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Courts-Martial and the Commander

KENNETH J. HODSON*

The most serious shortcoming in our military justice system is the danger of undue command influence over courts-martial. . . . In addition to the danger presented by command influence, the military justice system denies a defendant other rights fundamental to a free society.¹

—*Senator Birch Bayh*

In the fiscal year ending June 1972, three thousand three hundred nineteen soldiers were tried by “felony-type” courts-martial²

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1. 117 CONG. REC. 5306 (1971) (remarks of Senator Bayh introducing S. 1127, 92d Cong., 1st Sess., which would make major changes in the Uniform Code of Military Justice).

2. The military court of general criminal jurisdiction, the general court-martial, can adjudge any sentence not prohibited by law within the maximum punishment established by the President of the United States for the offense of which the accused has been convicted. 10 U.S.C. § 818 (1970). The court of intermediate jurisdiction, the special court-martial, has jurisdiction to try any non-capital offense. The maximum punishment which it may adjudge is six months confinement, six months forfeiture of two-

in the Army. Of these, three thousand one hundred ten were convicted of some offense for a conviction rate of just under 94%. Critics of military justice, who are either unaware of, or choose to ignore, civilian conviction rates,³ frequently point to this conviction rate as proof that the military system—in which the commander decides whom to try, selects the members of the jury, and reviews the results of the trial—is less fair than the civilian justice system.⁴ Comparison of these systems, however, reveals that pretrial and post-trial procedures in the military more closely approach the American Bar Association Standards for Criminal Justice than procedures followed in many civilian jurisdictions. Although the

thirds pay, and a bad-conduct discharge. However, the special court-martial may not adjudge a bad-conduct discharge unless a verbatim record is made and the accused is provided with lawyer counsel. 10 U.S.C. § 819 (1970). I use the term “felony-type” court-martial to refer to general courts-martial and to those special courts-martial empowered to adjudge a bad-conduct discharge. An equivalent term would be “non-petty offense-type” court-martial. 18 U.S.C. § 1 (1970). The lowest military court, the summary court-martial, has jurisdiction to try enlisted persons who consent to trial for minor offenses. It can adjudge forfeiture of two-thirds pay for one month, reduction in grade, and, provided lawyer counsel is made available to the accused (see *Argersinger v. Hamlin*, 407 U.S. 25 (1972), confinement for one month.

3. Federal figures for fiscal year 1972 are not available. In fiscal year 1971, the Army tried 3,942 persons by felony-type courts-martial. The term “tried” is used to include those cases which were litigated on their merits and does not include cases which were dismissed at a pre-trial hearing, for example, for lack of a speedy trial, or, for example, were dismissed when a resignation tendered by the accused was accepted. 3,762 soldiers were convicted of some offense, a conviction rate of approximately 95.5%. These figures are taken from *Fiscal Year 1971 and Fiscal Year 1972 Report of General and Special (BCD) Court-Martial Data* available from Clerk of Court, United States Army Judiciary, Nassif Building, Falls Church, Virginia 22041.

During fiscal year 1971 federal courts tried 46,674 persons. 24% of these cases were dismissed, a percentage which includes dismissals after commencement of the prosecution case as well as prior to trial. Of the cases which were tried and not dismissed, 96% resulted in conviction. See, Administrative Office of the U. S. Courts, Federal Offender Datagraphs, A-18 (1972).

4. The American Bar Association, on the contrary, warns that a “high acquittal rate is itself a prime indicator of either inadequate exercise of discretion in making the charge or inadequate preparation for or presentation at trial.” ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, § 3.4 at 84 (1971) [hereinafter cited as STANDARDS]. The “Article 32 investigation,” 10 U.S.C. § 832 (1970), required prior to all general courts-martial, and the requirement that the commander budget for the cash costs of the trial, such as travel and court reporter costs, witness fees, laboratory tests, etc., serve to keep losing cases out of military courts. The decision to refer a case to trial by court-martial is affected by the fact that a high court-martial rate—particularly if it involves military-type offenses, such as unauthorized absence, disrespect, or disobedience—has long been considered as an indicator of poor leadership.

military's system for selecting jurors fails to measure up to the ABA Standards, and is in need of change, it results in the selection of jurors who closely resemble the type of persons found on juries in most state courts.

Senator Bayh has introduced legislation which would establish a Court-Martial command within the Army and remove the commander from the judicial process.⁵ While I disagree with the desirability of a separate Court-Martial command, I do agree with his concept that the prosecuting, judging, and defense functions should be separated, and I favor removal of the commander from the system except for post-trial clemency purposes.⁶ The com-

5. See Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971), a part of that volume's symposium on military law.

6. See Hodson, *The Manual for Courts-Martial—1984*, 57 MIL. L. REV. 1 (1972), delivered at the first Kenneth J. Hodson Criminal Law Lecture at The Judge Advocate General's School, Charlottesville, Virginia, April 12, 1972.

While the United States government has three branches, legislative, executive, and judicial, few would suggest that the judicial branch is wholly separate from the national community which it serves. Most knowledgeable observers would agree with Mr. Dooley's perceptive observation—

No matter whether th' constitution follows th' flag or not, th' Supreme Court follows th' illiction returns.

While much of the criticism of military justice finds its source in anti-military, anti-establishment feelings, even among critics who consider themselves to be objective, there is a widespread belief that "true justice," whatever that term may mean, cannot exist within the military because of the influence of the commander in establishing and maintaining community standards of behavior. It should be obvious that the same type of community influence is found in civilian communities, where there is pressure on an elected judge—as well as on the members of a jury who must live in the community after disclosing their vote by a unanimous verdict—to maintain the standards of conduct that are acceptable to the responsible members of the community. In a recent address to the American Bar Association, Lord Denning, the Master of the Rolls in England, observed: "Justice is what the right thinking members of society believe to be fair." It is not basically unfair for the members of the society which sets the standards of conduct to sit in judgment on those who are alleged to have violated those standards. In this respect, although its standards may be stricter, the military community is no different from the civilian community.

Further, taking the commander completely out of the process would prevent him from helping in the process of correction and rehabilitation. If he wants to try to let the accused "soldier" his way out of his difficulty, I favor giving him the authority. The civilian correctional system is notoriously unsuccessful because it puts the accused in the artificial environ-

mander and his legal advisor are the "government," and their authority prior to and during trial should extend only to filing a "complaint" with the court and providing a prosecutor. The need for change, however, exists not because the military system is unfair—on the whole, it is probably more protective of the accused's rights than any other system of criminal justice in use in the states of the United States—but because it has the reputation of being unfair. Pertinent is a remark attributed to Justice Holmes: "A system of justice must not only be good, but it must be seen to be good."⁷

This article will examine the three most often criticized aspects of military justice, all of which involve the commanders' participation: (1) the decision to charge, (2) the selection of the jury, and (3) appellate review.

THE DECISION TO CHARGE THE ACCUSED WITH COMMITTING AN OFFENSE

Citizens accused by the federal government of capital or "infamous" crimes, generally crimes for which confinement for one year or more may be adjudged, have a Constitutional right to indictment by or presentment of a grand jury.⁸ This right is not applicable to the states,⁹ and most states permit the prosecutor to proceed by information, that is, a complaint presented to a magistrate.¹⁰ In Los Angeles County, for example, less than 1% of the

ment of the prison; giving the soldier the opportunity of trying to rehabilitate himself in his own community offers greater prospects of success.

7. Anthony G. Amsterdam of the Stanford University law faculty has suggested the urgent need to appraise criminal justice, not by a discussion of rights the criminal has but by examination of the treatment he actually gets. Amsterdam, *We Have Two Kinds of Justice—One for the Poor and One for Us*, 11 INTELLECT. DIG., No. 12 at 49 (Aug. 1972), reprinted from the Stanford Observer. I agree with this approach, and I am attempting in this article to compare military and civilian justice at a functional level. Time and space do not permit exhaustive treatment of every aspect of the administration of criminal justice, but the article will perhaps provide a starting point for comparison. An article providing similar treatment is Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 51 MIL. L. REV. 1 (1971), reprinted from a Symposium on Justice in the Military at 22 MAINE L. REV. 105 (1970). See also Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482 (1971).

8. U.S. CONST. amend. V. See Note, *Indictment Sufficiency*, 70 COLUM. L. REV. 876, 881-882 (1970) for a discussion of cases in which an indictment is required. A comprehensive study of the grand jury is contained as a symposium at 10 AM. CRIM. L. REV. No. 4 (Summer 1972).

9. *Hurtado v. California*, 110 U.S. 516 (1884).

10. See Steele, *Right to Counsel at the Grand Jury Stage of Criminal Proceedings*, 36 MO. L. REV. 193 n.1 (1971) and Spain, *The Grand Jury Past*

cases are referred to the grand jury. In Detroit, prosecution is always by information.¹¹ Within the federal system, cases arising "in the land or naval forces" are excluded from the requirement of presentment or indictment by the terms of the Fifth Amendment,¹² and the Army has no provision for convening a grand jury.¹³ No case may be referred to trial by general court-martial, however, until an Article 32 investigation¹⁴ has been conducted and a lawyer has advised the convening authority in writing¹⁵ whether the

and Present, A Survey, 2 AM. CRIM. L.Q. 119 (1964), for a state by state summary of methods of initiating a felony prosecution. As of 1971 the prosecutor had the option of proceeding by information in 26 states. See generally Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960). As in the federal system, use of the information generally does not prevent going before a grand jury in cases where the magistrate discharges the accused. FED. R. CRIM. P. 5.1(b); Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same*, 35 MO. L. REV. 281 (1970).

11. McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154, 1156 (1970). See also McIntyre, *A Study of Judicial Dominance of the Charging Process*, 59 J. CRIM. L.C. & P.S. 463 (1968), for a discussion of the relative roles of police, prosecutor, magistrate, and grand jury in the charging process.

12. U.S. CONST. amend. V, reads, in part, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces."

13. Beginning in 1963, however, the Department of the Army provided indictment by grand jury for persons tried in the Courts of U.S. Civil Administration of the Ryukyu Islands. These courts generally tried dependents of U.S. military personnel and civilian employees of the Army, although they had jurisdiction to try Ryukyuan and U.S. military personnel as well. Their legality was approved after being challenged by the proprietress of the Tea House of the August Moon. *Rose v. McNamara*, 375 F.2d 924 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 856 (1967). No soldier was tried in these courts during their twenty-seven year history which ended with the return of the Islands to Japan, 15 May 1972.

14. 10 U.S.C. § 832 (1970).

15. 10 U.S.C. § 834(a) (1970). MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 85b (rev. ed. 1969) [hereinafter cited as MCM, 1969]. The recommendation of the Article 32 investigating officer and the advice of the legal advisor are not binding. In practice, however, these recommendations are generally followed, as commanders recognize the expertise of their lawyer and the value of the independent fact finder. (In this connection see the comment in note 10, *supra*, as to the similar right of the civilian prosecutor to dispute the ruling of a magistrate discharging the accused.) The report of investigation and written advice are included as part of the record of trial. The appellate courts, therefore, can easily correct any error of judgment by the convening authority, as they are aware of the recommendations of the legal advisor and the investigating

charges state an offense and whether trial is warranted, based on the report of the investigation.

The classic empirical study of the independence of grand juries was conducted by Wayne Morse in the early 1930s.¹⁶ He concluded that, nationwide, grand juries tend to rubberstamp the prosecutor's recommendation, whether made expressly, which ABA Standards would still permit,¹⁷ or indirectly, and that grand juries are a "fifth wheel" in the administration of criminal justice.¹⁸ Although grand jury procedures vary from jurisdiction to jurisdiction, commentators have generally agreed that they do not in practice often disagree with the recommendation of the prosecuting attorney and, as at least one practicing attorney has put it, therefore fail to protect the innocent accused against unfounded accusations.¹⁹ In a

officer and of the reasons those officers felt a disposition different from that ordered by the convening authority was appropriate. In several of the so-called Presidio Mutiny cases, for example, the records of trial on file with the Clerk of the Army Court of Military Review show that the convening authority refused to follow the recommendations of the investigating officer that the mutiny charge be reduced to a lesser offense. In a number of those cases, the Judge Advocate General substantially reduced the confinement imposed by the court pursuant to his authority under 10 U.S.C. § 874 (1970). Thereafter, appellate review by the Court of Military Review resulted in further remission of the punishment, as the court affirmed a lesser included offense, setting the mutiny conviction aside. See, e.g., *United States v. Sood*, 42 C.M.R. 635, *petition denied*, 20 U.S.C.M.A. 636, 42 C.M.R. 356 (1970), and the companion cases reported at 42 C.M.R. 647, 648, 665, 666, and 668.

16. Morse, *A Survey of the Grand Jury System* (pts. 1-2), 10 ORE. L. REV. 101, 217, 295 (1931).

17. STANDARDS, *supra* note 4, § 3.5. The Commentary to the Standards provides at 88, "In situations where the prosecutor must prosecute an indictment returned by a grand jury, it is especially important that he be free to express his opinion. A prosecutor who had conducted an adequate investigation and analyzed the evidence is in a position to furnish guidance to the grand jury on the law and the weight of the evidence and should be free to do so whether this leads to a determination to indict or not to indict."

18. Morse, *supra* note 16, at 325.

19. Foster, *Grand Jury Practice in the 1970s*, 32 OHIO ST. L. REV. 701 (1971); Morse, *supra* note 16, at 361-364; 8 J. MOORE, FEDERAL PRACTICE—CIPES, CRIMINAL RULES, ¶ 6.02[1][b] (2d ed. 1972). See Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations* (pts. 1-2), 18 U.C.L.A.L. REV. 636, 678-685 (1971); Steele, *supra* note 10, at 199-207; Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361, 1380 (1969); Moyer, *supra* note 7, at 11 n.65. The titles of three of the articles cited by Moyer hint at the problem: Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965); Coates, *Grand Jury: The Prosecutor's Puppet. Wasteful Nonsense of Criminal Jurisprudence*, 33 PA. B. ASS'N Q. 311 (1962); Watts, *Grand Jury, Sleeping Watchdog or Expensive Antique?*, 37 N.C.L. REV. 290 (1959).

recent American Bar Association Journal the Honorable Melvin P. Antell said, "Realistically, the most demanding task faced by a conscientious prosecutor in a grand jury room is that of making a defendant's rights understandable to a grand jury bent on indicting without sufficient evidence but upon great provocation. . . . [A]lthough the grand jury is exalted as a curb upon arbitrary use of power, ironically it encourages abuse by allowing the prosecuting authority to carry on its work with complete anonymity and with effects greatly magnified by the accompanying judicial rites."²⁰

The conclusions reached by a group of Duquesne law students after a study of all aspects of the jury system are instructive:

The theory is that a grand jury will protect a citizen from an overzealous prosecutor and that factually baseless charges will be dismissed. The students questioned the factual accuracy of these assumptions, labelling them as naive. They concluded that the practice of submitting cases to grand juries is a waste of time and money, without any substantial offsetting benefits to the defendant. They found that the grand jury is used by some prosecutors to dismiss criminal proceedings secretly rather than by *nolle prosequi* with approval of court. In other instances, the students concluded prosecutors use grand jury hearings as an opportunity to have discovery which is denied to the defendant and, worse, as an occasion for impermissibly suggesting or molding the testimony of a prospective witness. Even under the federal system, where there is some opportunity for a defendant ultimately to gain access to the transcripts of grand jury testimony, they concluded that the opportunities for misuse of the grand jury process outweigh the benefits to the defendant which are claimed for the system.²¹

Without going into detail, it is fair to say that the nature of a grand jury proceeding is conducive to approval of the prosecutor's recommendation. It is traditionally a secret proceeding to insure straightforward testimony and discussion, to avoid needless em-

The preliminary hearing, in jurisdictions where magistrates are not lawyers, has been subject to similar criticism. See Anderson, *supra* note 10. The Federal Magistrates Act of 1968 provides that United States Magistrates shall be attorneys except for part-time magistrates in limited circumstances. 28 U.S.C. § 631(b) (1970).

20. Antell, *supra* note 19, at 155, 156. Mr. Antell is a judge of the County Court in Essex County (Newark), New Jersey. He served eight years as an assistant in the Office of the Essex County Prosecutor in Newark during which time he took cases before the grand jury as part of his duties.

21. Helwig, *The American Jury System: A Time for Reexamination*, 55 JUDICATURE 96, 98 (1971).

barrassment to an innocent accused and to prevent flight or perjured testimony.²² The need for secrecy has been thought to require the absence of the accused and his attorney, and, consequently, the accused has no right of cross-examination, confrontation, or presentation of evidence.²³ The attitude that the trial will provide the accused his day in court has provided justification for the *ex parte* nature of the proceedings as well as for relaxed rules of evidence.²⁴ Even under federal rules and ABA Standards, hearsay is competent evidence and may provide the sole basis for indictment, although secondary evidence, by ABA Standards, should be used only for "cogent reasons."²⁵

In theory, the Article 32 investigation is not an adversary proceeding, but in practice, the accused is provided all the protection he would receive if it were.²⁶ The hearing is conducted by an impartial officer, usually of the grade of major or higher. The accused has an absolute right to be present at all sessions of the investigation and to be represented by a qualified military lawyer,

22. See Meshbesh, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189 (1967); Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962).

23. FED. R. CRIM. P. 6(d); Meshbesh, *supra* note 22, at 206.

24. 8 J. MOORE, FEDERAL PRACTICE—CIPES, CRIMINAL RULES ¶ 6.02[1][a] (2d ed. 1972); *Costello v. United States*, 350 U.S. 359, 363 (1956); *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968); See *Indictment Sufficiency*, *supra* note 8.

25. FED. R. CRIM. P. 5.1(a); STANDARDS, *supra* note 4, § 3.6 at 88-89; *Costello v. United States*, 350 U.S. 359, 363 (1956); See Comment, *Indictment Upheld Even Though Founded Solely on Hearsay Evidence*, 104 U. PA. L. REV. 429 (1955).

26. 10 U.S.C. § 832 (1970), provides in part:

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

See MCM, 1969, *supra* note 15, para. 34; Moyer, *supra* note 7, at 6-11.

provided free, or a civilian lawyer, if provided by him. Witnesses, unless unavailable, must be called to testify and are subject to cross-examination. Sworn statements may be considered if the witness is unavailable. The accused has a right to make a sworn or unsworn statement and to present evidence in his own behalf, including evidence which goes only to extenuation and mitigation. In determining whether to refer the case to trial, the convening authority (the commander who orders the charges tried before a court-martial which he "convenes") must base his decision on the evidence considered by the Article 32 investigating officer only.²⁷

Confrontation, cross-examination, and representation by an attorney at the Article 32 investigation provide the military accused with an opportunity for discovery not provided a civilian accused.²⁸ Even in the federal system, an accused has no right to access to the pretrial statements of witnesses until after they have testified.²⁹ Originally, the Jencks Act did not apply to grand jury proceedings, which were discoverable prior to trial upon a showing of special circumstances, a particularized need.³⁰ The Organized Crime Control Act of 1970, however, brought statements made to grand juries within the scope of the act.³¹ This will make discovery of a witnesses' grand jury testimony a matter of right once he has testified at trial. It may also serve to prevent discovery until after the witness has testified at trial, even upon a showing of particularized need, although one District Court has held to the contrary.³²

27. 10 U.S.C. § 834(a) (1970).

28. For a discussion of military discovery, see Saunders, *Proposed Changes in Military Discovery*, 10 AM. CRIM. L. REV. 81 (1971).

29. FED. R. CRIM. P. 16; Jencks Act, 18 U.S.C. § 3500 (1970). See Comment, *Toward Effective Criminal Discovery: A Proposed Revision of Federal Rule 16*, 15 VILL. L. REV. 655 (1970); Comment, *Discovery in New York: The Effect of The New Criminal Procedure Law*, 23 SYR. L. REV. 89 (1972); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL, § 2.1(a) (i), at 52-56 (1970).

30. *Dennis v. United States*, 384 U.S. 855 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). Comment, *Toward Effective Criminal Discovery*, *supra* note 29.

31. 18 U.S.C. § 3500(e) (3) (1970). The Jencks Act was amended to include a statement made to a grand jury within the Act's definition of statement, at least for purposes of providing discovery as of right once the witness has testified at trial. Act of Oct. 15, 1970, Pub. L. No. 91-452, tit. I, § 102, 84 Stat. 926, amending 18 U.S.C. § 3500(e) (1964).

32. *United States v. Duffy*, 54 F.R.D. 549 (N.D. Ill. 1972). The prohibi-

Restrictive discovery in federal and state courts has led to attempts to use the preliminary hearing before a magistrate as a means of discovery.³³ Unlike the Article 32 investigation, however, the government is not required to reveal its entire case at such a proceeding. It need only call enough witnesses to establish probable cause to bind the accused over to the grand jury or for trial. Additionally, in the federal system, it is common practice for a prosecutor to avoid the requirement for a preliminary hearing by proceeding directly to the grand jury, thereby preventing discovery.³⁴ Mr. Chief Justice Burger, in his dissent in *Coleman v. Alabama*,³⁵ which holds that, where a state provides for a preliminary hearing it must provide counsel for an indigent accused, suggests that the Court held as it did only because it wished to provide the accused an opportunity to use the hearing for meaningful discovery.³⁶

Allowing a convening authority to determine who will stand trial, however, has the appearance of evil—the evil being that the court-martial appears to be an instrument of discipline rather than an instrument to aid in creating a peaceful or law-abiding environment in the military community within which leadership can function to create discipline and high morale. I, therefore, favor a court system in which the commander's legal advisor would have the power to docket cases for trial, followed by a probable cause hearing before a judge assigned to a central judiciary. This probable cause hearing would replace the present Article 32 investigation, but the commander and his legal advisor could not overrule the judge's determination that probable cause did not exist to hold the accused for trial.³⁷

JURY SELECTION

The military jury differs from the civilian jury in that it almost always consists of less than twelve members,³⁸ only a two-thirds

tion against discovery of a witness' statements until after he has testified at trial is contained in paragraph (a) of 18 U.S.C. § 3500 (1970). The definition of statement given in paragraph (e) by the terms of that paragraph applies to paragraphs (b), (c) and (d). *Duffy* concludes, therefore, that it does not apply to paragraph (a). Originally paragraph (a) dealt only with statements made to government agents, but the phrase, "to an agent of the government" was deleted by the 1970 amendments. This suggests that paragraph (a) may apply to statements made to grand juries.

33. See Anderson, *supra* note 10; Note, *Preliminary Hearing in The District of Columbia—An Emerging Discovery Device*, 56 Geo. L.J. 191 (1967).

34. 18 U.S.C. § 3060(e) (1970); Weinberg & Weinberg, *supra* note 19.

35. 399 U.S. 1 (1970).

36. *Id.* at 25.

37. Hodson, *supra* note 6, at 10.

38. The general court-martial jury must consist of not less than five members; the special court-martial jury, not less than three members. 10

vote is necessary to convict, and anything less than a two-thirds vote will acquit the accused.³⁹ Generally speaking, a civilian jury consists of 12 members who must not only agree unanimously to convict, but must also agree unanimously to acquit. The right to jury trial has now been extended to the states,⁴⁰ and the United States Supreme Court has recently upheld the validity of state provisions providing for less than a twelve-man jury,⁴¹ and less than a unanimous verdict.⁴² The Court's approach in these decisions was goal oriented. As it noted in *Williams*, ". . . the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."⁴³

Despite the goal of community participation, methods of selecting civilian juries have resulted in practice in the selection of a

U.S.C. § 816 (1970). A military judge assigned to the United States Army Judiciary, a separate unit under the jurisdiction of The Judge Advocate General, will also be detailed to every felony-type court-martial, 10 U.S.C. §§ 816, 819 (1970). Army Regulation 27-10, ¶ 2-16b (Change 8, 7 Sept. 1971). Except in a capital case, the accused may request to be tried by military judge alone. 10 U.S.C. § 816 (1970). Such requests are routinely granted, although the statute requires approval of the military judge. It is unclear whether approval may be withheld only when the accused does not understand the significance of the request or in other circumstances as well. This issue is now before the United States Army Court of Military Review in *United States v. Winston*, CM 427964.

The military is exempt from the Sixth Amendment requirement of jury trial and the court-martial is a creature of statute. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 40 (1942). Van Loan, *The Jury, The Court-Martial, and the Constitution*, 57 CORNELL L. REV. 363 (1972). See generally Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L.J. 193, 200-207 (1972). Nevertheless, Constitutional requirements are relevant in determining what type of jury Congress ought to provide absent overriding considerations of military necessity, which are the justification for exception from the Sixth Amendment requirement in the first instance.

39. 10 U.S.C. § 852 (1970). MCM, 1969, *supra* note 15, para. 74d(3). The death penalty is mandatory for the offense of spying, 10 U.S.C. § 906 (1970), and may well be valid since it is mandatory. *Furman v. Georgia*, 408 U.S. 238 (1972). Unanimity is required for a finding of guilty in such a case. A less than unanimous vote results in an acquittal.

40. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

41. *Williams v. Florida*, 399 U.S. 78 (1970).

42. *Johnson v. Louisiana*, 407 U.S. 932 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972).

43. 399 U.S. at 100.

conservative group of the more affluent members of the community.⁴⁴ Until the recent enactment of the Federal Jury Selection Act,⁴⁵ it was common for federal jurors to be selected by the key-man system, whereby the jury commissioner would contact the local banker, the local minister, the local businessman, and perhaps the local superintendent of schools and ask them to nominate people for jury duty.⁴⁶ The federal act, which requires the use of voting lists and a jury wheel, if followed in practice, would eliminate the use of the key-man system for federal but not state juries.⁴⁷ In most states jury commissioners are free to select the jury list from whatever source they choose.⁴⁸ Although the federal act prevents disqualification of any juror who can speak English and meets certain other objective criteria, e.g., does not have a felony charge pending against him,⁴⁹ most states still require jury commissioners to select only persons who meet other subjective standards, for example, "only such persons as the selecting officers know, or have reason to believe, are law-abiding citizens of approved integrity, good character, sound judgment and intelligence."⁵⁰

Use of subjective criteria has been criticized as a source of racial and economic discrimination.⁵¹ Nevertheless, the American Bar Association would permit a higher level of selectivity than mere

44. Kairys, *Juror Selection: The Law, A Mathematical Method of Analysis, and a Case Study*, 10 AM. CRIM. L. REV. 771 (1972). See Note, *The Congress, The Court and Jury Selection: A Critique of Title I and II of the Civil Rights Bill of 1966*, 52 VA. L. REV. 1069 (1966); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968). According to an editorial in the Washington Post for August 22, 1972, for example, petit jurors in Arlington, Virginia, are selected from sources such as "church and country club memberships, and political parties' rolls."

45. 28 U.S.C. § 1861 *et seq.* (1970). See McKusick & Boxer, *Uniform Jury Selection and Service Act*, 8 HARV. J. LEGIS. 280 (1971), for a comparison of the federal act with the Uniform Jury Selection and Service Act promulgated by the National Conference of Commissioners on Uniform State Laws in August, 1970, at the request of the American Bar Association, whose House of Delegates approved the Uniform Act Feb. 1971.

46. See Lindquist, *An Analysis of Juror Selection Procedure in the United States District Courts*, 41 TEMP. L.Q. 32, 35 (1967); Mills, *A Statistical Study of Occupations of Jurors in a United States District Court*, 22 MD. L. REV. 205 (1962).

47. 28 U.S.C. §§ 1863, 1864 (1970).

48. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY, § 2.1(a) at 48-51 (1968). Compare McKusick & Boxer, *supra* note 45, at 282 n.10.

49. 28 U.S.C. § 1865 (b) (1970).

50. FLA. STATS. ANN. § 40.01(2) (West 1961); STANDARDS RELATING TO TRIAL BY JURY, *supra* note 48, § 2.1(b) at 51-57; *The Congress, the Court and Jury Selection*, *supra* note 44, at 1072-1080 and nn.25-27.

51. *The Congress, The Court and Jury Selection*, *supra* note 44, at 1072-1080; Kuhn, *supra* note 44, at 266-282.

literacy, "if this can be accomplished through the use of objective criteria," to insure selection of a jury which is capable of understanding and intelligently evaluating the evidence.⁵² The United States Supreme Court said recently:

It has long been accepted that the Constitution does not forbid the State to prescribe relevant qualifications for their jurors. The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character. "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty."⁵³

The effects of use of the key-man system and use of subjective qualification criteria are pointed up in litigation currently in progress in Alexandria, Virginia, challenging the make-up of that city's grand jury.⁵⁴ The senior judge of the Corporation Court selects the grand jury of sixty members and he is required to select persons of honesty, intelligence and good demeanor who are suitable in all respects to serve as grand jurors. Although the judge testified he compiled the list from a cross-section of "men and women, black and white, Protestants, Catholics and Jews,"⁵⁵ defense attorneys claim they will show that fifty-eight of the sixty are property owners, fifty-two of whom own property in Alexandria of an average value of \$75,000; the average age of the group is fifty-nine, the youngest person being forty-three years old; the average annual income is \$50,000 with a minimum of \$10,000; the average educational level is five years of college; that thirty-five of the sixty are active in local politics, twelve are bankers, ten are in real estate, twelve are business owners, sixteen are business executives; and none are housewives, students or unemployed.⁵⁶ The judge testified he knew everyone on the list well enough to say hello and that he had used substantially the same list for ten years, adding and deleting names as necessary.⁵⁷

52. STANDARDS RELATING TO TRIAL BY JURY, *supra* note 48, § 2.1(b) at 57.

53. *Carter v. Jury Comm'n*, 396 U.S. 320, 332 (1970) (footnotes omitted).

54. *Sunday Star* (Washington, D.C.), Aug. 13, 1972, § D at 1, col. 1.

55. *Evening Star and Washington Daily News* (Washington, D.C.), Aug. 15, 1972, § B, at 1, col. 4.

56. *Sunday Star*, *supra* note 54. *Evening Star*, *supra* note 55.

57. *Evening Star*, *supra* note 55. Early cases challenging the composition of juries have centered on systematic exclusion of a group, on, for ex-

The members of a court-martial (the military jury) are selected by the commander, who is required by law to select members who, in his opinion, "are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."⁵⁸ Given the goal of random selection from a cross-section of the community, the present law which allows the commander to select military jurors, and even to exclude enlisted men unless they are requested by the accused, should be changed. Although military juries resemble their civilian counterparts in most states, and although judicial remedies exist in the military to prevent or overturn unlawful command control,⁵⁹ this is not good enough. The military system has the appearance of evil and the potential for abuse. I favor a military judicial system divided into districts, with the court serving all units in that district. Juries would come from the units in the area. The judge, a member of an independent judiciary, would call on units serviced by him to submit a specified number of names of personnel of specified grades, commissioned and enlisted. Enlisted grades 1 and 2, and probably 3, should not be eligible for jury duty because of their inexperience in the military community. When an accused wants a jury, names submitted by the units would be put in a jury wheel, and an appropriate number would be drawn. Once a name was drawn, that juror could be eliminated from the jury only by challenge for cause or by peremptory challenge. Members of the jury would be required to fill out a questionnaire in advance so that voir dire could be shortened and those clearly ineligible for jury duty, by objective standards, such as witnesses, members of the accused's immediate unit, those who are junior to the accused, those who are unavailable because of the importance of their duties, etc., could be excused by the judge. As the hung jury benefits neither the government nor the accused, I would retain the present two-thirds requirement for findings of guilt, an acquittal resulting

ample, economic or racial grounds. Recent litigation, however, frequently challenges the array on the ground that it was not chosen from a cross-section of the community or was not chosen from a group likely to result in representation of a cross-section of the community or the jury. Support for this approach may be found in dicta in Mr. Justice Marshall's opinion announcing the judgment of the Court in *Peters v. Kiff*, 407 U.S. 493 (1972), as well as in earlier decisions of the Court.

58. 10 U.S.C. § 825(d)(2) (1970). Enlisted men are eligible for court-martial duty only when requested by an enlisted accused, in which case one-third of the members must be enlisted men unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. 10 U.S.C. § 825(c)(1) (1970).

59. See, e.g., *United States v. Clayton*, 17 U.S.C.M.A. 248, 38 C.M.R. 46 (1967).

when less than two-thirds vote to convict.⁶⁰ This system would accomplish the random selection of jurors from a cross-section of the military community. Elimination of the lowest two or three grades is an objective qualification to insure a jury of sufficient maturity of experience and judgment to be capable of determining guilt or innocence with reference to the mores and needs of the military community.⁶¹

APPELLATE REVIEW

Appellate review does not appear to be a Constitutional right, though a state may not discriminate, as against the poor, if appellate review is made available to some of its citizens.⁶² Research by the American Bar Association indicates that all states now provide for some type of appellate review of convictions for significant crimes, except for Louisiana, which has no provision for appeal from a misdemeanor conviction in which less than six months confinement or a \$300 fine is adjudged.⁶³ Nevertheless the military system which requires automatic review of all courts-martial is unique.⁶⁴ In fiscal year 1972 the Army Courts of Military Review considered 3,156 cases, affirming the findings and sentence in only

60. The rule that acquittal results if less than two-thirds of the jurors vote to convict protects the accused against command control. No one member can hang the jury, forcing a second trial before a different jury, by persisting in a vote of guilty. Further, as the court members vote by secret written ballot in closed session, the convening authority does not know who voted to acquit or who voted to convict, thus making it impossible for him to pin responsibility for the verdict on any particular member of the court. The same protections exist when the court determines the sentence, as less than a unanimous vote is required except to impose the death penalty.

61. Hodson, *supra* note 6, at 9-10; Remcho, *supra* note 38, contains a thorough analysis of the problem of jury selection and proposals for change now before Congress as well as the author's proposals for improvement in the present system of selecting jurors.

62. McKane v. Durston, 153 U.S. 684, 687-688 (1893); Griffin v. Illinois, 351 U.S. 12 (1956); *In re Brown*, 439 F.2d 47 (3d Cir. 1971); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS, § 1.1 at 15 (1970).

63. STANDARDS RELATING TO CRIMINAL APPEALS, *supra* note 62, § 1.1 at 17; LA. STATS. ANN., CONST. art. 7, §§ 10, 29 (West Supp. 1972); *State v. Wilkes*, 250 La. 55, 193 So. 2d 783 (1967), *dismissing appeal on transfer from 187 So. 2d 519* (Cir. Ct. App. La. 1966).

64. STANDARDS RELATING TO CRIMINAL APPEALS, *supra* note 62, § 1.1 at 18-19. A discussion of military appeals is found at Moyer, *supra* note 7, at 26-32.

2,293 cases.⁶⁵ Senator Bayh has criticized the military system of appellate review as “antiquated and unnecessarily slow moving.”⁶⁶ In 1963, however, the Attorney General’s Committee on Poverty and Administration of Justice concluded:

The military experience demonstrates the essential fact that free access to appellate review is an indispensable feature of an enlightened system of criminal justice. . . . The experience gained . . . in the administration of military justice should be consulted in every serious consideration of new appeals procedures in the civil courts.⁶⁷

A sentence by a military court to a dishonorable or bad-conduct discharge or a year or more confinement triggers two levels of review. After preparation of a verbatim record, the legal advisor to the convening authority prepares a written review for use by the convening authority in determining whether to approve the findings of guilty or the sentence. The written review is required to contain “a summary of the evidence . . . opinion as to the adequacy and weight of the evidence and the effect of any error or irregularity respecting the proceedings, and a specific recommendation as to the action to be taken. Reasons for both the opinion and the recommendation will be stated.”⁶⁸ An incomplete or misleading review by the legal advisor is grounds for appellate relief, and in fiscal year 1972 the Court of Military Review returned 37 cases to the field for a new review and a new action by the convening authority.⁶⁹

After examining the legal advisor’s review, the convening authority has authority to set the findings of guilty of the sentence aside, in whole or in part, or to reduce (but not to increase) the quantum of punishment either by reducing it in severity, or by suspending the execution of all or a portion of the sentence.⁷⁰ Although he may take no action on findings of not guilty, he has complete discretion to disapprove findings of guilty. Further he may approve findings of guilty only if the court was legally constituted throughout the trial and had jurisdiction over the offenses and the person tried, the accused had the requisite mental capacity at the time of trial and at the time of commission of the offense,

65. Fiscal Year 1972 Report of General and Special (BCD) Court-Martial Data, *supra* note 3.

66. Bayh, *supra* note 5, at 21.

67. Report of the Attorney General’s Committee on Poverty and the Administration of Criminal Justice, 116-17 (1963), cited in Moyer, *supra* note 7, at 32 and n.225.

68. MCM, 1969, *supra* note 15, para. 85b.

69. Fiscal Year 1972 Report of General and Special (BCD) Court-Martial Data, *supra* note 3.

70. 10 U.S.C. § 864 (1970); MCM, 1969, *supra* note 15, para. 88a.

the competent evidence of record establishes the accused's guilt of each element of the offense beyond a reasonable doubt, and there were no errors which materially prejudiced the substantial rights of the accused.⁷¹

Senator Bayh favors elimination of this initial review, at least partly because it is time consuming.⁷² The convening authority's action is normally taken shortly after preparation of the verbatim record,⁷³ which is required in all cases involving a punitive discharge or more than six months' confinement.⁷⁴ While the present initial review by the convening authority provides a quick remedy for obvious errors, does not unduly delay receipt of the record by the Court of Military Review, and can never leave the accused in a less favorable position, the convening authority should no longer be required to review the record to determine the legality of the proceedings. However, he should have the opportunity to review the record and restore the accused to duty immediately if he determines that such action is in the best interest of the service and that the accused is a good prospect for rehabilitation.⁷⁵

71. MCM, 1969, *supra* note 15, para. 86b.

72. Bayh, *supra* note 5, at 21.

73. During fiscal year 1972 the average time lag between trial of a general court-martial and action by the convening authority was 59.8 days, which includes the not inconsequential time required for the reporter to prepare the verbatim record. Fiscal Year 1972 Report of General and Special (BCD) Court-Martial Data, *supra* note 3. An accused may request that his sentence to confinement be deferred pending action by the convening authority. 10 U.S.C. § 857(d) (1970). No punitive discharge may be executed until appellate review is completed. 10 U.S.C. § 871(c) (1970). Accused receives full pay at least until action by the convening authority and, in the discretion of the latter, may continue to draw his pay until completion of all aspects of appellate review. 10 U.S.C. § 857(a) (1970); MCM, 1969, *supra* note 15, para. 88d.

74. 10 U.S.C. § 854 (1970); MCM, 1969, *supra* note 15, para. 15b.

75. The convening authority commander may know of a place in his organization where the accused can be effectively rehabilitated, making further confinement unnecessary as, for example, where accused possesses a special skill and his misconduct appears to have resulted from his youth and inexperience, rather than from a fixed pattern of criminal behavior. In a sense, the commander becomes the accused's probation officer.

A related problem is whether to permit the prosecution to appeal unfavorable interlocutory rulings of the trial judge to the convening authority. 10 U.S.C. § 862(a) (1970); MCM, 1969, *supra* note 15, para. 67f. This appeal somewhat resembles the government appeal in the federal system, 18 U.S.C. § 3731 (1970), which, however, appears to be broader. For a discussion of the government appeal in the military see Floyd, *Government*

In any case in which the convening authority approves a punitive discharge or one year's confinement or more, he must forward the case to the Judge Advocate General for referral to the Court of Military Review.⁷⁶ Such cases must be considered by the Court, which sits in Washington, D.C.⁷⁷ The Army Court of Military Review consists of thirteen senior officers, all lawyers with an average experience of more than 20 years in criminal justice work. Civilian attorneys may be appointed to the court.⁷⁸ It may sit en banc but generally sits in panels of three judges.⁷⁹ Unlike appellate courts in most civilian jurisdictions, it has broad powers. It must weigh the evidence, decide controverted issues of fact and judge the credibility of witnesses just as the triers of fact do at trial, recognizing that the trial court saw and heard the witnesses. It may affirm findings of guilty only if convinced by the admissible evidence that guilt is established beyond a reasonable doubt.⁸⁰

The Court of Military Review also has authority to determine the appropriateness of the sentence.⁸¹ Although the ABA recommends that appellate review of sentences be available at least whenever review of the conviction is available,⁸² neither federal courts nor more than half of the state courts appear to have this authority,⁸³ except in a limited category of cases. In fiscal year 1972 the Army Court of Military Review affirmed the findings but reduced the severity of the sentence in 634, or approximately 21%,

Appeals in Military Criminal Cases, 24 JAG J. 129 (1970); *United States v. Frazier*, 21 U.S.C.M.A. 444, 45 C.M.R. 218 (1972). I favor permitting the prosecution to appeal certain interlocutory rulings provided the appeal is to an appellate military court rather than to the convening authority. See STANDARDS RELATING TO CRIMINAL APPEALS, *supra* note 62, § 1.4 and 33-40, which authorize prosecution appeals of certain interlocutory rulings.

76. 10 U.S.C. § 865 (1970). General court-martial convictions resulting in a sentence, as approved, of less than a year's confinement and no discharge must also be forwarded to the Judge Advocate General for review in his office. Such cases may be referred to the Court of Military Review. General court-martial cases which are not referred to the court, as well as all summary court-martial convictions and special court-martial convictions where a BCD is not approved, are subject to further review in the Office of the Judge Advocate General upon petition by the accused. 10 U.S.C. § 869 (1970). Some form of relief was granted in 92 of 488 cases received under this provision in fiscal year 1972.

77. 10 U.S.C. § 866(b) (1970).

78. 10 U.S.C. § 866(a) (1970).

79. *Id.*

80. 10 U.S.C. § 866(c) (1970); MCM, 1969, *supra* note 15, para. 100.

81. *Id.*

82. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES, § 1.1, at 7 and 13-15 (1968).

83. *Id.* at 13-15; 8 J. MOORE, FEDERAL PRACTICE—CIPES, CRIMINAL RULES, ¶ 32.09 (2d ed. 1972); *United States v. Wilson*, 450 F.2d 495, 498 (4th Cir. 1971).

of the cases reviewed by it.⁸⁴ Some states, as well as the ABA Standards, allow appellate courts to increase the sentence if the accused appeals sentence appropriateness and the court finds the sentence is too lenient.⁸⁵ In the military, however, the sentence may never be increased on appeal.⁸⁶ Additionally, although the Supreme Court has determined it is not unconstitutional to impose a higher sentence at a second trial following appeal, if based on events subsequent to the initial sentencing stated in the record,⁸⁷ such an increase in the sentence is not permitted in the military.⁸⁸

The United States Court of Military Appeals, a three-judge Court whose members are civilians appointed by the President, reviews certain categories of cases.⁸⁹ That Court must review all cases involving a general officer or a death sentence, or cases which are certified by the Judge Advocate General.⁹⁰ Its principal workload comes from petitions filed by accused whose cases have been reviewed by the Court of Military Review.⁹¹ At present there is

84. Fiscal Year 1972 Report of General and Special (BCD) Court-Martial Data, *supra* note 3.

85. STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES, *supra* note 82, § 2.3 at 55. See, e.g., MD. ANN. CODE, art. 26, § 134 (Michie repl. vol. 1966); ALAS. STATS. § 12.55.120 (Michie Supp. 1971). Such legislation has been held constitutional by both states, *Robinson v. Warden*, 8 Md. App. 111, 258 A.2d 771 (1969), and federal courts, *Robinson v. Warden*, 455 F.2d 1172 (4th Cir. 1972), even in light of *North Carolina v. Pearce*, 395 U.S. 711 (1969). In a recent decision the Court took a narrow view of *Pearce* when it ruled that the Constitution does not require that the sentence imposed following trial in an "inferior" court be the ceiling on the sentence following trial de novo in a higher court. *Colten v. Kentucky*, 407 U.S. 104, 112-120 (1972).

86. 10 U.S.C. § 866(c) (1970); MCM, 1969, *supra* note 15, para. 100.

87. *North Carolina v. Pearce*, 395 U.S. 711 (1969).

88. 10 U.S.C. § 863(b) (1970); MCM, 1969, *supra* note 15, para. 110a(2).

89. 10 U.S.C. § 867 (1970).

90. 10 U.S.C. § 867(b)(2) (1970).

91. 10 U.S.C. § 867(b)(3) (1970). The Judge Advocate General may direct the Court of Military Review to review certain general court-martial cases not entitled to automatic review (see note 76, *supra*); in these few cases, the accused may not petition the Court of Military Appeals for review. 10 U.S.C. § 869 (1970). An accused may also petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court, 10 U.S.C. § 873 (1970); or the Secretary of the Army for clemency, 10 U.S.C. § 874 (1970); the Army Board for the Correction of Military Records, 10 U.S.C. § 1552 (1970); or except for a discharge adjudged by a general court-martial, the Army Discharge Review Board, 10 U.S.C. § 1553 (1970); or further relief in federal courts, see, e.g., *O'Callahan v. Parker*, 395 U.S. 258 (1969).

no direct route from the Court of Military Appeals into the federal court system. I favor providing for a writ of certiorari from the United States Supreme Court to the Court of Military Appeals. This would bring military justice under the umbrella of the Supreme Court, which is terribly important, for that should remove military courts from the stigma of being an executive, or what is worse, a political court.

The number of appeals in the civilian system is increasing apparently as obstacles to such appeals are diminishing.⁹² During the first six months of Fiscal Year 1972, criminal appeals filed in the U. S. circuit courts of appeal were up 25% from the first six months of Fiscal Year 1971,⁹³ and the criminal caseload comprised 44.5% of the caseload of those courts in that period.⁹⁴ Obstacles to appeal have traditionally centered on the costs of criminal appeals, such as court costs, costs of a transcript, and attorney's fees.⁹⁵ The military has been fortunate in that Congress has provided for free appellate counsel for any accused whose case is before the Court of Military Appeals or Court of Military Review.⁹⁶ There are, of course, no court costs, and a copy of the verbatim record prepared in each case is routinely furnished to the accused.

CONCLUSION

Largely because of the intensive media coverage of the unpopular Vietnam conflict, the administration of military justice has probably come under closer and more continuous public scrutiny than any other single system of criminal justice in history.⁹⁷ There

92. STANDARDS RELATING TO CRIMINAL APPEALS, *supra* note 62, § 1.1 at 19-20.

93. Administrative Office of the U.S. Courts, 1972 Semi-Annual Report of the Director, 6 (1972).

94. *Id.* at 7.

95. STANDARDS RELATING TO CRIMINAL APPEALS, *supra* note 62, § 1.1 at 20.

96. 10 U.S.C. § 870 (1970).

97. The ABA Standards were formulated after in-depth studies and research which disclosed gross inadequacies and unfair practices in the administration of civilian criminal justice. But these disclosures have not generated wide-spread public demands for reform. Former United States Supreme Court Justice Tom C. Clark, chairman of the ABA committee charged with implementing the Standards, has reported that the task is an onerous one. "Not only are we faced with overhauling an antiquated and neglected system but also with bringing uniformity to 50 different systems interlaced with a federal system." Clark, *The Implementation Story—Where We Must Go*, 55 JUDICATURE 383 (1972). On the other hand, although they may not have had the benefit of objective research or study, many critics of military justice are clamoring for reform. Some of the critics have been less than objective—using military justice as a conveni-

have been widespread criticism and demands for reform. While much of the criticism is unfounded, nonetheless, there are features of military justice which are vulnerable to attack; for example, the statutory requirement that the commander select the members of the court, even though carried out with scrupulous fairness and impartiality, has the potential for and the appearance of evil. Fair minded commanders—and there are many of them—would prefer to be relieved of this responsibility.

In coming years the system of military justice should be changed to eliminate even the appearance that the commander can influence the outcome of a trial. But change for the sake of change, or because of a belief that “pure” justice cannot exist in the military structure, may well sacrifice aspects of a system which provides real advantages for the accused. In the area of post-trial review, for example, total elimination of the commander would deprive the accused of an important opportunity for rehabilitation. Anthony Amsterdam has noted that there is an important difference between discussion of the rights an accused has and the actual treatment he gets.⁹⁸ An objective comparison of military and civilian systems at this functional level shows that the military system measures up quite well. Unfair criticism tends to cloud the issues and may hinder the goal of providing the military with a system of justice which will not only protect the rights of the individual, but will also help to create an environment within which the armed forces can carry out their mission.

ently visible vehicle, a “whipping boy,” through which they can express their violent displeasure with the Vietnam conflict. Even some of the objective critics have tended to study military justice in a vacuum, comparing it with some non-existent ideal, rather than with systems of justice as they actually function on a day-to-day basis in our civilian jurisdictions.

98. See note 7 *supra*.