *United States v. Kazmierczak*,<sup>291</sup> Judge Ferguson of the Court of Military Appeals dissented from a decision that an inventory of accused's belongings in his room after his arrest, which resulted in the finding of evidence of a new crime, was merely an administrative inspection. He objected that a commanding

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<sup>287</sup> *United States v. Britt*, 17 U.S.C.M.A. 617, 38 C.M.R. 415 (1968); *United States v. Price*, 17 U.S.C.M.A. 566, 38 C.M.R. 364 (1968); *United States v. Brown*, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959). See generally Quinn, *Some Comparisons between Courts-Martial and Civilian Practice*, 15 U.C.L.A.L. REV. 1240, 1353-58 (1968) [hereinafter cited as Quinn, *Comparisons*].

<sup>288</sup> See Quinn, *Comparisons*, *supra* note 287, at 1254.

<sup>289</sup> See David, *The "Mere Evidence" Rule in Search and Seizure*, 35 MIL. L. REV. 101 (1967); Hamel, *Probable Cause in Military Search and Seizure*, 39 MIL. L. REV. 41 (1968).

<sup>290</sup> *United States v. Harman*, 12 U.S.C.M.A. 180, 187, 30 C.M.R. 180, 187 (1961).

<sup>291</sup> *United States v. Kazmierczak*, 16 U.S.C.M.A. 594, 37 C.M.R. 214 (1967).

officer could exercise his undoubted authority to confine the accused so that he could search wherever he pleased with or without probable cause, and he argued that this search should be subject to the fourth amendment.

The search and seizure area is an example of how recent Supreme Court decisions have erased early military superiority in due process rights. In June 1969, the Supreme Court decided in *Chimel v. California*<sup>292</sup> that, in the absence of a search warrant, a search cannot extend beyond the person of the individual searched and the area in which he might obtain a weapon or an object which could be used as evidence against him. The Court of Military Appeals had previously approved the search of another room as incident to arrest<sup>293</sup> and, over the dissent of Judge Ferguson, the court rejected reconsideration of its ruling after *Chimel*.<sup>294</sup> The Court of Military Appeals has also adopted the less restrictive rule concerning consent to search by a person living with the accused,<sup>295</sup> and its finding that search by foreign authorities is not covered by the requirements of the Constitution,<sup>296</sup> although sound, means that the substantial number of American troops abroad lack the protections of the fourth amendment in relation to searches by foreign authorities.

#### B. *Right Against Self-Incrimination*

In the area of self-incrimination the UCMJ was also in advance of the civilian courts. Article 31 requires that any person suspected or accused of a crime be warned before interrogation as to the nature of the accusation against him, that he does not have to make any statement, and that any statement he make may be used against him in the event of a court-martial. It was not until 1966 that the Supreme Court in *Miranda v. Arizona*<sup>297</sup> specifically held these warnings constitutionally required in civilian courts as a prerequisite to custodial interrogation. However, *Miranda* also required that the accused be informed of his right to consult with counsel, to have counsel appointed if he cannot afford to hire one, and to have counsel present during interrogation. These warnings were not required by article 31, although military law provided that a serviceman could consult with a legal advisor before being subjected to interroga-

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<sup>292</sup> 395 U.S. 752 (1969).

<sup>293</sup> *United States v. Goldman*, 18 U.S.C.M.A. 389, 40 C.M.R. 101 (1969).

<sup>294</sup> *Id.* at 395 (Ferguson, J., amending concurring opinion).

<sup>295</sup> *United States v. Mathis*, 16 U.S.C.M.A. 522, 37 C.M.R. 142 (1967); *United States v. Garlich*, 15 U.S.C.M.A. 362, 35 C.M.R. 334 (1965); *United States v. Conlon*, 14 U.S.C.M.A. 84, 33 C.M.R. 296 (1963). See ACM 19607, *Mathis*, 37 C.M.R. 797 (1966) (interpreting *Garlich* and *Conlon*, *supra*, as adopting the less restrictive rule in the split between the federal circuits).

<sup>296</sup> *United States v. DeLeo*, 5 U.S.C.M.A. 148, 17 C.M.R. 148 (1954).

<sup>297</sup> 384 U.S. 437 (1966).

tion<sup>298</sup> and provided for appointment of free military counsel (who had to be a lawyer in a general but not in a special court-martial) in the investigative stage.<sup>299</sup> Ten months after *Miranda*, the Court of Military Appeals in *U.S. v. Tempia*<sup>300</sup> held the *Miranda* requirements also applied to military law, retroactive to the date the civilian case was decided. However, servicemen were not entitled to a lawyer counsel in a special court-martial trial until the Military Justice Act of 1968 took effect on August 1, 1969.<sup>301</sup>

Even after *Miranda*, article 31 is still broader in certain aspects than the civilian court rule. The obligation to give warnings under article 31 is not limited to a custodial or coercive situation or to interrogation by police. Thus, incriminatory statements have been excluded in military courts although made while the accused was clearly not in custody,<sup>302</sup> and interrogation by any person subject to the UCMJ must meet the requirements of article 31. However, the Court of Military Appeals has considerably limited the applicability of article 31 by holding that it does not apply to one not engaged in gathering evidence for prosecution or to one not purporting to exercise disciplinary authority over the accused at the time of questioning.<sup>303</sup>

The particular circumstances under which the right against self-incrimination is recognized vary somewhat between the military and civilian courts. In at least three situations the military rule has been broader in excluding real evidence as incriminating "statements": voice identifications,<sup>304</sup> blood samples,<sup>305</sup> and handwriting exemplars.<sup>306</sup> However, in recent decisions the Court of Military Appeals has weakened the protection given handwriting exemplars by holding that exemplars taken

<sup>298</sup> *United States v. Gunnels*, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957).

<sup>299</sup> 10 U.S.C. § 832(b) (1964) (art. 32(b) of the UCMJ).

<sup>300</sup> 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

<sup>301</sup> Act of Oct. 24, 1968, Pub. L. No. 90-632, 82 Stat. 1335, *amending* 10 U.S.C. §§ 819, 827(c) (1964) (codified at 10 U.S.C. §§ 819, 827(c) (Supp. IV, 1968)) (arts. 19, 27(c) of the UCMJ).

<sup>302</sup> *See United States v. Wilson*, 2 U.S.C.M.A. 248, 8 C.M.R. 48 (1953).

<sup>303</sup> *See Quinn, Comparisons, supra* note 287, at 1245-46.

<sup>304</sup> *United States v. Mewborn*, 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968); *United States v. Greer*, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953).

<sup>305</sup> *Compare United States v. Musquire*, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958) *with Schmerber v. California*, 384 U.S. 757 (1966) (blood sample drawn over objection of accused held admissible under fifth amendment self-incrimination clause and fourth amendment right against unreasonable searches and seizures).

<sup>306</sup> *Compare Gilbert v. California*, 388 U.S. 263 (1967) (finding no violation of accused's right against self-incrimination by taking handwriting exemplar before indictment and appointment of counsel), *with United States v. White*, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967) *and United States v. Minnifield*, 9 U.S.C.M.A. 373, 26 C.M.R. 153 (1958).

by civilian police<sup>307</sup> and Secret Service investigators<sup>308</sup> are admissible in a military court despite absence of warnings. With regard to line-ups, the civilian courts have extended greater protections,<sup>309</sup> a military board of review having held that an article 31 warning is not necessary before subjecting an accused to a lineup.<sup>310</sup> The Court of Military Appeals seems to have adopted a less stringent rule concerning statements made to undercover agents than would be required under the Supreme Court's rule enunciated in *Massiah v. United States*.<sup>311</sup> The military court held in *United States v. Hinkson* that an accused was not entitled to warnings when he was engaged in conversation by an undercover Office of Naval Intelligence (ONI) agent in the waiting room of the ONI office where he had been ordered to report.<sup>312</sup>

There are some slight differences between military and civilian court rules with respect to use of a confession in a trial. The Court of Military Appeals<sup>313</sup> has adopted a stricter rule than the Supreme Court<sup>314</sup> concerning the degree of corroboration required for a confession to establish an offense. The military rule requires that there be evidence outside the record to establish "the probable existence" of each element of the offense charged, while the Supreme Court has held only that independent evidence is required to establish the truthfulness of the confession. However, the Court of Military Appeals<sup>315</sup> has adopted a less stringent rule than the Supreme Court<sup>316</sup> concerning the use of an improperly obtained statement to impeach the accused's credibility concerning matters he has affirmatively introduced at trial.

One of the less favorable aspects of the right against self-incrimination in the military comes from the subordinate status of the serviceman in dealing with superiors. The serviceman, obligated to obey all lawful orders of a superior, is sometimes placed in a position of complying with the order of superiors when such compliance may involve self-incrimination. Military law has left a number of such situations beyond the protection of the right against self-incrimination. The use of military psy-

<sup>307</sup> *United States v. Lewis*, 18 U.S.C.M.A. 355, 40 C.M.R. 67 (1969).

<sup>308</sup> *United States v. Penn*, 18 U.S.C.M.A. 194, 39 C.M.R. 194 (1969).

<sup>309</sup> *United States v. Wade*, 388 U.S. 218 (1967); *Russell v. United States*, 389 F.2d 305 (D.C. Cir. 1967).

<sup>310</sup> CM 418783, *Webster*, — C.M.R. — (Mar. 21, 1969).

<sup>311</sup> 377 U.S. 201 (1964). *But see Hoffa v. United States*, 385 U.S. 293 (1966).

<sup>312</sup> *United States v. Hinkson*, 17 U.S.C.M.A. 126, 37 C.M.R. 390 (1967) (Ferguson, J., dissenting).

<sup>313</sup> *United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962); *United States v. Villasenor*, 6 U.S.C.M.A. 3, 19 C.M.R. 129 (1955).

<sup>314</sup> *Opper v. United States*, 348 U.S. 84 (1954). *But see Forte v. United States*, 94 F.2d 236 (D.C. Cir. 1937).

<sup>315</sup> *United States v. Caiola*, 18 U.S.C.M.A. 336, 40 C.M.R. 48 (1969) (Ferguson, J., dissenting).

<sup>316</sup> *Walder v. United States*, 347 U.S. 62 (1954).

chiatrists provides a good example. The Court of Military Appeals recently upheld the requirement in the *Manual*<sup>317</sup> that an accused may be required to submit to a board of one or more medical officers if the commanding officer has reason to believe that he is insane or was so at the time of the offense, and that the prosecution can exclude testimony offered by an accused concerning his mental condition if he has not submitted to such examination.<sup>318</sup> The military court has also held that there is no right to counsel or to be informed of one's rights at a military psychiatric evaluation,<sup>319</sup> and although military courts have upheld a right to warnings when an accused makes statements to a psychiatrist,<sup>320</sup> the court has permitted a military psychiatrist to testify in rebuttal of an accused's insanity defense where the accused had not been fully advised of his rights.<sup>321</sup> In practice, most servicemen are given a routine psychiatric evaluation prior to court-martial and their rights are not explained to them. Not infrequently the medical officer who administers such examination is called to testify in rebuttal if the accused raises the defense of mental incompetency.

Other situations in which servicemen are sometimes ordered to undergo examinations in which military law does not hold that there is a right to warnings include surveying officer<sup>322</sup> and security investigations.<sup>323</sup> A recent Court of Military Appeals decision, *United States v. Vogel*,<sup>324</sup> provides an example of the continuing insensitivity

<sup>317</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, at ¶ 121 (rev. ed.) [hereinafter cited as MANUAL, 1969].

<sup>318</sup> *United States v. Babbidge*, 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969).

<sup>319</sup> *United States v. Wilson*, 18 U.S.C.M.A. 400, 40 C.M.R. 112 (1969).

<sup>320</sup> *United States v. Bunting*, 6 U.S.C.M.A. 170, 19 C.M.R. 296 (1956) (statements of accused taken without warnings not admissible in evidence where accused charged with murder and ordered to report for examination to determine mental competency); CM 418212, Hamlin. — C.M.R. — (Sept. 23, 1968) (statements of accused to military psychiatrist at examination conducted at request of staff judge advocate not admissible as evidence of mental competency or for impeachment without establishing that warnings were given); CM 387109, Reed, 21 C.M.R. 355 (1956) (statements made in second examination to same medical officer by accused suspected of use of narcotics not admissible without warnings). *But see* *United States v. Malumpy*, 12 U.S.C.M.A. 639, 31 C.M.R. 225 (1962) (statements admissible without warnings where medical examination not made pursuant to criminal investigation); *United States v. Baker*, 11 U.S.C.M.A. 313, 29 C.M.R. 129 (1960); NCM 262, Barnes, 13 C.M.R. 552 (1953) (medical officer's opinion based on statements of accused made in examination without warnings admissible where medical officer had no reason to suspect accused as dope addict).

<sup>321</sup> *United States v. Schell*, 18 U.S.C.M.A. 410, 40 C.M.R. 122 (1969).

<sup>322</sup> *See* Army JAG Instruction 1969/3370 (Jan. 31, 1969) (article 31 warnings not required before taking oral statements in surveying officer investigation).

<sup>323</sup> *United States v. Ledbetter*, 18 U.S.C.M.A. 67, 39 C.M.R. 67 (1968) (dicta).

<sup>324</sup> *United States v. Vogel*, 18 U.S.C.M.A. 160, 39 C.M.R. 160 (1969) (Ferguson, J., dissenting).

of military courts to the inherent coercion placed on a serviceman in certain situations involving superiors. There the court held that an accused was not entitled to be warned of his rights when he was suspected of a crime, ordered to report to the chapel, and there volunteered an incriminating statement to a major. A strong dissent by Judge Ferguson argued that the *Miranda* requirements should have been applied.

### C. *Right to a Speedy Trial*

The UCMJ requires that when a person is placed in arrest or confinement prior to trial, "immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."<sup>325</sup> Military cases have been particularly strict in applying this requirement.<sup>326</sup> A serviceman usually receives a speedier trial than an accused in a civilian court and can obtain a reversal when his trial was delayed without good reason for a shorter time than the duration needed for reversal in a civilian court.<sup>327</sup> However, it is especially important that the right to a speedy trial is protected in the military because there is no general right, as there is in civilian courts, to bail pending trial. Pretrial release is left up to the sole discretion of the commander, and a substantial proportion of servicemen, particularly those awaiting general courts-martial, are incarcerated prior to trial. Also, sentences in the military run from the date of sentencing and not the date of arrest<sup>328</sup> (although courts sometimes take into consideration the amount of pretrial confinement in adjudging sentence), and so undue delay in bringing an accused to trial substantially affects his rights.

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<sup>325</sup> 10 U.S.C. § 810 (1964) (art. 10 of the UCMJ).

<sup>326</sup> See, e.g., *United States v. White*, 17 U.S.C.M.A. 462, 38 C.M.R. 260 (1968); *United States v. Batson*, 12 U.S.C.M.A. 48, 30 C.M.R. 48 (1960); *United States v. Brown*, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959).

<sup>327</sup> See *United States v. Boehm*, 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968) (comparing military rule on speedy trial with FED. R. CRIM. P. 16, 48, and requirements of sixth amendment). See also *United States v. Weisenmuller*, 17 U.S.C.M.A. 636, 38 C.M.R. 434 (1968); *United States v. Smith*, 17 U.S.C.M.A. 427, 38 C.M.R. 225 (1968). But see *United States v. Smith*, 17 U.S.C.M.A. 55, 37 C.M.R. 319 (1967) (Ferguson, J., dissenting). Recent federal cases tend to adopt a similarly stringent speedy trial rule. See, e.g., *Jones v. United States*, 402 F.2d 639 (D.C. Cir. 1968).

<sup>328</sup> See MANUAL, 1969, *supra* note 317, at §§ 88d, 126j. The military practice of executing the confinement portion of a sentence immediately after sentencing was challenged in *Noyd v. Bond*, 285 F. Supp. 785 (D.N.M. 1968), *rev'd*, 402 F.2d 441 (10th Cir. 1968), *aff'd*, 395 U.S. 683 (1969), on the ground that article 71(c) of the UCMJ provides that a sentence of a punitive discharge or one year confinement or more may not be executed until affirmed by a board of review. The Supreme Court decision did not reach this contention, finding lack of jurisdiction due to failure to exhaust military remedies, but the Court of Military Appeals subsequently ordered the military not to impose confinement or

#### D. *Right against Double Jeopardy*

The UCMJ provides that no person shall be tried a second time for the same offense without his consent.<sup>329</sup> This means that if a serviceman has been acquitted or convicted in a prior court-martial and the verdict has not been voided for lack of jurisdiction, he cannot be tried for the same offense, or an offense of which the offense charged was a lesser included offense, in another court-martial.<sup>330</sup> Also, when the same acts constitute a crime against the United States, trial by court-martial is a bar to a second trial in a federal court, and vice versa. However, there is no double jeopardy protection against being tried in a state court and then being tried for the same crime in a court-martial, or vice versa.<sup>331</sup> Professor Keeffe's suggestion that the right against double jeopardy should be extended to such situations was rejected by the drafters of the UCMJ.<sup>332</sup> However, as far as double jeopardy protection when a new trial has been ordered, the UCMJ adopted the more protective rule that the sentence on a new trial cannot exceed that of the original trial. This rule was recently adopted by the Supreme Court for all cases except those in which the increased sentence is based on conduct occurring after the first sentence.<sup>333</sup>

#### E. *Right to Discover Evidence and Subpoena Witnesses*

The *Manual* provides that upon reasonable request and without the necessity of further process, documents and other evidentiary materials in the custody of military authorities will be made available to the defense to examine or use.<sup>334</sup> This is comparable to rule 16 (b) of the Fed-

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other restraints pending completion of the appeal to the Court of Military Appeals. *Noyd v. Bond*, Misc. No. 79-25 (U.S.C.M.A., June 26, 1969). *But see Levy v. Dillon*, 286 F. Supp. 593 (D. Kan. 1968), denying release, on habeas corpus petition, from disciplinary barracks despite the fact that appeal to a board of review was not completed. The decision was based on a finding that article 71(c) was not applicable because, until affirmance by a board of review, sentence had not been "executed." Justice Douglas subsequently ordered petitioner released until the full Court could pass on his application for bail pending determination of his habeas corpus petition after he had fully exhausted his military appeals remedies. *Levy v. Parker*, 90 S. Ct. 1 (1969).

<sup>329</sup> 10 U.S.C. § 844(a) (1964) (art. 44(a) of the UCMJ).

<sup>330</sup> MANUAL, 1969, *supra* note 317, at ¶ 68d.

<sup>331</sup> *United States v. Rosenblatt*, 13 U.S.C.M.A. 28, 32 C.M.R. 28 (1962); ACM 18339, *Herrington*, 33 C.M.R. 814 (1963); ACM S-21050, *Reed*, 33 C.M.R. 932 (1963); ACM 17156, *Panchisin*, 30 C.M.R. 921 (1961); ACM S-11780, *Peck*, 20 C.M.R. 810 (1955).

<sup>332</sup> Statement of Professor Keeffe, *supra* note 129.

<sup>333</sup> 10 U.S.C. § 863(b) (1964) (art. 63(b) of the UCMJ). *See Benton v. Maryland*, 395 U.S. 784 (1969), *rev'g Palko v. Connecticut*, 302 U.S. 319 (1937). *See also North Carolina v. Pearce*, 395 U.S. 711 (1969).

<sup>334</sup> MANUAL, 1969, *supra* note 317, at 115c.



eral Rules of Criminal Procedure, except that a federal judge, upon motion of the government, may condition his order upon the defense also disclosing its documents. Federal discovery is also conditioned by the Jencks Act<sup>335</sup> which excludes discovery prior to trial of the work product of agents made in the investigation or prosecution of the case and statements made by government witnesses to agents. The military also usually withholds work product but ordinarily permits defense counsel to see witnesses' statements.

Military discovery procedures have been traditionally informal and liberal. Since both counsel are usually lawyers from the Judge Advocate General's office working together in the same office, it is common for them to trade files, briefs, and other evidence rather freely. This practice is a mixed blessing for an accused because it can result in the prosecution obtaining liberal discovery of defense evidence which it might not otherwise be able to obtain. This informal practice also has the disadvantage of causing defense counsel to rely heavily upon both the good faith and the investigation of the prosecution. Thus, *The Advocate*, an excellent monthly newsletter for military defense counsel, cautions:

Defense counsel should not rely solely on the good faith of the prosecutor, or the rapport between the parties which often characterizes trial by court-martial, but instead should make diligent efforts to obtain maximum discovery of items which might not be known even to the prosecutor; these efforts should be made a part of each trial record.<sup>336</sup>

Military pretrial procedure, particularly after the Military Justice Act of 1968, is well suited to the early discovery of evidence by defense counsel. The article 32 investigating officer has broad powers to order production of documents and evidence, and this can be a fruitful source of discovery.<sup>337</sup> Additionally, under the new Act, the military judge is empowered to hold pretrial sessions (called "article 39(a) sessions") which can include such matters as discovery.<sup>338</sup> Broad discovery is permitted, including such items as statements of the accused, statements of witnesses and nonwitnesses, documentary evidence, medical and laboratory reports, official records, and personnel records.<sup>339</sup>

One significant kind of information which cannot be discovered in a court-martial is privileged material containing military or state secrets, classified information pertaining to national defense, and the Inspector

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<sup>335</sup> 18 U.S.C. § 3500 (1964); FED. R. CRIM. P. 16(b). For a case involving application of the Jencks Act to courts-martial see *United States v. Augenblick*, 393 U.S. 348 (1969).

<sup>336</sup> 1 *THE ADVOCATE*, September 1969, at 1.

<sup>337</sup> *MANUAL*, 1969, *supra* note 317, at ¶¶ 34a, 34c.

<sup>338</sup> Act of Oct. 24, 1968, Pub. L. No. 90-632, 82 Stat. 1335, *amending* 10 U.S.C. § 839(a) (1964) (codified at 10 U.S.C. § 839(a) (Supp. IV, 1968)) (art. 39(a) of the UCMJ).

<sup>339</sup> *See* 1 *THE ADVOCATE*, September 1969, at 1-6.

General's reports.<sup>340</sup> Ira Glasser, associate director of the New York Civil Liberties Union, has described the discovery problem as it arose in the court-martial of Captain Levy:

As the trial record in the Levy case indicates, the chief and perhaps the only evidence leading to the charges that resulted in a general court-martial was contained in a 180-page intelligence dossier on Captain Levy. Civilian counsel was never allowed to see more than a fraction of that dossier (having been assured by the prosecution that nothing in it was relevant) on the grounds that the material was classified and civilian counsel was without security clearance. Military counsel was allowed to see the dossier, but only on condition that he would not talk about it to civilian counsel! The obvious choice the army would seem to have is clear: either it must reveal the evidence to the defense or else it cannot introduce it. Yet in the weird world of military law, that choice need not be made. The evidence is both introduced and kept from defense scrutiny.<sup>341</sup>

Somewhat similar problems of disclosure of confidential information containing informer secrets and the results of government espionage have arisen in civilian courts in connection with claims of violation of defendant's fourth amendment rights. The Supreme Court in its recent decisions in *Alderman v. United States*<sup>342</sup> and *Giordan v. United States*<sup>343</sup> has upheld the right of a defendant to have surveillance records turned over to him without first being submitted to the trial judge for examination as to relevance.

The UCMJ provides that trial counsel, defense counsel, and the court shall have equal opportunity to obtain witnesses and other evidence by subpoena.<sup>344</sup> The process for subpoena is similar to that used in the federal courts. A military subpoena runs anywhere within the jurisdiction of the United States. However, the power to issue a subpoena under the UCMJ was given to the prosecutor trial counsel, rather than to an independent individual such as a clerk of the court as in most civilian jurisdictions. The defense counsel submits his request to subpoena a witness to the trial counsel and, if he refuses, the convening authority (or the law officer, if the court is already in session) decides the matter. The defense counsel is required to submit a statement in writing with a synopsis of expected testimony and reasons showing why the personal appearance of the witness is necessary,<sup>345</sup> thus having to reveal his evidence and argu-

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<sup>340</sup> MANUAL, 1969, *supra* note 317, at ¶ 151.

<sup>341</sup> Glasser, *Justice and Captain Levy*, 12 COLUM. F. 46, 47-48 (1969).

<sup>342</sup> 394 U.S. 165 (1969).

<sup>343</sup> 394 U.S. 310 (1969).

<sup>344</sup> MANUAL, 1969, *supra* note 317, at ¶ 115.

<sup>345</sup> *Id.* at ¶ 115a.

ment in advance.<sup>346</sup> The Military Justice Act of 1968 may have changed this undesirable procedure. Since the military judge can hold pretrial sessions which deal with discovery,<sup>347</sup> it appears that he, rather than the convening authority, will rule on many discovery motions. The UCMJ has not been directly altered to reach this result, but hopefully the *Manual* and military practice will insure that discovery will be placed in the discretion of the independent military judge.

#### F. *Right to a Public Trial*

The Court of Military Appeals has upheld the right to a public court-martial.<sup>348</sup> Exceptions arise when the commander determines that good order will be endangered or classified information will be presented.<sup>349</sup> The commander's power to close a trial to the public can be abused, but so can that of a civilian judge. Cases have also occurred, particularly involving Vietnam War dissenters, where attendance at a court-martial by sympathetic supporters has been prevented by a commander's denying them access to the post.<sup>350</sup> However, increasing judicial scrutiny of post regulations affecting first amendment rights appears to be resulting in more liberal post regulations,<sup>351</sup> and denial of access to open trials has not been a serious problem.

<sup>346</sup> See Glasser, *supra* note 341, at 47.

In the Levy case, civilian witnesses for the defense had to come voluntarily or else the defense had to request a subpoena from the prosecution! Furthermore, the defense had to justify the relevance of the desired witness to the prosecution; which meant that the defense had to reveal its argument in advance. Even then, subpoenas were with one exception never granted. Military witnesses for the defense who were not at Fort Jackson but who were willing to come were also prevented. One key witness, a doctor who had been chief of psychiatry at two hospitals in Vietnam, who was now serving the last weeks of his duty at Fort Dix in New Jersey and who would have testified that Dr. Levy was being prosecuted for saying things in an army hospital in South Carolina that were said widely and freely and without fear of prosecution in army hospitals in Vietnam, was ready to come. Plane reservations were made. All that remained was to issue a military subpoena, since the doctor could not leave Fort Dix without orders. The prosecution, however, decided that the testimony was irrelevant and so the witness never was allowed to testify.

<sup>347</sup> See text accompanying note 338 *supra*.

<sup>348</sup> *United States v. Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956).

<sup>349</sup> *MANUAL*, 1969, *supra* note 317, at ¶ 53c.

<sup>350</sup> A description of the closing of a court-martial proceeding at Fort Sill, Oklahoma, in July 1967, appears in Sherman, *Dissenters and Deserters*, 160 *NEW REPUBLIC*, Jan. 6, 1968, at 25.

<sup>351</sup> The Army has recently revised Army Reg. 210-1, para. 5-5, to permit

### G. *Right to a Transcript of the Trial*

An accused is entitled to a verbatim transcript of the trial in a general court-martial,<sup>352</sup> but not in a special court-martial (except when a bad conduct discharge can be adjudged),<sup>353</sup> or in out-of-court hearings.<sup>354</sup> A summarized record of trial is made in a special court-martial, but if the testimony is complicated, this type of record is rarely adequate. The absence of a verbatim transcript not only removes a salutary check on arbitrariness during trial, but also prevents any meaningful review of the conviction and makes the determination as to the sufficiency of the evidence of questionable value.<sup>355</sup>

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printed material to be distributed on post with prior approval of the commander. Army JAG Legal Service, Pamphlet No. 27-69-9, Apr. 9, 1969, at 15 advised:

In view of recent court decisions (*see, e.g., Shuttlesworth v. City of Birmingham*, 37 U.S.L.W. 4203 (1969)), if commanders deny approval to distribute publications on post through other than regularly established distribution outlets, they should be prepared to justify their actions by citing reasonable standards for denying approval. These standards, which need not be included in post regulations, must be specific. Vague criteria such as "good taste" and "in the best interests of the command" are of doubtful validity and are likely to invite legal challenge.

<sup>352</sup> 10 U.S.C. § 854(a) (Supp. IV, 1968) (art. 54(a) of the UCMJ); MANUAL, 1969, *supra* note 317, at ¶ 82b.

<sup>353</sup> 10 U.S.C. § 854(b) (1964) (art. 54(b) of the UCMJ); MANUAL, 1969, *supra* note 317, at ¶ 83b.

<sup>354</sup> *United States v. Ransom*, 4 U.S.C.M.A. 195, 15 C.M.R. 195 (1954); CM 417779, *Holthause & Laut*, — C.M.R. — (Nov. 18, 1968); CM 417540, *Sachs*, — C.M.R. — (Sept. 5, 1968).

<sup>355</sup> *See O'Connor v. Cushman*, Misc. No. 69-14 (U.S.C.M.A., Apr. 21, 1969) (dismissed for lack of jurisdiction). Petitioner claimed denial of constitutional rights resulting from refusal of convening authority to provide a verbatim transcript of his special court-martial trial which took six and one-half hours and involved testimony of four psychiatrists. A summarized record was provided, primarily containing notations as to time and appearance of witnesses.

The convening authority was notified more than a month before the court martial of defense counsel's request for a verbatim transcript. He was provided with specific reasons why the transcript was necessary, including the fact that lengthy and detailed testimony from expert witnesses was expected, a lengthy trial was expected, a vital issue as to accused's mental responsibility would be raised, and important issues needed to be preserved for review in case of conviction. In refusing the transcript convening authority gave no reason and provided no showing that a transcript could not be provided. On the contrary, petitioner believes that there were trained stenographers available on the day of his trial and that a transcript could have been provided with little expense or trouble to the Army. . . . It is clear, on the facts, that the Summarized Record which was provided was so sparse, haphazard, inaccurate, misleading, and prejudicial that no adequate review of the court martial can be made.

In comparison, most civilian court jurisdictions provide a stenographer who makes a verbatim recording as a matter of course in courts of general criminal jurisdiction. Although it has been argued that special courts-martial are like traffic and municipal courts<sup>356</sup> which do not ordinarily provide verbatim records of proceedings, there is usually a right to a trial *de novo* from such civilian courts. However, there is no *de novo* appeal from a special court-martial, and its possible sentence of six months confinement, plus substantial forfeiture of pay (which can amount to several thousand dollars for a ranking noncommissioned officer) and demotion, is more comparable to crimes tried in courts of general criminal jurisdiction. The special court-martial has always been the poor stepchild of the UCMJ system, and now that lawyers will be provided, it is unfortunate that there is still no right to a verbatim transcript, even when requested by accused and a showing of complicated testimony is made.

### III. SUBSTANTIVE DUE PROCESS UNDER MILITARY JUSTICE

The discussion of procedural due process rights in the last section, although focussing on certain weaknesses in military procedures, indicated that a serviceman's procedural due process rights are not substantially different from those available in civilian courts. However, in the area of substantive due process, the court-martial compares less favorably. The methods by which the crimes are charged, the court-martial convened, the personnel chosen, the verdict arrived at, and a review made, go directly to the issue of whether the accused has received a fair and impartial trial. The weaknesses of the court-martial system lie particularly in its structure which the UCMJ failed to change. These weaknesses, and suggestions as to what changes are now needed without endangering military effectiveness, will be considered in relation to the categories already used to analyze prior military codes:

1. *Statements of Crimes and Punishments*—Most of the individual military crimes are stated with sufficient specificity in the UCMJ to avoid charges of unconstitutional vagueness and overbreadth. However, even a staunch supporter of the military justice system, Frederick Bernays Wiener, has conceded:

It cannot be denied that there is language in the void for vagueness cases broad enough to condemn as unduly indefinite the prohibition in Article

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Brief for Petitioner at 9-10, *O'Connor v. Cushman*, Misc. No. 69-14 (U.S.C.M.A., April 21, 1969).

<sup>356</sup> See, e.g., *Kennedy v. Commandant, United States Disciplinary Barracks*, 377 F.2d 339 (10th Cir. 1967); *LeBallister v. Warden, United States Disciplinary Barracks*, 247 F. Supp. 349 (D. Kan. 1965); *United States v. Culp*, 14 U.S.C.M.A. 199, 216, 33 C.M.R. 411, 428 (1963) (Quinn, J., concurring). But see *In re Stapley*, 246 F. Supp. 316 (D. Utah 1965).

133 against 'conduct unbecoming an officer and a gentleman' and the prohibitions in Article 134 against 'all disorders and neglects to the prejudice of good order and discipline in the armed forces' and against 'all conduct of a nature to bring discredit upon the armed forces.'<sup>357</sup>

The question is whether a modern military code must retain these open-ended criminal definitions which survive from the day when military authorities did not find it necessary to inform servicemen in advance of the behavior they deemed criminal. It has been argued that these general articles are not unconstitutionally vague and should be retained because they date from 1775 and have been sustained since that time; because particular definitions found in the *Manual* provide adequate specificity; because the words convey a sufficiently definite meaning when measured by common understanding and practices; because it is impossible to draft a criminal law demanding adherence to military standards based on an implicit code of honor with more specificity; and because the Armed Forces differ from civilian society in requiring absolute obedience.<sup>358</sup>

The military establishment views these vaguely defined crimes not as setting a trap for the serviceman but as providing the commander with the tools which he needs for insuring good order and discipline. From the military point of view, efficiency in combat is the paramount consideration, and the idea that such efficiency can only be obtained by strict compliance of servicemen with military standards of conduct, guided by an unwritten code of honor, lies deep in military tradition. There is still a strong feeling among officers that the only alternative to strict discipline and absolute obedience to an undefined code of military conduct is chaos. Thus, the military sees the general articles as giving the commander the power to insure that his men live up to the "higher" standards required of servicemen, and the fact that failure to do so results in criminal penalties is accepted as a necessary part of the discipline process.

In a day when most servicemen will not see combat,<sup>359</sup> when substantial numbers of servicemen live off post and lead a nine-to-five military existence, and when even in combat such qualities as initiative, creativity, and intelligent reaction have replaced the old standard of

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<sup>357</sup> Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357, 363 (1968). See also Ackroyd, *The General Articles, Articles 133 and 134, of the Uniform Code of Military Justice*, 35 ST. JOHN'S L. REV. 264 (1961).

<sup>358</sup> Wiener, *supra* note 357, at 358-63.

<sup>359</sup> Although all servicemen still undergo training in combat skills in basic training, a minority of all servicemen are selected for the advanced combat training necessary for adequate performance in a combat zone today. Also a minority of all servicemen have combat military occupation specialties (MOS). See J. SHERBURNE & K. GROVES, *EDUCATION IN THE ARMED FORCES* 37 (1965).

blind obedience to orders,<sup>360</sup> military emphasis on obedience to a rigid and unspecified code of conduct administered by commanders with criminal sanctions has been subjected to question. Thus, there is a basic policy conflict between military demands for broad tools, such as the general articles, to enforce the conformity it feels is necessary to maintain military efficiency and civilian demands for greater military concessions to individual diversity.

The arguments previously made for maintaining the general articles draw these responses. First, the historical antiquity of the general articles seems to carry little weight today, for the principal characteristic of military law reform in this century has been the rejection of the argument that because practices and procedures date back to 1775 and have been reenacted again and again by Congress, they should necessarily be continued.

Second, although the *Manual* does contain a number of precise specifications which can be used to charge a serviceman with a crime under article 133 (from cheating at an examination to failure to pay a debt)<sup>361</sup> and article 134 (58 specifications running from wrongfully kicking a horse to making disloyal statements),<sup>362</sup> these are only examples of conduct which might be criminal under the general articles. An infinite variety of other conduct, limited only by the scope of a commander's creativity or spleen, can be made the subject of court-martial under these articles. Furthermore, some of the specifications are themselves written in such indefinite and overbroad language as not to provide adequate notice of what acts will be called criminal.<sup>363</sup> Specifications in the *Manual*, which are actually only a form to guide a prosecutor in filling out a complaint rather than the statement of a crime, do not seem to be the most satisfactory method of stating crimes in a modern criminal code.

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<sup>360</sup> See M. JANOWITZ, *THE NEW MILITARY* 17-25 (1967); M. JANOWITZ, *THE MILITARY IN THE DEVELOPMENT OF NEW NATIONS* 119-20 (1964); M. JANOWITZ, *THE PROFESSIONAL SOLDIER* 8 (1960).

<sup>361</sup> *MANUAL*, 1969, *supra* note 317, at app. 6c, art. 133.

<sup>362</sup> *Id.* art. 134.

<sup>363</sup> Brief for Appellant at 21-23, NCM 68-1734, Harvey, — C.M.R. — (July 10, 1969) (review granted, Oct. 31, 1969) claimed that the specification for making "disloyal statements . . . with design to promote disloyalty among the troops" was unconstitutionally vague and overbroad. Appellant argued:

The *Manual* provides only two unhelpful sentences in the section entitled "Discussion" under the "disloyal statements" specification of Article 134. The first sentence states that certain disloyal statements . . . may "be punishable as conduct to the prejudice of good order and discipline or conduct reflecting discredit upon the armed forces." The second sentence states: "Examples are public utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of govern-

Third, it is more difficult today than ever before to rely on a common understanding of generalities such as "conduct unbecoming an officer and a gentleman" or "conduct bringing discredit upon the armed forces." In our pluralistic society, it is difficult to find universal agreement as to the meaning of such subjective terms. One need only observe the conduct at a Saturday night party at an officers' club to appreciate the fact that there is considerable scope for selective enforcement in the open-ended articles (article 133 and 134 include such specifications as public drunk or disorderly actions, obscene language, and committing a nuisance).<sup>364</sup>

The fourth argument for maintaining the general articles is that the open-ended crimes, admittedly falling short of the constitutional requirements for certainty and particularity, must be retained because it is impossible to draft a criminal code which defines with specificity the

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ment." It strikes one immediately that these examples, which are not legal terms of art and have no judicial gloss to aid in definition, are also so vague that the serviceman still has little guidance as to what is criminal and so overbroad that they could include statements which are obviously protected by the First Amendment. For example, in the case of "praising the enemy," who is the enemy? Is it a country with whom the United States is engaged in a declared war? If not, how is a serviceman to know which countries might be considered "the enemy"? Is North Vietnam the enemy? Russia? Communist China? Cuba? East Germany? Poland? Syria and Egypt? What constitutes praise? Can one applaud the peace efforts of the Soviet Union in the Indian-Pakistan dispute? Can he praise the educational programs of Premier Castro? Can he comment favorably on the tenacity of Ho Chi Minh? Article 104 states, "Enemy imports citizens as well as members of military organizations and does not restrict itself to the enemy government or its armed forces." Is one, therefore, forbidden not only from praising the government but also the people? Is it a crime to praise the spirit of the North Vietnamese while denouncing their government?

The example of "attacking the war aims of the United States" is equally confusing. Is it an attack on the war aims of the U.S. to call for escalation of the war? To urge that we pull out of Vietnam? Can a serviceman be sure what the war aims of the United States are? Is the aim of our present Vietnam policy to insure a popularly elected government in Vietnam or an anti-Communist government? Do statements calling for a coalition government constitute a crime? "Denouncing our form of government" is similarly unhelpful. What is meant by "our form of government?" Is it the Constitutional framework? Can a soldier advocate abolition of the electoral college system established in the Constitution? Can a serviceman urge taking away constitutional powers of the Supreme Court or denounce the school desegregation decision? What elements are so basic to our "form of government" that they cannot be denounced—federalism, capitalism, democracy, welfare state programs, the draft?

*Id.* at 21-23.

<sup>364</sup> See MANUAL, 1969, *supra* note 317, at app. 6c, arts. 133, 134.



broad spectrum of conduct which the military needs to make criminal. This argument rests on an assumption which is subject to question. There seems to be no reason why the present specifications under articles 133 and 134 could not be rewritten as individual crimes so that each provides a clear statement of the elements of the crime charged. If there is other specific conduct which the military desires to make criminal, separate criminal definitions could be drafted covering such conduct. The military problem is not really so very different from civilian law in this respect. Drafters of civilian criminal codes run up against the same kinds of problems when legislators indicate that they want to make criminal all conduct which might be "disruptive" or "dangerous to the economy" or "potentially violent." The old solution was to draft a very vaguely defined crime so that almost any conduct which the police or prosecutor wanted to call criminal would fall within the definitional scope. These statutes have been declared unconstitutional so frequently in recent years<sup>365</sup> that drafters have now realized that a crime must be stated with specificity and definiteness and have begun to draft criminal codes accordingly.

The real question today is whether the military should be held to the requirements of specificity imposed on civilian definitions of criminal conduct or should be permitted to continue to court-martial individuals for conduct which all reasonable servicemen are supposed to recognize as criminal. It will be remembered that General Ansell was disturbed by the vagueness and breadth of article 134. He did not propose that it be abolished but that it carry a maximum sentence of six months.<sup>366</sup> Many of the specifications under the general article now provide for maximum sentences of several years, the highest being 20 years. Articles 133 and 134 have been applied particularly during the Vietnam War period to punish servicemen who have dissented in some manner from the war, and the sizable punishments given in some of these cases make General Ansell's recommendation particularly meaningful.<sup>367</sup> General Ansell's compromise reflects his feeling that a com-

<sup>365</sup> See *Keyishian v. Board of Regents*, 385 U.S. 589 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1964); *Baggett v. Bullitt*, 377 U.S. 360 (1963); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Straut v. Calissi*, 293 F. Supp. 1339 (D.N.J. 1968); *Synder v. Board of Trustees of University of Illinois*, 286 F. Supp. 927 (N.D. Ill. 1968); *Landry v. Daley*, 280 F. Supp. 938 (N.D. Ill. 1968); *Huerta v. Flood*, 103 Ariz. 608, 447 P.2d 866 (1968).

<sup>366</sup> S. 64, 1919, *supra* note 78, art. 96 at 38.

<sup>367</sup> *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967) (two years reduced to one, for contemptuous words against the President under articles 88 and 134); NCM 68-1734, *Harvey*, — C.M.R. — (July 10, 1969) (six years reduced to three, for disloyal statements under article 134); CM 418868, *Amick & Stolte*, — C.M.R. — (May 16, 1969) (four years each for distributing anti-war leaflets under articles 81 and 134); NCM 68-1733, *Daniels*, — C.M.R. — (May 15, 1969) (ten years reduced to four, for disloyal statements in violation

mander needs to have some general disciplinary powers to control a wide variety of unspecific conduct of servicemen, but once the possible sentence exceeds six months, the commander should only be allowed to court-martial for violation of crimes stated in advance with specificity. Thus, his philosophy seems consistent with the proposal that although article 15 nonjudicial punishment (which enables a commander to assess one month in custody plus forfeitures and demotion without following judicial formalities) is a necessary tool for enforcing discipline, court-martial prosecutions for violation of the general articles should either be limited by the punishment authorized or prohibited altogether.

This proposal would appear to satisfy the military's need to enforce general standards of conduct which are not amenable to specific drafting, while still preventing the vague general articles from being the basis for long-term sentences. A commander could nonjudicially punish a serviceman or officer for conduct violating articles 133 and 134, but if he desired to see the man court-martialed with the possibility of a substantial sentence, then he would have to prosecute him for a crime defined in the UCMJ with specificity. In fact, once a commander moves above the one month sentence available under article 15 (and in summary courts-martial)<sup>368</sup> and decides to use a special or general court-martial, the man's useful relationship to the military in the future is likely to be impaired anyway. Statistics show that a high percentage of men found guilty in special and general courts-martial will never be rehabilitated for service again.<sup>369</sup> Most general court-martial convictions result in confinement and a punitive discharge, and a substantial proportion of men convicted in special courts-martial are punitively or administratively discharged.<sup>370</sup> Thus, the military recognizes that when a man is tried by one of the two higher courts-martial, and particularly

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of 18 U.S.C. § 2387 (1964) assimilated by article 134); CM 416463, Levy. — C.M.R. — (Aug. 29, 1968) (review denied, Jan. 6, 1969) (three years for anti-war statements under articles 133 and 134 and refusal to teach Green Berets under article 90).

<sup>368</sup> The maximum punishments of a summary court-martial are confinement for one month, hard labor without confinement for 45 days, restriction to specified limits for two months, and forfeiture of two-thirds of one month's pay. 10 U.S.C. § 820 (1964) (art. 20 of the UCMJ). The maximum punishments under article 15 depend on the rank of the commanding officer imposing the punishment with officers of the grade of major or lieutenant commander able to impose correctional custody of 30 days, forfeiture of one-half of one month's pay per month for two months, reduction in rank, extra duties, restrictions for 60 days, and detention of one-half of one month's pay per month for three months. 10 U.S.C. § 815(b) (1964) (art. 15(b) of the UCMJ).

<sup>369</sup> See *Joint Hearings on S. 745*, *supra* note 206, at addendum to pt. 3, app. B, 1045-47, 1054-56.

<sup>370</sup> *Id.* at pt. 3, app. B, 966-73, 980-86, 1000-25.

if he receives a substantial sentence, he is often no longer of value to it. This makes it even more questionable to permit a commander to court-martial under the vague standards of articles 133 and 134 in the name of discipline.

Although it is difficult to verify, it appears unlikely today that there would be an adverse effect upon military efficiency if these vaguely defined crimes were restricted to punishment under article 15 (and, perhaps, in summary courts-martial). It is true that the commander would no longer be able to hold over his men's heads the threat of a major court-martial for unspecified conduct. But he would still have substantial "disciplinary" powers with which to maintain order and discipline among his men. Actually, the minor disciplinary powers, rather than the threat of major court-martial are the primary means of enforcing discipline in the military. Furthermore, the power to court-martial under vague standards tends to encourage an arbitrariness of command which is undesirable in itself and which can have an adverse effect upon morale.

Other deficiencies in the manner of statement of crimes and punishments in the UCMJ include the retention of certain crimes which are stated in such terms as to violate first amendment rights. These include the crime of "contemptuous words" against the President, Vice President, Congress, Secretaries of Departments, state governors, and legislatures (article 88), and "provoking or reproachful words or gestures" towards any other person subject to the UCMJ (article 117). Since crimes are rarely charged under these articles (the prosecution of Lieutenant Howe in 1965 under article 88 for carrying a sign reading "END JOHNSON'S FASCIST AGGRESSION IN VIETNAM" and "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FASCISTS IN 1968" in a peaceful off-post rally, while off-duty and in civilian clothes, was the first prosecution thereunder since the UCMJ took effect in 1951),<sup>371</sup> they appear to play no significant role in maintaining military discipline and efficiency. Furthermore, it is unthinkable that the military would undertake broad enforcement of these articles, and so they seem to serve no other purpose than to provide a means of selective and discriminatory prosecution for a commander.

Finally, as to punishments, there should be a thorough overhaul of the table of maximum punishments. Some maximum punishments are too high, permitting the extravagant sentences which are still handed out by courts-martial, particularly for military crimes (for example, sentences of at least 14 years were imposed on the first three men court-martialed for a brief sitdown strike protesting stockade conditions at the Presidio, all later cut to two years after intense public

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<sup>371</sup> See *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

pressure).<sup>372</sup> Also, consideration should be given to providing definitional subcategories of various crimes whenever possible so that findings by the court of less culpable elements would result in a smaller maximum sentence.

In summary, the following suggestions for changes in the UCMJ are made in connection with the statement of crimes and punishments: (a) articles 133 and 134 should be abolished, with new articles adopted contemplating sanctions for undesirable types of conduct that can be drafted with specificity, or prosecution under article 133 and 134 should be limited to article 15 nonjudicial punishment proceedings and summary courts-martial; (b) articles 88 and 117 should be abolished; (c) double jeopardy should attach to prevent trial of servicemen for the same crime in a court-martial after trial in any civilian court, and vice versa; (d) the table of maximum punishments should be rewritten with an eye to lowering the maximum sentences, particularly for military crimes; (e) an attempt should be made to include subcategories indicating differences in culpable elements and providing lower maximum penalties for lower degrees of culpability; (f) and the President's power to alter or suspend the table of maximum punishment as to particular geographical areas or to suspend the table for particular crimes should be removed.

2. *Pretrial Proceedings*—The UCMJ failed to alter the basic difference between military and civilian court pretrial proceedings, *i.e.*, the absence of a right to grand jury or other determinative pretrial investigation in the military. Here again, there is a basic difference in judicial philosophy between the two systems. Civilian law places emphasis upon the role of an independent grand jury,<sup>373</sup> selected at random from the community at large, which can prevent the prosecutor from going ahead with a criminal case if it refuses to indict. This policy lies in a belief that a separation of functions within the criminal process will prevent any one individual from exercising too much control over the process and thus preclude arbitrariness and prejudice. Under military law, commanders have always exercised an absolute right to decide whether to court-martial their men, and even the requirement in the UCMJ that the commander must appoint an investigating officer and consider his report does not remove that power since the commander is not required to follow the investigating officer's recommendations.

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<sup>372</sup> See N.Y. Times, Mar. 19, 1969, at 7, col. 1; N.Y. Times, Jan. 5, 1969, at 56, col. 4; N.Y. Times, Nov. 27, 1968, at 23, col. 5.

<sup>373</sup> Although the right to a grand jury is guaranteed in federal criminal trials by the fifth amendment, it has not been held to be a required element of due process, applicable to the states under the fourteenth amendment. *Hurtado v. California*, 110 U.S. 516 (1884). Most states have provisions for grand juries but the scope of the right varies considerably.

The pretrial investigation is still viewed primarily as an aid to the commander in insuring that he has all the facts before he makes his decision. The policy reason behind the military practice is a belief that a commander must himself possess the power to insure that a man is court-martialed or his authority will be weakened, and that without this power he will not be able to carry out his function of insuring order and discipline within the unit.

Once again a central consideration in weighing the competing military and civilian policies is whether, in fact, the military practice is needed to maintain discipline and efficiency. It is highly questionable whether the commander's absolute power to court-martial adds much to the efficiency of the modern military. Commanders possess substantial disciplinary powers over their men under the normal administration of discipline and the use of article 15. Also, the fact that a commander could still prefer court-martial charges against one of his men, with the final decision as to the sufficiency of evidence to court-martial being made by a separate and independent individual, would not seem to reduce significantly the commander's effectiveness. Furthermore, the commander's power to reject the recommendations of the investigating officer and his staff judge advocate creates an opportunity for arbitrariness which itself endangers morale and discipline within a unit.

The absence of a right to pretrial bail under the UCMJ has already been discussed.<sup>374</sup> A broader right to pretrial release would seem to present no threat to military discipline. It would avoid much needless incarceration with its attendant aggravation of personality and psychiatric disorders and permit, in many cases, productive use of the accused by the military prior to trial and greater assistance by the accused in his own defense.

The following suggestions for changes in the UCMJ are made concerning pretrial proceedings: (a) the power of commanding officers to convene a general court-martial should be removed. Such officers should only have the power to forward charges to the circuit judicial officer (see page 96) with recommendations as to appropriate action; (b) the circuit judicial officer, upon receipt of charges and recommendations should have the duty to appoint an impartial investigating officer who is legally qualified and is not under the command of the forwarding officer; (c) the investigating officer should conduct an investigation as now provided by article 32, and upon completion of his investigation he should submit his report to the circuit judicial officer for review; (d) if the investigating officer recommends that any or all of the charges not be referred to a general court-martial, the circuit judicial officer should only overrule such recommendations and refer such charges to a general court-martial if he determines, in a written review dealing with each issue of

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<sup>374</sup> See text accompanying notes 258, 259 *supra*.

fact or law raised by the investigating officer, that there is legally sufficient evidence to refer such charges to a general court-martial; (e) the circuit judicial officer should have the authority to convene the court if the above requirements have been met (see pages 96-97 for method of convening courts); and (f) all servicemen should be entitled to release from confinement pending court-martial, except when substantial evidence is presented indicating that pretrial confinement is necessary in order to insure the presence of the accused at the court-martial. Requests for release from pretrial confinement should be made not to the commander, but to an individual or agency independent of the commander, such as a military judge, or the circuit judicial officer.

3. *Role of the Commander*—The most important difference between military and civilian justice after the passage of the UCMJ lies in the role of the commander in a court-martial. Under the civilian criminal law process, different functions are performed by independent individuals: The district attorney decides whether to prosecute; the grand jury determines whether to indict; the defense counsel has no connection with any of the other participants; the jury is picked at random from the community; the judge and other court officials have no relation to the district attorney; and the appellate courts are independent tribunals. In a court-martial, the commander plays a role, in varying degrees, in all of these functions. He decides whether to prosecute; he has the power to handpick the jury from his command and the trial counsel and defense counsel from his legal officers; he has certain supervisory powers over the administration of the trial; and he has the power to review the findings and sentence.

The Military Justice Act of 1968, by creating military judges independent of the commander convening authority, removed one of the functions from the commander's control. Also, commanders do not usually handpick court members or counsel, leaving this up to one of their staff officers, such as the staff judge advocate, and commanders do not become involved personally in the administration of most courts-martial. However, the ultimate power still lies with the commander and, in cases in which he is particularly interested, a commander frequently takes a hand in the selection of court and counsel and in various administrative matters. The military cases have upheld the convening authority's power over a variety of supervisory and administrative matters connected with a court-martial. He has the power to enter into a pretrial agreement with the accused whereby he promises to cut down the sentence in return for a guilty plea<sup>375</sup> and to grant immunity to service-

<sup>375</sup> Although pretrial agreements were initiated in 1953 at the direction of the then Acting Judge Advocate General of the Army, they are not provided for in either the UCMJ or the *MANUAL*, 1969. See CM 390869, Callahan, 22 C.M.R. 443, 447 (1956). They have been upheld by the military courts, CM 384022,

men if they will testify against someone else.<sup>376</sup> This is an immensely important part of military justice prosecution; there are guilty pleas in two-thirds of all Army general courts-martial and almost three-quarters of these are negotiated pleas.<sup>377</sup> The convening authority, as has already been discussed,<sup>378</sup> rules on defense motions to subpoena witnesses and obtain other evidence before trial. He can excuse court members both before<sup>379</sup> and, in certain limited situations, after<sup>380</sup> the trial has begun. The Court of Military Appeals has even held that the convening authority can reverse a court's dismissal of charges granted on such grounds as denial of a speedy trial, if he disagrees, and order the court to try the man anyway.<sup>381</sup>

The administrative functions carried out by the staff judge advocate are usually performed without direct supervision by the commander but are subject to the commander's overall control. The staff judge advocate, who is directly responsible to the commander, performs a variety of impartial administrative functions in a court-martial as well as acting as the commander's lawyer in an admittedly partisan role. In a typical case, for example, the staff judge advocate might have conferred with the commander about an individual and might have been aware of the commander's desire to court-martial him. He also might have advised the commander as to legal issues regarding the court-martial, selected the trial and defense counsel and court members with or without instructions from the commander, carried out a variety of functions related to the preparation for and administration of the trial,

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Proctor, 19 C.M.R. 435 (1955), although the Court of Military Appeals has held there are limitations on agreements. *United States v. Veteto*, 18 U.S.C.M.A. 64, 39 C.M.R. 64 (1968); *United States v. Brady*, 17 U.S.C.M.A. 614, 38 C.M.R. 412 (1968); *United States v. Cummings*, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968). It has been stated that pretrial agreements for negotiated guilty pleas are not in accord with Air Force Procedure (AFP 111-1-1, Military Justice Handbook, para. 64e, n.2 (November 1962) (*cited in* ACM 18519, Rahn, 33 C.M.R. 945, 953 (1963))). There appears to be serious question as to the propriety of negotiated pleas in civilian courts. *See Alschuler, The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

<sup>376</sup> MANUAL, 1969, *supra* note 317, at ¶ 150b. *See also* *United States v. Kirsch*, 15 U.S.C.M.A. 84, 35 C.M.R. 56 (1964); ACM 10757, Guttenplan, 20 C.M.R. 764 (1955).

<sup>377</sup> 1 THE ADVOCATE, April 1969, at 1.

<sup>378</sup> *See* text accompanying notes 344-47 *supra*.

<sup>379</sup> *See* *United States v. Allen*, 5 U.S.C.M.A. 626, 18 C.M.R. 250 (1955).

<sup>380</sup> *See* CM 419200, Geraghty, — C.M.R. — (Jan. 28, 1969) (convening authority could relieve a colonel sitting on a court-martial after the trial had begun by indicating to the law officer that he was needed "for a very important matter involving exigencies of the service").

<sup>381</sup> 10 U.S.C. § 862(a) (1964) (art. 62(a) of the UCMJ); *Lowe v. Laird*, 18 U.S.C.M.A. 131, 39 C.M.R. 131 (1969); *United States v. Boehm*, 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968) (Ferguson, J., dissenting).

including giving advice and instructions to counsel, and finally advised the commander concerning review of the conviction and sentence. The potential for conflict of interest is increased by the fact that the staff judge advocate is considered first and foremost to be the commander's lawyer, and the staff judge advocate's office to be the commander's law firm. As former Judge George W. Latimer of the Court of Military Appeals has stated: "If we look the facts in the face, we must realize that presently the staff judge advocate is the officer who is suspected of being a messenger of conviction. He is always pictured as the alter ego of the commander."<sup>382</sup>

The military's defense of the structure of the legal corps relates to its emphasis upon unified command authority. It is felt that if the commander could not demand the unqualified obedience and loyalty of all legal personnel, he would lose effective control of discipline within his unit. This is not to say that the military position assumes that the staff judge advocate or the defense counsel will compromise the interests of the accused under pressure from the commander. The military takes pains to emphasize that although the staff judge advocate and the defense counsel are directly responsible to the commander and are charged with insuring that the interests of the command are preserved, nevertheless they are also charged with insuring that the rights of the accused are protected. There is no problem in serving both the interests of the command and the accused, the military maintains, because they are the same.

The problem with this analysis is that, in fact, the commander and accused often have different views of what rights the accused has and what is a fair and impartial proceeding. Commanders, no matter how conscientious, can become personally involved in disciplinary matters and court-martial cases, and this involvement can color their view of how the case should be handled. Likewise, the juggling of interests by the staff judge advocate and his legal officers can become a difficult process, for they too experience the inevitable conflict which arises when they are expected to maintain loyalties to two individuals whose interests are not, in fact, the same. The military, which tends to minimize possible conflicts between the interests of the command and servicemen and puts great faith in the ability of officers to perform conscientiously in a variety of assignments, sees no conflict of interest here; civilians, who emphasize independence of administrators, do.

"In the nature of things," the Court of Military Appeals has observed, "command control is scarcely ever apparent on the face of the

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<sup>382</sup> Latimer, *Improvements and Suggested Improvements in the Administration of Military Justice*, REPORT OF CONFERENCE PROCEEDINGS, ARMY JUDGE ADVOCATE CONFERENCE 54 (1954).



record. . . ."<sup>383</sup> For this reason, critics claim, there is much more improper command influence than ever reaches the military appeals courts. They cite the 1967 cases at Fort Leonard Wood, involving General Lipscomb, where the Court of Military Appeals reversed almost a hundred convictions after charges of improper command influence were made, as one of the rare occasions on which overbearing actions by commanders were detected and publicized.<sup>384</sup> The military, however, argues that an investigating officer found that the general had acted imprudently, but not illegally, and that this was just an example of overcaution on the part of the court.

Until recently there was little objective evidence either way to support or disprove claims of widespread command influence. This summer, however, a former career Army officer, Luther C. West, completed a dissertation for the Doctor of Juridical Science degree at George Washington University Law School entitled "The Command Domination of the Military Judicial Process."<sup>385</sup> This dissertation, as yet unpublished, contains a detailed and documented description of improper command influence in a number of cases of which Mr. West, as an Army officer in the Judge Advocate General's office, had personal knowledge. The accounts make up a startling picture of command intrigue, staff judge advocate compliance, and lower level accession to command wishes. The cases range from intense reprisals against a young military defense counsel, who raised the defense of command influence,<sup>386</sup> to documented proof of false or misleading testimony by three field grade officers in an article 32 investigation to cover up the role a commanding general had played in incidents leading up to court-martial charges.<sup>387</sup> Mr. West's conclusions remind one of the equally critical statements of another career soldier, General Ansell, 50 years before:

The military judicial setting is still dominated by military commanders, from the inception of charges to the final completion of appellate review, with the exception of the handful of cases each year that are subject to review by the United States Court of Military Appeals, and in these cases only a semblance of constitutional protection against command control is afforded the military defendant.

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<sup>383</sup> *United States v. DuBay*, 17 U.S.C.M.A. 147, 149, 37 C.M.R. 411, 413 (1967).

<sup>384</sup> *Id.* See also *N.Y. Times*, June 25, 1968, at 3, col. 3; *N.Y. Times*, Oct. 25, 1967, at 1, col. 1; *N.Y. Times*, July 22, 1967, at 1, col. 5.

<sup>385</sup> L. West, *The Command Domination of the Military Judicial Process*, Aug. 10, 1969 (unpublished thesis in George Washington University Law School, Washington, D.C.).

<sup>386</sup> *Id.* The case of Lieutenant Wayne Loudermilch is described at 244-88 of the thesis.

<sup>387</sup> *Id.* The case of Lieutenant Dennis Morrisseau is described at 298-329 of the thesis.

There can be no conclusions drawn from this study other than that the forces of justice under law within the military community are still locked in unending combat with the forces of order, whether it be called military necessity, discipline, law and order in the streets, or what have you, and that the omnipresence of the Court of Military Appeals is, at best, a very weak preserver of the balance between these two opposing social forces . . . .

The entire court-martial process should be lifted from the shoulders of the military commander, with the only possible remaining connection being in the area of preferring charges for trial, and in the furnishing of necessary logistics and court-martial members who in turn should be selected for jury duty by impartial civilian administrative methods as opposed to military command channels. Thus, the complete staff judge advocate function, as well as the law officer, prosecutor, and defense functions including the post-trial review function, should be non-military . . . . Only when procedural protections of this magnitude come to pass, will the conflicting interests of military necessity and justice under the rule of law (if there is indeed any conflict between these values) be fairly administered and balanced in our nation's military courts.<sup>388</sup>

Mr. West's account, of course, is limited to a tiny percentage of the total courts-martial, and many of the cases displaying extreme command influence, which he refers to, involved circumstances which particularly aroused the ire of the commander. There is probably truth to the claim by military apologists that the average court-martial (a high percentage of courts-martial are for AWOL) is not directly affected by improper command influence. However, when a commander views a court-martial case as a particular threat to the command, such as cases involving political dissent, alleged homosexual acts, barracks thefts, or any kind of disobedience, the court-martial system seems to provide an unduly attractive opportunity for a commander to influence the trial.

Even if one is willing to admit that the court-martial does not always provide the same kind of impartial trial as does a civilian court, the dispositive question is whether the military can permit courts-martial not to be administered by the commander without adversely affecting discipline. Again, there is no objective way to predict the effect of removing command control of courts-martial on military discipline. However, if past military predictions as to the dire effects of other reforms which lessened commander control over military justice are any indication, the threat would seem to be exaggerated. Commanders once warned that if lawyers were used in general courts-martial, servicemen would learn that they could "beat" charges with legal technicalities, and discipline would be impaired. Commanders warned that if law officers or judges were introduced into courts-martial, legal considerations, rather than the needs of the command, would become paramount, and dis-

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<sup>388</sup> *Id.* at 447-48, 451.

cipline would suffer. Commanders warned that if persons other than the commander could set aside court-martial convictions, the commander's authority and prestige would be undermined, and discipline would fail. After each of these reforms, and many others, the military quickly and efficiently adapted to the change, and there was no evidence that discipline or efficiency suffered.

One source of enlightenment as to the possible effect on discipline of civilianizing reforms in military justice is the experience of other countries. It appears that a number of countries have restricted command control over military justice to a greater degree than has the United States and have suffered no adverse consequences. Perhaps the best example is West Germany. When the West German army was established in 1955, it was reconstructed on democratic principles, and troops were made subject to civilian courts for discipline. There have been no military courts in West Germany since the collapse of Hitler's regime in 1945, and there has been general satisfaction over the absence of courts-martial.<sup>389</sup> Great Britain,<sup>390</sup> Canada,<sup>391</sup> and France<sup>392</sup> have all introduced civilianizing elements into their military systems of justice which appear to exceed those of the United States, all without adverse effect on discipline. At approximately the same time that the UCMJ was passed, Great Britain, Canada, New Zealand, and Australia provided for civilian tribunals to review military trials.<sup>393</sup> Great Britain went even further by making the Judge Advocate General of the military a civilian office under the Lord Chancellor and delegating to it a number of functions previously held by commanders, including providing counsel and judges.<sup>394</sup> In Canada, the Court-Martial Appeals Board made up of civilians was given broad review powers, exceeding those of our Court of Military Appeals, over courts-martial.<sup>395</sup>

A reduction of commanders' powers over military justice is consistent with the civilianization trend which has been taking place in the military since World War II. There is a certain anachronistic ring to arguments that a commander needs to control courts-martial to obtain instant and unthinking response from his men and that any lessening of his powers would weaken his ability to maintain discipline. The

<sup>389</sup> See N.Y. Times, Apr. 11, 1969, at 12, col. 1; N.Y. Times, Apr. 9, 1969, at 3, cols. 1-2.

<sup>390</sup> WIENER, CIVILIANS UNDER MILITARY JUSTICE 231 (1967).

<sup>391</sup> National Defence Act, CAN. REV. STAT. c. 184 (1952) established a "Code of Service Discipline." Paragraphs 189-96 provide for a review system under a civilian Court-Martial Appeal Board.

<sup>392</sup> E.g., the French military code acknowledges the right to disobey an order against one's conscience. Paxton, *The Right to Disobey*, N.Y. Times, May 5, 1968, at 14 (Book Review).

<sup>393</sup> See WIENER, *supra* note 390, at 232.

<sup>394</sup> Note 159 *supra*.

<sup>395</sup> Note 391 *supra*.

truth is that the nature of the military has changed dramatically since World War II and likewise the nature of discipline has had to change. Servicemen today have more technical jobs, better education, and more individual rights than ever before. Technology has transformed the military into a highly bureaucratic society. A whole new class of enlisted men, called specialists, came into being after the Korean War. They perform technical jobs and are not placed in a troop environment. Many servicemen work in jobs not much different from that of a civil servant or a corporation employee, and substantial numbers live off post. Only about ten percent of today's servicemen have MOS's (job descriptions showing their occupational speciality) which involve combat skills, while 54 percent hold technical specialties (electronics, mechanics, crafts, etc.) and the rest hold service specialties (food, administration, clerical, etc.).<sup>396</sup> Most servicemen are not given specialized combat training,<sup>397</sup> and since some 20 men are now needed in support for every combat soldier, there is no need for them ever to be in combat. Seventy-five percent of enlisted men are serving their mandatory tour and will return to civilian life when it is completed.<sup>398</sup> In short, today's military is a big business with a substantial portion of its members being noncareer civilian-soldiers who serve their country in a service job or at a desk.

This change in the nature of the military inevitably calls for a re-evaluation of traditional military attitudes towards discipline and the role of the commander. Two of the traditional commandments of military discipline, absolute and unquestioning obedience to commands of superiors and absolute conformity to official attitudes, have already been seriously undercut. After Nuremberg, men in the ranks cannot escape individual responsibility for acts which they are ordered to do,<sup>399</sup> and the Court of Military Appeals has further undercut the concept of absoluteness of orders by creating a number of areas in which a serviceman is not bound to follow the orders of a superior.<sup>400</sup> The following language of a board of review in *United States v. Kinder* (1953) indi-

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<sup>396</sup> J. SHELBURNE & K. GROVES, EDUCATION IN THE ARMED FORCES 37 (1965).

<sup>397</sup> *Id.* at 26-40.

<sup>398</sup> *Id.* at 41.

<sup>399</sup> See CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG) arts. 6, 8 (1945). These articles provide for individual responsibility for war crimes and crimes against humanity and "the fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility." See also Note, *Nuremberg Rule of Superior Orders—Court-Martial Trial of Captain Howard Levy*, 9 HARV. INT'L L.J. 169 (1968); Kimball, *The Court-Martial of Dale Noyd: A Commentary on the Tensions Between Law and Moral Action*, 86 THE CHRISTIAN CENTURY 116 (1969).

<sup>400</sup> See, e.g., *United States v. Gentle*, 16 U.S.C.M.A. 437, 37 C.M.R. 57 (1966); *United States v. Wilson*, 12 U.S.C.M.A. 165, 30 C.M.R. 165 (1961); *United States v. Granger*, 9 U.S.C.M.A. 719, 26 C.M.R. 499 (1958).

cates the change in attitude towards the relationship of a serviceman to his commander:

The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery. It is a fallacy of wide-spread consumption that a soldier is required to do everything his superior officer orders him to do.<sup>401</sup>

A similar alteration of attitude has taken place concerning the obligation of servicemen to conform to official attitudes and demands. No young man who enters the service today has escaped the influence of the individualistic and democratic values of our society, and it is more and more difficult for the military to command the absolute conformity to official views it once could. The current movement for expanded servicemen's rights, particularly as regards exercise of first amendment rights involving reading and expressing dissenting views, has already led to re-writing of regulations to permit many of these activities.<sup>402</sup> The substantial number of court cases still pending may further extend servicemen's individual rights.<sup>403</sup>

These changes have significantly reduced the role and the power of the commander. Whereas once the commander possessed the authority to control virtually every aspect of the life of his men, today there are distinct areas where he lacks authority. In many ways, the military trust in the commander-soldier relationship as the keystone of an effective military is now subject to question. Many servicemen work in a bureaucratic or technical atmosphere, and the command structure, with its rigid notions of caste, rank, and absolute obedience, has little to do with their effectiveness on the job. The traditional view of the commander as an all powerful *pater familias* is today something of an anachronism and, even among combat troops, the specialization of jobs has removed much of the need for the crude authoritarianism which has always characterized the command philosophy. Our civilian paramilitary, like police and firemen, demonstrate that men can function effectively in life-endangering activities under a normal civilian superior-subordinate relationship where the superior lacks absolute powers and criminal law sanctions. This is not to say that commanders are on the way out, but rather that the role of the commander, except with some modifications in a combat situation, must necessarily be closer to that of a civilian manager.

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<sup>401</sup> ACM 7321, Kinder, 14 C.M.R. 742, 776 (1953) (quoting from the "Einsatzgruppen Case").

<sup>402</sup> See note 351 *supra*.

<sup>403</sup> Pending federal habeas corpus petitions seeking to overturn court-martial convictions claiming denial of first amendment rights include *Howe v. Laird*, Civil Action 622-68 (D.D.C., Mar. 11, 1968); *Levy v. Laird*, No. 1057HC (M.D. Pa., filed Apr. 19, 1969). For other first amendment cases still on appeal within the court-martial system see note 367 *supra*.

There is also something unrealistic about the notion that a commander must himself possess all effective powers over his subordinate personnel or his authority and effectiveness will be undermined. This, of course, is the premise behind the contention that a commander must control all functions of a court-martial. Today, with instant communications and easy mobility, there is no reason to believe that a commander's effectiveness would be destroyed if he had to rely upon other agencies to perform court-martial functions. Commanders may once have held their men in check by the fear which their disciplinary powers engendered, but discipline in the modern military is surely not based upon such crude displays of retributory powers. The fact is that in many ways the military command structure has succeeded beyond the wildest dreams of the military; servicemen today generally accept the authority of the individuals who fill various command positions, and there is much less need for constant displays of command power to hold men in line. The fact that such authority is not absolute, or that it must be shared with other officials, is not a reason for rejecting that authority. In fact, the young servicemen of today are more sensitive to abuse of authority, brutality, and injustice than to the pettiness of bureaucracy. The fact that their commander, in order to court-martial them, must submit the charges to an independent court administered by impartial officials is more likely to win their acceptance than the spectre of an all powerful commander whose control makes a farce out of courts-martial.

Of course, it is difficult to judge what the reactions of millions of servicemen would be to removal of command control of courts-martial, and the foregoing analysis can hardly be considered a scientific prediction. However, it should indicate that there are complicated dimensions to this question, and that the obsession of the military with individual command powers as the only key to military effectiveness fails to take into account both changed conditions and a variety of other relevant factors. There is simply no concrete evidence on which to argue that removal of command control of court-martial appointments and machinery would adversely affect military discipline today.

It has been suggested that the only way to remove the threat of improper command control over courts-martial is to remove military jurisdiction over servicemen's crimes altogether or to replace the military administrators with civilians. However, the court-martial structure can be modified to prevent a commander from influencing a trial and yet leave a workable criminal law system. Based in part upon an administrative scheme proposed by Colonel J. F. Rydstrom in an article in the *A.B.A. Journal*, entitled "Uniform Courts of Military Justice,"<sup>404</sup> and in part

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<sup>404</sup>Rydstrom, *Uniform Courts of Military Justice*, 50 A.B.A.J. 749 (1964). Under Colonel Rydstrom's proposal the judicial circuits would provide the judge, the court personnel, and counsel, but they would not have the power to appoint

upon the new use of "regions" and "circuits" in the Air Force trial judiciary<sup>405</sup> and the use of "law centers" in the Navy,<sup>406</sup> the following suggestions for reform of the UCMJ are made concerning the role of the commander in courts-martial:

A. The only connection which a general court-martial convening authority will have with a general court-martial will be to refer charges accompanied by a recommendation for general court-martial to the circuit judicial officer for investigation, and possible convening of a general court-martial (see page 86). The only connection which a special court-martial convening authority will have with a special court-martial will be to refer charges to the circuit judicial officer for convening of a special court-martial.

B. The United States and the world will be divided into judicial circuits with areas similar to the present Army areas. A judicial circuit office will be established for each circuit, and the Judge Advocate Generals of the services will be responsible for providing lawyers and personnel for each circuit. The personnel provided by each service will be determined by the ratio of its personnel in that circuit to the total personnel in that circuit. One service, usually the one predominant in the circuit area, will be given primary responsibility for the operation of each judicial circuit office. That service will provide a circuit judicial officer who will be in charge of the office and to whom all other personnel will be responsible and be subject for efficiency reports. He will report directly to the Judge Advocate General of his service.

C. Each judicial circuit will be divided into at least four divisions: a field judiciary division, a trial counsel division, a defense counsel division, and a review division. The divisions will function as separate offices, but the chiefs of each section will be under the command of the circuit judicial officer.

D. Upon the direction of the circuit judicial officer that charges be referred to a general court-martial, pursuant to the requirements for investigation and approval thereof (see pages 86-87), or upon the receipt by the circuit judicial officer of charges for a special court-martial from a special court-martial convening authority, the circuit judicial officer will:

- (i) Insure that the field judiciary division appoints a military judge, a court reporter, and such other court personnel as are necessary, and arrange the time and place for the court-martial to

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the court or to review the decisions. He argues that this arrangement would provide a higher caliber of legal representation, would remove counsel from command control, and would encourage more lawyers to stay in the service. He suggests that his plan could be implemented by the services without need for a change in the UCMJ.

<sup>405</sup> See Kenney, *The Trial Judiciary*, U.S.A.F. JAG L. REV. 208-11 (1969).

<sup>406</sup> See Selman, *The Military Justice Act of 1968: Some Problems and Practical Solutions*, 23 JAG J. 147-53 (1969).

be held, so notifying the commanding officer and the accused involved.

- (ii) Insure that the trial counsel and defense counsel divisions provide a trial counsel and a defense counsel who will take such steps necessary to investigate and prepare the case for trial.
- (iii) Insure that a court is chosen by random selection from all the officers eligible for court-martial duty within the circuit and, if the accused has elected to have enlisted men on his court, insure that the requisite number of enlisted members are chosen by random selection from all the enlisted men eligible for court-martial duty within the circuit (see pages 98-99).

E. Upon the completion of the trial, the military judge will forward the record to the circuit judicial officer for review.

4. *Membership and Selection of the Court*—Trial lawyers are well aware of the fact that trials are often won or lost according to whether the lawyer is able to obtain jurors whose attitudes and prior experiences relate favorably to their case. Thus, the commander's power to hand-pick the court members from a small, select class (his officers) gives a tremendous advantage to the prosecution. If the present requirement that at least two-thirds of the members of every court-martial must be officers were removed, and if members were selected at random from the entire military community at the particular installation, it is likely that a heavy majority of the members would be young men in the lower ranks. The military views this change as highly undesirable, arguing that class antagonisms might prevent lower ranking servicemen from rendering an honest verdict and cause undue sympathy for the accused. The military has also raised the somewhat contradictory objection that low ranking enlisted men might be overwhelmed by the presence of officers on the court and therefore not exert their own independence. Finally, the military has argued that low ranking enlisted men are not qualified to serve on courts-martial because of their lack of experience in the military and their lack of understanding and appreciation of the purposes and objectives of military discipline.

These arguments actually go to the heart of the jury system itself. Permitting an accused to be tried by a jury of his peers chosen at random always involves the possibility that jurors will be sympathetic to the accused, swayed by other members of the jury, or that they will not appreciate the purposes and objectives of the prosecution and the criminal laws. These qualities, however, are only objectionable if they prevent a juror from viewing a case with an open mind, and they have a valuable function in insuring trial by a jury whose members reflect the different experiences, attitudes, and class prejudices found in the community. The court-martial comprised solely of officers is especially lacking in these qualities.



There seems to be little basis for arguing that lower ranking servicemen are not qualified to sit as members of courts-martial. Today, when a high percentage of enlisted men have a high school education and a substantial minority are college educated, they appear to possess as acceptable qualifications as the average civilian juror. There may be, however, some risk that court-martial members from lower ranks will be more class motivated and less objective than civilian jurors. The young recruit, who has been forced to accept a highly disciplinarian way of life, may harbor deeper antagonisms against a military prosecution than does the average civilian juror towards the district attorney's case. The continued effects of the anti-war movement, of the servicemen's movement for unionization in the military, and of the movement for expanded individual rights in the military have increased anti-establishment antagonisms among some servicemen. Of course, similar problems exist in civilian law, and no one has suggested that the right to be tried by a jury of the accused's peers should be suspended because, for example, a high percentage of the jury in a prosecution for acts connected with a labor dispute might be sympathetic to the aims of the workers.

Both the military and some of its critics have maintained that trial by peers is not adaptable to the military because of the potential bias inevitably created by the military caste system. Thus, advocates of the present system argue that the right to court-martial members randomly selected from a broader base would be dangerous, while reformers, such as Charles Morgan,<sup>407</sup> argue that the military can never provide a serviceman an impartial trial and therefore all military crimes should be tried in civilian courts. General Ansell, on the other hand, took the position that if court membership were weighted somewhat against complete domination by the lower ranks, while still insuring that members of the same rank as the accused would hold the controlling votes on the court, trial by jury approximating the civilian right to trial by one's peers could be achieved. The following suggestions for reform of the UCMJ are based upon this view. However, like most compromises, this view can only be recommended with the caveat that it may prove inadequate to insure serviceman a fair trial, and as a result broader guarantees of trial by one's peers or a civilian jury may ultimately be required.

A. An enlisted man or officer may elect to have one-half of a general or special court-martial composed of members of his own rank.

B. The circuit judicial officer of each judicial circuit will insure that the name of every enlisted man assigned to a unit within that district who is eligible for court-martial duty is placed in an enlisted man's jury roll or wheel, and that the name of every officer assigned to a unit within that district, who is eligible for court-martial duty, is placed in an officer's jury roll or wheel. Standards for eligibility will be established, with ex-

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<sup>407</sup> THE NEW YORKER, Oct. 25, 1969, at 63, 119.

ceptions from court-martial duty limited to extreme personal or official hardship, with the requirement that such reasons be described in full in writing and sent to the circuit judicial officer who will rule on such exemptions.

C. The circuit judicial officer will insure that a court is chosen by random selection from the officers' jury roll or wheel for court-martial duty for each individual court-martial and, if accused has elected to have enlisted personnel on his court, will insure that the requisite number of enlisted members is chosen by random selection from the enlisted men's jury roll or wheel.

5. *Judicial Functions*—The establishment of a field judiciary system in the Military Justice Act of 1968 insures that the court-martial function of military judges will be performed by individuals free from the commander's control. This procedure is satisfactory, and the only recommended changes would be to put the military judges under the administration of the judicial circuits which have been proposed.

6. *Defense Counsel*—The most serious weakness in the present law providing for military lawyers in both general and special courts-martial is that the lawyers come from the office of the commander's staff judge advocate. The staff judge advocate, because of his close association with the commander as his principal legal advisor, is not independent. The staff judge advocate's office often resembles a small law firm, and there is usually a good deal of discussion of cases between opposing counsel and other lawyers in the office. All actions are inevitably influenced by the staff judge advocate. Law firms have recognized that they cannot avoid conflict of interest problems by claiming that different lawyers in the firm are handling each side of the case and, despite the good faith of most military lawyers, the closeness in which they work and the overriding command interest of the staff judge advocate are not conducive to an adversary defense.

A second problem with military defense counsel is that, in some cases, the usually higher ranking members of the court prevent counsel from taking as strong a position of advocacy as they should. The only way to avoid such problems is to remove as many of the trappings of rank as possible from a court-martial trial, and to forbid any adverse action against a defense counsel on account of his zeal in the court room. Finally, one substantial defect in the adequacy of military defense counsel results from the refusal of the Judge Advocate General to permit them to bring collateral suits for extraordinary relief (such as habeas corpus, injunction, mandamus, and declaratory judgment) in federal district courts.<sup>408</sup> There are times when the only way a serviceman's

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<sup>408</sup>In the court-martial case involving Lieutenant Morriseau, discussed by West, note 384 *supra*, his appointed military counsel was refused permission from

rights can be protected is by seeking federal court relief,<sup>409</sup> and if he is unfortunate enough only to be represented by a military lawyer, that avenue will be foreclosed to him.

The following suggestions for reform of the UCMJ in this area are made:

A. Defense counsel will be selected by the chief of the defense counsel division of the judicial circuit. A defense counsel need not be a member of the same service as the accused, unless the accused so requests.

B. Defense counsel are subject to the command of the chief of their division who is in turn responsible to the circuit judicial officer. They will not be subject to the command of any commander convening authority or his staff judge advocate.

C. No adverse action of any kind may be taken against a defense counsel by an individual subject to the UCMJ on account of his performance as counsel in a particular case, except that the chief of the defense counsel division and the circuit judicial officer may rate him on the merits of his judicial work.

D. Defense counsel shall be authorized to bring suit in federal district courts when deemed necessary to protect the interests of a client. Court costs will be paid by the military.

E. The chief of the defense counsel division may assign as a defense counsel for a particular case an officer from the appellate counsel division of the office of the Judge Advocate General and such counsel shall be permitted to represent the client through appellate review.<sup>410</sup>

7. *Nature of the Trial*—The UCMJ, as amended by the Military Justice Act of 1968 and supplemented by the *Manual*, now provides a relatively judicial format for general and special courts-martial. The military rules as to admissibility of evidence,<sup>411</sup> scope of cross-

the Judge Advocate General of the Army to file a federal court action seeking to enjoin the court-martial on the ground that the prosecution was brought without hope of ultimate success and would have a chilling effect on first amendment rights. The suit was prepared by civilian counsel but the court-martial charges were dropped before it was filed.

<sup>409</sup> See *Extraordinary Remedies*, 1 THE ADVOCATE, August 1969, at 1-4; Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Doctrine*, 55 VA. L. REV. 483 (1969).

<sup>410</sup> See Rydstrom, *supra* note 404, at 750 n.10.

<sup>411</sup> The rules of evidence contained in the MANUAL, 1969, *supra* note 317, at §§ 137-54, are comparable to the rules followed in most federal courts. Occasionally one system or the other applies a more stringent rule, for example, the Court of Military Appeals in *United States v. Gooding & Axel*, 18 U.S.C.M.A. 188, 39 C.M.R. 188 (1969) (Ferguson, J., dissenting) declined to follow the restrictive rule of *Bruton v. United States*, 391 U.S. 123 (1968) which concerned the admissibility of pretrial statements by a joint defendant.

examination,<sup>412</sup> and affirmative defenses<sup>413</sup> such as the defense of insanity,<sup>414</sup> are comparable to civilian courts. The military rule as to challenges, both peremptory (only one permitted to the defendant)<sup>415</sup> and for cause,<sup>416</sup> are barely satisfactory and do not provide the same kind of broad protection found in civilian trials. Decisions of the Court of Military Appeals as to requirements of specificity of specifications,<sup>417</sup> providency of guilty pleas,<sup>418</sup> and instructions to the court<sup>419</sup> are at least as fair as most civilian courts.

<sup>412</sup> MANUAL, 1969, *supra* note 317, at § 149b. *See also* United States v. Baldwin, 17 U.S.C.M.A. 72, 37 C.M.R. 336 (1967).

<sup>413</sup> MANUAL, 1969, *supra* note 317, at §§ 214-16.

<sup>414</sup> *Id.* at § 120b. "A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right." *Id.* The military test for insanity is broader than the *M'Naghten* rule, with a formulation similar to that of the ALI MODEL PENAL CODE.

<sup>415</sup> *Id.* at § 62e. In contrast, under FED. R. CRIM. P. 24(b) each side is entitled to 20 peremptory challenges if the offense charged is punishable by death; the government to six and the defense to ten if the offense is punishable by imprisonment for more than one year; and each side to three if the offense is punishable by imprisonment for not more than one year or by fine, or both.

<sup>416</sup> *Id.* at § 62f. Court members who display on *voir dire* prejudices and conflicts of interest which would be grounds for challenge for cause in a civilian court are frequently allowed to remain on courts-martial. *See, e.g.*, the Presidio courts-martial in which a defense challenge was denied as to a major who stated that he did not think demonstrations were ever a proper way to express grievances and admitted that he bowled weekly with the post's Provost Marshal who was directly involved in the incident on which the courts-martial were based. N.Y. Times, Jan. 31, 1969, at 3, col. 1. The reason often given for a less liberal challenge rule in the military is that the number of officers available for court-martial duty is usually limited.

<sup>417</sup> *See, e.g.*, United States v. Jackson, 16 U.S.C.M.A. 509, 37 C.M.R. 129 (1967); United States v. Fleig, 16 U.S.C.M.A. 444, 37 C.M.R. 64 (1966). *But see* United States v. Aloyian, 16 U.S.C.M.A. 333, 36 C.M.R. 489 (1966) (Ferguson, J., dissenting).

<sup>418</sup> United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969); United States v. Calpito, 18 U.S.C.M.A. 450, 40 C.M.R. 162 (1969). The *Care* decision was intended to bring military procedure as to the judge's obligation to insure the providency of a guilty plea up to the federal court standard as expressed in FED. R. CRIM. P. 11, *Boykin v. Alabama*, 395 U.S. 238 (1969), and *McCarthy v. United States*, 394 U.S. 459 (1969). However, it has been suggested that the military rule, permitting the trial judge to question the accused to determine if there is a factual basis for the plea, rather than determining this factor from other sources as under the federal rule, could prejudice the accused or cause him to incriminate himself in an uncharged crime. 1 THE ADVOCATE, September 1969, at 8-9.

<sup>419</sup> United States v. Johnson, 18 U.S.C.M.A. 436, 40 C.M.R. 148 (1969); United States v. Meador, 18 U.S.C.M.A. 91, 39 C.M.R. 91 (1969).

Unfortunately, vestiges of the old court-martial administrative hearing still remain and serve as constant reminders that this is a military, not merely a judicial, hearing. It seems unlikely that the participants can escape being affected by such military aspects or that they serve any useful judicial purpose. The following are recommendations for changes in court-martial trial proceedings to make the formalities conform to a genuine judicial proceeding: (a) Judicial robes for military judges should be provided. The court room should be redesigned so that it will be identical to a civilian court room with the judge at the front and the court in a jury box. Seating by rank and saluting should be abolished. The use of "sir" when examining witnesses should be discouraged; (b) a transcript should be provided by the field judiciary division in all general and special courts-martial if requested by accused and a showing is made that lengthy or complicated testimony is expected; (c) the procedure for compelling attendance of witnesses and discovery of evidence should be changed so that all of such requests are made to the circuit judicial officer or to the military judge if already appointed; and (d) classified material and other material which cannot be made available to the accused and his military and civilian counsel should be made inadmissible as evidence in a court-martial.

8. *Post-Trial Proceedings*—The appellate structure in the military needs a thorough overhauling. The numerous administrative reviews by officers all too often become a routine without any real scrutiny of the record. The courts of military review are not yet independent, and too few cases get to the Court of Military Appeals. The following recommendations are made:

A. Commanders will not review court-martial convictions or sentences. Upon completion of all general and special courts-martial, the military judge will forward the record to the circuit judicial officer for review by the review division of the judicial circuit.

B. Upon completion of the review by the judicial circuit, if any part of the sentence still remains, the record of all general and special courts-martial will be forwarded to the Judge Advocate General for review.

C. Upon completion of the review by the Judge Advocate General, the accused will have 30 days in which to give a notice of appeal to the court of military review from any general court-martial conviction, or from any special court-martial conviction in which the sentence as approved on review includes a bad conduct discharge or exceeds four months confinement. No further review will be provided for other cases.

D. Upon completion of the appeal to the court of military review, the accused will have 30 days in which to give a notice of appeal to the Court of Military Appeals from any general court-martial conviction in which the sentence as affirmed by the court of military review affects

a general or flag officer or extends to death or includes a bad conduct or dishonorable discharge or includes confinement of one year or more.

E. The Court of Military Appeals shall review all such cases as to errors of both law and fact.

F. The Court of Military Appeals<sup>420</sup> and the courts of military review<sup>421</sup> will grant equitable and extraordinary relief in any situation involving a serviceman, and the Court of Military Appeals shall possess the power to issue any writ necessary to insure the prompt protection of servicemen's rights under the Constitution, the laws of the United States, or military rules and regulations.

G. Jurisdiction is extended to United States district courts to hear cases in which a serviceman claims a denial of his constitutional rights resulting from the action of a court-martial or a military determination, when it is shown that the military remedy, including court-martial, is not adequate to protect the rights of the petitioner or to prevent a chilling effect upon the first amendment rights of the petitioner or others similarly situated.

8. The judges of the courts of military review, who may be civilians or military men, will be appointed by the President for terms of three years. They will be assigned to the office of the Judge Advocate General and the court will be placed there, but only for administrative convenience and personnel and administrative support. They will not be rated if they are military men on their tour as a judge on the court.

#### IV. CONCLUSION

The movement for civilianization of military law has achieved only limited success in the 50 years since General Ansell proposed an overhaul of the court-martial system. However, the tremendous changes which have taken place in the nature of the military suggest a renewed movement for reform of the basic structure of the court-martial, with particular emphasis upon further limitation of command control and broadening of court membership. These changes, far from threatening the dissolution of proper military order, appear to promise a more equitable system of justice which will strengthen the morale of servicemen and restore the confidence of the public in the quality of military justice.

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<sup>420</sup> Although the Court of Military Appeals has now claimed it possesses "all writs powers," it has denied relief in most cases seeking extraordinary relief. See Sherman, *supra* note 409, at 532 n.228.

<sup>421</sup> It has been suggested that Courts of Military Review can grant extraordinary relief. *In re Strickland*, Misc. No. 69-48 (U.S.C.M.A., Sept. 24, 1969); CM 419804, Dolby, — C.M.R. — (Sept. 19, 1969); CM 419804, Smith, — C.M.R. — (Feb. 14, 1969), but the courts have not exercised such powers.

